

**HOLDEN AT LUSAKA**

*(Criminal Jurisdiction)*

**BETWEEN:**

**WARRANT C. CHILUNDIKA**

**APPELLANT**

**AND**

**THE PEOPLE**

**RESPONDENT**

**CORAM: MCHENGA, DJP, MAKUNGU AND NGULUBE, JJA.**

***On 19<sup>th</sup> January, 2021 and 23<sup>rd</sup> March, 2021.***

***For the Appellant:*** E. I. Banda, Senior Legal Aid Counsel, Legal Aid Board

***For the Respondent:*** N. T. Mumba, Chief State Advocate, National Prosecution Authority

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**J U D G M E N T**

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**NGULUBE, JA** delivered the judgment of the Court.

**Cases referred to:**

1. *David Zulu vs The People* (1977) Z.R.151
2. *Bwanausi vs The People* (1976) Z.R.103
3. *Dorothy Mutale and another vs The People* S.C.Z. Judgment Number 11 of 1997
4. *Phiri and others vs The People* (1973) Z.R. 47 (CA)
5. *John Mwanauta vs The People* S.C.Z. Appeal Number 200 of 2011
6. *Mbinga Nyambe vs The People* (2011) Z.R.246

7. *Richard Phiri vs The People (1997) SJ51(S.C)*

**Legislation referred to:**

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

**INTRODUCTION**

1. This is an appeal against a judgment of the High Court delivered by Maka - Phiri, J. in which the court sentenced the appellant to death for the offence of murder.
2. The background to the appeal is that the appellant was tried for one count of the offence of murder contrary to section 200 of the Penal Code, Chapter 87 of the Laws of Zambia before the High Court at Mazabuka. The particulars of the offence are that the appellant, on 3<sup>rd</sup> February, 2018 at Pemba in the Pemba District of the Southern Province of the Republic of Zambia, murdered Chiwego Chipangu.

**PROSECUTION'S CASE IN THE COURT BELOW**

3. The prosecution called six witnesses in support of their case. PW1, Ketrina Habasune was the mother of Chiwego Chipangu the girl child who died. Her testimony was that she left her daughter at home with the appellant on 3<sup>rd</sup> February, 2018 and went to draw water from the borehole. She stated that the child

was sleeping on the bed at the time. When she returned, she found her unconscious, lying on the floor and inquired from the appellant what happened. He expressed ignorance. She got the child and rushed to her mother's home and upon examining the child, PW1's mother told her that the baby was dead.

4. PW1 returned home to call the appellant and found that he had left. She stated that the appellant was her boyfriend and that she had lived with him for sometime. She further stated that when she left the child as she went to the borehole, she was in good health. She also confirmed that the child was on antiretroviral therapy (ART) as she was HIV positive. PW1 went on to testify that she found that the child was swollen at the back of the neck and on the back.
5. PW2, Juliet Milambo's testimony was that on 3<sup>rd</sup> February, 2018 at about 16:00 hours, her daughter, PW1 rushed to her house with her daughter and informed her that the child was unwell. When she examined her, PW2 realised that the child was swollen on the back, face and head and she was dead.
6. PW1 told her mother that she left the child with the appellant when she went to draw water and upon her return, she found



her unwell. PW2 further testified that PW1 and the appellant were in a relationship and that they had lived together for about three months. She also testified that her daughter PW1 was retarded and that she spoke with difficulty.

7. PW3, Josty Manyepa was the village headman. His testimony was that on 3<sup>rd</sup> February, 2018, there was a funeral at his village as PW1's child had died. When he examined the body of the child, he noticed that there was a swelling on the back and on the head with bruises. He went on to state that PW1 and the appellant lived together for about four months. The appellant was later apprehended at Lutanga in Chief Hamaundu's chiefdom.
8. PW4, Fitness Munsaka's testimony was that on 4<sup>th</sup> February, 2018 at about midnight, the appellant went to her house to ask for a place to sleep and offered her K100.00. PW4 stated that the appellant told her that he had run away from the village where he lived because he killed PW1's child. She agreed to give the appellant a place to sleep but alerted a neighbourhood watch member about his presence at her home. The Community

Crime Prevention Unit members later went to PW4's house and apprehended the appellant.

9. PW5, Clever Munsanje's testimony was that on 4<sup>th</sup> February, 2018, PW4 went to his home to inform him that the appellant, who was suspected of having murdered a child was hiding at her house. He went to PW4's house with another Community Crime Prevention Unit member and they apprehended the appellant.
10. PW6, Collins Litia Mwape, was the arresting officer. He attended the postmortem examination that was conducted on the body of the child Chiwego at Monze Hospital. The said examination revealed that the cause of death was head injuries. In the course of investigations, the appellant told PW6 that the mother of the child (PW1) gave the child a product which she got from the clinic and that this is what led to the child's death. PW6 later charged and arrested the appellant for the offence of murder.

#### **THE DEFENCE**

11. In his defence, the appellant testified that he is a witchdoctor and that on 3<sup>rd</sup> February, 2018, PW1 went to draw water from

the borehole and left her baby sleeping on the bed. He sat outside until she returned, when she found the child on the ground and told the appellant that the body of the child was weak. He suspected that the child was affected by the medicine which she got from the clinic and added to the child's porridge.

12. The appellant left to go and collect money from his creditors and on the way back home, he went to PW4's home to collect K100 for a radio that he sold to her husband. While he was at PW4's house he was apprehended for the murder of the child and taken to Pemba Police station. He denied killing the child and stated that he did not know anything about the stick that was exhibited in this matter.
13. The appellant stated that what caused the child's death was the fall from the bed and he conceded that at the time, he was alone with the child. He denied fleeing from home after the child died.

#### **DECISION OF THE LOWER COURT**

14. The court analysed the evidence before it and found that the appellant went to PW4's home to ask for a place to sleep as he had fled from PW1's house after her child was found dead. The court further found that the appellant was left with the child



when its mother, PW1, went to fetch water. The court concluded that the appellant was the last person who was with the child and that he had the opportunity to murder the child.

15. The court opined that the postmortem report showed that the child suffered abrasions on the cheek and the back and that this was not consistent with the appellant's evidence that the child fell from the bed. The court was of the view that the appellant caused the injuries that the child suffered and which led to her death and opined that the circumstantial evidence had taken the case out of the realm of conjecture as the appellant's suspicious conduct and the odd coincidences confirmed that he murdered the child. The court convicted the appellant for the murder of the child and sentenced him to death.

#### **GROUND OF APPEAL**

16. The appellant was dissatisfied with the judgment of the lower court and lodged this appeal advancing one ground which was that—

***“1. The Learned trial Judge erred in law and fact by convicting the appellant based on circumstantial***

***evidence when it was clear that there was more than one reasonable inference that could be drawn from the said circumstantial evidence.”***

## **APPELLANT’S ARGUMENTS**

17. In arguing the sole ground of appeal, Ms Banda, Senior Legal Aid Counsel submitted that the only evidence against the appellant was circumstantial. According to her, the evidence on record did not take the case out of the realm of conjecture. She referred to the case of ***David Zulu vs The People***<sup>1</sup> and the case of ***Bwanausi vs The People***<sup>2</sup> and submitted that the court misdirected itself when it concluded that since the appellant was the last person to be with deceased, then he had the opportunity to commit the offence even if the appellant and PW1, the mother of the child had a cordial relationship.
18. It was submitted that since the lower court found that there was no motive for the commission of the offence, this should have raised some doubts in the mind of the court as to whether it was the appellant who murdered the child. According to Counsel, the appellant’s explanation that the child fell from the bed to the floor was a reasonable explanation and that by dismissing it because the court was of the view that it did not



tally with the injuries that the child suffered, this was a misdirection. Counsel was of the view that the appellant's explanation was both plausible and probable.

19. It was contended that the appellant explained that he left the village to look for money to take the child to the hospital and that the omission of not helping to resuscitate the child was not necessary as the child was still alive when he left. Counsel went on to submit that PW1 should have taken the child to the hospital when she saw that the child was unwell instead of taking her to "an elder" within the village.
20. It was contended that from the evidence on record, it cannot be said that the only reasonable inference that can be drawn is that the appellant committed the offence. Ms Banda cited the case of ***Dorothy Mutale and another vs The People***<sup>3</sup> which establishes the principle that in criminal law, where there are two or more inferences, the court will adopt one which is more favourable to the accused person if there is nothing in the case to exclude such an inference. Counsel submitted that two possible inferences can be drawn from the circumstantial evidence on record, these being that the appellant murdered the

child or that the child fell from the bed and died as a result of trauma. It was contended that the injuries that the child suffered as per the postmortem report are consistent with a fall and not a beating with a small stick.

21. Counsel contended that the lower court misdirected itself when it relied on the testimony of PW1 who was not completely normal. It was argued that the court should have taken PW1's evidence with a pinch of salt as she even made a mistake when she stated that she lived with the appellant for three years when they only lived together for three months.
22. It was argued that PW2, who was PW1's mother and PW4 were biased witnesses whose evidence should have been received after the court warned itself and ruling out the possibility of false implication and that not doing so was a misdirection on the part of the court. Counsel referred to the case of ***Phiri and others vs The People***<sup>4</sup> where the court stated that –

***“The courts are required to act on the evidence placed before them. If there are any gaps in the evidence, the courts are not permitted to fill them by making assumptions adverse to the accused. If there is insufficient evidence to justify a conviction, the courts have no option but to acquit the accused.”***

23. According to Counsel, the court should have analysed and reasoned its judgment using the evidence before it and should not have made assumptions which were unsupported by the evidence. Counsel contended that there was no evidence that warranted the conviction of the appellant as the prosecution did not prove its case beyond reasonable doubt. We were urged to allow the appeal, quash the conviction and acquit the appellant.

#### **RESPONDENT'S ARGUMENTS**

24. The respondent's Counsel Ms Mumba, Chief State Advocate filed submissions to the effect that she was in support of the conviction as there was overwhelming circumstantial evidence against the appellant. Counsel contended that the appellant was the last person who was with the child when the mother went to fetch water and that he exhibited odd behaviour when she returned and found her on the ground in an unconscious state. It was argued that the child was in good health and was left sleeping on the bed when the mother went to fetch water.
25. Counsel argued that there was no other person who had access to the child during the period when PW1 went to draw water and that the appellant had the opportunity to commit the



offence. It was further contended that the injuries which the child suffered as per the doctor's findings in the postmortem report were not consistent with a fall as alleged by the appellant and that the injuries were inflicted by the appellant. It was contended that looking at the appellant's conduct after PW1 found the child lying on the floor, his behaviour was an odd coincidence which shows that the appellant inflicted the injuries on the child.

26. According to Counsel, when the appellant refused to administer traditional medicine to the child upon PW1's request, he knew what was wrong with the child as he is the one who inflicted the injuries that resulted in the child being found unconscious on the floor. As PW1 rushed to seek help from PW2, the appellant disappeared from the house, on 3<sup>rd</sup> February, 2018 and was only apprehended on 4<sup>th</sup> February, 2018 at midnight when he sought refuge at the home of PW4. It was submitted that the only reasonable inference that can be drawn from the appellant's conduct is that he was on the run.
27. Counsel referred to the evidence of PW4 which was that the appellant told her that he ran away from where he lived because

he had murdered a child. It was submitted that the statement amounts to a confession which is admissible as the appellant made it voluntarily to PW4 who was not a person in authority. It was argued that the circumstantial evidence had taken the case out of the realm of conjecture in line with the case of **David Zulu vs The People (supra)**.

28. It was Counsel's contention that the appellant's explanation was not reasonable. The court was referred to the case of **John Mwanaute vs The People<sup>5</sup>** and it was submitted that since the appellant being the last person seen with the deceased prior to her being found unconscious, the lower court's conviction and sentence cannot be faulted. We were urged to dismiss the appeal.

#### **DECISION OF THIS COURT**

29. We have considered the evidence on record and the submissions by learned counsel for the parties.
30. It goes without saying that this case rests on circumstantial evidence. In the case of **Mbinga Nyambe vs The People<sup>6</sup>**, in which the case of **David Zulu vs The People (supra)** was also considered, it was held *inter alia* that-

***“Where a conclusion is based purely on inference, that inference may be drawn if it is the only reasonable inference on the evidence, an examination of the alternative and a consideration of whether they or any of them may, be said to be reasonably possible cannot be condemned as speculation.”***

31. Ms Banda argued that the circumstantial evidence against the appellant did not take the case out of the realm of conjecture. She argued that the lower court misdirected itself when it relied on the evidence of PW1, Ketrina Habasune as she was not completely normal. Ms Banda further submitted that PW2 Juliet Milambo who was PW1's mother and PW4, Fitness Munsaka were biased witnesses as there was a danger that they could have falsely implicated the appellant. In our view, we note from the lower court's Judgment that the credibility of the appellant was under scrutiny. The learned trial Judge did not believe the appellant's version of the events and concluded that his suspicious conduct and odd coincidences in the matter confirmed that it was he who murdered the child. Nothing on record suggested bias on the part of PW2 and PW4.
32. A perusal of the evidence reveals that the appellant left PW1's home where he had lived for about three months and went to



PW4's home in another village where at midnight, he asked for a place to sleep and promised to give PW4 money amounting to K100. He also told PW4 that he had run away from the village where he lived because he had killed PW1's child.

33. However, in his defence, the appellant stated that he left PW1's home after the baby was found injured and in a critical state to go and collect money from his creditors, who included PW4. He stated that PW4 owed him K100 for a radio that he sold to her husband. From the evidence on record, particularly that of PW4, it is clear that the appellant did not leave the village in a normal way but he fled.
34. We note that the appellant left the village when PW1 found her child unconscious and run to seek help from her mother, PW2. Interestingly, the appellant who claimed to be a witchdoctor did not offer to give any help in resuscitating the child as he only retorted that the baby needed to be taken to the hospital. The appellant was apprehended in another village, at PW4's home where he went to ask for a place to sleep and made a confession to PW4. Why would the appellant leave the village in haste and

go and seek refuge in another village? In our view the behaviour of the appellant implied that he had guilty knowledge.

35. The undisputed facts of this case are that, the appellant was the only person who was left at home with PW1's baby and as such, that there is no question that the appellant is the only person who could have inflicted the injuries on PW1's baby as found in the postmortem report. The appellant's evidence that he left the village to collect debts from his creditors when his girlfriend's baby was in a critical state is untrue and does not make sense. In any event, the learned trial Judge analysed the evidence before her with great caution and gave reasons why she believed the prosecution witnesses as being truthful, credible free from concoction and without false implication. In our considered view, the cautious approach by the learned trial Judge was sufficient to negate the need for warning as we knew it in relation to evidence of PW2 and PW4.

36. We do not agree with the argument presented on behalf of the appellant to the effect that there were two possible inferences in the matter, that the child could have been murdered by the appellant or that the child fell from the bed. The findings of the

doctor as per the postmortem report were that the child died due to head injury. Further, PW2 and PW3 observed that the child had a swelling on the back and on the head and also had abrasions on the body. Clearly, these were injuries which were inflicted by the only person who was left at home with the child, this being the appellant.

37. In the case of ***Richard Phiri vs The People***<sup>7</sup>, the Supreme Court held *inter alia* that-

***“Where two or more inferences are possible, it has always been a cardinal principle of criminal law that the court will adopt the one which is more favourable to an accused if there is nothing in the case to exclude such inference. (underlined by the court for emphasis only)”***


38. In the present case, we do not find that two possible inferences could be drawn on the circumstantial evidence before us. The fact that the appellant was the only person at home with the child when PW1 went to draw water, and returned to find the child injured and unconscious on the floor points at the appellant as the person who inflicted the injuries on the child. We are of the considered view that the evidence highlighted above culminates into cogent evidence that permitted only an inference of guilt.



## CONCLUSION


39. In sum, the appellant had an opportunity to murder the child for reasons best known to himself and he took that opportunity. The appeal accordingly fails and we uphold the conviction and sentence.

Dated at Lusaka this 23<sup>rd</sup> day of March, 2021.




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C.R.F MCHENGA  
**DEPUTY JUDGE PRESIDENT  
COURT OF APPEAL**



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C.K MAKUNGU  
**COURT OF APPEAL JUDGE**



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P.C.M. NGULUBE  
**COURT OF APPEAL JUDGE**