**IN THE SUPREME COURT OF ZAMBIA** **APPEAL NO. 08/2016**
**HOLDEN AT NDOLA**
(Criminal Jurisdiction)

**BETWEEN:**

**NALYELA MWAKAMUI** **APPELLANT**

**AND**

**THE PEOPLE** **RESPONDENT**

**CORAM: Phiri, Muyovwe and Hamaundu, JJS**
**on the 1st March, 2016 and 4th March, 2016.**

For the Appellant: Mr. K. Mweemba, Legal Aid Counsel, Legal Aid Board

For the Respondent: Mrs. M.P. Lungu, Senior State Advocate, National Prosecutions Authority

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## JUDGMENT

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

**Cases referred to**:

1. **Machipisha Kombe vs. The People (2009) Z.R. 282**
2. **Kosamu and Chishimba vs. The People (1973) Z.R. 96**
3. **Kalebu Banda vs. The People (1977) Z.R. 169**
4. **Kunda vs. The People (1972) Z.R. 196**
5. **Phiri and Two Others vs. The People (1971) Z.R. 136**
6. **David Zulu vs. The People (1977) Z.R. 151**
7. **Eddie Christopher Musonda vs. Lawrence Zimba SCZ Appeal No. 41/2012**
8. **The Attorney General vs. Achiume (1983) Z.R. 1**
9. **Joseph Mwamba Kalenga vs. The People SCZ/103/2011**

The appellant was convicted of the offence of murder contrary to Section 200 of the Penal Code, Cap 87 of the Laws of Zambia.

The particulars of the offence alleged that on 29th November, 2013, he murdered Eunice Manyambe Mwambi (hereinafter called "the deceased") at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia.

The prosecution established that on 29th November, 2013 in the evening, Matilda Mwiinga (PW1) the mother of the deceased child, left her asleep in the house while her husband, the appellant was seated outside the house. According to Matilda, when she returned home she did not find the deceased in the house. She searched everywhere including her elder sister's house, the toilet and the bush, but she could not find her anywhere. As she was about to go to the police to report the matter, she saw the appellant approaching the house carrying the child on his shoulder. She noticed that the child was not breathing properly and when she inquired from the appellant as to why the child was breathing abnormally, he told her that the child normally breathed in that

manner. She asked him where he had gone with the child and he stated that he had just gone around with the child. Matilda quickly rushed to her mother's house to get a panadol for the child and by the time she returned home she found that the child had died and the appellant was just standing outside the house. Other members of Matilda's family were informed and transport was organised and the child was taken to the hospital in the absence of the appellant who refused to accompany the family on the pretext that he wanted to go and inform his relatives.

According to the postmortem report, the cause of death was asphyxia and hemorrhagic shock due to strangulation and rapture of the liver, left kidney due to blunt injuries of the chest and abdomen and sexual assault. The prosecution witnesses who included his wife (PW1) the sister-in-law (PW2) and the brother-in-law (PW3) to the appellant testified that the appellant was never seen again until the police received information on his whereabouts on 15th January, 2014. The appellant was apprehended at Delta Farm in Neganega, Mazabuka where he had relocated. He was later charged with the offence of murder which he denied.

The appellant's story was that after the death of his daughter, his mother-in-law in the presence of PW3 his brother-in-law and his wife's aunt and others informed him that she did not want him at the funeral and reminded him that he had not paid any dowry for Matilda his wife. He said he pleaded with her to allow him to stay for his daughter's funeral but his mother-in-law threatened to find men to kill him if he stayed at the funeral house. He said he told his wife that he was going to Mazabuka to inform his relatives about the funeral. But, however he did not find his relatives in Mazabuka and as he was afraid to return to Lusaka, he found employment as a casual worker in Mazabuka. He called his wife to join him but he was surprised to see her in the company of the police and this is how he was apprehended.

On this evidence, the learned trial judge found the appellant guilty as charged and convicted him accordingly. The appellant was sentenced to the mandatory death sentence. He has now appealed against his conviction.

On behalf of the appellant, Mr. Mweemba advanced two grounds of appeal couched in the following terms:

1. **The learned trial court erred in law and fact when it convicted the appellant on the basis of suspect evidence which was not sufficiently corroborated.**

2. **The learned trial court erred in law and fact when she failed to consider the fact that there was dereliction of duty as the prosecution had failed to bring the DNA results from the vaginal swab which would have conclusively shown the identity of the murderer.**

Mr. Mweemba entirely relied on his heads of argument. In relation to ground one, while pointing out that there was no eye witness to the commission of the crime, he focused on the evidence of PW1 and PW2. According to Counsel, PW1 and PW2 were suspect witnesses with a motive to give false evidence against the appellant. In support of this argument Counsel relied on the case of **Machipisha Kombe vs. The People.**[1] It was Counsel's submission that PW1 did not leave the deceased with the appellant but left her sleeping in the house and, therefore, anyone could have inflicted the injuries on the deceased. Mr. Mweemba submitted that the testimony of PW1 was suspect in that according to her she saw the appellant approaching the house with the child who was not breathing properly. Counsel contended that it was strange that PW1 failed to tell the court the visible injuries the child had

sustained. Counsel contended that the fact that the appellant disappeared from home after the child died did not amount to corroboration of the testimony of PW1. According to Counsel, the appellant gave an explanation regarding his absence during the funeral of his daughter which explanation could have been reasonably true. In support of this argument, Counsel referred us to the case of **Kosamu and Chishimba vs. The People.**[2] Mr. Mweemba submitted that the alleged confession the appellant made to PW2 should not have been accepted by the trial court because PW2 is a relative to PW1 and, therefore, had a motive to falsely implicate the appellant.

With regard to ground two, Counsel submitted that the police were guilty of dereliction of duty when they failed to produce DNA evidence of the vaginal swab which was collected from the deceased. According to Counsel, the person who sexually assaulted the deceased was the one who also inflicted injuries on the deceased, and, therefore, the DNA evidence could have conclusively revealed who the defiler and murderer was. Counsel argued that the house in which PW1 left the deceased was not secure and anyone could

have entered and inflicted injuries on the deceased. Relying on the cases of **Kalebu Banda vs. The People**[3] and **Kunda vs. The People**[4] Counsel contended that the appellant was prejudiced by the failure by the police to produce DNA evidence of the vaginal swab, and therefore, the assumption should be that had the evidence been produced, it should have been favourable to the appellant.

In her response, Mrs. Lungu the learned Senior State Advocate relied on her heads of argument and augmented briefly. She submitted that she supported the appellant's conviction. She contended that PW1 was a credible witness who gave an account of what transpired. It was her submission that the trial court that had the opportunity to observe PW1's demeanour found her to be credible. Counsel relied on the case of **Phiri and Two Others vs. The People.**[5] Counsel submitted that from the account of the events given by PW1, the child was in good condition when PW1 left her before proceeding to her mother's house. That contrary to the appellant's evidence that the deceased was unwell on the material day, PW1 and other witnesses refuted this assertion stating that the

deceased was not sick considering that on the material day she was seen walking to the neighbour's house. Counsel contended that most importantly, the cause of death was not any sickness but the severe injuries inflicted on the deceased. Mrs. Lungu submitted that while there was no eye witness to the commission of the heinous crime, there is strong circumstantial evidence pointing to the appellant as the one who murdered the deceased. That the strong circumstantial evidence has taken the case out of the realm of conjecture and that the only inference that could be drawn is that of guilt on the part of the appellant. Counsel relied on the case of **David Zulu vs. The People.**[6]

In her brief augmentation, Mrs. Lungu submitted that even in the absence of DNA test results, there was overwhelming evidence against the appellant. Counsel submitted that this was because the appellant was the one who was left with the deceased and, therefore, he had an opportunity to sexually assault the deceased and inflict the injuries on her. It was her submission that the behaviour of the appellant was suspicious in that he refused to take the child to the clinic or report the matter to the police on the

pretext that he wanted to go and inform his relatives and when he left, he never returned until he was apprehended a month later. Counsel submitted that from the conduct of the appellant, it points to him as the one who sexually assaulted the deceased and inflicted fatal injuries on her. Counsel urged us to uphold the conviction and sentence slapped on the appellant by the learned judge in the court below.

We have considered the evidence in the court below, the judgment appealed against and the submission by learned Counsel for the parties.

In ground one, Counsel for the appellant challenged the testimony of PW1 and PW2 that they were suspect witnesses whose evidence needed corroboration. As regards PW2's evidence, Counsel argued that the appellant's confession to PW2 should not have been accepted by the learned judge for lack of corroboration. Further, that the appellant's conduct after the child died did not amount to corroboration of the testimony of PW1. On the other hand, Counsel for the State submitted that PW1's testimony was credible as she merely gave an account of the events of the material day and that

the court that observed her found that she was a credible witness. On the conduct of the appellant after the deceased died, Counsel submitted that the behaviour was suspicious and it pointed to his guilt.

In addressing the attack on the evidence of PW1, we note that it is not in dispute that PW1 was the wife to the appellant and the mother to the deceased. We take the view that PW1 had no reason to implicate her husband. The evidence of PW1 was crucial in this case as she was the first person who saw the deceased in a bad condition while in the custody of the appellant and she even observed the appellant who seemed detached from the whole episode. We agree with Mrs. Lungu, that the learned judge in the court below addressed her mind to the demeanour of PW1 and found her to be credible. In her judgment, the learned judge had this to say at page J15 to J16 that:

> **"Having heard the testimony of PW1, it seems improbable to me that she would falsely implicate her husband for something that he did not do. It is clear PW1 would have had the instinct to defend her husband unless she had a reservation. PW1's demeanour was firm and did not appear shaken in cross**

**examination. I therefore find her to be a competent and credible witness."**

With regard to Counsel's argument that the appellant's confession to PW2 should not have been accepted by the learned trial judge, we are of the view that the learned judge rightly accepted it having found that the witness had no motive to falsely implicate the appellant. At page J16 of the record, the judge had this to say:

**"PW2 and PW3 were at the scene immediately after the death of the deceased and therefore best placed to view the actions and behaviour of the accused on the night in question. They are distant relatives of the deceased but did not appear to have harboured any ill feelings or bias against the accused. Having assessed their demeanour and conduct in court, I found them both to be sincere and truthful. I therefore found them to be credible witnesses."**

In the case of **Eddie Christopher Musonda vs. Lawrence Zimba**[7] the then Acting Chief Justice Lombe Chibesakunda at page J28 said:

**"Also it is a well established principle that the learned trial Judge is a trier of facts, he has the advantage of observing the demeanour of witnesses to determine as to who was telling the truth in the trial. Bearing that in mind, we cannot upset his findings..."**

Further, in the case of **The Attorney General vs. Achiume**[8] we stated that an appellate Court will not reverse findings of fact made by a trial Judge unless it was satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of facts or that they were findings which, on a proper view of the evidence, no trial Court acting correctly can reasonably make. We have combed the record and we have not found any material upon which we can reverse the finding of fact by the learned trial judge on the credibility of PW1 and PW2.

We now come to the second limb of ground one which relates to the conduct of the appellant which the learned trial judge found that it amounted to corroboration of the evidence of PW1 and other witnesses. We agree with the State that the conduct of the appellant gave credence to the evidence of not only PW1 but PW2 and PW3. The learned judge found it strange, and we agree, that the appellant as a father to the deceased refused to go to the police and the hospital upon the death of his daughter and that he could leave the funeral never to return on the pretext that his mother-in-

law planned to hire men to kill him. His own story is to the effect that he left so that he could inform his relatives about the bereavement. In fact, his whereabouts were unknown until he contacted his wife from Mazabuka where he had settled after finding employment. Certainly, this is not the behaviour of a bereaved father and husband who had lost the child in a traumatic manner. If his mother-in-law threatened him, he could have sought assistance from the police or neigbours but to completely abandon his wife at the time of their loss can best be described as very odd behaviour which cannot reasonably be expected of a reasonable man in our society. It was certainly an odd coincidence which strengthened the case against him pointing to his guilt. In the **Machipisha Kombe**[1] case we held, inter alia, that:

> **5. Odd coincidences constitute evidence of something more. They represent an additional piece of evidence which the Court is entitled to take into account. They provide a support of the evidence of a suspect witness or an accomplice or any other witness whose evidence requires corroboration. This is the less technical approach as to what constitutes corroboration.**

Indeed, the appellant's unusual behaviour following the death of his own daughter clearly corroborated the testimony of PW1, PW2 and PW3. Therefore, Counsel for the appellant's argument that the

danger of false implication of the appellant was not eliminated cannot stand. Regarding the issue of motive to falsely implicate the appellant, in the case of **Joseph Mwamba Kalenga vs. The People,**[9] this court had this to say:

> **"Since the prosecutrix was the grandmother of the Appellant, the question of mistaken identity cannot arise. We also do not see any motive for the prosecutrix to falsely implicate her grandson of such an atrocious crime."**

Similarly, in the case in *casu*, we have not found any motive the witnesses could have had to falsely implicate the appellant of such a heinous crime. The appellant was the father to the child and at the time he refused to accompany his wife and other witnesses taking the deceased to the clinic and the police, the appellant had not been implicated in the murder of his daughter. Ground one, therefore, fails.

Coming to ground two, the gist of the argument by Counsel for the appellant was that there was dereliction of duty on the part of the police when they failed to provide DNA evidence of the vaginal swab obtained from the deceased. According to Counsel, we must assume that had this evidence been presented, it would have been

favourable to the appellant as the DNA results would have revealed the perpetrator of this crime. The State on the other hand submitted that the absence of DNA evidence was inconsequential as there was overwhelming circumstantial evidence against the appellant.

In our considered view, while it cannot be denied that the police were guilty of dereliction of duty due to their failure to avail the DNA results to the trial court, we tend to agree with the State that there was overwhelming evidence which pointed to the guilt of the appellant. Considering the circumstantial evidence before the trial court, which we have already discussed herein, we agree with the learned State advocate that the circumstantial evidence took the case out of the realm of conjecture thereby leaving an inference of guilt on the part of the appellant in terms of the case of **David Zulu vs. The People**[6].

We are satisfied that the learned trial judge drew the right inference from the circumstantial evidence at her disposal. Ground two also fails.

In closing, we must stress the importance of co-ordination between National Prosecutions Authority and the office of the State Forensic Pathologist in following up specimens obtained during postmortem examination on the bodies of deceased persons. The results from the tests provide crucial evidence required during trial. The trend of not following up such specimens must come to an end as it depicts lack of seriousness on the part of the prosecution and may in specific cases result in injustice.

We uphold the conviction and the mandatory death sentence and dismiss the appeal for lack of merit.

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

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

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**E.M. HAMAUNDU**
**SUPREME COURT JUDGE**