

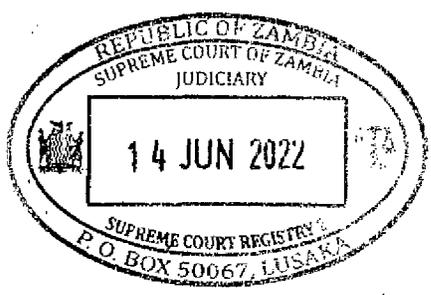
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IN THE SUPREME COURT OF ZAMBIA SCZ APPEAL NO.35 2020

HOLDEN AT NDOLA
(Criminal Jurisdiction)

BETWEEN:

FERDINAND BANDA
AND
THE PEOPLE



APPELLANT
RESPONDENT

CORAM: HAMAUNDU, KAOMA, CHISANGA, JJS,

On 7th June 2022 and 14th June 2022

For the Applicant: Mrs. L. Z. Musonda, Legal Counsel - Legal Aid Board

For the Respondent: Ms. S. Muwamba, Deputy Chief State Advocate - National Prosecutions Authority

J U D G E M E N T

CHISANGA, JS delivered the Judgment of the Court.

Cases referred to

1. ***Mwewa Murolo vs the People (2004) Z.R. 207***
2. ***Mutale & Another vs The People (1997) S.J. 51***
3. ***Kashenda Njunga vs The People (1988-1989) Z.R. 1***
4. ***Chansa vs The People (1975) Z.R. 136***
5. ***Saluwema vs The People (1965) Z.R 4***

6. *Chabala vs The People (1976) Z.R 4*
7. *Changwe and Another vs The People (1988-1989) Z.R. 144*
8. *Nkhata and Four Others vs the Attorney General (1966) Z.R. Reprint 147*
9. *Minister of Home Affairs & Another vs Habasonda (2007) Z.R. 207*
10. *Kasuba vs The People (1975) Z.R. 274*
11. *Mulenga vs The People (2008) Z.R. 1. Vol. 2 (S.C.)*

INTRODUCTION

1. Ferdinand Banda, the appellant stood charged with Richard Tembo with the offence of murder, contrary to section 200 of the Penal Code CAP 87 of the Laws of Zambia. The particulars of offence were that the appellant, with Richard Tembo, on a date unknown but between 18th and 19th March 2013 at Chadiza in the Chadiza District of the Eastern province of the Republic of Zambia, jointly and whilst acting together, murdered Maclina Banda.

THE EVIDENCE

2. The evidence before the trial judge was largely common cause. The court heard that on 18th March 2013, Charles Phiri found Jasiyele Banda, Richard Tembo, Ferdinand Banda (appellant), Blackson Banda and Maclina Banda (deceased) at a drinking place.

3. They were drunk, and dancing a nyau dance. Charles Phiri left after being threatened by Richard Tembo, for failing to settle his indebtedness to Richard Tembo, who he owed a considerable sum of money.
4. Maclina announced that she was going to bed around 22:00 hours. She apparently did not execute this intention, as Josephine Phiri, PW4 heard someone talking outside her home around 23:00 hours. She got up, went outside and asked who was talking. The person identified herself as Maclina Banda and informed Josephine that she had been caught by a Nyau. Josephine decided to escort Maclina home, and went to get a torch from her abode.
5. On her return from retrieving a torch, Josephine heard voices again, and asked who was talking to Maclina. The individual who was talking to Maclina identified himself as Ferdinand (appellant). This individual was her son, and she lived with him. Josephine explained to him that she was about to escort

Maclina home, and that she had informed her that a nyau had caught her. Ferdinand offered to take Maclina home.

6. The following day, Blackson Banda who was Maclina's spouse, went to ask Josephine whether his wife had spent the night at her place. Josephine advised him to ask Ferdinand as he had offered to take Maclina home the previous night. Blackson Banda's visit to Ferdinand's home yielded no result, as he was informed Ferdinand was not around by his fiancé when he was actually inside the house.
7. A search was mounted for the missing Maclina. Initially, the search was unfruitful, until the search party decided to search an area they had not gone through. It was in this place that they found Maclina's head band. They observed that the grass in the area was flattened, and some bushes had been uprooted. Foot prints leading to a stream were also seen. A search in the stream, by means of a stick, proved futile. The search party left for the village to reorganize themselves so as to continue searching for Maclina later.

8. When they returned to this place, they found Maclina's body floating in the stream. Police were informed, and they retrieved the body from the stream. Examination of the body by police revealed whitish stuff in her thighs.
9. A couple of days later, Zalila Banda, the appellant's brother, who had heard that the appellant was a suspect in the matter, urged him to tell him the truth. He confessed that Maclina was murdered, and that he did this with Richard Tembo. The motive for this was to make money so that Richard could settle his indebtedness to a society.
10. When the police returned to the village to investigate the matter, Zalila disclosed what the appellant had told him. Police suggested that Zalila calls the appellant and he did so. The appellant urged him to ask Richard as he knew the issue better, and that the appellant would come when Richard had been apprehended. He also said he had written a letter, which should be retrieved from his wife. The police officers went to the appellant's home and retrieved a note from his wife. Richard Tembo was implicated as the architect of the plot to

kill Maclina. In fact Richard Tembo was apprehended and jointly charged with the appellant for the murder of Maclina Banda on the strength of this note.

11. The trial judge found both individuals with a case to answer and put them on their defence. Richard Tembo denied involvement in the murder, and explained his movements on the fateful night.
12. On his part, the appellant informed the court that he joined those who were dancing nyau dance at Maclina's place. He proposed to her that they should have carnal connection, and she agreed. When he parted company with Richard Tembo after failing to get some beer from Alice Banda, the appellant started off for the agreed rendezvous. He met Maclina behind Josephine's house and they left together for the gardens. He had his way with her on the grass.
13. After this, Maclina made to grab money that the appellant had, but he rebuffed the attempt, explaining that it was not his and that he would give her money the following day.

Unpersuaded by this promise, she grabbed his shirt, and the appellant pushed her. She fell backwards and fainted. He took her near the stream so that he could pour water on her. When he put her on the side, she slipped into the stream.

DECISION BY THE TRIAL JUDGE

14. Upon considering the evidence, the learned trial judge acquitted Richard Tembo of the charge, but found the appellant guilty. Her reasoning was that the evidence that implicated Richard Tembo was extra judicial, and that corroboration of extra judicial evidence was required, for it to implicate Richard Tembo.
15. As for the appellant, she found that he had confessed to PW5 Zalila Banda, and PW6, Detective Inspector Stephen Banda, the investigating officer that he was involved in the killing of the deceased. In addition to this, the appellant, in his testimony on oath, admitted that he had caused the death of the deceased after a struggle, but had not intended to kill her. The learned judge relied on the post-mortem report, which

according to her, indicated the cause of death as fracture of the skull on the base, and brain damage with blood in both left and right pleural sacks. She concluded that this evidence revealed that Maclina was already dead at the time she slipped into the stream. This negated the appellant's claim that she fainted, and he carried her to the stream to resuscitate her.

16. The trial judge opined that the action of pushing another person was an unlawful act, and the appellant ought to have known that when a person is pushed and falls, she can sustain grievous harm or die. This proved the requisite malice aforethought. The defences of intoxication and diminished responsibility put forward by the defence were both discounted on the evidence.

17. Dissatisfied with the judgement of the learned trial judge, the appellant brings this appeal on two grounds:

- 1. The learned trial judge erred in law and fact when she convicted the appellant for murder on insufficient evidence of the deceased's cause of death.**

2. **The learned trial judge erred in law and in fact when she found that the appellant's action of pushing the deceased proved the requisite malice aforethought for murder and rejected his defence which might reasonably possibly be true.**

SUBMISSIONS OF THE PARTIES

18. Both learned counsel for the parties filed written submissions. Mrs. Musonda drew our attention to the burden borne by the prosecution to prove every element of the offence charged, and the guilt of an accused person as echoed by this court in ***Mwewa Muroho vs the People***¹. Learned counsel also referred to the criminal law principle that where two or more inferences are possible, the court will adopt the one favourable to the accused person. She enlisted the case of ***Mutale & Another vs the People***², where this court reiterated this principle.
19. Mrs. Musonda submitted that on a charge of murder, the prosecution must prove the *actus reus*, which is the unlawful killing of another person, and malice aforethought as defined in section 204. She went on to argue that the post-mortem examination did not state the cause of death. She noted that it

was indicated on the PROFOMA that a post-mortem would follow and that the deceased died from a possible head injury resulting into basal skull fracture and brain damage. Learned counsel argued that as at that date, the pathologist did not conclusively establish the cause of death.

20. Referring to evidence on record that the deceased had drunk some illicit beer on the material date, learned counsel argued that an inference could be drawn that the bad illicit brew, head injury or something else had caused the death. The court should have adopted the inference that was favourable to the appellant. It was submitted that the prosecution failed to prove the case of murder against the appellant, on account of insufficient evidence as to the cause of death.

21. In countering this argument, learned counsel for the Respondent, Ms. Muwamba, argued in the written arguments in response that the act of pushing the deceased was unlawful, and unjustified. It was this act, that caused the appellant to sustain an injury which resulted in her death. Ms. Muwamba referred us to the case of ***Kashenda Njunga vs***

The People³, which confirms that where there is evidence of an assault followed by a death without the opportunity for a *novus actus interveniens* a court is entitled to accept such evidence as an indication that the assault caused the death. Learned counsel also drew our attention to **Chansa vs The People**⁴ where the duty of the court to come to a finding when an expert gives evidence was reiterated.

22. Learned counsel submitted that the medical evidence before the court being inconclusive, the court was entitled to accept and rely on the evidence given by the appellant that his act of pushing the deceased led to her death.

23. On the second ground of appeal, learned counsel for the appellant submitted that there were no marks or scratches on the deceased's body or head to signify a struggle between herself and the appellant. That there was no evidence that the appellant had indicated to any of the prosecution witnesses that he intended to kill the deceased. That being the case, his testimony that he had carnal connection with the deceased reasonably accounted for the flattened grass at the point the

deceased's head band was found. His account of what transpired gave a reasonable explanation as to the reason for the deceased's dead body being found in the stream.

24. Learned counsel contended that pushing the deceased did not indicate the intention to cause death. The pathologist was not called to explain his finding. That the trial judge's finding that the deceased was already dead at the time she slipped into the stream was not supported by the evidence. The suspected head injury sustained by the deceased could have been as a result of hitting herself on a hard surface when she slipped into the stream. The cases of ***Saluwema vs The People***⁵ and ***Chabala vs The People***⁶ were relied upon. These cases state that if an accused's explanation is reasonably possible or might reasonably be true, then a doubt exists, and a finding of guilt is not the only inference.

25. In opposing this argument, Ms. Muwamba cited ***Dickson Sembauke Changwe and Another vs The People***⁷, where the court discussed the question of fact whether a reasonable person must know or foresee the serious consequence of throwing someone out of a moving train.
26. Learned counsel argued that sub-section (b) of section 204 of the Penal Code was satisfied because the appellant should have foreseen the probable consequence of pushing the deceased who was drunk. Section 204 included cases where the knowledge that the act or omission causing death would probably cause death or grievous harm to some person was accompanied by indifference whether death or grievous bodily harm was caused or not, or by a wish that it may not be caused. That this was such a case, and that the requisite *mens rea* was revealed. Learned counsel contended that the appellant's explanation could not be reasonably true.
27. Mrs. Musonda's oral arguments were that it was possible that the push could not have caused the deceased's death. If she

slipped in the stream, there was a possibility that she hit herself on a hard surface in the stream.

28. She conceded that the evidence did not reveal whether there was grass or stones at the place, but argued that no one knew what was in the stream. She also conceded that the post-mortem report did not show that sex was involved.
29. The court asked Mrs. Muwamba whether the prosecution established the terrain where these alleged events occurred, and her response was that the record made no indication.

CONSIDERATION

30. We have considered the grounds of appeal, as well as the supporting, and opposing arguments. An appeal being a rehearing on the record, we have duly considered the case record. Mrs. Musonda faults the learned judge's decision and invites us to overturn her findings on the cause of death as well as the guilt of the appellant. This invitation must be approached on applicable principles, as elucidated by the courts in numerous cases. One such case is *Nkhata and*

Four Others vs The Attorney General⁸. That case was concerned with a claim for damages arising from a road traffic accident. Each party claimed that the accident was entirely due to the negligence of the other. The appellant and his wife gave evidence on one side and the driver of the government owned vehicle and his passenger gave evidence on the opposing side. The trial judge described the evidence of the four witnesses as '*clear and straight forward*'. He remarked that as both sides flatly contradicted each other, he would, were it not for other evidence, find it difficult to assign responsibility for the accident. The trial judge resolved the issue of liability in favour of the respondent. His finding was that at the time of the accident, the appellant was on his wrong side of the road. That he had totally failed to establish his claim.

31. The appellant was dissatisfied, and appealed. His lawyer went to great pains to analyse the evidence in attempting to show that the learned trial judge could not or should not have come to the conclusions he drew. In considering the appeal, the

Court of Appeal restated the basis on which an appellate court can reverse a trial judge, as follows:

- (a) by reason of some non-direction or mis-direction or otherwise the judge erred in accepting the evidence which he did accept; or
- (b) in assessing and evaluating the evidence the judge has taken into account some matter which he ought not to have taken into account, or failed to take into account some matter which he ought to have taken into account; or
- (c) it unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he cannot have taken proper advantage of his having seen and heard the witnesses; or
- (d) in so far as the judge has relied on manner and demeanor, there are other circumstances which indicate that the evidence of the witnesses which he accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer.

32. The Court of Appeal held that it was in as good a position as the learned trial judge to draw inferences from accepted facts, and that the inferences the learned trial judge had drawn accorded entirely with the court's own view of the case.
33. The learned trial judge in the case we are concerned with accepted both the prosecution's version as to how the deceased met her death at the appellant's hands, and the defence version as given by the appellant. This was a misdirection. A trial judge is expected to consider the contesting positions of the opposing parties to the matter and reveal his mind on the evidence. See ***Minister of Home Affairs & Another vs Habasonda***⁹.
34. We equally note that the learned judge accepted PW6's evidence concerning the appellant's confession, without inquiring whether the appellant had no objection to its admission. This was a misdirection. In numerous cases, including ***Kasuba vs The People***¹⁰, this court has reiterated that when a witness is about to give evidence as to an alleged confession the court should inquire whether the accused

objects to the admission of that evidence. This requirement applies to confessions given to persons in authority, and not to persons who are not in authority.

35. On that basis, PW5's testimony concerning the confession made to him by the appellant was properly received by the trial judge. PW5, Zalila Banda testified that he asked his brother, the appellant, to tell him the truth. The appellant informed him that the woman was murdered, and that he was with Richard Tembo when doing it. When asked why he did this, he responded that Richard Tembo had credit with the society, and he wanted the woman to disappear so that he could make money and pay what he owed.
36. When PW5 reported this to the police, he was asked to call the appellant. He did so, and put the phone on loud speaker. The appellant said Richard should be questioned about the death, and he directed that a note about the matter be retrieved from his wife.
37. The note was retrieved, and it was signed off by '*majela*' which was the appellant's nickname. Moreover, PW5 was familiar

with the appellant's handwriting and he identified it as being that of his young brother. PW5 informed the court that the appellant ran away from the village after the burial of the deceased.

38. We note from the record that the confession was not disputed. PW5 was only asked as to whether the appellant told him what exactly happened, or gave him the details. PW5's response was that he was not given the details by the appellant as to what exactly happened and that he had told the court exactly what the appellant told him.
39. The appellant's testimony was that he had arranged with the deceased for sexual intercourse and that it was after this that she demanded for money, and grabbed his shirt. He pushed her, she fell and fainted. He took her to the stream to try and resuscitate her, but she slipped into the stream. The record reveals that the note that the appellant had written was produced before the court. This note was produced as P1 in evidence. It read as follows:

“About the death Richard knows better. He said he had something to do and that he has someone who knows juju to kill her. I am nearby and if Richard is apprehended, I will also come.”

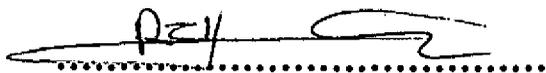
40. As noted at paragraph 34, PW5, to whom the confession was made was not a person in authority, and his evidence was properly received. It could be relied upon as done by the trial judge. The confession established that the appellant was involved in the killing with a named individual, for an ulterior motive. Had the learned trial judge properly considered this evidence, she would not have accepted the appellant's version, that the death was not premeditated. This is because the appellant's confession to PW5 revealed an intention in the appellant and the named individual to kill the deceased for whatever purpose. In this regard, the learned trial judge failed to properly take into account the evidence that disclosed a motive for killing the deceased. The appellant having confessed to the killing for the stated motive, the account he gave at trial should not have been accepted and would not reasonably possibly be true.

41. As the prosecution evidence on the contents of the confession went unchallenged, that evidence was accepted by the appellant. This court has held in a number of cases, including ***Mulenga vs The People***¹¹ that evidence that is not challenged in cross examination is accepted by the defence.
42. Therefore the facts before the trial court and now before us, were common cause. That being the case, we have no difficulty in discounting the appellant's version as an afterthought.
43. Moreover, although the post-mortem report did not conclusively state the cause of death, it indicated the injuries that were inflicted on the deceased. The only inference that could be drawn was that the injuries were inflicted by the appellant. Both grounds of appeal fail, and the appeal is dismissed.
44. There was no appeal against sentence, but we are compelled to interfere with the sentence. The trial judge sentenced the appellant to life imprisonment, without assigning any reasons for the reduced sentence. We are satisfied ourselves that the appellant killed the deceased with malice aforethought. No

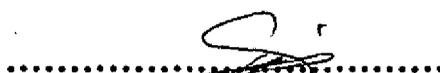
extenuating circumstances were revealed on the evidence on record. That being the case, we are at large to impose the capital sentence, which a conviction for murder without extenuation attracts. We accordingly sentence the appellant to death.



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E.M. HAMAUNDU
SUPREME COURT JUDGE



.....
R.M.C. KAOMA
SUPREME COURT JUDGE



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F.M. CHISANGA
SUPREME COURT JUDGE