IN THE SUPREME COURT OF ZAMBIA Appeal No. 21/2020
HOLDEN AT KABWE
(Criminal Jurisdiction)

B E T W E E N:

JOSEPH CHANDA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: **Muyovwe, Hamaundu and Chinyama, JJS**
on 11th August, 2020 and 19th August, 2020

For the appellant: Mrs. S.C. Lukwesa, Senior Legal Aid Counsel

For the respondent: Mr. C. Bako, Deputy Chief 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. **Kashenda Njunga and Others vs. The People (1988-89) Z.R. 1**
3. **Michael Njobvu vs. The People SCZ Judgment No. 17 of 2011**
4. **Patrick Sakala vs. The People (1980) Z.R. 205**
5. **Chabala vs. The People (1976) Z.R. 14**
6. **Maseka vs. The People (1972) Z.R. 9**
7. **Jack Chanda and Another vs. The People (2002) Z.R. 124**
8. **Dorothy Mutale and Another vs. The People (1995-1997) Z.R. 227**

This is an appeal against conviction. On the 17th January, 2013 Ngulube J (as she then was) delivered judgment in which she found the appellant guilty of the offence of murder. The learned trial judge convicted him and sentenced him to death for the murder of his nearly 2-year-old daughter, Mary Miyambo on the 1st September, 2012.

According to the evidence before the trial court, on the material day PW1 the wife of the appellant left to go and visit her mother. On her return from the visit, the appellant asked her to go back to her mother and when she refused, he assaulted her. She decided to leave. The appellant did not allow her to take the baby and she left her with the appellant. The baby was in good health. She was later, that day, called to go back to her home as her baby had died.

The trial court heard from PW2 who happened to be 20 metres from the appellant's house in the afternoon of the fateful day. His evidence was to the effect that he heard a sound which he likened to someone slapping a person and immediately, he heard a child crying and this was coming from the appellant's house. After 10 minutes, the child stopped crying. He saw the appellant come out

of his house with the child and what followed was that the appellant took the child to the hospital. PW2 stated that he had seen the child crawl from one room to the other and he was able to observe all this as the door was open.

PW3's evidence was that she met the appellant carrying the deceased and he requested her to check the baby's condition. The appellant told her that whilst in the house, the child screamed, and he observed that she was bleeding from the mouth. PW3 poured water on the baby who looked weak and tired and was bleeding from the mouth. The child was rushed to the hospital in a state of unconsciousness and died shortly after admission. According to the arresting officer, he charged the appellant with the offence of murder on the ground that he was alone with the child when she became ill.

The learned trial judge found the appellant with a case to answer and put him on his defence. The appellant's evidence was that he had a quarrel with his wife after she returned from her mother's place and he sent her back. She left the baby who had a high temperature. According to the appellant, the baby was in another room when he heard her scream and when he rushed

there, he found her fitting and he rushed out to seek help from PW3. He mentioned that in June, 2012 the baby had cerebral malaria. He denied killing his own child.

The learned trial judge found that there was no direct evidence pointing to the guilt of the appellant. However, the appellant was with the child after the grandmother of the child (the appellant's mother) went to church leaving the child in good health yet within two hours, she was in a critical condition. She rejected the defence raised by the appellant that the child could have developed cerebral malaria. The learned trial judge accepted that the appellant struck his child hence the sound heard by PW2. That he caused her to bleed in the mouth, caused her sudden death and that he acted with malice aforethought. Relying on **David Zulu vs. the People**[1] she found that the only reasonable inference was that the appellant caused the deceased's death. The learned trial judge was satisfied that the prosecution proved its case beyond reasonable doubt. She found no extenuating circumstances and sentenced the appellant to death.

Mrs. Lukwesa advanced two grounds of appeal couched in the following terms:

1. **The trial court erred in law and fact when it found the appellant guilty of murder based on circumstantial evidence which raised other inferences rather than that of guilty.**

2. **The trial court erred in law and fact by convicting the appellant in the absence of medical evidence to prove the cause of death despite the case at hand being a borderline case requiring medical evidence.**

In her filed heads of argument in support of this appeal, Mrs. Lukwesa argued the two grounds of appeal together. The gist of Mrs. Lukwesa's argument is that medical evidence was required to prove the assault on the child and to link the assault to the death of the child. It was submitted that the evidence that the appellant slapped the child which led to her death was purely circumstantial. She argued that there was no medical evidence to dispel the appellant's defence that the child was sick on the material day. It was submitted that fitting could have caused the bleeding in the mouth. She contended that it was necessary to call medical evidence to establish the cause of death and that had a postmortem been conducted, it may have been in favour of the appellant.

Counsel attacked the trial court's reliance on PW2's evidence especially that he was 20 metres away from the appellant's house at

a place where people were playing musical instruments. In any case, she contended that there was no proof beyond reasonable doubt that the sound heard by PW2 was that of a slap and not any other sound and from anywhere else. In support of her argument, she relied on the case of **Kashenda Njunga and Others vs. The People**[2] and **Michael Njobvu vs. The People.**[3] Mrs. Lukwesa submitted that in this case, no one saw the appellant slap the child and no motive for his alleged actions was established. Counsel opined that the prosecution failed to prove that the appellant caused the death of his child and we were urged to allow the appeal and acquit the appellant.

In response, Mr. Bako filed heads of argument in which he indicated that he was supporting the conviction. He submitted that although the case against the appellant was based on circumstantial evidence, the totality of the evidence took the case out of the realm of conjecture and allowed the trial court to draw an inference of guilt. Mr. Bako contended that the trial court was well guided by the **David Zulu** case[1] not to draw wrong inferences. Counsel argued that amongst other things, the trial court observed that the appellant's account that the child had a high temperature

was contrary to the evidence of PW1, PW2 and PW3. Counsel opined that the appellant's explanation as regards the bleeding in the mouth of the child was not logical and was therefore unreasonable. He argued that if the child was sick, he would not have put the child to bed but would have taken her to the hospital. He defended the trial court's finding that the child did not die of natural causes and that the trial court's reliance on the evidence of PW2 cannot be faulted. Counsel argued that it was not suggested to PW2 that perhaps he was incapable of hearing properly because of the musical instruments playing at the place where he was in relation to the appellant's house.

In conclusion, he contended that on the totality of the evidence, the trial court had enough cogent evidence to hold that the deceased was in good health and with normal temperature at the time the appellant remained with her in his house on 1st September, 2012. Counsel was in full support of the trial court's rejection of the appellant's averment that the deceased suddenly fell ill and died. Mr. Bako argued that the totality of the evidence illustrates that this case is not a borderline case requiring medical evidence and that the **Kashenda Njunga**[2] case is applicable.

We have considered the arguments by Counsel for the parties. It is common cause that the appellant's conviction was based on circumstantial evidence. It is not in dispute that the appellant remained with the deceased after he chased his wife from the matrimonial home. The finding by the learned trial judge was that the child did not die of natural causes but at the hands of the appellant who struck her causing her to bleed from the mouth leading to her death. This evidence was from PW2 who heard the sound of a slap 20 metres away from the appellant's house and who stated that he saw the child crawling from one room to another. Other than the evidence of PW2, no one saw the appellant assault, slap, strike or beat the deceased. The appellant denied causing harm to his child stating that she suddenly fell very ill, and he sought help immediately. It is common cause that no post-mortem examination was conducted on the body of the deceased. There are three issues for our determination in this appeal: whether the circumstantial evidence relied upon by the prosecution was cogent so as to allow no other inference other than that of guilt, whether the appellant's explanation could reasonably be true and whether the absence of medical evidence was fatal to the prosecution case.

We have in a plethora of cases such as **David Zulu vs. The People**,[1] **Patrick Sakala vs. The People**,[4] **Michael Njobvu vs. The People**,[3] and **Kashenda Njunga and Others vs. The People**[2] pronounced ourselves on how trial courts should deal with circumstantial evidence and the appellant's explanation in any given case. In the case of **David Zulu vs. The People**[1] we held that:

> **(i) 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 fact in issue and from which an inference of the fact in issue may be drawn.**
>
> **(ii) 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.**
>
> **(iii) The appellant's explanation was a logical one and was not rebutted, and it was therefore an unwarranted inference that the scratches on the appellant's body were caused in the course of committing the offence at issue.**

Looking at the facts of this case, was the circumstantial evidence cogent; the appellant's explanation reasonable? According to the appellant's explanation, the child fell ill suddenly; he found her fitting (like one having an epileptic attack) and was bleeding from the mouth. In contrast to the circumstances in the cases of **Patrick Sakala vs. The People**[4] and **Kashenda Njunga vs. The**

People[2] where the deceased had visible injuries, the deceased in this case had no visible injuries. In the case of **Chabala vs. The People**[5] we held that:

> **(ii) If explanation is given, because guilt is a matter of inference, there cannot be conviction if the explanation might reasonably be true, for then guilt is not the only reasonable inference. It is not correct to say that the accused must give satisfactory explanation.**
>
> **Dictum of Clayden, F.J., in R v Fanwell [1] cited with approval.**
>
> **(iii) There is no onus on an accused to prove his explanation.**
>
> **(iv) The court is required to consider whether the explanation might reasonably be true.**

Further, in the case of **Maseka vs. The People**,[6] the Court of Appeal, the forerunner to this Court stated, *inter alia*, that:

> **An explanation which might reasonably be true entitles an accused to an acquittal even if the court does not believe it; an accused is not required to satisfy the court as to his innocence but simply to raise a reasonable doubt as to his guilt. A fortiori, such a doubt is present if there exists an explanation which might reasonably be true; for the court to be in doubt does not imply a belief in the honesty generally of the accused nor in the truth of the particular explanation in question.**

The above cited cases clearly show that in relying on circumstantial evidence, it is crucial that the facts should reveal only one inference, that of guilt because guilt is a matter of

inference. In this case, the arresting officer charged the appellant with murder because, according to the appellant, he was with the child when she suddenly fell sick and nothing more. In **Kashenda Njunga**[2] which Mr. Bako contended was applicable to this case, we 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 has 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.** (Emphasis ours)

Looking at the evidence before the lower court, our view is that **Kashenda Njunga**[2] is not applicable to this case and it is not a borderline case. We do not agree with Mr. Bako that the learned trial judge was on firm ground to hold that the child did not die of natural causes. Further, we held, *inter alia*, in **Jack Chanda and Another vs. The People**[7] that:

> **(i) Lack of expert evidence of a doctor as to the cause of death is not fatal where the evidence is so cogent that no rational hypothesis can be advanced to account for the death of the deceased.**

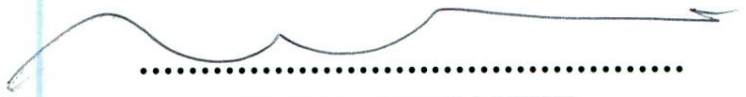
This is precisely the issue in this case. In our considered view, PW2's evidence which the learned trial judge relied heavily on

left much to be desired: He heard a slap like sound but when the appellant came out of the house, no one saw any evidence that the child had been slapped, beaten or assaulted. According to PW3, she looked weak and tired and was bleeding in the mouth. We tend to agree with Mrs. Lukwesa that on the peculiar facts of this case, medical evidence was crucial in proving the guilt of the appellant of the offence of murder. And the onus remained on the prosecution.

It would appear that because the appellant exhibited a violent disposition earlier in the day when he assaulted his wife and ordered her to return to her parents without the child, this may have influenced the learned trial judge in concluding that he may have turned his anger against his child and struck her to death. We take the view, that lack of medical evidence as to the cause of death left many unanswered questions. Had the postmortem examination been conducted, perhaps the results would have been in favour of the appellant or indeed the prosecution. (See **Dorothy Mutale and Another vs. The People.**[8]) And as we stated in the **Chabala**[5] case, guilt is a matter of inference and there should be no conviction if the explanation might reasonably be true. In short, the circumstantial evidence was weak and did not take the case out of

the realm of conjecture so that it attained a degree of cogency which could permit only an inference of guilt.

We find merit in this appeal. The conviction is unsafe, and we set it aside as well as the sentence. The appellant is acquitted forthwith.



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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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E.M. HAMAUNDU
SUPREME COURT JUDGE

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J. CHINYAMA
SUPREME COURT JUDGE