IN THE HIGH COURT FOR ZAMBIA **HJ/37/2018**

HOLDEN AT CHIPATA

(*Criminal Jurisdiction*)

BETWEEN:

THE PEOPLE

VS

VERONICA TEMBO

BEFORE THE HONOURABLE LADY JUSTICE M. CHANDA THIS *25TH* DAY OF *APRIL*, 2018.

APPEARANCES

FOR THE PEOPLE: MRS. A.N. SITALI, DEPUTY CHIEF STATE ADVOCATE APPEARING WITH MR. M. LIBAKENI ACTIN SENIOR STATE ADVOCATE OF NATIONAL PROSECUTIONS AUTHORITY.

FOR THE ACCUSED MR. J. PHIRI, SENIOR LEGAL AID COUNSEL OF LEGAL AID BOARD.

J U D G M E N T

LEGISLATION REFERRED TO:

1. THE PENAL CODE, CHAPTER 87 OF THE LAWS OF ZAMBIA
2. THE CRIMINAL PROCEDURE CODE CHAPTER 88 OF THE LAWS OF ZAMBIA

CASES REFERRED TO:

1. POULTON (1832) 5 C & P 329
2. R V BRAIN (1834) 6 C & P 350 (OXFORD ASSIZES)
3. CRIMINAL LAW REVISION COMMITTEE: FOURTEENTH REPORT, OFFENCES AGAINST THE PERSON, CMND 7844, LONDON: HMSO, 1980
4. DOROTHY MUTALE AND RICHARD PHIRI V THE PEOPLE (1997) S.J. 51 (S.C.)
5. MBINGA NYAMBE V THE PEOPLE (2011) Z.R 246

Veronica Tembo, the accused person, stands charged with the offence of Murder contrary to *Section 200 of the Penal Code Chapter 87 of the Laws of Zambia.* The particulars of offence alleged that on 22nd June, 2017, at Katete in the Katete District of the Eastern Province of the Republic of Zambia, the accused murdered **a newly born child**. She denied the charge and the matter proceeded to trial.

In order to establish the guilt of the accused the prosecution must satisfy me upon each and every ingredient of the offence charged. The elements of the offence of murder are stipulated in *Section 200 of the Penal Code.* The prosecution is therefore required to establish three elements namely that:-

1. The accused person caused the death of the child when it had completely proceeded in a living state from her body.
2. By an unlawful act.
3. With malice aforethought.

Pursuant to *Section 204 of the Penal Code* malice aforethought is established when it is proved either that the accused had an actual intention to kill or to cause grievous harm to the deceased or that the accused knew that his actions would be likely to cause death or grievous harm to someone.

Grievous harm is interpreted in *Section 4 of the Penal Code* as any harm which endangers life or which amounts to a maim or which seriously or permanently injures health or which is likely to injure health, or which extends to permanent disfigurement, or

to any permanent or serious injury to any external or internal organ, member or sense.

Further *Section 208 of the Penal Code* provides that:-

> *"A child becomes a person capable of being killed when it had completely proceeded in a living state from the body of its mother, whether it had breathed or not, and whether it has an independent circulation or not, and whether the navel-string is severed or not."*

I will now consider the evidence in this case. The prosecution called five witnesses.

The first prosecution witness (**PW1**) was **Tiweleko Tembo**, the accused's aunt. PW1 narrated that on 25th June, 2017 the accused's mum informed her that the accused's pregnancy had suddenly vanished. The witness said she knew that the accused was pregnant as her pregnancy was visible and that she would attend antenatal clinic. According to PW1, her sister requested her to inquire from the accused on how her pregnancy had apparently disappeared. The witness testified that she proceeded to question the accused who then denied having been pregnant and insolently imputed that PW1 was not thinking properly. The witness stated that she tried to persuade the accused to tell her the truth about what had transpired but to no avail.

PW1 narrated that she later discussed the disappearance of the accused's pregnancy with her sister-in-law who suspected that

the accused had given birth and thrown her baby away. According to the witness her sister-in-law then suggested that they check for the baby in the surrounding pit latrines.

PW1 indicated that during their search, they noticed a sack which was tied-up in the pit latrine belonging to the accused's mother. PW1 stated that they rushed to inform headman Israel Phiri (PW2) who then instructed Kanada Banda (PW3) and Felix Mvula (PW4) to retrieve it. She explained that the sack was removed from the latrine and when it was untied they found a dead baby girl wrapped in a black plastic. She said the infant's hands were tied with a red cloth. She further explained that the red cloth was also tied around its neck. PW1 asserted that when the accused was asked if the baby was hers, she vehemently refused. She stated that the body of the baby was thereafter deposited at St Francis Hospital mortuary where a post-mortem examination was conducted. She said the accused was also examined at the hospital and it was confirmed that she had recently given birth. PW1 stated that it was only at that point that the accused admitted that the baby was hers. According to the witness the accused informed them that she had ditched the baby in the latrine three days prior to its being found. The witness added that the baby was buried the following day.

In cross-examination, PW1 stated that she did not know whether the baby was alive at the time of delivery. She also stated that the doctor did not inform them on what caused the baby's death. In further cross examination, PW1 agreed to the suggestion that

a woman in her right frame of mind whose pregnancy was visible to the members of the community would not suddenly conceal it.

The second witness (**PW2**) was headman **Israel Phiri**. In his evidence in chief, PW2 testified that at around 20:00 hours on 25th June, 2017 he received information from PW1 that the accused had abandoned her newly born baby in a sack that was in one of the latrines. The witness testified that he instructed his indunas Kanada Banda (PW3) and Felix Mvula (PW4) to accompany PW1 to the pit latrine where the baby was believed to have been dumped.

It was PW2's further evidence that after the sack was retrieved, he went to the scene and confirmed that the baby had indeed been dumped. He told the Court that the incident was immediately reported to the police. The witness also told the Court that the accused and the baby were both taken to St Francis hospital. PW2 indicated that the accused had been pregnant but when he saw her on the material date, she did not appear pregnant.

In cross-examination PW2 testified that PW1 told him the accused's baby was alive when it was delivered. He said he was not aware if PW1 was present during the delivery of the baby.

The prosecution's third witness (**PW3**) was **Kanada Banda**. His testimony was that on 25th June, 2017 he was among the people instructed to retrieve the sack from the accused's mother's pit

latrine. He stated that inside the sack was the corpse of a baby girl wrapped in a plastic. PW3 said the incident was reported to the police and that the accused was thereafter apprehended.

In cross-examination PW3 disclosed that Felix assisted him to retrieve the sack from the latrine. The witness confirmed that he unwrapped the sack which contained the baby in the presence of PW1.

Felix Mvula was the prosecution's fourth witness (**PW4**). PW4's testimony was similar to that of PW3. In addition PW4 stated that when the baby was retrieved, its body was covered in maggots and it seemed as though it was dumped a few days before. He also asserted that the accused had been pregnant prior to 25th June, 2017.

The last prosecution witness **(PW5)** was **Sergeant Boniface Sitwala**, the arresting officer in this matter. PW5's testimony was that he arrested the accused on 25th June, 2017 upon receiving a report that she had dumped her newly born baby in a pit latrine. He testified that the accused was duly subjected to a medical examination and the doctor established that she had a normal delivery. He stated that the accused was also mentally assessed and the Doctor found that she was sane. PW5 also indicated that the doctor however failed to confirm whether the accused had been mentally disturbed at the time of giving birth. The witness produced the medical report, the mental assessment report and the post-mortem report as part of his evidence and they were

marked as exhibits **"P1, P2** and **P3"** respectively. PW5 informed the Court that when the accused was warned and cautioned, she elected to remain silent.

After the close of the prosecution's case I found that the state had established a *prima facie* case against the accused person and I found her with a case to answer. When put on her defence in compliance with *Section 291(2) of the Criminal Procedure Code*, the accused elected to give unsworn evidence and did not call any witnesses.

The accused's testimony was that she became pregnant on 17th October, 2017 and that during her pregnancy, she attended antenatal clinics at Chibolya clinic in Katete. She narrated that she went into labour during the night of 24th June, 2017. The accused stated that she consequently gave birth but the baby did not cry. The accused confirmed throwing the infant in the latrine for no apparent reason. She however denied having tied the baby with a red cloth as indicated by PW1.

At the close of the case submissions were received from both the prosecution and the defence.

It was submitted by Legal Aid Counsel, Mr. J Phiri, on behalf of the accused that the State had failed to prove the charge of murder against the accused person beyond all reasonable doubt.

Mr. Phiri pointed out that while there was no doubt that the accused was pregnant, that she delivered and later dumped the baby in a pit latrine, there was overwhelming doubt as to whether or not the baby was alive when it was dumped in the pit latrine.

It was Counsel's further contention that there was no evidence that the baby was alive at the time it was being thrown in the pit latrine. **P3**, the Post-mortem Report did not contain any information suggesting that the baby died while in the pit latrine. It was submitted that there was also no evidence suggesting that the baby suffered any physical injuries to suggest that force was applied on it.

It was Counsel's further submission that, the possibility that the accused could have physically harmed her baby was ruled out. It was stated that the evidence of **PW1** that the baby was tied with a cloth on the neck sharply contradicted **P3** the post-mortem report and the evidence of **PW1**and **PW3** who actually retrieved the body from the pit latrine. It was argued that the evidence of PW1 and PW3 did not disclose that the baby was tied up on the neck or hands with any kind of cloth or rope. The defence urged the Court to construe this doubt in favour of the accused.

P3 stated that the baby died of Asphyxia (suffocation). According to **PW5** he was informed by the doctor that this condition was caused by the lack of oxygen in the body. However, the doctor did not state at which point the baby could have suffocated. The

defence further submitted that the baby could have suffocated during the actual process of delivery.

The accused stated that it took a while for her to deliver after the labour pains started. And after the baby was delivered, it did not cry. This was buttressed by prosecution evidence which did not state that the baby was ever seen alive by anyone or whether or not anyone heard cries of a newly born baby coming from the accused's house.

The attention of the Court was drawn to the case of **R v Poulton**[1] where it was stated that:-

> ***"With respect to the birth, the being born must mean that the whole body is brought into the world; and it is not sufficient that the child respires in the progress of the birth. Whether the child was born alive or not depends mainly upon the evidence of the medical men. None of them say that the child was born alive; they only say that it had breathed: and if there is all this uncertainty among these medical men, perhaps you would think it too much for you to say that you are satisfied that the child was born alive."***

Defence Counsel also cited the case of in **R v Brain**[2] where it was held that:-

> **"A child must be actually wholly in the world in a living state to be the subject of a charge of murder; but if it has been wholly born, and is alive, it is not essential that it should have breathed at the time it was killed; as many children are born alive, and yet**

> **do not breathe for some time after their birth. But you must be satisfied that the child was wholly born into the world at the time it was killed, or you ought not to find the prisoner guilty of murder.**"

It was finally submitted that according to the **Criminal Law Revision Committee: Fourteenth Report, Offences against the Person**[3]:

> **"The common law definition of birth (for the purposes of offences against the person) has not been the subject of judicial review or comment for a long time. The last reported case on the subject that we can trace occurred in 1874. We have examined not only the common law test of birth but also the statutory formulation in the Infant Life (Preservation) Act 1929 which provides that the offence of child destruction may apply only to the killing of a child 'before it has an existence independent of its mother'. In our opinion the test of independent existence should be adopted. It also seems to us right that there should be an ascertainable point up to which the killing of a child would be child destruction under the Infant Life (Preservation) Act 1929 after which the law of homicide would apply. We therefore recommend that for a killing to constitute murder (or manslaughter or infanticide) the victim should have been born and have an existence independent of its mother."**

Given the above the defence humbly prayed that the accused person be acquitted of the charge of murder and be set at liberty.

In the alternative, the Court was urged to convict the accused of Infanticide because there was doubt on whether or not the

accused had lost the balance of her mind at the material time. Mr. Phiri submitted that **PW1** and **PW2** confirmed that the accused's behaviour was odd after she dumped the baby in the toilet. However she was assessed very late-10 days after being apprehended. Counsel contended that this was prejudicial to the accused and further that P2 was inconclusive. He submitted that there was a real possibility that the accused could have lost the balance of her mind at the material time. The Court was implored to construe this in favour of the accused in accordance with the principles set out in **Dorothy Mutale and Richard Phiri v The People**[4] where it was held that:

> "**Where two or more inferences are possible, it has always been a cardinal principle of the criminal law that the Court will adopt the one, which is more favorable to an accused if there is nothing in the case to exclude such inference.**"

On behalf of the state, it was submitted by Mrs. Sitali and Mr M Libakeni that the evidence against the accused person was circumstantial as there was no eye witness who saw the state of health of the baby when it was delivered. In support of their submission the prosecution cited the case of **Mbinga Nyambe v The People**[5], wherein the Supreme Court held *inter alia that:*

> "(i) **Circumstantial evidence or indirect evidence is evidence from which the Judge may infer the existence of the fact directly;**
>
> (ii) **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 can be drawn."

(iii) A trial 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."……

The prosecution contended that the circumstantial evidence in the matter before Court strongly showed that the accused person deliberately killed her baby after it was born and disposed of the body in the pit latrine. It was argued that the claim advanced by the accused that the baby did not cry was an afterthought.

The prosecution submitted that P2, which was the post-mortem report, showed that the baby died of asphyxia/suffocation. It was contended that the testimony of PW1, PW2 and PW3 was that the baby was wrapped in a plastic bag, which was then placed in the sack. Further, evidence from PW1 was that the baby had a piece of chitenge material wrapped around its neck. The prosecution argued that the act of tying a piece of chitenge material around the neck of a newly born baby, wrapping it in a plastic bag and tying it in a sack before throwing it in a pit latrine were indicative of a desire to end its life. In any case, the presence of a chitenge material around the neck of the baby and the fact that it was found in a plastic bag were consistent with the cause of death as indicted on P2, as both acts could lead to asphyxia/suffocation. They went on to submit that had the accused person's intention been to dispose of the body of a dead baby as claimed, she could not have gone to the trouble of

concealing the body in the manner that she did. Her actions after delivery could only lead to the inference that she killed the baby before disposing of its body in the pit latrine.

It was also submitted that the accused person did intend to kill her newly born baby as envisaged by *Section 204 of the Penal Code*. The prosecution contended that the fact of tying a piece of chitenge material around the neck of the baby, placing it in a plastic bag and a sack coupled with the action of throwing it in the pit latrine showed that the accused person meant to kill her baby.

The prosecution wound up their submissions by stating that they had proved, beyond all reasonable doubt, that the accused person unlawfully and with malice aforethought, did cause the death of her newly born baby girl.

I am greatly indebted to Counsel for their submissions and I have taken them into consideration in arriving at my decision.

From the evidence adduced on record it is common cause that the accused gave birth to a child at home unattended on 24th June 2017. It is not in dispute that the body of the child was found in the pit latrine belonging to the accused's mother on 25th June, 2017. According to the report on post-mortem examination produced in Court as exhibit **"P1"** the cause of the baby's death was asphyxia (suffocation).

The defence has forcefully submitted that there is a dispute that the baby was not in a living state at the time of giving birth. That the report on post-mortem did not disclose whether the asphyxia occurred during or after birth. The state of the accused mental stability during delivery is also in dispute. The defence seemed to suggest that a normal woman whose pregnancy was visible to all the members of her community would not suddenly conceal it.

I have carefully scrutinized and considered the entire evidence adduced on record. It is my immediate affirmation that there are doubts about the reliability of the accused unsworn account of the events leading to the dumping of the baby in the pit latrine. No significance can be attached to the accused's clear insinuation in Court that she had not killed the child because the baby was born dead. The accused's assertion that the baby was already dead when she tied it in a sack, were attempts by her to distance herself from unpalatable truth namely that she had deliberately thrown the baby in the pit latrine to die.

The accused had been aware of the fact that she was in labour and had a benefit of a very close and concerned family unit around her but she willfully omitted to seek their help. She gave birth and did nothing to ensure the child was alive: far from it. When she did not allegedly hear the child cry after delivery, she did not bother to see if it made any movements. The accused proceeded to wrap the baby in the plastic and tie it in a sack. She then dumped the baby unceremoniously in the pit latrine. She vehemently refused to disclose to her family when confronted

about the disappearance of her pregnancy until after the medical test confirmed that she had actually given birth. There was no reliable independent evidence as to how the baby died. But the record of observation as per exhibit **"P1"** indicate that the decomposed body had bruises all over.

On this evidence I am entitled to infer that the accused had caused the bruises on the child intentionally and recklessly left her baby to die simply because she did not want it to survive.

I now turn to consider whether or not the accused's balance of mind was disturbed during delivery and consequent upon the birth of the child. There was no evidence from either her family or medical personnel that the accused was suffering from any psychiatric disorder. The evidence from PW1 infact shows that at no time did the accused exhibit any mental disorder. After delivery the accused carried on normally. She understood the nature of the inquisition by her family and was able to follow the happenings but remained defiant. It is my firm belief that the arrogant behavior exhibited by the accused towards her aunt when she was asked to account for her missing pregnancy could only be attributed to her incorrigibility. There is no doubt on my mind that the accused was in an optimal state to give full and careful consideration of all the implication of her actions before, during and after delivery. Further I must also mention here that although the accused appreciated the nature of the allegations and was able to follow Court proceedings, the levels of emotional

detachment and lack of remorse that I observed in her were unbelievable.

From the totality of the evidence on the record it must be therefore a safe and proper inference that the baby died because the accused willfully bruised and left her to suffocate in the pit latrine.

Finally it is my finding that the prosecution has proved the charge against the accused beyond all reasonable doubt. I have not established any extenuating circumstances to reduce the accused's culpability as envisaged by *Section 201 of the Penal Code*. I find the accused guilty as charged and I convict her of the offence of murder contrary to *Section 200 of the Penal Code*.

Delivered in open Court at Chipata this 25th day of *April*, 2018.

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M.CHANDA
JUDGE