IN THE COURT OF APPEAL FOR ZAMBIA **Appeal No.39/2018**
AT THE APPEAL REGISTRY
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

EMELDA MWANZA **APPELLANT**

REPUBLIC OF ZAMBIA
COURT OF APPEAL
20 NOV 2018
REGISTRY
P.O. BOX 50067, LUSAKA

AND

THE PEOPLE **RESPONDENT**

Coram: **Mulongoti, Sichinga and Ngulube, JJA**
On 21st day of August 2018 and 20th day of November, 2018

For the Appellant: *Mr. H.M. Mweemba – Principal Legal Aid Counsel.*

For the Respondent: *Mrs. R.N Khuzwayo – Chief State Advocate of National Prosecutions Authority*

JUDGMENT

Sichinga, JA, delivered the Judgment of the Court

Cases referred to:

1. *David Zulu v The People (1977) ZR 151 (SC)*
2. *Chimbini v The People (1973) ZR 192 (SC))*
3. *Kenious Sialuzi v The People (2006) ZR 87(SC)*
4. *Saluwema v The People (1964) ZR 4 (CA)*
5. *Phiri and Others v The People (1973) ZR 47(CA)*

6. *Mbinga Nyambe v The People SCZ Judgment No. 5 of 2011(SC)*
7. *Khupe Kafunda v The People (2005) ZR 31 (SC))*
8. *Ezious Munkombwe and Others v The People CAZ No.7,8,9,of 2017 (CA)*
9. *Saidi Banda v The People SCZ Judgment No. 30 of 2015 (SC)*
10. *Rosemary Chilufya v The People (1986) ZR 32 (SC)*
11. *Lumangwe Wakilaba v The People (1979) ZR 74 (SC)*
12. *Hamfuti v The People (1972) ZR 240 (SC)*
13. *Morgan Ngosa v The People (2010) ZR 191 Vol 3 (SC)*
14. *Chileshe v The People (1972) ZR 48 (HC)*

Legislation referred to:

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

This is an appeal against conviction and sentence. The appellant stood charged with 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, Emelda Mwanza, on the 10th day of November, 2017 at Petauke in the Petauke District of the Eastern Province of the Republic of Zambia did murder one unnamed baby girl.

The summary of the evidence in support of the charge came from four (4) witnesses, namely PW1, the appellant's landlord, PW2, a headman in the appellant's village, PW3, a fire brigade officer, and PW4, the arresting officer. The prosecution's evidence was that sometime in 2016, the appellant who was pregnant at the time, rented a room from PW1. She stayed with PW1 for three months when her pregnancy became due. PW1 helped her along for the

remainder of her pregnancy including taking her to the clinic where she delivered a baby girl. The appellant returned to her rented home with the baby after her discharge and remained there for a week and two days. She informed PW1 that she would take the baby to her village for her mother to see the child. She was gone for a week. PW1 did not see her on the day she returned from the village. She saw the appellant the following morning and the appellant informed her that the baby was well and asleep. For the next two days when PW1 checked on the appellant and her baby she found that they were not home. On the 3rd day three women went to PW1's home and they inquired about the appellant and her baby. The women informed PW1 that a baby had been retrieved from a well in Mwase area, where the appellant had gone to visit her mother.

It was in evidence that PW2, a peasant farmer and headman at Mwase Village was informed by people in the village of a figure in the well that looked like a doll. Upon investigations he confirmed the figure in the well was a dead baby. The matter was reported to the police and the fire brigade who retrieved the baby from the well and ordered that the baby be buried due to its state of decomposition. PW3, a fire brigade officer, was part of the rescue team, confirmed that the deceased baby was female.

PW4, the police officer who investigated the case, also attended to the retrieval of the baby's body from the well. He observed that the

female baby had a deep cut on the right side of the head and that the baby was in a state of decomposition, which prompted the decision to bury the body immediately and marking the site for exhumation later. His evidence was that three days after the discovery of the body, the appellant appeared at the Police station and reported that her boyfriend had killed the baby for a ritual practice and that she had not received her share of the money. PW4 warned and cautioned her before charging her with the offence of murder. He produced a medical examination report dated 15th November, 2016, **P1**, showing that the appellant had recently given birth. PW4 also produced a post mortem report, **P2**, dated 22nd March, 2017 which indicates that the forensic examination was conducted on 17th March, 2017 at 15:30 hours at Mlawa area in Petauke. The cause of death was brain hemorrhage due to fracture of skull bones which was due to fatal traumatic injuries of the head.

PW4 said the appellant informed him that she had met her boyfriend in a field, some 2 kilometers away from where the baby's body was retrieved. He said beside the report he received from the appellant, there were no other cases reported of a missing baby in Petauke district. Under cross-examination PW4 said Petauke district had two police posts and only one station.

Upon being found with a case to answer, the appellant elected to remain silent and did not call any witness to her defence.

After considering the case before him, the learned trial Judge formed the view that the case was based on circumstantial evidence. The trial court applied the principles enunciated in the case of ***David Zulu v The People***[1]. He found that it was not in dispute that the appellant was expecting a child at the time she rented accommodation from PW1, and that she remained at this address until she delivered a baby girl. The court below found as a fact that it was not in dispute that the body of a baby girl was discovered in a well at David Mwase village in Petauke district. The learned trial Judge found that the post mortem report revealed that the baby died as a consequence of brain haemorrhage due to injury of the skull. The trial court found there was malice aforethought in the killing of the child.

The trial Judge accepted that the appellant was within her right when she elected to remain silent. He applied the principle espoused in ***Chimbini v The People***[2] that:

> *"when the evidence against the accused 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"*

The learned trial Judge also relied on the case of ***Kenious Sialuzi v The People***[3] where the Supreme Court held that:

> *" there is no obligation on the accused person to give evidence but where an accused does not give evidence, the court will not*

speculate as to possible explanations for the event in question. The court's duty is to draw the proper inferences from the evidence before it.

From the cited cases, the learned trial Judge discerned that he was under a duty to guard against drawing a wrong inferences based on the evidence before him, and that he could only convict if an inference of guilt was the only one that he drew from the evidence. The learned trial Judge considered that there was no evidence led to confirm whether the baby was killed and then thrown into the well or if it was thrown in the well alive and then sustained fatal injuries to the head along the passage going down. The court found that it was reasonably foreseeable that the act of throwing a baby into a well would probably cause the death, or grievous harm of the infant. From this the learned Judge found that the ingredient of malice aforethought within the meaning placed in **Section 204** of the **Penal Code** had been established. The Judge accepted the testimonies of the prosecution witnesses.

The learned trial Judge rejected the submission by the defence that the police had exhibited bias against the accused because there was no evidence to support the assertion. The lower court equally declined to consider the possibility that the appellant had suffered from post-delivery depression as this was not supported by any evidence given that the appellant elected to remain silent. The learned Judge found that he had been invited to speculate and

maintained that his duty was confined to drawing inferences from the available evidence before him.

Ultimately the court rejected the defence's assertion that the appellant was in Nyimba District at about the time of the discovery of the body because this was rebutted by PW1's testimony that the appellant had returned to her home, that she met with her and even had a conversation with her. The learned trial Judge expressed the view that the presumption extended by law in favor of an accused as a result of a finding of dereliction of duty by the police, was displaceable by strong evidence. In this case the learned Judge found there was no dereliction by the police by their failure to go to Nyimba in the wake of the evidence before him.

The learned trial Judge was satisfied that the circumstantial evidence in the matter took the case out of the realm of conjecture as it attained such a degree of cogency which permitted only an inference that the accused was guilty as charged. He convicted the appellant accordingly and sentenced her to the mandatory sentence of death.

The appellant being dissatisfied with the decision of the trial court has raised two grounds of appeal as follows:

1. **The learned Judge in the lower court erred both in law and in fact when he convicted the appellant on circumstantial**

evidence that did not sufficiently attain the degree required; and

2. **The learned Judge in the court below erred both in law and in fact when he convicted the appellant for murder and sentenced her to death in the presence of facts revealing infanticide as an alternative charge.**

The appellant wholly relied on her heads of arguments filed on 16th August, 2018. On ground one, learned counsel for the appellant submits that the burden of proving a case against an accused person always lies on the prosecution, and that proof must be beyond all reasonable doubt. It is submitted that the evidence on record was of a circumstantial nature. The principles on circumstantial evidence enunciated in the case of ***David Zulu v The People supra*** were relied upon. And further, learned counsel relied on the case of ***Dorothy Mutale and Richard Phiri v The people***[5] and the holding that where two or more inferences are possible, the court will adopt the one more favorable to an accused person, if there is nothing in the case to exclude such inference.

According to learned counsel, the circumstances of the case are that the appellant gave birth to a baby girl as witnessed by PW1. She went away to her village and after a week returned. That PW1 never saw the appellant with the baby. It is contended that PW1 gave speculative evidence and could never confirm that the

appellant did not have the baby since she never suggested to the appellant to enter the house to confirm this fact.

It is also submitted that PW1 being the closest to have seen the baby, was not given an opportunity to confirm whether the baby which was drowned in the well looked anything closer to the one that the appellant had given birth to. That equally, PW4, the arresting officer, led evidence indicating that the deceased was the appellant's daughter as this was not confirmed by the appellant herself.

Learned counsel submitted that the identity of the body of the child found in the well was never established. That the prosecution should have gone further to link the deceased baby to the appellant through medical evidence establishing that the baby belonged to the appellant. It is submitted that the baby found in the well could have been different from the one that the appellant had given birth to. That there are more inferences that can be drawn from or about the identity of the deceased baby other than the one conclusive inference that the baby belonged to the appellant. Learned counsel also advanced the argument that the evidence regarding the distance also brought favorable inferences in respect of the inferences that could reasonably be drawn from the facts of the case as this was not an appropriate case where it could be stated that the circumstantial evidence had taken this case out of the realm of conjecture so that it

attained a degree of cogency which permitted an inference of guilt.

Learned counsel further advanced the argument that there was evidence that came in through the cross-examination of PW4 that the appellant explained that she gave the baby to her boyfriend. That her explanation was reasonably possible and therefore the state could not be said to have discharged the burden beyond all reasonable doubt. **Saluwema v The People**[4] is relied upon in that respect.

According to the learned counsel, the inference favorable to the appellant ought to have been adopted that the deceased baby could have been any other child and not the appellant's baby. We are urged to allow ground one, quash the conviction of the lower court, set aside the death sentence, and acquit the appellant forthwith.

Regarding ground two, which is argued in the alternative to ground one, it is submitted that on the facts of the case, notwithstanding the weak circumstantial evidence cited, there was also the possibility that the appellant suffered from post-traumatic depression having recently given birth. **Section 203** of the **Penal Code** is relied upon in that respect. It provides that:

> *"Where a woman by any willful act or omission causes the death of her child, being a child under the age of twelve months but at the*

time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of a child, then notwithstanding that the circumstances were such that but for this section the offence would have amounted to murder, she shall be guilty of felony, of infanticide as if she had been guilty of the offence of manslaughter of the child."

Learned counsel contends that that the above provision is clear and calls for an examination of the accused in order to ascertain such post traumatic depression that would lead to a particular behavior. That the record shows that this issue was never entertained at any time during investigations, and the police were prejudiced as they only subjected the appellant to a single test of determining whether or not she had given birth to a child. Learned counsel submitted that this case was properly suited to be one of infanticide and that the court below should have so found. The case of ***Phiri and Others v The People***[5] was referred to where it was held:

"The courts are required to act on the evidence placed before them. If there are gaps in the evidence the courts are not permitted to fill them by making assumptions adverse to the accused if there is insufficient evidence to justify a conviction and courts have no alternative but to acquit the accused...."

It is argued that the learned court below should have directed its mind to the case cited above so as to avoid imputing facts that were not favorable and led to the conclusion that the appellant murdered

her daughter. Learned counsel submitted that the appellant should have been found guilty of manslaughter. We are urged in the alternative to sentence the appellant to any other sentence other than death for the lesser offence of infanticide.

Learned counsel for the respondent equally filed in heads of arguments. It is argued in relation to ground one that the appellant is linked to the offence of the murder of her baby by the principle of circumstantial evidence. That for an accused person to be convicted on circumstantial evidence, the trial court must be of the opinion that the evidence has been removed from the realm of conjecture and has attained such a degree of cogency that the only irresistible inference to be drawn from the facts is a guilty verdict. Further, that a trial court must warn itself before relying on circumstantial evidence. It is contended that the trial court warned itself before relying on the circumstantial evidence on record. After considering the facts, it was clear that the appellant delivered a female baby which was later found dead with head injuries, and that the appellant was at the center of the causing of its death. She did not immediately report to the police that the baby had been snatched, but instead she lied to PW1 twice upon inquiry that the baby was well when in fact not. Further, that the appellant would not have gone to the police to complain about not being given a share of the money realized from the alleged ritual killing of her baby.

Learned counsel submitted that in the circumstances of the case, the only irresistible inference to be made was that the appellant had unlawfully caused the death of her baby whilst seized with malice aforethought. We were urged to disregard the appellant's submissions that the circumstantial evidence the court below relied on was not cogent. Learned counsel contended that the evidence on record indicates that the appellant placed herself at the scene of crime by reporting that her boyfriend had conducted a ritual killing on her new born baby and that he did not thereafter give her, her share of the money. That she also placed herself at the scene by leading the police to the vicinity where the deceased baby was found. It is submitted that the appellant acquiesced to the killing of her child and was therefore a party to the murder.

As regards the appellant's submission on there being more than one inference that the trial court could have made, it is submitted that the evidence on record does not indicate multiple inferences but only the one made by the trial court. It is argued that the evidence on record is clear that after the appellant returned home from her visit, she did not have her baby. When she reported her boyfriend to the police for the ritual killing of her baby, she equally did not have the baby. It is submitted that the appellant's submission that there was no confirmation of the baby's death flies in the teeth of the evidence on record. Learned counsel contends that the circumstances of this case clearly prove that the evidence was cogent as it had taken the case from the realm of conjecture.

As regards ground two, it is argued that for the appellant to benefit from **Section 203** of the **Penal Code,** she must have proved that at the time of killing her baby, the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth or by reason of the effect of lactation.

It is submitted that infanticide is more of a defence to murder available to women in the child bearing group and that an accused person requires medical evidence to successfully benefit from it.

Learned counsel submitted that the appellant did not discharge her burden of proof by not placing medical evidence on record for the learned trial Judge to have considered the option of the lesser offence of infanticide.

It is contended that the appellant was motivated by greed for money to commit the offence, and this led her to report her boyfriend to the police for not sharing the proceeds of their crime. It is argued that her action was not consistent with a woman whose mind was disturbed because of child birth or lactation. However, it was more of a mind controlled by greed. It is submitted that it was incumbent upon the defence in the lower court to subject the appellant to medical examination, and having sat on her rights, she could not now blame the court for her incompetence. Learned counsel urged the court to dismiss the appeal and uphold the conviction.

We have carefully considered the arguments advanced by both parties in this appeal, the evidence on record and the Judgment of the court below. The question for determination, as we see it, is whether there was sufficient evidence adduced in the lower court to soundly support the conviction of the appellant.

It is not in dispute that the evidence adduced against the appellant was entirely circumstantial since there was no direct evidence linking the appellant to the commission of the crime. It is trite that the prosecution can prove guilt beyond reasonable doubt by building a case through circumstantial evidence. This evidence relies on an inference to connect it to a conclusion of fact.

In the case of ***Mbinga Nyambe v The People***[6] It was held that:

> *"circumstantial evidence is evidence from which the Judge or jury may infer the existence of a fact in issue but which does not prove the existence of the fact directly. Case law has described circumstantial evidence as evidence that is relevant and, therefore, admissible but that has little probative value. "*

Further in ***Khupe Kafunda v The People***[7] the Supreme Court confirmed the position that a conviction founded in circumstantial evidence is, in appropriate cases, competent. They stated in that case *inter alia* that:

> *" there was no direct evidence and no eye witness to the incident that led to the death of the deceased. However the circumstantial*

evidence was so overwhelming and strongly connected the appellant to the offence"

It is clear that a trial court is thus permitted to make reasonable inferences from the evidence adduced at trial to make findings of fact. For a trial court to convict on the basis of circumstantial evidence, it 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. In the case of ***David Zulu v The People Supra*** the Court cautioned that:

"It is incumbent upon a trial Judge to guard against drawing wrong inferences on 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 a degree of cogency which can permit only an inference of guilt"

From the evidence on record, the learned trial Judge considered the evidence that the appellant had given birth within 6 weeks of an examination conducted on her after she reported herself to PW4, the arresting officer, that she handed over the baby to her boyfriend for ritual purposes. After analyzing that evidence, the trial court found as a fact that the appellant did not return to her rented home with the baby when she went to visit her mother in the village. Shortly thereafter, the baby was found dead in a well within a 2 kilometer radius of the village she visited. PW2, PW3 and PW4 all

confirmed that they retrieved a baby girl from a well. The fact that the baby was thrown in a well shows that causing death or grievous bodily harm was intended by the perpetrator of the crime. The trial court cannot be faulted in its finding that the action satisfied the *mens rea* for murder **per Section 204** of the **Penal Code.**

In resolving the identity of the perpetrator, the learned trial Judge made various findings of fact. First, that the appellant was expecting a child and rented accommodation from PW1. That she was with PW1 when she gave birth at the clinic. Second, the appellant left home within a week of her discharge contending she was proceeding to take the baby to her village for her mother to see. Third, that upon her return from the village, the appellant was seen by PW1 on one occasion and she told PW1 that the baby was fine and asleep. The learned trial Judge found that the appellant did not return home with the baby. Fourth, that the appellant voluntarily led the police to a field within a 2 kilometer radius from the well where she asserted she handed over the baby to her alleged boyfriend. And fifth, that there was no case reported to the police about any woman missing a child in the area. Given these facts collectively, the learned trial Judge concluded that the appellant, with malice aforethought caused the death of her child which she threw in the well at David Mwase village. Having collectively considered these strands of facts, the learned trial Judge was satisfied that the circumstantial evidence had taken the case out of the realm of conjecture and had attained such a degree of cogency

which permitted only an inference that the appellant was guilty of the offence charged. We cannot fault the court below on this approach. The postmortem report confirmed the cause of death was head injuries and not a knife wound as stated by the appellant to PW4. In the case of ***Ezious Munkombwe and Others v The People***[8] we stated that:

> *"....when considering a case anchored on circumstantial evidence, the strands of evidence making up the case against the appellants must be looked at in their totality and not individuality."*

Further in the case of ***Saidi Banda v The People***[9] the Supreme Court held:

> *"where the prosecution's case depends wholly or in part on circumstantial evidence, the court is, in effect being called to reason in a staged approach. The court must first find that the prosecution evidence has established certain basic facts. These facts do not have to be proved beyond reasonable doubt. Taken by themselves, these facts cannot therefore prove the guilt of the accused person. The court should then infer or conclude from a combination of these established facts that a further fact or facts exist. The Court must then be satisfied that these further facts implicate the accused in a manner that points to nothing else than his guilt. Drawing conclusions from one set of established facts to find that another fact or facts are proved, clearly involves a logical and rational process of reasoning. It is not a matter of casting any onus on the accused, but a conclusion of guilt the court is entitled to draw on the weight of circumstantial evidence before it."*

In the case of **Rosemary Chilufya v The People**[10] the Supreme Court stated that infanticide is an offence committed as a result of disturbance of the mind caused by the stress of birth. The appellant did not raise this as a defence. For this reason ground two of the appeal must equally fail.

Before we part from this appeal, we wish to comment on the evidence of PW4 on record that the appellant confessed to handing over the baby to her boyfriend for rituals and led police to a place in maize field where she allegedly handed over the baby to her boyfriend. Ordinarily a confession would have warranted the trial Judge to conduct a trial within a trial to ascertain the voluntariness of the confession. Further, we note that the lower court did not intervene to ask the defence if they had any objection to this apparent leading. In the case *of* ***Lumangwe Wakilaba v The People***[11], the Supreme Court held that:

> (i) It is the duty of the court to inquire, where a point is reached at which a witness is about to depose as to the contents of a statement, whether the defence has any objection to that evidence being led, **Hamfuti v The People**[12] followed.
>
> (ii) It was mandatory for the trial magistrate after the issue of voluntariness had been raised to conduct a trial within a trial notwithstanding that the prosecution had already closed its case."

Notwithstanding that the learned trial Judge did not conduct a trial within a trial, the conviction was safe on the basis that he found

that the circumstantial evidence took the case out of the conjecture and was so cogent to permit only an inference of guilt. The case of ***Morgan Ngosa v The people***[13] refers:

Further, in the case of ***Chileshe v The People***[14] it was held *inter alia* as follows:

> " (i) *Under the pre -1964 Judges Rules applicable in Zambia, a person in custody whether he has been charged or not must be cautioned before any interrogation takes place.*
>
> (ii) *If a court is satisfied that the statement was made voluntarily but unfair to the accused, the court has discretion to exclude such statements under the pre-1964 Judges' Rules."*

On the facts of this case, the appellant was not in custody. She had freely and voluntarily availed herself to PW4 who she led to a maize field. The lower court cannot thus be faulted for not intervening to ask the defence if they had an objection to the apparent leading because the Judges' Rules only apply to a person in detention. In this case, the appellant was not in custody and gave an unsolicited confession to PW4.

We further note from the record that PW4 told the court that the appellant did not mention the name of the alleged boyfriend she handed over the baby to. However, from the statement she made to PW4 she did in fact mention the name of Charles Phiri being her boyfriend. It is clear that the police ought to have investigated this aspect of the appellant's boyfriend being involved. The failure to

investigate it, in our view amounts to a dereliction of duty. However, this was not fatal as the appellant was not prejudiced by the police's failure to investigate because the circumstantial evidence given on behalf of the prosecution was so cogent and compelling as found by the learned trial Judge permitting only an inference of guilt. On the totality of the evidence before the court below, the inference that the appellant murdered the deceased baby was inescapable. We thus find that this appeal is devoid of merit and dismiss it accordingly.

In the net result, the conviction and sentence are upheld.

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J.Z. MULONGOTI
COURT OF APPEAL JUDGE

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D.L.Y. SICHINGA
COURT OF APPEAL JUDGE

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P.C.M NGULUBE
COURT OF APPEAL JUDGE