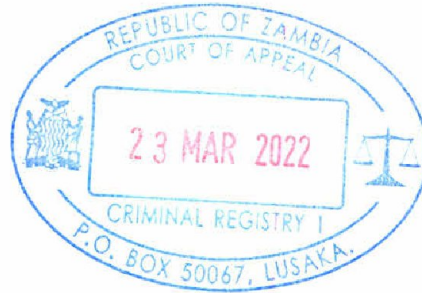


HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BETWEEN:

MUSTARD SIMUKONDA



APPELLANT

AND

THE PEOPLE

RESPONDENT

CORAM: Mchenga DJP, Majula and Muzenga, JJA

On 28th August 2021 and 23rd March 2022

For the Appellant: L.Z. Musonda, Legal Aid Counsel, Legal Aid Board

For the Respondent: F.M. Sikazwe, Principal State Advocate, National Prosecution Authority

J U D G M E N T

Mchenga DJP, delivered the judgment of the court.

CASES REFERRED TO:

1. Dorothy Mutale and Richard Phiri v The People [1995-1997] Z.R. 227
2. Saluwema v The People [1965] Z.R. 4

3. Chabala v The People [1976] Z.R. 14
4. Kenmuir v Hattingh [1974] Z.R. 162

LEGISLATION REFERRED TO:

1. The Penal Code, Chapter 87 of the Laws of Zambia

1. INTRODUCTION

- 1.1. The appellant, appeared before the High Court (Limbani, J.), charged with the offence of murder, contrary to **section 200 of the Penal Code**. He denied the charge, and the matter proceeded to trial.
- 1.2. At the end of the trial, he was found guilty of committing the offence and condemned to suffer capital punishment.
- 1.3. He has appealed against the conviction, and the sole ground of appeal, is that the trial Judge erred when he failed to find that the explanation he gave, in his defence, of what transpired, could reasonably have been true.

2. CASE BEFORE THE TRIAL JUDGE

2.1. On 20th March 2018, between 21:00 and 22:00 hours, Dorothy Nachizya, who was in her house in Ntindi Village, in Nakonde, heard a knock on the door. When she opened the door, she found the appellant's wife, who told her that the appellant was beating up someone, at their house.

2.2. She went to the house, and found the appellant. Also present, was Sarah Namonje, a neighbour, who was also awakened by the appellant's wife. At the time Sarah Namonje arrived, the man who was sleeping on the appellant's veranda, was not showing any signs of injury.

2.3. Dorothy Nachizya and Sarah Namonje, advised the appellant, who was using fists and a stick, to stop beating the man, but he did not. The man started to bleed from the nose and mouth. The man told Sarah Namonje that his name was Kanono, and he was from

Nyondo Village. They left when the appellant lifted Kanono and claimed he was taking him to the police station

2.4. The following morning, on 21st March 2018, Kanono's body was lying by the roadside, on the road leading to the police station. His face was swollen face.

2.5. The same morning, around 06:30 hours, Chief Inspector Silombwana, picked Kanono's body, and his relatives gave his full names as Oscar Kanono Silupumbwe. When Chief Inspector Silombwana, went to the appellant's house, the same morning, he found that he had shifted.

2.6. A postmortem, was conducted on the body of Oscar Kanono Silupumbwe on the 23rd of March 2018. The cause of his death was found to be chest injury (lung trauma).

2.7. The appellant was only apprehended on the 28th of August 2018.

2.8. In his unsworn statement, the appellant told the trial judge that on the material night, he found a drunk person sleeping on his veranda. That person struggled to get up, but he eventually did, and walked away. He confirmed the presence of both Dorothy Nachizya and Sarah Namonje, at the time.

3. FINDINGS BY TRIAL JUDGE

3.1. The trial judge accepted the evidence of both Dorothy Nachizya and Sarah Namonje, that the appellant assaulted Oscar Kanono Silupumbwe. He also accepted Sarah Namonje's evidence that before the assault, Oscar Kanono Silupumbwe did not exhibit any signs of injury.

3.2. He opined that in the absence of evidence of *novus actus interveniens*, the only inference that could be drawn on the evidence before him, was that the appellant's beatings, caused the injuries that led to Oscar Kanono Silupumbwe's death.

3.3. The trial judge concluded that case against the appellant, was anchored on circumstantial evidence, in that, he was seen assaulting Oscar Kanono Silupumbwe; and he purported to take him to the police station but, did not deliver him. Further, the appellant fled from his house soon after the incident. On that evidence, an inference of guilt, is the only one that could have been drawn, he concluded.

4. ARGUMENTS IN SUPPORT OF AND AGAINST THE APPEAL

4.1. In support of the sole ground of appeal, Mrs. Musonda brought the cases of **Dorothy Mutale and Richard Phiri v The People**¹, **Saluwema v The People**² and **Chabala v The People**³, to our attention. She then submitted that the chest injury that Oscar Kanono Silupumbwe suffered, could have been from a fall, since he was drunk or being beaten by some other people. That being the case, an inference that he died at the hands of the appellant, is

not the only inference that the trial judge could have drawn, on the evidence that was before him.

- 4.2. In response, Mr. Sikazwe submitted that the only inference that could be drawn on the evidence that was before the trial judge, was that the appellant caused the death of Oscar Kanono Silupumbwe, because no other person was seen beating him.

5. CONSIDERATION OF APPEAL BY COURT

- 5.1. The argument, by Mrs. Musonda, that Oscar Kanono Silupumbwe could have died from falling or being assaulted by some other persons, can only stand, if the trial judge's acceptance of Dorothy Nachizya and Sarah Namonje's evidence, is assailed.
- 5.2. An examination of the judgment, shows that the acceptance of their evidence, followed the trial judge's finding, that it was credible. In the case of **Kenmuir v Hattingh**⁴, the Supreme Court held, *inter alia*, that:

“Where questions of credibility are involved an appellate court which has not had the advantage of seeing and hearing the witness will not interfere with the findings of fact made by the trial judge unless it is clearly shown that he has fallen into error.”


- 5.3. Having examined the record, we have not found any reason, why we would conclude that that the trial judge erred, when he accepted the evidence of Dorothy Nachizya and Sarah Namonje, in preference to that of the appellant.
- 5.4. The appellant’s version of what happened, having been rejected, and there being no evidence of *novus actus interveniens*, we are satisfied that the trial judge, was entitled to conclude that, the only inference that could be drawn on the evidence that was before him, was that Oscar Kanono Silupumbwe, died from the injuries inflicted on him by the appellant.


5.5. Consequently, we find no merit in the sole ground of appeal, and we dismiss it.

6. VERDICT

6.1. The sole ground of appeal having been dismissed, the appeal fails, and we dismiss it. We uphold the conviction and sentence imposed by the court below.


.....
C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT


.....
B. M. Majula
COURT OF APPEAL JUDGE


.....
K. Muzenga
COURT OF APPEAL JUDGE