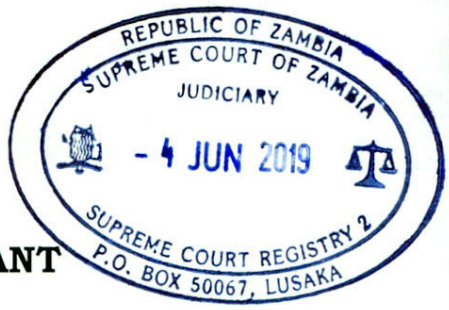
IN THE SUPREME COURT OF ZAMBIA Appeal No. 246/2017
HOLDEN AT LUSAKA
(Criminal Jurisdiction)



B E T W E E N:

LASTONE NYIRONGO **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: **Phiri, Muyovwe and Chinyama, JJS**
on 7th May, 2019 and 4th June, 2019

For the Appellant: Mrs. M.K. Liswaniso, Legal Aid Counsel, Legal Aid Board

For the Respondent: Mr. F. Sikazwe, Senior State Advocate, National Prosecution Authority

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J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court

Cases referred to:

1. **Mutale and Another vs. The People (1977) Z.R. 227**
2. **David Zulu vs. The People (1977) Z.R. 151**
3. **Ilunga Kabala and John Masefu vs. The People (1981) Z.R. 102**
4. **Attorney-General vs. Achiume (1983) Z.R. 1**

The appellant was convicted of the murder of his two children aged 5 years and 8 years and sentenced to the mandatory death sentence.

This case was anchored on circumstantial evidence as there were no eye witnesses to the murder of the two children. At the time of the death of the children, the appellant's wife was away at her parent's home. According to PW1 an uncle to the appellant and who lived 150 metres from the appellant's house, on 4th January, 2014 the appellant left his deceased children at his home while he went to fetch his wife from Chawama where she had gone to visit her relatives. The same evening the appellant returned without his wife and told him that she would return the following Monday. However, she did not return as promised. On Wednesday the fateful day, PW1 was informed by the appellant's workmate that the appellant was crying and PW1 passed by his house to check on him but he did not find him. Eventually, the witness was informed that the appellant's two children had passed on.

PW2 who was a neighbour to the appellant recalled that on 8th January, 2014 he heard strange groaning sounds from outside

between 04:00 hours and 05:00 hours. Later that morning around 06:00 hours, as he was walking past the appellant's house with his wife, he heard the same sound coming from the appellant's house. He decided to go to the appellant's house as he sensed that there was something wrong. The witness knocked on the door but there was no response. He heard the sound again and he forced the door open and went in. As soon as he entered the house, he smelt a strong medicine. He observed the appellant lying unconscious in the corner of the house and nearby there was a bottle of tangy drink. With the help of a neighbour they lifted the appellant out of the house and suspecting that he had ingested some poison they gave him some milk to drink. PW2 then recalled that the appellant had two children and he went back inside only to find the children had died. They then rushed the appellant to the hospital where eventually he was resuscitated. The police came on the scene and investigations were instituted. A post-mortem examination was carried out on the bodies of the two children and the cause of death was found to be cardio respiratory arrest due to pulmonary and cerebral edema due to acute gastritis (poisoning by dichlorvos an organophosphate pesticide).

According to the investigations officer, the appellant did not disclose to him that he had sprayed the vegetables a few days earlier or that the chemical he used was the very one the children ingested; that he did not disclose to him that he had left the children on their own and that they could have ingested the poison in his absence. The officer subsequently charged the appellant for the offence of murder.

The appellant's testimony in sum was that on 7th January, 2014 in the evening he sprayed his vegetables with a pesticide which was in a Tangy bottle. He left the bottle containing the pesticide in the garden intending to bury it later in the usual place. Around 05:00 hours the following morning he was called to his workplace and returned between 06:00 hours and 07:00 hours only to find his children were unconscious and foaming in the mouth. According to the appellant, he did not know what happened as he found himself in the hospital. He denied taking the poison or that he poisoned the children.

In her judgment, the learned trial judge rejected his defence and accepted PW2's evidence that he found him in an unconscious

state with the two children already dead. She also accepted PW6 the clinical officer's evidence that he resuscitated the appellant who had diarrhea and vomiting which was consistent with a person who had ingested poison and the treatment he administered on the appellant was that of a patient who had been poisoned. That the appellant responded to the treatment and he only referred him to the University Teaching Hospital for purposes of identifying the poison ingested by the appellant. The learned judge found that the appellant deliberately administered the poison to his children and concluded that malice aforethought was established and convicted the appellant and sentenced him to death.

Counsel for the appellant Mrs. Liswaniso advanced one ground of appeal couched in the following terms:

1. **The learned trial judge erred and misdirected herself in law and in fact when she found that the appellant had the opportunity to administer the poison to the deceased children and that he deliberately administered the pesticide to them when the evidence adduced by the prosecution was circumstantial evidence.**

In her filed heads of argument, Counsel submitted, *inter alia,* that the learned trial judge relied heavily on the evidence of PW2

and yet this evidence did not prove that the appellant deliberately administered the pesticide to his children. Counsel argued that although the trial court rejected the explanation given by the appellant, it was possible that the children drank the contents in the bottle. Her argument is that the trial judge convicted the appellant on an inference that he had the opportunity to administer the poison to the children. Relying on the case of **Mutale and Another vs. The People**[1] it was submitted that this was not the only inference that could reasonably be drawn from the facts of this case. According to Counsel, there were two inferences: that the deceased children woke up in the absence of the appellant and picked up the bottle of pesticide from the garden and drank the poison or that the appellant deliberately gave the deceased children the poison to drink. Counsel contended that the trial court should have resolved the lingering doubts in favour of the appellant as there was clear evidence that he loved his children and could not deliberately harm them. We were urged to allow the appeal and set aside the death penalty. In the alternative, Counsel urged us to convict the appellant of manslaughter on the ground that he

accidentally left the bottle containing the pesticide without realizing that his children would locate it and drink the poison.

Mr. Sikazwe the learned Senior State Advocate filed heads of argument in response. In supporting the conviction by the lower court, it was submitted that the evidence connecting the appellant to the offence came from PW2 his neighbour; PW6 the clinical officer and the postmortem examination reports. That the evidence was clear that the children had been poisoned. Also relying on the case of **David Zulu vs. The People**[2] it was submitted that the circumstantial evidence in this case was strong and overwhelming that it took the case out of the realm of conjecture so that it attained such a degree of cogency which can permit only an inference that it is the appellant who administered the poison to the deceased children and himself. It was contended that the appellant had the opportunity to administer the poison and he did in fact administer it as he was the only person with the children at the time. It was submitted that the learned trial judge was on firm ground when she dismissed the appellant's explanation as an afterthought in the face of the evidence of PW2. Counsel argued

that the case of **Mutale and Another vs. The People**[1] is not applicable in this case because no other inference can be drawn from the circumstantial evidence other than that of the appellant's guilt. Counsel opined that there was strong and overwhelming circumstantial evidence against the appellant which proved beyond reasonable doubt that he caused the death of his two children with malice aforethought. We were urged to uphold the conviction and sentence and dismiss the appeal.

We have considered the arguments presented by Counsel for the parties. It is common cause that the conviction was anchored on circumstantial evidence. It is also common cause that the appellant was the only one present with the deceased children on the fateful day. The postmortem examination reports established that the children died as a result of having ingested poison. The question is whether the learned trial judge was on firm ground when she found that the appellant deliberately administered the poison to his children thereby causing their death.

The learned trial judge based the conviction on the evidence of PW2, a neighbour, PW6 the clinical officer and the findings of the

pathologist contained in the postmortem reports. According to PW2, he heard strange noises outside his house in the early hours of the 8th January, 2014. Later around 06:00 hours as he was walking to town in the company of his wife, he again heard the strange noise coming from the appellant's house prompting him to turn to the appellant's house. He had to force the door open only to find the appellant unconscious and foaming in the mouth. Immediately he entered the house, he was greeted by a strong smell of medicine. It is not in dispute that the children were already dead when PW2 forced his entry into the appellant's house. It was the quick action by PW2 that saved the appellant's life as he was taken to chilenje clinic where he was resuscitated by PW6, a Clinical Officer. The evidence of PW6 was that the symptoms presented by the appellant were that of a person who had taken poison. The appellant was referred to UTH to determine the poison in his system. The poison was identified at the Food and Drug Laboratory to be a pesticide namely dischlorvos, an organophosphate pesticide. This was the poison ingested by the children and the appellant.

The appellant's defence which was rightly rejected by the learned trial judge was that he had left the poison in the garden and the children took it accidently in his absence. In fact, he went further to state that upon finding that his children had died he was in so much pain that he did not know what happened but that he only found himself in the hospital. He denied taking any poison. However, this flies in the teeth of PW6's evidence who found that the appellant had ingested poison and actually exhibited symptoms of a person who had ingested poison and was treated accordingly. When the appellant was referred to UTH, it was confirmed that he had ingested a poison called dischlorvos which was also ingested by the children which is odd. And the explanation by the appellant is no explanation at all. In the case of **Ilunga Kabala and John Masefu vs. The People**[3] it was held, *inter alia*, that:

> **(vii) It is trite law that odd coincidences, if unexplained may be supporting evidence. An explanation which cannot reasonably be true is in this connection no explanation.**

As the learned judge observed, PW2 was his neighbour with whom he had a good relationship with and he had no reason to concoct such a horrendous story against the appellant.

The learned trial judge considered the circumstantial evidence before her and found that it was cogent and only permitted an inference of guilt in terms of **David Zulu vs. The People[2].** We agree with Mr. Sikazwe that the case of **Mutale and Another vs. The People[1]** is not applicable to this case as there is only one inference in this case and this is that the appellant deliberately administered the pesticide to his children. The learned trial judge went on to hold that:

> **"As the accused was alone with his children in the house on the night that they died, I find that he had the opportunity to administer the poison to the children and I further find that it was the accused person who in fact deliberately administered the pesticide to the children and by that unlawful act caused the death of the children as revealed by the postmortem reports."**

This was a finding of fact by the learned trial judge based on the evidence before her which cannot be faulted. We have held in a plethora of cases that an appellate court will not interfere with findings of fact made by a lower court unless the same are perverse and based on a misapprehension of facts. See **Attorney-General vs. Achiume.[3]**

On the totality of the evidence, the learned trial judge properly found the appellant guilty of the murder of his two children and convicted him accordingly. This appeal lacks merit and we dismiss it.

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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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J. CHINYAMA
SUPREME COURT JUDGE