

IN THE SUPREME COURT FOR ZAMBIA

Appeal No. 203/2011

HOLDEN AT NDOLA

(Criminal Jurisdiction)

BETWEEN

GOERGE KAMWASHA

APPELLANT

AND

THE PEOPLE

RESPONDENT

Coram: CHIBESAKUNDA, MWANAMWAMBWA and MUYOVWE, JJS
On the 5th June, 2012 and 15th August, 2012

For the Appellant: Ms. B.L. Pizo, Legal Aid Counsel

For the Respondent: Mr. P. Mukuka, Senior State Advocate

J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court.

Cases referred to:

- 1. David Zulu vs. The People (1977) Z.R. 151**
- 2. Abraham Mwanza and 2 Others vs. The People (1977) Z.R. 221**
- 3. Mutale and Phiri vs. The People (1995/97) Z.R. 227**
- 4. Khupe Kafunda vs. The People Z.R 31**

The Appellant was convicted of the offence of murder contrary to **Section 200 of the Penal Code**. The particulars alleged that George Kamwasha on the 15th day of June 2007 at

Kitwe, in the Kitwe District of the Copperbelt Province of the Republic of Zambia, did murder Lesina Kabondo (hereinafter called 'the deceased')

The prosecution called three witnesses. PW1 who was the husband to the deceased, told the Court that on 15th June 2007 the deceased woke up around 04:00 hours and went outside to sweep the yard. The witness explained that when he woke up later he found that the deceased was not outside the house. His daughter Chama Kabondo informed him that the deceased had gone to Simbotwe's tavern in the same area. PW1 then followed to the tavern where he found the Appellant outside with an open lock in his hand. When he asked him if his wife was in the tavern the Appellant said she was not there and stated that the deceased had gone to her child's home. According to PW1 he insisted that his wife was in the tavern and demanded that the Appellant bring her out and that if he did not do so he would go to Court over the matter. PW1 said that the Appellant invited him to enter the tavern and check for his wife but PW1 refused to enter the tavern on the pretext that he was not working there. The Appellant left the place and PW1 decided to wait for the barman. He said when the barman

arrived, he opened the tavern while he remained outside at first. That after sometime the barman came out of the tavern and went to call some young men known as call boys at the nearby station to assist him. When the barman returned with the call boys PW1 entered the tavern with the barman and the call boys and they found the deceased in a sitted position by the drum of beer. The deceased had her eyes open. The barman requested PW1 to take his wife outside but PW1 refused saying that he was not the one who had taken her into the tavern. That the barman went to look for the Appellant who shortly came back to the tavern and they proceeded to take the deceased outside the tavern and PW1 realized that his wife was dead.

PW2's evidence was that when she received information concerning her grandmother she rushed to the tavern where she found the deceased's body lying on the ground outside the tavern.

PW2 observed some froth coming from the mouth of the deceased, a scratch on the forehead and bruises on the elbow. She later accompanied PW1 and the Police in taking the body to the hospital. She inspected the body of her grandmother

and she observed that she was not wearing any under wear and she appeared to have had sexual intercourse as evidenced by the dried sperms on her thighs.

Under cross-examination PW2 said she suspected that the Appellant and the deceased had an affair.

PW3's evidence was that he was among the officers who rushed to Simbotwe's tavern when the report of the death of the deceased was received. He took photographs of the deceased's body and he produced the photographs in his evidence and these were admitted in evidence as Exhibit P2 and he also produced a post-mortem report which was admitted in evidence as Exhibit P1. PW3 later recorded a warn and caution statement from the Appellant and charged him for the subject offence which he denied.

At the close of the prosecution case the learned trial Judge found the Appellant with a case to answer and put him on his defence. The Appellant elected to give evidence on oath and called no witnesses.

In his defence, the Appellant stated that he was employed as a guard at Simbotwe tavern and that apart from guard

duties he also used to sweep the tavern and also wash the tins of Chibuku beer and that he normally reported for work at 18:00 hours and knocked off the following morning. He stated that the bar closed at 24:00 hours. That at this point he would receive a handover from the barman and that he would check the inside of the tavern before commencing his guard duties. The Appellant admitted that he knew PW1 and the deceased as they lived within the same township and that they were tribal cousins. He stated that PW1 and the deceased used to patronize the tavern to drink beer.

According to the Appellant on 15th June, 2007, he was at the tavern washing the beer tins and when he finished he left home but that later he was called back by the barman. He said when the barman opened the tavern he saw the deceased in a sitting position and that her body was moved outside the tavern and that at that point the Neighbourhood Watch Members came to the scene and they remained there until the police arrived to take him away.

The Appellant explained that the arrangement was that the barman would open for him to take out the tins for cleaning

and that after cleaning the tins he would take the tins back inside and there after the barman would lock the tavern. He stated that on 15th June 2007, he got the tins to clean them and that he did not see anybody inside the tavern and that he only saw the body of the deceased when the barman called him back to the tavern. He maintained that he did not see the deceased enter the tavern.

He maintained in cross examination that his duties were to guard the property and that there were no trespassers that entered the premises that night after he started guard duties. He also admitted that he was the only person at the tavern when the place closed at 24:00 hours on 15th June, 2007 and that everything was in order in the tavern when he took over the guard duties on the material day. The Appellant stated that when he knocked off in the morning he locked up the premises and that he used a small lock. He stated that the barman had the key but had left the open lock with him so that after cleaning the tins he would shut the door and lock up using the lock. That he only realised there was a woman's body inside the bar when the barman called him back to the tavern. He also confirmed that there had been no break in into the tavern.

After summarizing the evidence, the learned trial Judge found as a fact that when the tavern closed at 24:00 hours on the material day the barman took the key but left the lock with the Appellant. That the lock remained open so that the Appellant would secure the door by snapping it shut after he completed his duties in the morning.

The learned trial Judge found as a fact that the tavern would remain accessible to the Appellant until the following morning when he knocked off and that the tavern would only be opened by the barman in the morning when he came back with the key for the lock. And the learned trial judge accepted that this is what should have happened on the material day. That PW1 arrived at the tavern before the Appellant locked up the tavern and that the Appellant invited PW1 to enter the premises and check for his wife and that this showed that the place was accessible for anyone to enter. That when PW1 declined to enter the tavern, the Appellant locked up the place and left. That the Appellant was on duty from 24:00hours until he closed the tavern around 07:00hours when he knocked off after snapping the door shut and leaving PW1 behind to wait

the arrival of the barman. The learned trial Judge observed that the Appellant in his defence did not state that he had left the premises during the night while he was on duty and therefore, as a reasonable person he could and ought to have observed anyone else accessing the premises. The learned trial Judge addressed his mind to the period between 24:00hours and 07:00hours which he considered to be a critical period in this matter.

As the prosecution strongly relied on circumstantial evidence. The learned trial Judge was invited by both Counsel to consider the case of **David Zulu vs. The People**¹ and it was his conclusion that the only reasonable inference having regard to the facts was that the Appellant is the one who caused the injuries on the body of the deceased which were found by the Pathologist, and which caused her death.

He considered the evidence of PW1 and PW2 and found that although they were related to the deceased there was sufficient evidence to confirm that in fact the Appellant is the one who caused the death of the deceased. He found the

Appellant guilty of murder and convicted him accordingly. The Appellant was sentenced to the mandatory death sentence.

The Appellant appealed against his conviction and has put forward two grounds of appeal.

- 1. The trial Court misdirected itself and erred when it did not call evidence that was necessary for the true determination of the issue falling for consideration during the trial.**
- 2. The learned trial Court erred when it convicted the Appellant on circumstantial evidence that did not in any way connect him to the commission of the offence**

On behalf of the Appellant Ms. Pizo filed written heads of arguments. In relation to Count one she conceded that there is a plethora of authorities by this Court which has given guidelines that it is not always necessary to call medical evidence in cases of murder.

She argued that while it is alleged that the deceased was assaulted by the Appellant, there is no evidence that she was assaulted by the Appellant. She submitted that it was important for the trial judge to call verbal medical the Pathologist to explain the cause of death.

The gist of her argument is that the cause of death as stated in the post- mortem report could have been caused by another factor, that possibly the deceased could have fallen and bruised herself; that she could also have been assaulted by her husband, who at the time of giving evidence, had a swollen hand and that the deceased could have suffered *ventricular septum*.

Ms Pizo also argued that it was possible that the deceased could have been hypertensive and that because she used to drink beer this could have caused the ventricular septum which is indicated as the cause of death in the post-mortem report.

She relied on an excerpt from the Post Graduate Medical Journal obtained from the internet where it is stated:

“Septal rupture occurs more frequently with anterior than other types of acute myocardial infarction, risk factors for septal rupture in the era before thrombolytic therapy included hypertension, advanced age (60 to 69 years), female sex, and the absence of a history of angina or myocardial infarction”

Counsel contended that without a medical explanation of the observations by a qualified Medical Doctor one is left to

wonder what would have led to the break of the ventricular septum which later led to the death of the deceased person.

She buttressed her argument by relying on the case of **Abraham Mwanza and 2 Others vs. The People²**.

“(i) It is essential for a proper consideration of the question of sentence, and in some cases may be essential also on the question of verdict, for the Court to know precisely what was the nature and severity of the injuries inflicted on the deceased.....

Neither the trial Court nor this Court could say from this statement of facts precisely what was the nature or the severity of the injuries inflicted on the deceased. We point out to those responsible for prosecution that this information is essential to a proper consideration of the question of sentence, and may in some cases be essential on the question of verdict. There may be cases in which the medical report will be sufficient to supply this information without it being necessary to call the doctor, but our experience is that medical reports usually require explanation not only of the terms used but also of the conclusions to be drawn from the facts and opinions stated in the report. It is therefore highly desirable, save perhaps in the simplest of cases, for the person who carried out the examination in question and prepared the report to give verbal evidence in Court, certainly the doctor should have been called in the present case.

In the present case the only information before the trial Court was that death was found to be due to injury to “vital organ” whatever that may mean,

and the statement of facts continued with the following legend:

“There were multiple abrasions in front of chest, in front of left upper arm, front of middle of left leg and in the back of left side of chest. The membranes congested, blood in skull cavity present. The brain was congested.”

She distinguished the case of **Abraham Mwanza**² from the present case stating that in this particular case there was no evidence of the assault on the deceased actually taking place on the fateful day.

Ms. Pizo also referred us to the case of **Mutale and Phiri vs. The People**³ where it was held that where two or more inferences are possible, it is cardinal that the Court should adopt the one that is more favourable to an accused person if there is nothing to exclude that inference. And that where there are lingering doubts the Court must resolve such doubts in favour of the accused.

In support of ground two, Ms Pizo submitted, inter alia, that the trial Court erred when it held that the Appellant was responsible for the death of the deceased by relying on circumstantial evidence which did not reveal the Appellant's motive for killing the deceased.

She referred again to the case of **David Zulu vs. the People**¹. She argued that there were no facts available from which an inference of guilt could be drawn. Ms Pizo argued that the allegation that the Appellant had an affair with the deceased was not sufficient to establish any motive for the Appellant to murder the deceased.

She further reiterated that the post-mortem report was not helpful and that, therefore, it was difficult to conclude that the death of the deceased resulted from an assault by the Appellant or any assault at all.

Counsel argued that the Court below did not state the reasons for its conclusion that it was the Appellant who caused the injuries on the deceased's body after analysing the evidence before it.

Ms. Pizo also relied on the case of **Khupe Kafunda vs. the People**.⁸⁸ She contended that in the present case it is unsafe to convict the Appellant for such a serious offence on the mere assumption that because he was the one who was

guarding the premises he was the one who committed the offence.

According to Ms. Pizo the facts of this case are intriguing in that there was no explanation as to what happened or how the deceased entered the premises between 04:00hours and 05:00 hours. She submitted that it was possible that the deceased may have remained in the premises contrary to PW1's evidence.

She buttressed her argument further with the case of **David Zulu**¹ where we said:

"It is incumbent on a trial Judge that he should guard against drawing wrong inferences from the circumstantial evidence at his disposal before he can feel safe to convict. The Judge must be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such a degree of cogency which can permit only an inference of guilt."

Ms. Pizo submitted that the circumstantial evidence was weak and that it created a doubt as to who committed the offence. And that the matter, therefore, was not proved beyond reasonable doubt that it was the Appellant who committed the offence and she urged us to quash the conviction and sentence and set the Appellant at liberty.

On behalf of the state Mr Mukuka supported the conviction. He relied on the case of **David Zulu**¹ stating that it was up to the trial Judge to guard against wrong inferences. He submitted that this appeal hinges on circumstantial evidence.

Counsel submitted that the events that took place on 15th June, 2007 were clear and without exaggeration in relation to the offence, in particular that the deceased left her home and went to the tavern where she was found dead. Mr. Mukuka submitted that the observations made by PW2 regarding the injuries on the body of the deceased were supported by the dealing officer and the post-mortem report. He submitted that although the Appellant was not the custodian of the keys to the tavern, he had access into the tavern as a guard and that it is on record that the Appellant did not leave the premises during the critical period of his watch and he was the only person on the premises. Mr. Mukuka argued that this was an odd coincidence which points to the fact that the Appellant he knew when the deceased entered the tavern and that looking at the evidence on record the only reasonable inference is that the Appellant caused the death of the deceased. He submitted that

the trial Judge was on firm ground when he convicted him of the offence of murder.

We have considered the evidence on record, the judgment of the Court below and the submissions of learned Counsel.

We propose to deal with the two grounds of appeal together.

In sum, the gist of the arguments in the two grounds of appeal is that the lower Court should have called for viva voce medical evidence instead of relying on the post-mortem report which did not fully explain the cause of death. That the circumstantial evidence which the Court relied on did not connect him to the offence. Ms. Pizo relied heavily on the case of **Abraham Mwanza**² and for obvious reasons ignored the facts which distinguish the present case from the case of **Abraham Mwanza**². In that case we said:

“There may be cases in which the medical report will be sufficient to supply this information without it being necessary to call the doctor, but our experience is that medical reports usually require an explanation not only of the terms used but also of the conclusions to be drawn from the facts and opinions stated in the report. It is therefore highly desirable, save perhaps in the simplest of cases, for the person who carried out the examination in question and prepared the report to give verbal evidence in court; certainly the doctor should have been called in the present case.”

However, we observed further in the same case that:

“It is therefore highly desirable, save perhaps in the simplest of cases, for the person who carried out the examination in question and prepared the report to give verbal evidence in court; certainly the doctor should have been called in the present case.

We are left here with the statement of facts and know only that the deceased died as a result of a beating in which fists and boots were used. We entirely associate ourselves with the remarks made by the learned trial judge in his condemnation of the behaviour of these appellants. The deceased was in their custody and they were detailed to escort him to his village and to bring him back to camp. What motive they had for inflicting this beating is not clear; whether they were punishing him for being a deserter, or whether they were trying to extract information from him as to the whereabouts of his uniforms, is not stated but is in any event not relevant. This was a deliberate and totally unwarranted assault on a man in the custody of the appellants.....”

This was a case where the prosecution merely presented the Court with a statement of facts minus a post-mortem report. However, it is important to note that the lack of a written medical report did not affect the prosecution case as there was sufficient evidence to sustain a conviction. We do appreciate the spirited arguments advanced by Counsel but in the circumstances they are of no help to the Appellant. We say this because the evidence before the Court below showed that the deceased did go to the tavern where her body was found in the early hours of the fateful morning. The deceased had left

her bed around 0400 hours. There was uncontroverted evidence to the effect that PW1, the husband to the deceased followed to the tavern to check for his wife. The learned trial Judge found as a fact that the Appellant invited him to go inside to check for his wife and he declined upon which the Appellant locked the door. The Appellant locked the door since he was left with an 'open lock' by the barman who was expected to report for work that morning and who was in possession of the keys to the lock. There was no other person who had access into the bar apart from the Appellant that night and the Appellant confirmed that he never left the premises throughout the night. The Appellant's assertion that he was not aware of the presence of the deceased inside the tavern was rejected by the learned trial Judge and rightly so. The possibility of the body having been left inside the tavern before it closed was also ruled out as he had received a hand-over at close of business at midnight. And according to PW1 the deceased woke up at 0400 hours and told him she was going outside to sweep the yard and that is when she left for the tavern where her body was found.

Ms. Pizo submitted that there was no evidence that the Appellant is the one who assaulted the deceased. The trial Judge ruled out the fact that the deceased could have been assaulted by her husband or on her way to the tavern. In our view, he rightly concluded that the injuries on the deceased's body were inflicted on her at the tavern where her body was found. And that since the Appellant was the only person at the tavern between 2400 hours and 0700 hours with access into the tavern, the only reasonable inference is that the Appellant was responsible for the death of the deceased.

Ms. Pizo argued that the trial Court erred in convicting the Appellant on circumstantial evidence which did not reveal the Appellant's motive. We know that there have been cases where the motive for the killing is not clear but facts would still point to the accused or Appellant and the Court in a proper case would be entitled to convict. One such example is the case of **Abraham Mwanza**². In this case, the Appellant was suspected to be having an affair with the deceased.

Indeed, the conduct of the Appellant indicated that he was not an innocent guard who knocked off without knowledge that there was a dead woman inside. The circumstances suggest

that he had sexual intercourse with the deceased and that there must have been a scuffle between him and the deceased. For Ms. Pizo to submit that PW1, the husband to the deceased may have assaulted her is tantamount to Counsel giving evidence from the Bar as there was no evidence to this effect and this issue was not raised in cross-examination of PW1.

All in all, we agree that it was desirable to have the pathologist or medical doctor to give evidence on the cause of death but even without it there was sufficient evidence which pointed to the guilt of the Appellant. The learned trial Judge was on firm ground when he convicted the Appellant.

From the foregoing, we find no merit in the two grounds of appeal advanced and the appeal is dismissed.

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L.P. CHIBESAKUNDA
SUPREME COURT JUDGE

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M.S. MWANAMWAMBWA
SUPREME COURT JUDGE

.....
E.N.C. MUYOVWE
SUPREME COURT JUDGE