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**SCZ Appeal No. 220/2011**

**IN THE SUPREME COURT OF ZAMBIA**
**HOLDEN AT NDOLA**

**(Criminal Jurisdiction)**

**BETWEEN:**

**BENNY KANYAMA** **APPELLANT**

**AND**

**THE PEOPLE** **RESPONDENT**

Coram: Phiri, Muyovwe, JJS and Lisimba, A/JS
On the 4th day of December 2012 and 13th January, 2015.

**For the Appellant:** **Mr. S.K. Mumba, Senior Legal Aid Counsel, Legal Aid Board.**

**For the Respondent:** **Mrs. C.L. Phiri, Senior State Advocate.**

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# JUDGMENT

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**Phiri, JS, delivered the Judgment of the Court**

***Cases referred to:***

1. **Jeffrey Godfrey Munalula vs. The People (1982) Z.R. 58**
2. **Simon Malambo Choka vs. The People (1978) Z.R. 243**
3. **George Musupi vs. The People (1978) Z.R. 271 (SC)**

The Appellant, Benny Kanyama, was tried and convicted in the High Court sitting at Lusaka, of the offence 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 the 15th day of February, 2010 at Chirundu in the Chirundu District of the Southern Province of the Republic of Zambia, did murder Melody Kanyama. Melody Kanyama (hereinafter referred to as the baby or the deceased) was the Appellant's own daughter aged 14 days. The Appellant was ordered to suffer the mandatory death penalty. He now appeals against both conviction and sentence.

Briefly, the prosecution's case was based on the evidence given by 4 witnesses; these were Wanda Kanyama (PW1) who was the Appellant's own son aged 14 years, Bigfellow Siachoka (PW2), the Appellant's brother in marriage who was also Chairperson of the Community Crime Prevention Unit, Margaret Sakala, (PW4) a Chemist by profession and Public Analyst at the Food and Drugs Control Laboratory at UTH, and No. 29894 Detective Constable Chaiwila Mukuka (PW5) of the Zambia Police Service, who investigated the case. Maureen Kanyama (PW3) was the Appellant's

wife and the deceased's mother. She was called as a State witness, but was declared hostile at the instance of the prosecution. Consequently PW3 was cross examined by the prosecution and her evidence was impeached by the production of her statement earlier made to the Police, which she did not object to.

Wanda Kanyama testified that on the material date around 10.00 hours his mother (PW3) left him at home to take care of the deceased. She went to the river to fetch some water. While the mother was away, his father (Appellant) who had been away, returned home and found him with the baby. Thereafter the Appellant sent PW1 away to fetch cattle from the place the cattle were grazing. Consequently, PW1 left the baby under the care of the Appellant.

Upon PW1's return, he found the deceased vomiting some white stuff and proceeded to clean her mouth. PW1 also found that his father (Appellant) had left the baby alone. As soon as PW1 completed cleaning the deceased's vomit, his mother returned home; and when she saw the baby's condition she sent PW1 to seek

help from his grandmother and his uncle who advised that the baby should be taken to the Clinic. PW1 later learnt that the baby had died. PW1 identified the Appellant as his father. When cross examined, PW1 testified that he was the first born in the Appellant's family and that the only other person present at the house when his mother went to the river was Mutinta Kanyama who was aged 3 years.

PW2 received a report about the sick baby from PW1 and advised that the baby be taken to the clinic. The next morning he followed the Appellant's wife at Lusitu Health Centre where he discovered that the baby had been referred to Chirundu District Hospital. PW2 proceeded to the hospital and learnt that the baby had died. Thereafter PW2 reported the matter to the Police. When he returned to the village, he did not find the Appellant. On the 18th of February, 2010 around 15 hours the Appellant came to PW2's home in the company of his relatives. A joint meeting was held at which the Appellant admitted to have administered battery acid to the baby and suggested that it was up to his wife's relatives to decide whether he should compensate them or not. At that point

PW2 opted to apprehend the Appellant and convey him to Lusitu Police Post. When cross examined, PW2 stated that the Appellant had been married to PW3 (his sister) for close to 9 years. He also testified that the Appellant and his wife had differences over the deceased baby.

PW4 was the Public Analyst who testified that on the 19th of February, 2010 while on duty at the Food and Drugs Laboratory based at University Teaching Hospital, she carried out a toxicology analysis of the deceased's stomach contents and detected sulfuric acid in the specimen. Consequently PW4 prepared a report which was admitted in evidence without objection.

PW5 investigated this case. On the 19th of February, 2010 he witnessed the postmortem examination which was conducted on the deceased body by Dr. Musakhanov, a Forensic Pathologist. This witness produced the post-mortem report as part of the evidence. The report was admitted without objection. The cause of death was listed as "Haemoperitoneum due to Hemorrhagic Necrosis due to poisoning (acid type)". PW5 also produced the report of the Public

Analyst (PW4) which concluded that sulfuric acid was present in the deceased's stomach contents. PW5 interviewed the Appellant after warn and caution, and proceeded to charge the Appellant with the offence of murder contrary to ***Section 200 of the Penal Code Chapter 87 of the Laws of Zambia.*** The Appellant denied the charge.

When put on his defence the Appellant denied the charge and narrated how he left his home around 05.00 hours to collect cattle. When he returned home he found two of his children; PW1 and Mutinta (aged 3 years) trying to make a fire. The children were listening to the radio. The Appellant explained that he and his wife owned a radio which operated on batteries which were kept at a safe distance of 3 meters above ground. He rebuked PW1 for playing the radio in the absence of his mother. Thereafter he left the children and proceeded to take the animals into the field to graze. He denied PW1's testimony that he sent him to look after cattle while he remained at the house with the baby. He stated that PW1 was sent by his mother to call him from the field when the baby became sick. The baby eventually died at the hospital.

He further narrated that on the 17th of February, 2010 he, in the company of his wife (PW3), his mother and his uncle, attended a community meeting where he was required to explain the death of the baby. He further narrated that at that meeting he was implicated by the Community Crime Prevention Unit in which PW2 was a member. He was accused of having poisoned the baby with acid. The Appellant denied the allegation that he administered acid to the baby and stated that he did not see the child's vomit when he returned home.

At the conclusion of the trial, the learned trial Judge dismissed the Appellant's story as an afterthought. The trial Court found as a fact that the deceased died from poisoning by sulfuric acid whose traces were found by the Public Analyst in the specimen taken by the Pathologist from the deceased's stomach. The learned trial Judge concluded that the deceased, who was aged 14 days, could not have taken the acid on its own and that PW1, the Appellant's own son, had sufficiently linked the Appellant to the deceased's death by poisoning. The learned trial Judge believed the testimony given by the prosecution witnesses; in particular PW1 whose demeanour was

found to be exceptionally intelligent, honest and reliable. The learned trial Judge did not find the Appellant to be an honest and truthful witness.

With regard to the Appellant's movements on the fateful day, the learned trial Judge found as a fact that the Appellant confirmed PW1's evidence to the effect that when the Appellant returned home he found PW1, the deceased and Mutinta to whom he gave a cucumber to eat. The learned trial Judge also found as a fact that the Appellant sent PW1 to look after the cattle while he remained at the house with Mutinta and the deceased baby.

The learned trial Judge concluded that the Appellant, by administering sulfuric acid, which is also commonly known as battery acid, to a two-weeks old baby, he acted with the intention of causing death and that he had the necessary malice aforethought for the offence of murder. The Appellant was therefore found guilty of the capital offence of murder. The learned trial Judge also found that there were no extenuating circumstances to warrant the award of any lesser sentence than the ultimate sentence of death. The

Appellant appeals against both conviction and sentence. Mr. Mumba advanced 2 grounds of appeal. These were as follows:

1. **That the learned trial Judge erred in law and in fact in declaring PW3 hostile without observing the correct procedure.**

2. **The learned trial Judge misdirected himself in law and in fact by failing to treat PW1 as a witness with an interest of his own to serve.**

In support of the first ground of appeal, Mr. Mumba submitted that the trial Court, in treating the evidence of PW3, ought to have been guided by the standard set by this Court in the case of ***Jeffrey Godfrey Munalula vs. The People***[1]. According to Mr. Mumba, the Court ought to have considered the prosecution's application to treat PW3 as a hostile witness after having sight of her inconsistent statement; and, that it was the duty of the prosecution to present the witness with her previous inconsistent statement so as to allow the witness to state whether or not she made the statement in question. It was also argued that a witness is not hostile simply because he or she gives evidence which is unfavourable to the Prosecution.

According to Mr. Mumba, the record of appeal clearly shows that PW3 had some damning revelations to make about PW2, who was her own brother, which revelations also impinged on PW1, her son. It was Mr. Mumba's contention that when the Court pronounced PW3 as a **"shameless woman who did not seem to have been sad with the loss of her baby",** the Court completely disregarded her evidence; and this operated to the detriment of the Appellant. Mr. Mumba stated that according to the record of appeal, PW3 testified that PW2 attempted to elicit her testimony against the Appellant in order to have him condemned to prison and that, it was PW2 who contracted her son (PW1) to administer poison to the deceased baby. It was Mr. Mumba's view that, regardless of whether the trial Court believed or did not believe the foregoing testimony, it ought to have at least considered it; and that failure to do so violated the procedure for the declaration of a witness as being hostile.

The second ground of appeal criticized the treatment of PW1 by the trial Court. According to Mr. Mumba, the lower Court overlooked an important aspect in the manner in which it ought to have approached the evidence of PW1 which formed the basis of the

Court's conclusion that it was the Appellant who administered the acid to the child. The Appellant's position is that PW1 may be said to have been in a position or opportunity to commit the offence in question. PW1 should therefore, have been treated as a witness with a possible interest of his own to serve despite being a child of the family and the Appellant's step son. On the basis of the foregoing grounds, we were urged to quash the conviction and set aside the sentence.

We did not receive any heads of argument in response from the Prosecution.

We have considered the Appellant's grounds of appeal, the heads of argument and the submissions before us. We have also considered the record of proceedings and the judgment of the trial Court as well as our statement in the case of ***Jeffrey Godfrey Munalula vs. The People***[1] to which we have been referred.

In ground 1, the gist of the argument in support is simply that the learned trial Judge did not observe the correct procedure when declaring PW3 hostile; and therefore, that PW3's evidence should

have been considered favourable to the Appellant because she implicated PW1 and PW2. Our statement in the ***Jeffrey Godfrey Munalula case***[1] was outlined as follows:

> **"i) Where on application to treat a witness as hostile, the Court after sight of the inconsistent statement, decides to grant the application, it should then direct itself not to place any reliance on the contents of the statement and so record in the judgment.**
>
> **ii) Before, with leave of the Court, adducing evidence to prove a witness's inconsistency, the previous statement and its circumstances must be mentioned to the witness so that he may say whether or not he has made such a statement.**
>
> **iii) It is in the Court's discretion to determine a witness's hostility in that he does not give his evidence fairly and with desire to tell the truth; he is not hostile simply because his evidence contradicts his proof or is unfavourable to the party calling him. Much is dependent on the nature and extent of the contradiction; but under common law the Court may treat as hostile, even a witness who has not made a prior inconsistent statement, on the basis of his demeanor.**
>
> **iv) The inconsistent statement of a hostile witness is completely inadmissible as evidence of the truth of the facts stated therein."**

Our examination of what we stated in the Munalula case as against the events upon which the declaration of PW3 as a hostile witness

was premised, convinces us that learned Counsel for the Appellant has miscomprehended both our statement on hostile witnesses and the events that led to the treatment of PW3 as a hostile witness. The record clearly shows that before PW3 was declared a hostile witness, she was paraded as a state witness. She began her testimony. PW3 testified in full and alleged that she had no contact with the Police.

PW3's previous statement was mentioned to her. She told the trial Court that she had been stopped by PW2 from giving a statement because PW2 stated that he was the one who was going to give a statement as a **"vigilante"**.

At that point in time, the learned State Advocate applied for a short adjournment in order to consult the Director of Public Prosecutions. In our narration we have deliberately omitted to indicate the full testimony given in Court by PW3 prior to being declared hostile. This is for the simple reason that, in our considered view, PW3's evidence was effectively impeached because, at the resumption of the proceedings, the prosecution made an application for PW3 to be

declared a hostile witness because the evidence given in Court contradicted her earlier statement given to the Police. Following this application the Court did grant leave and the learned State Advocate proceeded to cross-examine PW3.

Curiously, the learned defence Counsel also cross-examined PW3 after PW3 had already been declared a hostile witness; and when the Prosecution, through PW5, offered PW3's statement made to the Police as part of the prosecution's evidence, the learned defence Counsel indicated on the record that he had no objection.

Consequently the statement allegedly made by PW3 to the Police was admitted as part of the Prosecution evidence and marked **Exhibit 'P3'**. The record of proceedings indicates that learned defence Counsel did not object to the short adjournment sought by the learned State Advocate and, also, did not object to the subsequent application by the prosecution to declare PW3 hostile. This is the more reason why we are saying that the learned defence Counsel curiously took part in cross-examining PW3 which, really, was like squeezing a dry fruit for juice.

An examination of our afore-quoted statement in the ***Munalula case***[1] clearly shows that all the benchmarks for properly identifying and treating a hostile witness were met by the Prosecution. PW3 testified in full and she was challenged with a statement she previously gave to the Police which is part of the documentation before Court and the Court did exercise its discretion to determine PW3's hostility by declaring that she had demonstrated shamelessness and without any sadness at the loss of her baby in her own house. We take this statement to be a direct reference to PW3's demeanor; simply put, the learned trial Judge concluded that PW3 was not capable of stating the truth.

As we have earlier indicated, we find PW3's evidence to have been properly impeached and therefore of no value at all, and it really does not matter whether or not the Court made any further adverse comments about PW3. Her evidence had been effectively excluded and it is absolutely incorrect to argue that the trial Court should have treated PW3's evidence any differently. We find no merit in ground 1 of the appeal.

The gist of the Appellant's argument in support of ground two was that the learned trial Judge failed to treat PW1 as a witness with a possible interest of his own to serve.

It is essential, before resolving this ground, to re-evaluate the evidence on record in order to appreciate the scene of crime and the circumstances under which the crime was committed in this case. The evidence on record clearly establishes that the scene of crime was the Appellant's own family home, and all the relevant events occurred in broad daylight from about 10.00 hours. The victim, who was aged two weeks, was the youngest child of the family. PW1 was the eldest child of the family aged 14 years and in school, doing Grade 6. PW1 identified the Appellant as his own father and it is apparent from his evidence that he genuinely believed that he was the Appellant's biological son; while the deceased was his youngest sibling who was enjoying good health until he was made to ingest acid which eventually caused his death as concluded by the Forensic Pathologist and the Public Analyst in their respective examinations.

PW1 implicated his father, the Appellant. He stated that the deceased was fine at the time the Appellant returned home and immediately sent him on an errand away from home. When he returned, he found the baby vomiting and the Appellant was no longer at home. The baby never recovered. The learned trial Judge concluded that at only 14 days, the deceased could not have ingested the acid on its own; and that PW1 had sufficiently connected the Appellant to the crime. PW1 was believed on the grounds that his demeanour was exceptionally intelligent, honest and reliable.

A scrutiny of the Judgment appealed against, clearly shows that in evaluating the evidence against the Appellant, the learned trial Judge did not place conclusive reliance on the testimony of PW1 alone. Reliance was also placed on the Appellant's own evidence on oath. The learned trial Judge found that the Appellant had confirmed PW1's evidence regarding the Appellant's movements on the fateful day, and his presence at the crime scene moments before the baby was poisoned. From these findings of fact, the learned trial Judge concluded that it was the Appellant who made the

deceased baby to ingest acid from which it died. On his part the Appellant stated that he kept two batteries in the family home and kept them three meters above the floor.

The question of the treatment of witnesses with a possible interest to serve is a well settled question. We have on may occasions stated that Courts should not lose sight of the real issue. One of the occasions is found in our statement in the case of ***George Musupi vs. The People***[3] which reads as follows:

> **"The tendency to use the expression witness with a possible interest to serve carries with it a danger of losing sight of the real issue.....The critical consideration is not whether the witness does in fact have interest or a purpose of his own to serve, but whether he is a witness who because of the category in which he falls or because of the particular circumstances of the case, may have a motive to give false evidence".**

The Appellant's criticism of PW1's evidence appears to stem from a statement from PW3 that when the Appellant married her, he found her already with a baby boy. The Appellant alleges, therefore, that because PW1 was the Appellant's stepson, he should have been treated as a witness with a possible interest of his own to serve.

We have carefully examined this argument in the circumstances of this case. First, we do not agree that there was any evidence before the trial Court establishing that PW1 was the Appellant's stepson. PW3's testimony was impeached when she was declared hostile. Any reference to what PW3 stated during the trial is a misdirection because it is a well settled principle of law that the inconsistent statement of a hostile witness is completely inadmissible as evidence of the truth of the facts stated herein **(see Godfrey Munalula).**

Second, from PW1's own testimony, it is clear that he genuinely believed that he was the Appellant's biological son; and, in any event, we have not found any evidence which suggests that the relationship between PW1 and the Appellant was so poor as to inspire any ill motive. A stepson can be a competent witness against his stepfather, and vice versa. Such a relationship should not, of its own, be sufficient reason for the Court to discount any evidence. In our considered view, ground two of the appeal is devoid of merit and must fail as a consequence.

The net result is that we find no merit in the appeal and we dismiss it.

**G. S. PHIRI**
**SUPREME COURT JUDGE**

**E. C. MUYOVWE**
**SUPREME COURT JUDGE**

**M. LISIMBA**
**A/G SUPREME COURT JUDGE**