IN THE COURT OF APPEAL OF ZAMBIA **CAZ APPEAL NO. 31 OF 2016**

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BETWEEN:

MORGAN GIPSON MWAPE **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Chisanga JP, Chashi and Mulongoti JJA

ON: 7th, 9th February and 13th April 2017

For the Appellant: *K. Muzenga, Deputy Director-Legal Aid Board*
For the Respondent: *C. Bako, Chief State Advocate-National Prosecution Authority*

JUDGMENT

CHASHI, JA delivered the Judgment of the Court.

Cases referred to:

1. ***Kambarage Mpundu Kaunda v The People(1990-1992) ZR, 215***
2. ***Simon Malambo Choka v The People (1978) ZR, 243***
3. ***Bernard Chisha v The People (1980) ZR 36***
4. ***Kashenda Njunga and Others v The People (1988-1989) ZR 1***
5. ***Jack Chanda and Another v The People – SCZ Judgment No. 29 of 2002***
6. ***Machipisha Kombe v The People (2009) ZR, 282***
7. ***Yokoniga Mwale v The People – SCZ Appeal No. 285/2014***
8. ***R v Wilson (1914) 58 Cr App R, 304***
9. ***Mbomena Moola v The People (2002) ZR 148***
10. ***Kazembe Zulu v The People – SCZ Judgment No. 29 of 2015***

Legislation referred to:

11. ***The Penal Code, Chapter 87 of The Laws of Zambia***
12. ***The Juveniles Act, Chapter 53 of The Laws of Zambia***
13. ***The Court of Appeal, Act No. 2016***

The Appellant was tried by the Mansa High Court on one Count of Murder contrary to Section 200 of ***The Penal Code***. The particulars of the offence were that, the Appellant on 29th April 2012 at Chilubi, in the Chilubi District of the Northern Province of the Republic of Zambia murdered one Joyce Mwape.

The evidence before the trial Court was given by eight prosecution witnesses.

PW1, Mulenga Mumba the brother to the deceased, lived in John Mukuba Village. On 30th April 2012, around 02:00 hours, he was informed by Oswald Kaluba, that the deceased had died in Chikopela village where she lived with her husband, the Appellant, their children and the grandmother to the Appellant (PW2). When he went to Chikopela village, he found the Appellant had run away. In the morning when he looked at the body of the deceased, he noticed bruises on the face. At that stage, he overheard PW2, say the

deceased had drunk logo. It was only then that PW5, Christabel Kabinda Musonda Mwape, the daughter to the Appellant and the deceased explained to him that PW2 was lying as the decased was killed by the Appellant.

PW1, reported the matter to the Police and they later buried the deceased.

PW2, Felistus Mwape, the Appellant's grandmother's version of events was that on the fateful night, she heard the Appellant and the deceased quarreling. She was in the neighbouring hut. The deceased went and informed her that she would take poison. When she followed the deceased to her house, she met PW5, who asked her to go and see how the deceased was looking. She found the deceased in a sitting position, shook her, but she did not respond. That she had vomited some white stuff and passed some faecal matter. At this stage the Appellant had gone to the river to load the boat.

According to PW2, she ran to the neighbours to seek assistance and when she returned, she found the Appellant. They then started looking for milk as they suspected she had taken poison, but they

could not find any. They tried to administer pounded charcoal, but failed and she passed on.

According to PW2, the Appellant ran away the same night. PW2 further testified that the Appellant and the deceased used to argue a lot.

PW3, Innocent Mwansa told the Court that he met the Appellant, his brother in law, on the afternoon of 23rd April 2012 in the company of two other people. When he asked him why he was always fighting with his wife, he told him that he will beat him up, kill the deceased and buy them a boat as compensation. When the deceased died, he went to the funeral house and noticed that the deceased's face was swollen and the Appellant had run away.

PW4, Vernious Kala basically received the Appellant when he came out of hiding in the bush and handed him over to the Police.

PW5, aged 10, after a ***voire dire*** testified that on 29th April 2012, the Appellant came from a drinking spree and told the deceased that after killing the witch, he will buy the family a boat. He later held the deceased by the neck and pressed hard until her voice could not be heard. He started hitting her head on the ground. Thereafter, he

went outside. PW5 followed him. He picked a small stone and threw it on the roof and an Owl fell from the roof. He picked up the Owl, went inside the house and started wiping it on the body of the deceased. The Appellant then dragged the deceased outside and made her sit on the corridor whilst she was leaning on the wall and breathing heavily.

According to PW5, she was then asked by the Appellant to go and inform PW2 that the deceased had been killed. PW2 quickly came and upon being informed commended the Appellant for fulfilling his wish by killing someone's relative.

PW2, did not stay as she went to look for help from other people. She came back and said they should look for panado, so as to create the impression that the deceased had died from poison.

At this stage, the Appellant had run away.

PW5's observation was that when she looked at the deceased, she noticed black marks on the face and the eyes were swollen. She recalled explaining to several people at the funeral house as to how the deceased died. PW5 denied having been coached by PW6 to give the evidence she did.

PW6, Stevania Chanda's evidence was that she was on the fateful day informed of the death of the deceased, her daughter.

At the funeral house, PW5 narrated to her what had happened. She observed that the deceased's head and neck were swollen. That she did not see the Appellant at the funeral house.

PW7, was the ***Police Officer*** who investigated the case. His testimony was that he received a report of murder, in which it was alleged that the deceased died in the process of being beaten by the Appellant. At the scene he saw that the head of the deceased was swollen. He searched for anything poisonous as there were rumours of the deceased having taken poison, but did not find any. At the time, the Appellant was on the run.

The family was advised to bury the deceased due to the lack of a doctor or pathologist and as such, no postmortem was conducted.

The Appellant was subsequently apprehended.

The defence case was made up of the testimony of the Appellant on oath. His account was that around 18:00 hours on the material date, he came back from the river where he had gone to pack firewood on

the boat. He found the deceased at home. He asked her whether she had seen the Owl which was on the roof, to which she responded in the negative. He went outside, got a stick, threw it and killed the Owl and placed it near the house.

According to the Appellant, the deceased had wanted to accompany him on the fishing trip, but he refused to accede to the request. He went back to the boat to load mealie meal and when he returned around 20:00 hours, he found the deceased had fallen at the entrance of the house and foaming from the nose and mouth. At that stage she was just alone at the house. He then called for PW2 who informed him that the deceased had taken some poison. They later checked where they had stored the rat poison in a plastic and discovered it was missing.

It was also his evidence that they tried to resuscitate the deceased by giving her milk and smashed charcoal. She later became weak and died.

According to the Appellant, when the relatives gathered at the funeral house, they refuted that the deceased had taken poison, despite PW2

showing them where the medicine was and the vomit. When they looked at the medicine, they said it was crushed panado.

According to the Appellant, he left the house and went to hide in a makeshift hut behind as the relatives to the deceased kept insulting and threatening to kill him. He only came out of hiding after the deceased was buried.

As regards the evidence of PW5, the Appellant alleged that she was coached by PW6 as to what to say. The Appellant denied killing the deceased and reiterated that she had taken poison as he had refused to go fishing with her. The Appellant conceded that PW5 was at home when he killed the Owl.

After analyzing the evidence before her, the learned trial Judge came to the conclusion that the prosecution had proven the case against the Appellant beyond all reasonable doubt and convicted him accordingly. She sentenced the Appellant to suffer the death penalty.

Disenchanted by the Judgment, the Appellant now appeals on four grounds as follows:

1. The learned trial Judge misdirected herself in law and fact when she found as supporting evidence, things that are not relevant to the core evidence of PW5 as the basis for accepting her evidence.
2. The learned trial Judge erred in law and fact when she ignored the statutory requirement for corroboration in relation to a witness of tender age.
3. The learned trial Judge erred in law and fact when she held that in the circumstances of the case, postmortem examination was not necessary.
4. In the alternative, that the learned trial Court misdirected itself in law and fact when after accepting the evidence of PW5 found that there existed no extenuating circumstances.

At the hearing of the appeal, the learned Deputy Director of Legal Aid, Mr. Muzenga relied on the Appellant's heads of arguments which he augmented with brief oral submissions.

The first and second grounds of appeal, were argued together and it was submitted that the only eye witness to the alleged assault was PW5 whose evidence was received after a ***voire dire***.

That since the demise of her mother she had been staying with the mother's relatives who had desired to assault or kill the Appellant as they believed he was responsible for the death. Counsel submitted that the trial Court rightly treated PW5 and PW6 as witnesses with a possible interest to serve and drew our attention to the Supreme Court cases of **Kambarage Mpundu Kaunda v The People**[1] and **Simon Malambo Choka v The People**[2].

According to Counsel, the learned trial Court looked for supporting evidence and to that effect found that when PW7 went to the scene he observed that the deceased's head was swollen, though none of the people who knew the deceased very well observed this. PW1, brother of the deceased, who was one of the first to arrive at the house told the trial Court that when he closely looked at the body of the deceased, he saw bruises on the face. Equally PW5 never told the Court that the mother sustained a swollen eye.

On the story of the Owl, Counsel submitted that the trial Judge considered that an odd coincidence.

Counsel contended that, that evidence could not properly be considered as corroborative evidence or evidence providing a link as it is not connected to the core or gist of the evidence of PW5's evidence.

According to counsel, there exists no corroborative evidence nor is there evidence of something more which effectively rules out the danger of false implication.

That as such the evidence of PW5 must be discounted as it is unreliable.

It was in addition submitted that the evidence of PW5 is further weakened by the requirement under Section 122 of ***The Juveniles (Amendment) Act, No. 3 of 2011***[12] which provides under Section 122 (b) as follows:

> *"(b) where evidence admitted by virtue of this Section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating the accused".*

It was Counsel's contention that the trial Judge did not seem to have been alive to the aforestated requirement as no reference was made thereto in the Judgment. That this was a misdirection. Reliance was placed on the case of **Bernard Chisha v The People**[3] where the Supreme Court observed that a child due to immaturity of mind is susceptible to the influence of third persons and as such their evidence requires to be corroborated.

Counsel on this ground urged us to allow the appeal.

On the third ground of appeal, learned Counsel submitted that the issue of the deceased possibly having taken poison arose right from the first to the last Prosecution witness, though the witnesses who were related to the deceased vehemently denied the possibility.

That based on the evidence of PW2, there is a possibility that the deceased took poison after the quarrel with the Appellant.

It was submitted that even though the container for the poison was not found, the State ought to have conducted a postmortem in order to ascertain the cause of the death.

That though the learned trial Court relied on the case of **Kashenda Njunga and Others v The People**[4] where it was held that:

> *"It is not necessary in all cases for medical evidence to be called to support a conviction for causing death, except in borderline cases, laymen are quite capable of giving evidence that a person had died. Where there is evidence of 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",*

the aforestated case is not applicable to the case in casu as the evidence of the alleged assault was given by PW5 whose evidence requires corroboration as a matter of law to be believed. Further that the allegation that the deceased took poison after the quarrel and the vomit and faecal matter were seen by PW2 is consistent with suicide as a result of poison.

It was therefore important to ascertain the cause of death in order to establish the required standard as to what caused the death. As the

situation stands, there are two possibilities that the deceased was either poisoned or died as a result of the assault.

Counsel argued that where there are more than one possibility in the matter, the one more favourable to the accused must be adopted. It was contended that there is nothing on the record which excludes a favourable inference to the Appellant.

Ground four was argued in the alternative and it was submitted that from the evidence of PW5, the learned trial Judge should have considered the fact that the Appellant had been drinking as an extenuating circumstance.

According to Counsel, the trial Court in its Judgment considered the defence of intoxication and found that the defence was not available to the Appellant.

Reliance was placed on the case of **Jack Chanda and Another v The People**[5] where the Supreme Court held inter alia that:

> *"Failed defence of provocation, evidence of witchcraft; and evidence of drinking can amount to extenuating circumstances".*

It was submitted that in view of the extenuating circumstances the trial Court should have imposed any other penalty than the mandatory death penalty.

The learned Counsel for the Appellant prayed that the appeal be allowed.

In response, Mr. Bako, the learned Chief State Advocate made oral submissions. In response to the first and second grounds of appeal, Counsel submitted that looking at the evidence of PW5, the trial Court was on firm ground when it took into consideration the cautionary rule with the sole purpose of excluding false implication.

That there was ample corroboration of PW5's testimony in material respect.

Counsel cited the case of **Machipisha Kombe v The People**[6] where the Supreme Court guided that corroboration is independent evidence which tends to confirm that the witness is telling the truth when he or she says that the offence was committed and that it was the accused who committed it. The Supreme Court went further to state that the approach should no longer be static. There is no need to be technical about corroboration; evidence of something more, which

though not constituting corroboration as a matter of strict law, yet satisfies the Court the danger of false implication has been excluded, and it is safe to rely on the evidence implicating the accused, is sufficient.

According to Counsel, the evidence of PW7, particularly the observation he made that the head of the deceased was swollen was corroborative of PW5's evidence, who explained how the deceased was assaulted by the Appellant. The injuries observed by PW7 were consistent with PW5's narration.

It was further submitted that the death happened instantaneously and it is inconceivable that PW5 did not see her father assault the deceased. It was also argued that PW5 was at home together with the Appellant and the deceased, which fact was confirmed by the Appellant. As such the evidence of PW5 was properly supported.

In response to the second ground of appeal, it was argued that although the statutory requirement under Section 122 (b) of ***The Juveniles Act***[12], was not adhered to, there was no prejudice or injustice occasioned to the Appellant in that the trial Court did look for corroboration to make the conviction safe. It was contended

that had the trial Court addressed its mind to that requirement, it would still have come to the same conclusion it did. Our attention was drawn to the provisions of Section 16 (2) of ***The Court of Appeal Act***[13] which provides as follows:

> *"Despite subsection (1) where the Court is of the opinion that the point raised in the appeal might be decided in favour of the appellant, the Court may dismiss the appeal if it considers that no miscarriage of justice has actually occurred".*

In response to the third ground of appeal, learned Counsel for the Respondent, relied on the **Kashenda Njunga**[4] case which was cited by the Appellant and submitted that the evidence of PW5 was not only confirmed by PW7 in respect of the assault but also by the evidence of PW1 and PW3. That the Appellant's version that the deceased took poison cannot even be considered, looking at the facts of the case.

According to Counsel, although the Appellant in his defence indicated that the remnants of the poison were collected by PW2, the record will confirm that in fact PW2 did not see any.

Her only evidence was that the deceased told her that she was going to take poison. Further that PW2 confirmed seeing the deceased after being told that she was not feeling well. It was submitted that there being no confirmation of the presence of poison and there being a variance in the evidence of PW2 and that of PW5, the trial Court was on firm ground when it concluded that this was not a borderline case in terms of the versions of poisoning and assault, requiring further inquiry into the cause of the death as the cause of death was clear.

Counsel added that PW2, being the person who generated the version of poison had all the opportunity to get the remnants of the poison, if at all it was there and hand it over to the Police. That as such there was no poison at all.

On the fourth ground of appeal, Counsel for the Respondent submitted that there was no extenuating circumstance in this case, in that, a perusal of the record does not show nor reveal any circumstance that reduced the criminal culpability of the Appellant.

On the allegation that PW5 was coached on account of being a child of tender age, Counsel submitted that the allegation was baseless as the details of her testimony were agreed to by the Appellant, which

were not known by the people who allegedly coached her particularly PW6 who was keeping her.

Counsel prayed that the conviction and sentence be upheld and the appeal dismissed.

We have carefully considered the evidence on record, the Judgment of the trial Court and the submissions by both learned Counsel.

We note that both Counsel argued grounds one and two of the appeal together although in our view from the manner the arguments have been advanced, the two grounds seem to raise two distinct issues and as such we shall consider them separately.

The first ground of appeal relates to the evidence of PW5 and PW6 being relatives to the deceased and as such being witnesses with a possible interest to serve.

The trial Court in considering their evidence treated them as suspect witnesses because of the nature of their relationship with the deceased and warned itself of the need to act with caution and exclude the danger of false incrimination. It is in that respect that the trial Court ventured into looking for corroboration and found it in

the evidence of PW7 who observed that the head of the deceased was swollen which was consistent with the evidence of PW5, that the Appellant had hit the head of the deceased several times on the ground. According to the trial Court, this was a sign that she did not die from poisoning.

Further corroborative evidence was found in the admission by the Appellant over the killing of an Owl which was on top of the roof of the house which was in tandem with the evidence of PW5, and confirmed the presence of the Appellant and PW5 at the crime scene at the same time and took that odd coincidence as being corroborative.

In the recent Supreme Court case of **Yokoniya Mwale v The People**[7] the Supreme Court revisited the **Kambarage Kaunda Case**[1] and once more had the occasion to address the evidence of witnesses who are friends and relatives and put the issue in its proper perspective. The Supreme Court in the **Mwale**[7] case concluded that a conviction will thus be safe if it is based on the uncorroborated evidence of witnesses who are friends and relatives of the deceased or victim provided that on the evidence before it, those witnesses could not be said to have a

bias or motive to falsely implicate the accused, or any other interest of their own to serve. That what was key was for the Court to satisfy itself that there was no danger for false implication.

As earlier alluded to, in respect of PW6 the trial Court took into stride the cautionary rule and endeavoured to find corroborative evidence in excluding the danger of false implication although the Court did not need to go that far as what was key was for the Court to satisfy itself that there was no danger of false implication. In so far as PW5 was concerned it was a misdirection to rely on the cautionably rule because corroboration of a child of tender years is a matter of law.

However, we agree with Counsel for the Respondent that in this case, there was ample corroborative evidence from PW7 and also from the Appellant, to exclude the danger of false implication.

Neither was any indication given, nor was there any evidence on the part of the Respondent that PW5 and PW6 had a motive to falsely implicate the Appellant. The evidence in respect of the Owl confirmed that PW5 was present at the time the Appellant assaulted the deceased. This part of the story was admitted by the Appellant and cannot therefore be said not to be connected to the core or gist of the

evidence of PW5. It amounted to something more. The learned trial Judge cannot be faulted in regarding the said evidence as corroboration of PW5's testimony.

In the view, we have taken, the first ground of appeal fails.

The second ground of appeal relates to the evidence of PW5, a child of tender age, whose direct evidence was that the Appellant assaulted the deceased, which led to her death. Indeed Section 122 (b) of ***The Juveniles Act***[12] provides that where evidence of a child of tender age is admitted under the Section on behalf of the Prosecution, the accused shall not be liable to be convicted of an offence unless the evidence is corroborated by some other material in support thereof implicating the accused.

In the English case of **R v Wilson**[8], Edmund Davis L J, stated that where there is statutory provision about the requirement of corroboration, the customary warning about the danger of convicting in the absence of corroboration is insufficient. The jury must be told in clear terms that unless corroboration required by statute is forthcoming, they cannot convict.

We are satisfied that although the trial Judge did not make specific reference to the proviso to Section 122 of the ***Juveniles Act[12],*** she was mindful and alive to the need for corroborative evidence, of PW5's testimony although she looked for corroboration on the wrong premise. As earlier stated the story of the Owl and PW7's testimony provided corroboration.

We are in addition on this point, in agreement with Counsel for the Respondent that, notwithstanding that there was no specific reference to Section 122 (b) of ***The Juveniles Act[12]*** there was no prejudice or injustice to the Appellant to be occasioned in view of the fact that, had the Court addressed its mind to the said provision of the law it would still have come to the same conclusion it did. We in that respect invoke the provision of Section 16 (2) of ***The Court of Appeal Act[13].***

We are further in agreement with Counsel that even though the trial Court did not go further and address the evidence of PW1 and PW3 as to their observation of the deceased's face, their evidence was corroborative of the testimony of PW5 and in tandem with PW5's

narration of events on the material day, that the deceased was assaulted by the Appellant.

In the view we have taken on the second ground of appeal, it has no merit and it is dismissed.

We now turn to the third ground of appeal. Having ruled out poisoning as the cause of death and having not faulted the trial Court in the first and second grounds of appeal in finding that the death of the deceased was as a result of the assault inflicted on the deceased by the Appellant, we note that the death occurred instantaneously after the assault without any intervening factor. As held in the **Njunga**[4] case which has been cited by both parties, it is not necessary in all cases for medical evidence to be called to support a conviction for causing death except in borderline cases and this is not such a case. The **Njunga**[4] case was later re affirmed by the case of **Mbomena Moola v The People**[9] where the Supreme Court held inter alia as follows:

> *"It is not necessary in all cases for medical evidence to be called to support a conviction for causing death. Where there is evidence of assault followed by a death without the*

opportunity for a ***novus actus interveniens*** *the Court is entitled to accept such evidence as an indication that the assault caused the death".*

Having found that the assault was the cause of the death, there was no need to call for medical evidence as the cause of death was clear and obvious.

We do not agree with Counsel for the Appellant that, there were two possibilities for the cause of death as the trial Judge effectively excluded PW2's and the Appellants story of poisoning as no remnants of the poison or a container were found, and there was no evidence at all that the deceased took poison apart from the alleged threat to do so as was alleged by PW2.

This ground of appeal is equally dismissed as it has no merit.

The fourth ground of appeal was argued in the alternative and it relates to intoxication as an extenuating circumstance.

We note that the learned trial Judge considered the issue in her Judgment and this is what she said on page J17, line 23.

"I note from the evidence of PW5, the child witness stated that on the material night, her father returned home from a drinking spree.

For a defence of intoxication to stand, it is trite law that the burden of proving it lies on the claimant. Section 13 of The Penal Code states that:

> *"Save as provided in this Section, intoxication shall not constitute a defence for any criminal charge".*

It would be an exception if the accused did not know what he was doing at the time. I find that the evidence on record shows that the accused was in full control of his mental faculties when he beat up his wife in the manner that he did".

Having made the aforestated observation, the trial Judge concluded that she did not find any extenuating circumstance.

We also note that the Appellant did not in his defence proffer any evidence of intoxication which could be said to have diminished his responsibilities or mental faculties.

We are satisfied that the trial Court dealt with the issue of extenuating circumstance conclusively and in a proper and befitting manner and we agree with the learned trial Judge that there was no extenuating circumstance.

The Supreme Court in the case of **Kazembe Zulu v The People**[10] in addressing the issue of intoxication as an extenuating circumstance observed that it would be absolutely unconscionable to suggest that any person who merely states that he drunk beer must be presumed to have been either drunk or adversely affected by it, and therefore morally diminished in responsibility. There is no such presumption at law. To the contrary when a person commits an offence, the law presumes that he was of full mental capacity and responsible for the consequences of such an act unless the contrary is proved. The onus of proof lies on him or her to establish that he or she was of such degree of mental incompetence that he or she suffered a diminished culpability.

Phiri JS in that case had this to say:

> *"What we consider paramount to note is that the question of extenuating circumstances is a question of fact to be decided*

on the merits of each case. The finding of extenuating circumstances must be evidence based, and not based on speculation and cursory statements or claims".

As earlier alluded to, there was no evidence of intoxication proffered by the Appellant in his defence.

In view of the aforestated the sum total of this appeal is that all the four grounds of appeal lack merit and they are accordingly dismissed.

The conviction and sentence of the lower Court are upheld.

.....

F.M. CHISANGA
JUDGE PRESIDENT
COURT OF APPEAL

.....

J. CHASHI
COURT OF APPEAL JUDGE

.....

J. Z. MULONGOTI
COURT OF APPEAL JUDGE