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Saidi Banda v The People SCZ Appeal No. 114 of 2015)

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Saidi Banda v The PeopleSCZ Appeal No. 114 of 2015)

Mwaka Chizinga¹

Facts

The case of *Saidi Banda v the People* is a fundamental case as it endorses the established rules governing circumstantial evidence² and develops the law further by providing clear guidelines to the court, which must be applied, whenever the case depends principally on circumstantial evidence.

The appellant was convicted of murder, contrary to section 200 of the Penal Code, Chapter 87 of the Laws of Zambia. The particulars of the offence were that the appellant on a date unknown but between 12 and 13 September 2011 at Lusaka, in the Lusaka Province of the Republic of Zambia, did murder Peter Daka (herein after known as the deceased). The cause of death was cardiac haemotampanede due to stab wounds with penetration into the heart.

The evidence of the prosecution was produced through eight witnesses. The evidence was wholly circumstantial. Below is a summary of the facts:

The Appellant was a Business Development Executive for Allied Mobile Company, whereas the deceased was a sales agent engaged with the same company. The appellant owed the deceased person a sum of seventy-five thousand Kwacha (K75, 000,000), being the value of mobiles that had been paid for by the deceased to the appellant. On 12 September 2011, the deceased left home to sell mobiles. At 17:00 that day, the deceased wife called the deceased person, he informed her that he was with the appellant and that he would return home soon after. The deceased person never returned home. The deceased person's wife after noticing that her husband had not returned home, called the deceased a number of times between 19:00 and 20:00 hours. After this, the deceased persons' wife received text messages from the deceased's phone number. This she found odd, as the deceased had never communicated to her through text messages. She then called the deceased person's line which was picked up by the appellant, who indicated that he was not with her husband.

A search for the deceased was launched on 13 September 2011, the body was found on 15 September 2011. The appellant was arrested and detained. Three phones were found in the possession of the appellant; one phone was concealed in his socks. This phone belonged to the deceased. During his interview at the police station the appellant, in a recorded statement, disputed being with the deceased on 12 September. He claimed that he had travelled to Ndola on that date. The appellant had visible bruises on his neck and an injury on his left hand which revealed a fresh wound. He explained the cause of the injuries as being due to a fight he had with his boss in Ndola on 12 September 2011.

A subscriber information analyst, acting on a search warrant, retrieved the following data:

The appellant called the deceased on the 11th of September, 2011 on 17 different times, the last such calls being at 20:55 hours and 20:56 hours.

The appellant called the deceased on 12th September 2011 at 08:35 hours and at 12:05 hours and that a call was made from the deceased's phone to the deceased's wife on the 12th September, 2011 at 22:01 hours and further that two messages were sent from the deceased's

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² See *Khupe Kafunda v the people* (2005) Z.R. 31 (S.C.), see also *Patrick Sakala v The People* (1980) Z.R. 205 (S.C.).

phone to the deceased's wife's phone at 22:03 hours; that a call was made from the deceased's phone to the deceased's wife's phone at 13:44 hours on the 14th September.

The learned trial judge concluded that the prosecution had proved on the circumstantial evidence submitted the case against the appellant to the requisite standard and convicted the appellant accordingly. She found no extenuating circumstances and sentenced the appellant to suffer the mandatory death sentence.

The Appellant brought an appeal against the decision of the High Court on the following grounds:

1. The court below erred in law and in fact in convicting the appellant and by relying on the doctrine of recent possession instead of proof of malice aforethought as defined in section 200 and 204 of the Penal Code, Cap 87 of the Laws of Zambia.
2. The learned trial court erred both in law and in fact when it convicted on circumstantial evidence which did not raise the inference of guilt as the only inference.
3. The learned trial judge in the lower court erred in law and in fact when it refused the explanation of the appellant which was reasonably possible.

Holding

The Supreme Court summed up the issues as boiling down to whether or not a conviction of the appellant based on circumstantial evidence in the case was competent. The remainder of the arguments by defense counsel were dismissed as being baseless or not sound at law. In relation to the argument pertaining to the doctrine of recent possession, the court held that the doctrine only had application in cases dealing with theft, thus, it had no application to the facts in contention being murder.

In relation to the argument pertaining to the dereliction of duty the court held that, where there is a dereliction of duty, the court is instructed to adopt a presumption favorable to the accused person. However, this presumption is displaced by strong evidence to the contrary. Thus, even in cases where there is a dereliction of duty, the court may uphold a conviction where remainder of the evidence establishes the accused person's guilt. The presumption is therefore not fatal to the prosecution's case as it is not conclusive.

Significance

The court reiterated the established principles governing circumstantial evidence, it was stated that 'in order to convict based on circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of the accused's guilt.'

The following quotation from *David Zulu v the People* was highlighted:

It is a weakness peculiar to circumstantial evidence that by its very nature it is not direct proof of a matter at issue but rather is proof of facts not in issue but relevant to the facts in issue and from which an inference of the facts in issue may be drawn. 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.

The court took the principles governing circumstantial evidence a step further and provided clear steps that a Judge must take when the prosecution's case depends wholly or in part on circumstantial evidence. The court developed a three staged test that must be highlighted in the judgement being:

1. First the prosecution must establish basic facts. These facts do not have to be proved beyond a reasonable doubt, in that, taken by themselves the facts cannot prove the guilt of the accused person.
2. The court should then infer from a combination of those basic facts, further facts or that a further fact exists. The circumstances from which the inference of guilt is sought must be cogently and firmly established.
3. The court must then be satisfied that those further facts point to nothing else but the guilt of the accused person. The circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that, within all human probability, the crime was committed by the accused and no one else.

Circumstantial evidence can constitute good evidence and often times it is the only type of evidence available³. It must however be stressed that unlike direct evidence which requires the court to merely assess the truth of the evidence given, with circumstantial evidence the court must first assess the veracity of the evidence then secondly consider what inference may be drawn from such evidence. The danger that the court is faced with is one of drawing the wrong inference, it is therefore imperative that the court diligently assesses the circumstantial evidence admitted at trial. The cases decided prior to the case being the subject of the discussion provided the court with guidelines as to when the court may convict based on circumstantial evidence, however no specific rules were developed on the process the court must take in arriving at their decision. The current case establishes a three staged approach the court must take when arriving at a decision. This approach if followed provides coherence as well as transparency. Justice must not only be done but must be seen to be done. Outlining the court's reasoning process allows for clarity and aids the appellate court in instances of an appeal. The decision therefore fosters the administration of justice.

Conclusion

The decision has been argued to alter the burden of proof or perhaps change the law governing circumstantial evidence. The decision however does nothing as far as altering the position of the law governing circumstantial evidence which remains the same. The standard of proof is not altered. The court merely provides guidelines or steps to take when faced wholly with circumstantial evidence at trial. The fact in issue must be proved to the standard of proof required in criminal cases that is beyond a reasonable doubt. A fact in which a fact in issue may be inferred in itself taken solely, need not be proof of the accused guilt beyond a reasonable

³ See Hatchard J and Ndulo M, Law of Evidence in Zambia Cases and Materials, Southern African Institute for Policy and Research 2013, p.4, citing United States v Nelson (1969) 419 F. 2d 1237 states "either direct or circumstantial evidence may fail to prove the fact in issue- direct evidence because the credibility of the witness is destroyed; circumstantial evidence for that reason or because the inference from the proven circumstances to the fact in issue is too speculative or remote. Whether such a failure has occurred is an appropriate inquiry in any case-be the evidence direct, circumstantial or both. But since under some conditions circumstantial evidence may be equally or more reliable than direct evidence, it would be wholly irrational to impose an absolute bar upon the use of circumstantial evidence to prove any fact, including a fact from which another fact is to be inferred."

doubt. Taken cumulatively however, the circumstances must lead to no other reasonable hypothesis besides the guilt of the accused person.