**IN THE SUPREME COURT OF ZAMBIA** **Appeal No. 200/2011**

**HOLDEN AT NDOLA**

**(*Criminal Jurisdiction*)**

**BETWEEN:**

**JOHN MWANAUTE**  **APPELLANT**

**AND**

**THE PEOPLE RESPONDENT**

### Coram: Chirwa, Ag. D.C.J., Chibomba and Wanki, J.J.S.

**On 6th December 2011 and on 7th February 2012.**

***For the Appellant: Mr. K. Muzenga, Ag. Principal Legal Aid Counsel.***

***For the People: Mr. P. Mutale, Principal State Advocate.***

JUDGMENT

**Chibomba, J.S., Delivered the Judgment of the Court.**

***Cases referred to*:**

1. **David Zulu v The People [1977] Z.R. 151.**
2. **Chimbini v The People [1973] Z.R. 192**

***Legislation referred to*:**

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

The appellant was convicted of one count of murder, contrary to **Section** **200** of **the Penal Code,** **Chapter 87** of the Laws of Zambia. Particulars of the offence were that **John Mwanaute**, on 18th day of December 2007, at Solwezi in the Solwezi District of North Western Province of the Republic of Zambia did murder one **Gladys Chiyuka**.

The appellant denied the charge and trial ensued. The conviction was based on circumstantial evidence. This evidence was that the appellant was the last person to be seen with the child who was then aged two (2) years and was his niece. P.W.3, the mother to the deceased, testified that on the date in question, she cooked food for her two children and the appellant who was her young brother at about 12.00 hours. She then went to sleep and that when she woke up, she found that the deceased was not home as she had gone with the appellant so that the appellant could buy sweets for her.

P.W.2’s evidence was that on 18th January 2007, at about 05:00 hours, he met the appellant with the two girls, who were his nieces, at the river.

P.W.4’s evidence was that he met the appellant in the bush with the child, who the appellant said was his sister’s daughter.

The appellant’s explanation was that although he was at his sister’s house, he later left the deceased with her sister when he went to visit a friend and that on his return, his sister asked where the child was. He said he told her that he left the child with her sister and that the child must have followed him without his knowledge. Further that he went to Kitwe because he had differences with his parents and that he left for Kitwe after the child was reported missing. He said he was apprehended in Kitwe but denied killing the child.

After evaluating the evidence before him, the learned trial Judge came to the conclusion that although there was no direct evidence to link the appellant to the death of the deceased, there was sufficient circumstantial evidence which connected the appellant to the murder of the child in question. The learned Judge, accordingly, convicted the appellant of murder and sentenced him to death.

Dissatisfied with the conviction, the appellant has appealed to this Court advancing one ground of appeal as follows:-

**“The learned trial Judge erred in law and in fact when he convicted the appellant on circumstantial evidence when an inference of guilt is not the only inference that could reasonably be drawn from the facts.”**

In support of the sole ground of appeal, the learned Counsel for the appellant, Mr. Muzenga, relied on the arguments in the appellant’s Heads of Argument. It was contended, in the said Heads of Argument, that the only evidence relied upon by the learned Judge to draw the inference of guilty is that the appellant was the last person seen with the deceased and that he travelled to Kitwe after the deceased went missing and that he did not make an effort to look for the child.

It was contended that the appellant, however, explained to the Court below why he went to Kitwe. This is that he had already moved to Kitwe at the time the child went missing as his parents did not like him. Further that the appellant also explained that the last time he saw the child, she was alive.

It was argued that the fact that the appellant did not help in looking for the child cannot certainly be indicative of being guilt. In support of this contention, the case of **David Zulu v The People1**,was cited.

It was contended that in light of the explanation by the appellant, it would not reasonably be said that the only inference that could be drawn from the facts is that of guilty. That, therefore, it was unsafe to convict on the basis of the circumstantial evidence and that on this ground, this appeal should be allowed and the conviction quashed and the death sentence set aside.

On the other hand, the learned Principal State Advocate, Mr. Mutale, informed the Court that the State was supporting the conviction.

In response to the sole ground of appeal, Mr. Mutale argued that there was overwhelming circumstantial evidence which allowed the Court below to draw the only reasonable inference that it was the appellant who brutally murdered the deceased in this matter. Mr. Mutale, drew our attention to the evidence of P.W.3 which he contended, was to the effect that the deceased was her daughter and that on that particular day, she cooked food for her children and the appellant who was her young brother at 12.00 hours and that she thereafter, went to sleep. When she woke up, she found that the deceased and the appellant had left home.

Mr. Mutale also drew our attention to the evidence of P.W.2 which was to the effect that on that particular day, he met the appellant with the two girls at the river.

He also drew our attention to the evidence of P.W.4, which he contended, was even more damning in this case. This evidence is that PW4 met the appellant in the bush with the child whom he identified as his sister’s daughter.

It was Mr. Mutale’s submission that this was the last time the child was seen alive in the presence of the appellant. And that all efforts to find the child was futile until she was found brutally murdered. And that the appellant took off and went to Kitwe even though he said he did so as he had differences with his parents.

Mr. Mutale contended that the picture that emerges and was presented to the learned trial Judge, clearly showed that the circumstantial evidence was cogent and that it left only one inference to be drawn and this is that it was the appellant who terminated the life of the deceased.

To buttress his submissions, Mr. Mutale cited the case of **Chimbini v The People²**  whichthe learned trial Judge cited and relied upon in coming to the conclusion that the circumstantial evidence against the appellant was cogent and that the only reasonable inference to be drawn from the facts is that of guilty as the appellant was the last person seen with the child. It was submitted that this appeal, therefore, has no merit and it should be dismissed.

In reply, Mr. Muzenga submitted that the record does not show any motive for the appellant to have killed the child as he did not have any differences with the child or the parents. He contended that the fact that he was seen with the child who was his niece is normal and that the appellant explained that the child must have followed him behind without him realizing it. And that this explanation does not take this case out of conjecture. And that the child could have gone back alone as he did the other child and that since there was no motive, then there was no basis to draw the irresistible inference that he could have killed the child.

We have seriously considered this appeal together with the arguments in the appellant’s Heads of Argument, the oral submissions by the learned Counsel for the parties and the Judgment by the Court below.

This appeal raises the question whether the circumstantial evidence relied upon by the learned Judge in the court below to convict the appellant of murder, was so cogent that the only irresistible inference to be drawn from the facts was that the appellant is the one who killed the deceased. This circumstantial evidence is that the appellant was the last person seen with the child at the river and in the bush before she was found dead in the bush.

The appellant’s contention is that there are other inferences that could have been drawn from these facts other than the guilty inference since he explained that he left the child with her sister and that the child may have followed him without his knowledge. And that he left for Kitwe after the child was found missing because he had differences with his parents as they did not like him.

In the case of **David Zulu vs. The People1**, we laid down guidelines for trial Courts to follow where the only evidence linking the accused person to the offence is circumstantial. We stated that:-

**“1. 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 fact in issue may be drawn.**

**2. 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 degree of congency which can permit only an inference of guilt.**

**3. The appellant’s explanation was a logical one and was not rebutted, and it was an unwarranted inference that the scratches on the appellant’s body were caused in the course of committing the offence at issue.”**

Applying the above principles to the facts of this case, we are satisfied that the learned trial Judge was on firm ground when he drew the inference of guilty on the basis of the circumstantial evidence before him. The totality of this circumstantial evidence which is that the appellant was the last person seen with the child before the child wound up dead in the bush, takes this case out of conjecture. This evidence came from PW3, the mother to the deceased, PW2 who saw the appellant with two girls at the river and PW4 who saw the appellant with the child in the bush. This evidence, though circumstantial, is so cogent and strong such that it allowed the Court below to draw only one reasonable inference and this is that the appellant is the one who murdered the child. The fact that the appellant took off for Kitwe after the child was found missing without looking for the child who was his niece is indeed an odd coincidence which suggests that the appellant was running away because he knew that what he had done was wrong.

In view of this circumstantial evidence, we do not find to be reasonable, the appellant’s explanation that the child may have followed him without his knowledge. The evidence of PW4 which, as Mr. Mutale put it, is even “more damning”, was that he saw the appellant with the deceased in the bush from where her body was later found. This evidence, in no way, suggests that the appellant may not have been aware of the child’s presence.

We therefore, find that the circumstantial evidence in this case was so cogent that it left only one inference to be drawn and this is that the appellant is the one who murdered the deceased. This evidence, satisfies the principle in **Chimbini vs. The People2** in which we held, interalia, that:-

***“*Where the evidence against an accused person is purely circumstantial and his guilt entirely a matter of inference, an inference of guilt may not be drawn unless it is the only inference which can reasonably be drawn from the facts. In such cases, the fact that an accused person has elected not to give evidence on oath may, in certain circumstances, tend to support the case against him but will certainly not do so unless the inference was one which could properly be drawn in the first place.”**

For the reasons given above, we find no merit in this appeal. The conviction is confirmed and the death sentence meted out on the appellant by the learned Judge in the Court below is upheld.

The appeal is therefore dismissed.

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D. K. CHIRWA

**ACTING DEPUTY CHIEF JUSTICE**

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H. CHIBOMBA

**SUPREME COURT JUDGE**

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M. E. WANKI

**SUPREME COURT JUDGE**