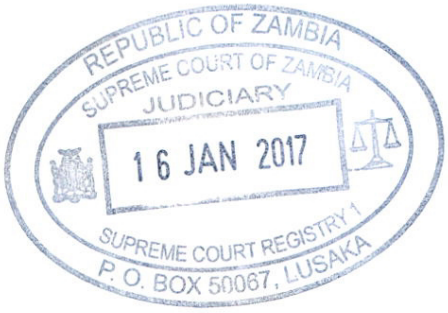
SELECTED JUDGMENT NO.1/2017

P.01

IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 40/2016**

HOLDEN AT NDOLA

(Criminal Appellate Jurisdiction)



BETWEEN:

EDWIN SICHAMBA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: **Muyovwe, Kabuka and Chinyama, JJS**
On the 6th December, 2016 and 14th December, 2016

FOR THE APPELLANT: Mrs. M. Liswaniso, Legal Aid Counsel, Legal Aid Board.

FOR THE RESPONDENT: Mrs. M. C. Mwansa, Deputy Chief State Advocate, National Prosecutions Authority.

JUDGMENT

Kabuka, JS, delivered the Judgment of the Court.

Cases referred to:

1. Choka v The People (1978) Z.R. 243 (SC).

2. Sakala v The People (1980) Z.R. 205 (SC).
3. David Zulu v The People (1977) Z.R. 151 (SC).
4. Mbinga Nyambe v The People Z.R. 2011 Vol.1 Z.R. 246.
5. Bwanausi v The People (1976) Z.R. 103 (SC).
6. Mwewa Murono v The People 2004 Z.R. 207 (SC).
7. Dorothy Mutale & Another v The People 1997 Z.R. 51 (SC).
8. Ilunga Kalaba v The People (1981) Z.R. 102 (SC).
9. Chansa v The People 1975 Z.R. 178 (SC).
10. Chuba v The People (1976) Z.R. 272 (SC).
11. Shawaz Fawaz and Prosper Chelelwa v The People Z.R (1995 - 97) Z.R. 3 (SC).
12. R v McLeod (1995) 1 Cr. App. R. 591 CA.

Legislation referred to:

1. The Penal Code Cap. 87, S. 200, 201 (1) (b), (2)(a).
2. The Criminal Procedure Code Cap.88 S.192 (1), 275 (a).

The appellant was convicted of the murder of his 1 year 10 months' infant step son by the High Court at Kabwe and was sentenced to life imprisonment. He now appeals against both conviction and sentence.

The facts of the case are that the appellant was charged with the offence of murder, contrary to section 200 of the Penal Code Cap. 87 of the Laws of Zambia. It was alleged in the particulars of the offence that, on the 25th day of March, 2014 at Kabwe, he did murder **Nimrod Chaiwila**.

The background of the matter to the extent that it is relevant for putting the events that evolved in perspective is that, sometime in 1995, the appellant married the mother to the deceased, Mercy Nankamba, who testified for the prosecution as PW5. There were four children of the family namely; Potfela Sichamba (m), Abishag Nachamba (f), Jethro Sichamba (m) and the deceased child Nimrod Sichamba (m), who was born Chilufya Musonda Chaiwila, but was also variously referred to as Chilufya, Nimrod Sichamba, or Nimrod Chaiwila.

Five years into their marriage, in the year 2000, the couple were separated. Although they remained apart for the next 13 years and 4 months as the appellant was in prison, their contact was

maintained as the wife used to visit him regularly during the said period. In 2012 and whilst he was still incacerated, the appellant was informed by his wife, that she was six months pregnant from another man and wanted them to divorce. According to her, the appellant reacted badly to this 'news' and threatened to stab her, remove the foetus from her womb and kill her. The wife went ahead to sue him for divorce and although the appellant declined to attend at the hearing, the Local Court proceeded with the matter and dissolved their marriage, in the month of October, 2012.

Ten months after the divorce, the couple were at the instance of the appellant who was now out of prison, reconciled through the intervention of their relatives. The family thereafter lived in a one bedroomed house, located in the Ngungu township of Kabwe which consisted of a living room and kitchen. The appellant was at the time unemployed and the breadwinner of the family was his wife, who was selling second hand bed linen and curtains, from the market where she used to go in the morning with their eldest son Potfela and they would return in the evening.

Potfela's siblings Abishag, a girl aged 16, and 15 year old Jethro, a boy, were both school going and would equally leave the home in the morning and only return, after 16:00 hours. The deceased child was also enrolled into a nursery class, at Chalo Private School, located within 100 metres of their residence. He too attended school daily from morning until 16:00 hours - Monday to Thursday, while Friday, was half day and classes ended at 12:30 hours.

In her evidence given at the trial of the matter, PW5, the mother to the deceased child and wife to the appellant said that, on 25th March, 2014 the deceased woke up and started making noise. He was taken by his sister to prepare him for school. She bathed him, and then gave him a plate of porridge, she had prepared. The deceased brought his plate of porridge to the appellant in the bedroom, who then, fed him. It was the mother's evidence in this regard, that the appellant got on well with the child. She later saw the child and his sister leave the home for school, with the toddler

walking ahead of his sister. PW5 asserted that the child was not ill on that day.

The class teacher who took over responsibility for the child thereafter, 24 year old Mildred Mwewa (PW1), in her testimony at the trial of the matter, told the court below that the child participated in the school activities of that day, 25th March, 2014. He wrote Maths and English tests and scored 10 out of 10 in both papers. It was also her evidence, that the school did not allow children to share food prepared from their homes, but sometimes provided food to all of them. On the material day, she recalled that the child had come with macaroni in a lunch box and a cup of juice. She said whenever a child got ill whilst in their custody, the school would inform the parents.

She maintained, that when all the children were taken to the playground, Nimrod Chaiwila, participated in the activities. There were no signs of illness exhibited by the child on that day or to her recollection, the previous few days. She said when going home with

the appellant, she saw the child walk out through the school gate on his own. Granted it was rather cold, she conceded, that the child could have sneezed during the day, without her noticing.

Around 15:00 hours, the child's mother realized it was half day at school and called to remind the appellant to pick him up but the appellant's phone was off. She then called her neighbour, whom she requested to go to her home and ask one of her older children to pick up their sibling from school. When the neighbour informed her that there was loud music at the house, she requested her to take the phone there, so that she could speak with whoever was available. The neighbour went to her home and the person she actually spoke to was her husband, the appellant. He confirmed to her that he had already picked up the child and that the child was sleeping.

In continuing with the events of that day, the child's brother Jethro (PW2), in his testimony in the court below said that, he had developed a headache and left school early, at about 13:10 hours.

As a result, he got home around 14:00 hours instead of after 16:00 hours, as he normally did. As he entered the house, he was greeted by loud music that was playing in the sitting room while his father, the appellant, emerged from the bedroom. The appellant asked him why he was home early and Jethro explained, he was not feeling well. When he asked whether he could go and pick up his young brother from nursery school, the appellant's response was that, he had already fetched him and he was asleep in the bedroom. That is how Jethro went into the said bedroom to go and change his uniform. While there, he noticed that the child was laying face down on his bed. Thereafter, Jethro left to attend to some household chores.

At 16:00 hours he prepared porridge for the child and went into the bedroom to wake him up. He observed the child was still laying in the same position of face down that he had earlier found him. When he tried to turn him over, he immediately noticed that the body was stiff. Alarmed by this state of affairs, Jethro called out to his father to come and see what had happened to the child but

the appellant did not respond to this distress call. This prompted the boy to call out to him a second time. Still the appellant did not react nor did he do so on the third call. Jethro was now forced to follow his father in the sitting room where he had been sitting for the whole period that he had been back from school.

The appellant's only reaction to his son's plea for him to go into the bedroom and see what had happened to the child was to instead direct him to go and call their elderly neighbour, who was a nurse.

In her evidence, the 63 year old nurse, Rhoda Kanyakula (PW3), said she had cordial relations with the appellant's wife, Mercy Nankamba. After receiving information that the child was very ill and that the appellant had requested for her to go to their home, she was expecting to find the child in the appellant's arms. The appellant instead only beckoned her to enter into the bedroom. After entering, she turned the child around and observed there was a lot of blood which had been oozing from the mouth as well as

some foam. The nurse asked the appellant, who was standing with his hands crossed behind his back, what had happened and he said he did not know what was wrong with the child. She then, asked him for a cloth to clean up the child, but the appellant did not respond. He was still in the same posture she had found him.

The nurse then got a cloth for herself and cleaned the child. Sensing from the smell in the room that the child had defecated, she asked for a diaper so that she could change him but the appellant who maintained the same position, did not respond to her request. Nor did he react immediately, when she asked for the child's clean clothes so that she could change him. She had to ask the appellant twice, before he finally gave them to her. After she had changed the child, the witness sent the child's brother Jethro to go to her home and fetch her young sister, Violet.

When Violet came, she put the child on Violet's back and hurried them off to the clinic, with the appellant, while she went back to her house to get her phone and a K30.00 for a taxi. Shortly,

she followed them and met them on their way back from the clinic with a letter referring the child to Kabwe General Hospital. She got them into a taxi and then, went back to her home to prepare to go for work.

It was Rhoda Kanyakula's further evidence that, from her experience of having been a nurse for 34 years, she noticed that the child had died, immediately upon setting eyes on him, when she entered the bedroom in the appellant's house.

The substance of the evidence from Abishag (PW4), the deceased child's sister was that, the child was in good health that morning. After preparing him, she packed his lunch box with rice and filled his feeding cup with some juice. When she got home after school she found her brother Jethro weeping. When she got inside the house, she overheard her father first speak to someone in Namwanga saying the child had died. The same message was communicated to someone else in Nyanja, in a very casual manner, as it was punctuated with laughter.

Abishag decided to disturb this apparent callous behaviour by entering the bedroom unannounced. In reaction to this, the appellant rebuked her for not knocking and sent her away to prepare him water for a bath, which in the circumstances, she declined to do. Abishag, denied a suggestion which was put to her, that the appellant had that morning given her a half tablet of panadol to pass on to the class teacher so that she could administer it to the child, who according to him, was ill.

Later, in the evening of the same day when the appellant's wife got home around 18:30 hours, she was shocked to find a funeral gathering at her home and her mother-in-law wailing. Upon asking her mother-in-law as to who had died, she responded that it was her son Chilufya Musonda. When she further inquired whether the death was as a result of an accident, her mother-in-law said the child had died in his sleep. In total disbelief at hearing this news, the appellant's wife then went to inquire from her son Jethro (PW2), as to what had really happened. Jethro told her that, he too did not know. That is how the appellant's wife started mourning her child.

At about 21:00 hours, the appellant returned home from the mortuary and immediately rebuked the mourners telling all of them to keep quiet. He told them that he found a lot of children's bodies in the mortuary, who had died from malaria.

On 28th March, 2014 which was the fourth day of mourning, the mother to the deceased child declared her wish to have a post-mortem examination done on the body. It was her evidence that after hearing this, her husband run away and he did not even attend the post-mortem and child's burial. He only returned the following day, 29th March, 2014.

She went on to narrate that, after they had reconciled with the appellant in August 2013, in January, 2014 just five months later, they started having marital problems. The problems were caused by the appellant who started demanding to see the man who had fathered the child, Chilufya. When she reminded the appellant that as they had reconciled, there was no need to see the father to the child, the appellant retorted by threatening he would do something

that would force him to come. Two weeks prior to the child's death the appellant again repeated the death threats which would force the father of the child to come for the funeral, upon which he said, he would also kill the father. She informed her relatives about these threats and also requested their Pastor to counsel them. The Pastor advised her to continue praying for the appellant to change, whilst awaiting for him to counsel them. As it happened, she lamented that the child unfortunately died before the Pastor could undertake the counselling sessions. She maintained the child had been well that morning and she did not know what killed him nor was she aware that the child had pneumonia.

For his part, Boston Matunga (PW6), a cousin to the appellant's wife (PW5) recounted how he received a call from his nephew Potfela around 22:00 hours in the night of 25th March 2014. Potfela called to inform him of the death of Chilufya. When he asked what happened, Potfela said he did not know. Later, when the witness went to the funeral house he asked the appellant how the child had died and his answer was that, the child had died from

malaria. When the mother to the child came outside, he queried her as to why she did not inform him that the child was suffering from malaria. In answer to his query, she denied the child had been ill, at all. Since people who were coming to the funeral house were all asking them what had caused the child's death and they had no answers, it was agreed by the family that a post-mortem be conducted to ascertain the cause of death.

The 28th March, 2014 was set for the post-mortem examination of the deceased and it was to be followed by the burial. Boston Matunga noticed that the appellant was nowhere to be seen that morning. When he called him, the appellant's phone went unanswered. When they asked the appellant's father who was with them at the funeral house for his son's whereabouts, he told them that they would find him at the mortuary, but when they got to the mortuary, the appellant was not there.

The matter was thereafter reported to the police and the appellant was arrested the following day, immediately upon his

return to the funeral house. It was the testimony of the police officer who investigated the matter, Margret Lungo (PW7) that, on 27th March, 2014, whilst at the Bwacha Police station, Mercy Nankamba, the mother to the deceased child, in the company of her brother, Boston Matunga, took a cup containing some juice to her which was suspected to be contaminated with poison and which they said was found under the bed of the deceased child. The juice in the cup had an unpleasant smell. In the course of her investigations at the child's school, PW7 found out that the real names of the child were Chilufya Musonda Chaiwila, but the Director of the School said, they changed the name in the School Register, to Nimrod Sichamba, at the appellant's instance.

It was the investigation officer's further evidence, that on the day of post-mortem, 28th March, 2014, the pathologist who conducted the examination Dr. Pavlo (DW2), gave the police specimens from the deceased child's liver and blood, which together with the cup of juice, the Criminal Investigations Officer for Bwacha Police Station directed PW7, in writing, to take to the Food and

Drug Control Laboratory in Lusaka, for a toxicology examination. The officer went on to testify that, the toxicology results were only released on 15th September, 2014. The reason given for the delay was that, the Food and Drug Control Laboratory did not have the chemicals that were required to test the samples.

When she was cross-examined, the officer conceded, that she made no mention of the cup of juice that was recovered from the scene of the crime in her report of 14th April, 2014. She also confirmed, that Boston Matunga accompanied her when she was taking the samples to Lusaka. She said she had no knowledge of whether the samples were tempered with, but admitted the cup was not made available to Dr. Pavlo at the time he was conducting the post-mortem examination. That in his post-mortem report, however, the doctor did indicate in relation to the cause of death, that poison was suspected to have been used.

She confirmed that the appellant told her the child had malaria and that he had been on medication but did not disclose

how he knew it was malaria or that the child had also manifested a high fever.

At the date of trial, the pathologist Dr. Pavlo who had conducted the post-mortem examination was away to Ukraine, on leave. Dr. Anaclet Tshimpanga (PW8), 63, who was trained as a medical doctor in Lubumbashi, in the Democratic Republic of Congo, came in his stead. He told the court he had practiced medicine in Congo for 20 years before coming to Zambia where he had continued practising for a further 21 years. It was his evidence he did at times work as a pathologist when Dr. Pavlo was away. In connection with the present case, he had been requested by the Director of Kabwe General Hospital to step in for Dr. Pavlo.

PW8 considered the post-mortem report which shows the cause of death as **"bilateral acute broncho- pneumonia"**. He also considered the toxicology report indicating an insecticide Abemactin was found in the liver and blood samples from the deceased. On the

particular facts of this case, his conclusion was that, pneumonia as the cause of death was precipitated by the insecticide.

In his defence to this prosecution case in the court below, the appellant, a 41 year old Social Welfare Officer, gave sworn evidence raising a bare denial. He explained that the child had been ill a week prior to his death and the mother and himself had administered an antibiotic, Amoxyl in syrup form as well as a pain killer- panadol. On 23rd March, 2014 at around 18:00 hours, the child's temperature was high. They suspected he had malaria and the mother administered a half tablet of Fansida. Around 20:30 hours she again administered piriton to him. Later, the mother said he needed a pain killer and the appellant gave him half a tablet of panadol.

In the night of 24th March, 2014 at around midnight the child had convulsions, he also had heart palpitations and the temperature was high. A half panadol was again administered to him and the mother also used a towel and cold water to massage

his body, until the temperature came down. He thereafter fell asleep at around 04:00 hours on 25th March, 2014 and around 06:00 hours there was a slight improvement in the condition. He was prepared for school by Abishag and the appellant fed him porridge. Sometime between 08:00-09:00 hours he was taken to school and the appellant gave Abishag a half panadol to pass on to the child's teacher to administer to him, later.

The appellant said 25th March, 2014 was half day at school as the children were writing tests. When he went to pick up the child at 13:00 hours, the class teacher informed him that the child had just been sleeping and had even failed to write the tests. That is how the appellant carried the child home and he was quiet that day, although the temperature was not high. When they reached their home, the child said he wanted to sleep and the appellant took him to the bedroom. The rest of the appellant's evidence relating to the period when Jethro came back home from school early, around 14:00 hours, was as narrated by the said boy.

The appellant's further testimony was, however, to the effect that, when Jethro first called out to him to go and see the child, he immediately got up and went into the bedroom. There, he observed that some foam was coming from the child's mouth which had blood spots. That is what made him send Jethro to call the nurse. He said he was at the funeral house from the 25th to the 27 March, 2014. He was only compelled to leave around 05:00 hours in the morning of 28th March, 2014 on account of his wife's behaviour, who in mourning, kept accusing him of having caused the child's death. The other mourners were also threatening to beat him up. He said he actually got on well with the deceased child, which is the reason he even gave him his name, Nimrod Sichamba.

The appellant admitted that when he spoke with his wife on the phone in the afternoon of the material day, he did not inform her, that the child was ill. He declined to comment on Abishag's evidence that the child was well and had even walked to school on his own, saying, she was better placed to know how the child got to the school in the morning. He confirmed that the plot where he had

gone in the morning of 25th March, 2015 was purchased by his wife using her terminal benefits. He also admitted, the fact that it was a sign of love that she allowed him to develop this plot. This was notwithstanding that she had the deceased child from another man, during the period that they were seperated. The appellant said his wife was claiming the child was not ill that day because she feared her relatives would accuse her of having neglected him by going to the market. He also claimed that the police officer who investigated the matter, Margret Lungo, was a close friend of his wife from whom she used to buy second hand bed linen and curtains.

The appellant called as his witness, DW2, Dr. Pavlo the pathologist who conducted the post-mortem on the deceased child. According to this doctor, the child died from **acute broncho-pneumonia,** where **'acute'** means fast or a period of less than 14 days.

In her judgment, the learned trial judge accepted the evidence of the appellant's wife, that the appellant had issued threats saying he wanted to see the father to the deceased child. She also considered that, although some of the prosecution witnesses were related, they all testified that the child was not ill on the material day. After considering the need for corroboration of such evidence coming from relatives of the deceased, the learned judge accepted their evidence on the basis that she found they were all credible witnesses, who did not contradict themselves in any way. That their demeanour remained intact and unshaken throughout and cited our decision in the case of **Simon Choka v The People (1).**

In the final analysis, the trial court found the following facts were not in dispute: that the appellant had picked the child from school on the date in question; he did not call PW5 to inform her the child was seriously ill; and he had a previous conviction of murder as admitted by himself.

Based on those findings, the trial court came to the conclusion that, from the post-mortem report it was clear the child was poisoned before he died. She found this was particularly so, in view of the evidence in cross-examination of the doctor who conducted the post-mortem when he admitted that, bronchial pneumonia does not cause bleeding from the mouth, nose and ears; nor the release of white and pink foam from the mouth. That release of white and pink foam can be caused by poisoning which in turn, can lead to respiratory failure.

The learned trial judge also found that, although the two doctors who were called as witnesses differed on the issue of levels of concentration of the poison Abemactin and its effect on the deceased, they were both agreed, that poison could be fatal to a human being depending on the levels of concentration, especially in a small child. That the information on the actual levels found in the samples, was not indicated in the laboratory report. Notwithstanding, the report still confirmed the presence of an

insecticide known as Abemactin, which they both agreed could be dangerous if administered to a human being.

It was the court's finding that the circumstantial evidence in this case was so cogent and compelling as regards the accused person, that no rational hypothesis other than murder could be reached on the facts. The cases of **Patrick Sakala v The People (2)** and **David Zulu v The People (3)** were cited as authority. The learned judge also referred to **Mbinga Nyambe v The People (4)** in which we held that, the pieces of evidence in that case though circumstantial, were so strong that it was irresistible to draw the inference of guilt. The trial judge further relied on our decision in the case of **Bwanausi v The People(5)** where we held that:

> **"Where a conclusion is based purely on inference, that inference may be drawn only if it is the only reasonable inference on the evidence."**

It was on this evidence before her that the learned judge below found the appellant guilty of the offence of murder and convicted him accordingly. The judge upon considering whether there were extenuating circumstances pursuant to S.201 of the Penal Code

found evidence of marital problems between the appellant and the child's mother, his wife, satisfied the test. In view of that position the appellant was sentenced to life imprisonment.

Dissatisfied with the judgment, the appellant filed two grounds of appeal stated as follows:

1. **that the learned judge erred in law and fact in convicting the appellant in the absence of proof beyond reasonable doubt; and**
2. **that the learned trial judge erred in law and fact in convicting the appellant on circumstantial evidence when an inference of guilty was not the only inference that could be drawn.**

In support of the grounds, written heads of argument were filed on record which learned Counsel for the appellant reiterated in her oral submission at the hearing of the appeal.

The appellant's submission on ground 1 of the appeal, was that, the prosecution had failed to prove its case beyond reasonable doubt. The case of **Mwewa Murono v The People (6)** was relied on where we restated the legal position that, the burden of proving every element of the offence charged, rests on the prosecution from

beginning to end; and that the standard of proof, is beyond all reasonable doubt.

Counsel also referred us to the case of **Dorothy Mutale & Another v The People (7)** in which we 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 favourable to an accused if there is nothing in the case to exclude such inference."**

Her submission on the point was to the effect that, as there was in the present case, two or more inferences as possible causes of death, a doubt exists. In the presence of such doubt, the prosecution cannot be said to have discharged its burden of proof.

On the evidence of the investigations officer, her argument was that, it was critical to know the concentration levels of the insecticide, Abemactin, in order to ascertain the cause of death. It was contended on the point that none of the key witnesses, who were the mother to the deceased and her cousin, ever indicated in their evidence that they handed a cup to the investigations officer or

indeed to any other police officers. Counsel's submission in this regard was that, the investigations officer was not a credible witness and that her efforts to implicate the appellant were an afterthought motivated by her relationship with the mother to the deceased. That she was a witness after the fact, who is the only one who mentioned the cup and there was no other evidence led to show where the cup came from.

On ground 2, the argument was that, the circumstantial evidence adduced by the prosecution did not take the case out of the realm of conjecture so that it attained such a degree of cogency which could permit only an inference of guilt. The case of **David Zulu v. The People (3)** was cited as highlighting the dangers of relying on circumstantial evidence which is not direct proof of matters complained of. Learned Counsel submitted in conclusion that, from the evidence on record, two possible inferences can be drawn. The first is that, the deceased child had died of food poisoning; while the second is as stated in the post-mortem report, that the cause of death was bilateral-acute broncho pneumonia,

acute respiratory failure, and lung edema (otherwise oedema). That, the court ought to have adopted the inference more favourable to the appellant.

In their response to the appellant's heads of argument, the learned State Advocate, Mrs. Mwansa on ground 1, submitted that, the appellant had a motive to kill the deceased child; and his action was premeditated as testified by the child's mother that the appellant had warned her, he would kill the deceased who was his step child.

Counsel further argued that, the appellant was also said to be in the habit of threatening the child's mother with violence. He had done so when she was pregnant, when he told her he would stab her and remove the baby from the womb so that she could also die. Counsel submitted, such language demonstrated that the appellant had ill motive towards the child who was fathered by another man and had ill intentions of terminating the life of the child, even before the child was born.

She further argued, it was an odd coincidence that as the appellant had issued what she termed as 'terrorizations;' just a few days later, the child was found dead in mysterious circumstances. Her submission was that, this coincidence was not explained and she relied on our decision in the case of **Ilunga Kalaba v The People (8)**, where we held that, odd coincidences if unexplained, provide supporting evidence.

Counsel also argued that, the appellant's act was well calculated. That while he was expected to be at the plot, the appellant instead rushed to go and pick the deceased child from school, at a time when no one expected him to do so, thus giving himself time to execute his plan when no one else was at home. It was further argued, that the appellant was the person the deceased child was last seen active and alive with, before he was later found dead after the appellant had been with him, alone, for some time. Counsel went on to submit, that the appellant was presented with an opportunity to do anything he wanted to the deceased child, including to administer poison. It was in this regard contended,

that the appellant had increased the volume of the music which was playing in their house, so that the neighbours would not hear or suspect anything.

Counsel further alluded to the conduct of the appellant on the fateful day in that, when the deceased child's brother, Jethro, found the deceased stiff with blood and foam coming from the mouth, he called out to the appellant three times to go and see the condition of the deceased. The appellant, however, did not heed the call, despite alleging that the child was sick that day. The submission on the point was that, the reason the appellant did not show any concern for the child was because he knew what he had done and the expected outcome. Further reference was made to the evidence that, the appellant was heard laughing over the death of the deceased by his daughter Abishag, whilst on the phone with someone. The submission on this was that, this conduct only goes to show he had accomplished his mission.

Counsel referred us to **John Hatchard and Muna Ndulo's: A Case Book on Criminal Law, at page 64** where the learned authors, state that:

> **"In most cases, the best evidence is that of the witnesses who can speak to the accused's action and demeanour at and immediately before and immediately after the incident."**

The submission in this respect was that, the deceased' siblings Jethro and Abishag, as well as the nurse Rhodah Kanyakula, gave the best evidence on the conduct of the appellant and we were urged to accept their evidence. Further, that the appellant lied when he testified that the deceased child did not do anything at school on the day in question, contrary to exhibit 'P1', which shows that the child wrote tests that day. It was contended that this lie, told by the appellant, should reduce the weight attached to his testimony as we held in the case of **Dorothy Mutale and Richard Phiri v The People (7).**

On ground 2, the submission by learned Counsel was that, the suspicious circumstances formed strong circumstantial evidence which moved the case out of the realm of conjecture as required by

the case of **David Zulu v The People (3).** Counsel urged us to find that the only reasonable inference to be drawn, was that the appellant killed the deceased as planned.

Addressing the disparities in the testimonies of the doctors, PW8 and DW2, the contention was that, the two witnesses in fact agreed that poison had been administered to the deceased child. They agreed, that the child could have suffered from broncho-pneumonia which was in the second stage and therefore not fatal, as it is only fatal in the fourth stage. They further agreed, that broncho-pneumonia could not cause bleeding. That DW2 explained how broncho-pneumonia could be accelerated by ingestion of poison which could cause inflammation of the lung tissues and subsequent respiratory failure. It was Counsel's contention, that the cause of death as indicated by the Food and Drug Control Laboratory Report exhibit 'P3', PW8, and DW2, was that, the poison ingested by the deceased child contributed to its death. That in such event, the levels of concentration of the poison was immaterial. It was further argued, that there was no evidence to

show the child had been coughing or had fever as would be expected in an ordinary case of broncho-pneumonia.

Counsel noted that, the learned judge in this regard, did not make a finding that resolved the disparities of the two doctor's testimonies. The case of **Chansa v The People (9)** was cited in enunciating the principle that, when an expert witness gives evidence, the court has a duty to make a finding, as an expert merely assists the court arrive at a finding. The case of **Chuba v The People (10)**, was further referred to as having settled the legal position that, an expert witness is not a witness of fact but one called by virtue of his or her experience and qualification to give an opinion to the court and the court is not bound to such opinion. We were accordingly invited to resolve the contradictions and make a finding that the substantial cause of death was food poisoning as indicated in the post-mortem report 'P3'.

It was further submitted that, the investigations officer had no motive to lie and was a credible witness, even if the evidence

of the cup obtained by her was to be set aside, the fact would still remain, that poison was ingested by the deceased; and this fact is supported by the evidence of both PW8 and DW2. Counsel contended, the deceased had eaten food packed from home and there is nowhere in the record showing that the deceased ate food from elsewhere on the material day, as children were not allowed to share food at school. The appellant had fed the deceased child in the morning and was with him during lunch hour after school.

Counsel ended her arguments by reiterating, the circumstantial evidence is so cogent and compelling that only an inference of guilt can be drawn from it and the trial judge cannot be faulted for drawing that inference.

In relation to the sentence, it was argued that no extenuating circumstances existed in the present case, as envisaged in **section 201(1) (b), (2) (a) of the Penal Code**. That the perceived marital problems had nothing to do with the child and since the appellant stated that he was fond of the child, their problems with

the mother could not affect him in any way. Counsel in conclusion submitted that, the death penalty was a more appropriate sentence.

We have carefully considered the evidence on record, the submissions from learned counsel on both sides, case law and other authorities to which we were referred, for which we are indeed indebted.

Having looked at the two grounds of appeal, we find the issues raised are inter-related. The substance of ground 2 of the appeal is that the conviction was based on circumstantial evidence and on the evidence led, an inference of guilt was not the only reasonable inference that could be drawn from it. In ground 1, the appellant claims that the trial court should not have convicted him of the offence of murder as the prosecution failed to discharge its burden of proving the case against him beyond reasonable doubt.

We will start with the inference of the appellant's guilt that was drawn from the circumstantial evidence that was before the trial court which is the issue in ground 2. The gist of the argument

of learned Counsel for the appellant on this issue is that, from the evidence of the two doctors who testified, there are two possible inferences that could be drawn on what caused the deceased death. The first inference is that, the deceased was poisoned from the Abemactin insecticide, which was the testimony of PW8; while the second is that, the deceased death was as a result of acute broncho-pneumonia; acute respiratory failure; and lung oedema, as testified by DW2.

We have examined the evidence on record in this regard. The evidence shows, the first question which confronted the trial judge was whether or not the child was infact ill on the material day, 25th March, 2014. After considering all the evidence before her, the trial judge preferred the version of events as given by the prosecution over that of the appellant and accepted evidence of prosecution witnesses to the effect that, the deceased child was not ill.

According to the prosecution' case, as narrated by the mother (PW5), sister (PW4) and brother (PW2), to the deceased child, the

child was not ill, at all. Their common position was that, he was well enough to go to school, that day. After preparing him, his sister accompanied him to school and the child eargely led the way walking ahead of her.

While at school, his class teacher (PW1) testified, the child actively participated in writing the English and Maths tests, which evidence the appellant disputed, claiming the teacher told him the child was sick, inactive and he was just sleeping as a result. We have considered this evidence and examined exhibit 'P1' which shows the child sat for a test, of course befitting the age. On the face of the document it shows this test was not in reference to actual writing, but intended to ascertain whether the child could identify the correct letters and colour inside the lines of the objects and numbers pre-printed thereon, in the correct colours. The child managed to do these tasks. Hence, scoring 10 out of 10.

The relevancence of this evidence which was not in any way challenged by the appellant, is to show that the child was

undoubtedly alert enough to undertake the exercise; and therefore active and participating in the class activities. The teacher in her evidence further told the court that, when the children were taken to the playground, the deceased child participated in the physical activities in which they were engaged. This evidence was again not challenged by the appellant and in view of the alertness earlier exhibited in undertaking the tests; and the teacher's further evidence that, when the children knocked off at 12:30, the deceased child was seen by his teacher, walking away through the school gate with the appellant who came to fetch him that day. This evidence which is on record clearly supports the finding of fact made by the trial judge, that the child was not sick on that day.

Proceeding from that premise, the record shows the trial judge considered what could then, have caused the child to die barely three hours later? Unchallenged evidence on record again shows that, after he collected him from school, the appellant was the only person with the child at home until 14:00 hours when PW2 returned home from school. The evidence, also shows there was no

interaction whatsoever between PW2 and the child, as he found him in apparent 'deep' sleep from which the child failed to wake up at 16:00 hours when PW2 tried to awaken him. Later, he was pronounced dead on arrival at the Kabwe General Hospital, where he was finally taken. This evidence was not disputed by the appellant who in fact remained to deposit the body in the mortuary.

As to what really caused the death, a post-mortem examination which was subsequently, conducted on the body of the deceased on 28th March, 2014 disclosed the cause of death as ***'bilateral acute broncho-pneumonia, acute respiratory failure, lung oedema'***. **'Acute'**, in this case was defined by DW2 who carried out the post-mortem to mean, fast or less than 14 days. That **'bilateral'** meant the pneumonia was severe as both lungs were affected; and **'lung oedema'**, that there was overloading of bodily fluids in the lungs and not enough carbon dioxide and oxygen exchange. The doctor said severe lung oedema occurs due to a cut in the lung tissue from which the fluids then, emerge. He

explained that, white-pink foam is a sign of lung oedema as air is mixed with fluids in the lung tissue causing great foam.

He said he confirmed the child had pneumonia after he conducted a microscopic examination. The pneumonia was in stage 2. This meant the child was infected 3 days before his death. He explained that, pneumonia has 4 stages lasting between 18-20 days. Although it can be fatal from stage 3, it is only in stage 4 that the child could have exhibited coughing, fever, difficulty in breathing as well as weakness, and he would not have been able to go to school.

It is for this reason that DW2 was prompted to check for any other diseases the child could have had, such as malaria, but a malaria test came out negative. A historology examination of intestinal contents was also negative.

On the head trauma indicated as another finding in his report, DW2 said this was caused by lack of circulation of oxygen in the body as a result of which more blood was sent to the brain.

DW2's views on the toxicology report from the Ministry of Health, Food and Drugs Laboratory, was that it did not indicate the concentration levels of the insecticide known as Abemactin which was found in the samples of the child's liver and blood. It was, therefore, not possible for him to conclude that the child died from poisoning.

Under cross-examination, DW2 conceded, that broncho-pneumonia does not cause bleeding. That, white-pink foam can be caused by poisoning and in some cases this leads to respiratory failure.

The substance of the evidence of PW8 based on the post-mortem report 'P2' and that on toxicology 'P3,' was categorical, to the effect that, normal broncho-pneumonia does not cause bleeding from the nose, ears or mouth. Nor, is there in pneumonia, the presence of pink and white foam which is due to difficulties in breathing. That brain vessels are white but when injured they will turn red. His evidence was that, when an insecticide is ingested, by

a broncho pneumonia patient, it may lead to oedema in the brain and the discharge of pink and white foam. The insecticide can also lead to respiratory failure.

He said concentration levels of the poison must be shown to have been lethal for it to be said that the death was caused by poison. That exhibit 'P3' does not disclose the levels of the Abemactin which was found in the liver and blood samples taken from the deceased child. The conclusion of PW8 was that, pneumonia can be accelerated by an insecticide and lead to respiratory failure.

It was on considering this evidence against the background of the common position taken by both doctors that, stage 2 pneumonia does not cause death, and that poisoning can lead to the release of white pinkish foam, that the learned trial judge found, the circumstancial evidence was clear that the child was poisoned before it died as indicated in the post-mortem report. No specific finding of fact was, however, made by the learned judge to

resolve the two conflicting positions of the doctors on the cause of death.

We here note that, in arriving at the finding of poisoning, the learned trial judge nonetheless greatly relied on the opinion of PW8. This witness in turn was to a large extent informed by the results in the toxicology report from the Food and Drug Control Laboratory exhibit "P3". These results indicated there was evidence of the insecticide Abemactin, in the child's liver and blood samples, as well as in a cup of juice which was allegedly found under the child's bed.

In arguing the appeal regarding the toxicology report learned Counsel for the appellant unleashed a general attack on the authenticity of this report. She pointed out that, while the samples were indicated as having been sent on 28th March 2014; the results were only received back on 15th September, 2014. She further noted that, although the results indicated the presence of insecticide known as Abemactin, in the samples, the levels of the said

insecticide were not disclosed. Her submission was that, this was a discrepancy. After further observing that the report was not signed by a Public Analyst, she went on to argue, that this was also a discrepancy.

Our examination of this 'report' shows it is infact a letter, stating it was signed by a 'Richard Chamba' on behalf of a Public Analyst. The name of this Public Analyst or his qualifications have, however, not been disclosed, as required by S. 192 (1) of the Criminal Procedure Code. This section provides that evidence of an analyst who has undertaken, an examination for which he is qualified to undertake must be reduced in an affidavit form, which must also disclose his qualification. The section is couched in following mandatory terms:

> **"192. (1) Whenever any fact ascertained by any examination or process requiring chemical or bacteriological skill may become relevant to the issue in any criminal proceedings, a document purporting to be an affidavit relating to any such examination or process shall, if purporting to have been made by any person qualified to carry out such examination or process, who has ascertained any such fact by means of any such examination or process, be admissible in evidence in such proceedings to prove the matters stated therein:**
> (boldfacing and underlining for emphasis supplied)

The above provision was intended to safeguard the integrity of the results undertaken by someone who himself would not be available to give evidence in court, as was the case at the trial of this matter, where the Public Analyst did not appear to give evidence. In the event, we find the document exhibit 'P3' was irregular in form and content for failure to comply with S.192 (1) of the Criminal Procedure Code. It was not properly received in evidence and it is hereby expunged from the record.

Although the circumstantial evidence is heavily anchored on the finding that the child was poisoned, which in turn was premised on the expunged document, exhibit "P3", we have considered that the two doctors were agreed, and the fact that the child was poisoned, was not an issue in this case. The question was, whether the death ensued from the poisoning. Again both doctors were agreed, that in the absence of the concentration levels of the poison there could be no basis for finding the child died from poisoning. These expert opinions were made independent of the now expunged

toxicology report exhibit "P3". The finding of poisoning actually appears in the post-mortem report "P2". The evidence of poisoning is further supported by the position of the doctors who were again agreed, that poisoning can indeed cause bleeding from the nose, ears and mouth, but not pneumonia. That the white-pinkish form found on the deceased body could also be caused by poisoning and is an indication of respiratory failure, which can lead to death.

In light of that evidence and evidence of the prosecution witnesses accepted by the trial judge, that the child was well that day, we agree with her observation, that the mother, sister, and brother, who gave this evidence as relatives to the deceased child fell in the category of suspect witnesses and that their evidence required corroboration.

We have noted from the record that in addressing whether there was evidence to corroborate the said witnesses, the trial judge noted as follows: *"I however find that PW2, PW3, PW5 and PW6 were credible witnesses and did not contradict each other. I therefore find that their demeanor remained intact throughout."*

We wish to observe that although the learned trial judge referred to our decision in **Choka v The People (1),** there was a misapprehension of the *ratio decidendi* of the said case. The judge relied on the demeanour and plausibility of the evidence given by PW2, PW4 and PW5, in accepting their evidence which was uncontroverted, although they were considered suspect witnesses. The misapplication of the decision arose in that, as the said prosecution witnesses were relatives to the deceased they fell in the category of suspect witnesses who could have had an interest to serve. 'Something more' was, therefore, required other than their own testimonies or demeanour, before their evidence could have been accepted by the judge. The learned judge thus erred in relying on her own belief of the evidence as the 'something more,' required.

The record shows there was infact testimony from PW3, the nurse, who was not a relative of the deceased and whose independent credible evidence was the corroborative evidence needed to support the evidence of the suspect witnesses regarding

the accused's suspicious behaviour, in the period immediately before the deceased's death.

To support that position, there were many odd coincidences as aptly summarised by the learned State advocate, Mrs. Mwansa, in her submissions, 'that it was an odd coincidence which was not explained by the appellant, that as the appellant had issued threats to kill the deceased. A few days later, the child was found dead in mysterious circumstances and the last person with whom he was seen alive and well, is the appellant'.

We have no difficulty in finding that, even without relying on the toxicology report, the trial court, could still have made a finding of fact, that the child's death ensued from the ingestion of the poison. As we observed in the case of **Shawaz Fawaz and Prosper Chelelwa v The People (11):**

> **"When dealing with the evidence of an expert witness a court should always bear in mind that the opinion of an expert is his own opinion only, and it is the duty of the court to come to its own conclusion based on the findings of the expert witness. As we said in Chuba v the People (1), the opinion of a handwriting expert must not be substituted for the judgment of the court. It can only be used as a guide, albeit a very strong guide, to the court in arriving at its own conclusion on the evidence before it. The same thing applies to the opinion of other expert witnesses."**

On the evidence, the learned trial judge was entitled to make a finding that the only inference that could reasonably be drawn from the circumstantial evidence before her, was that the child was poisoned and the only person who had an opportunity to poison him is the appellant. That the appellant had a motive to kill the child who was fathered by someone else and he had an intention to do so, is reflected in threats to kill the child made to the mother just a few days before the child was found dead, in 'mysterious' circumstances.

Ground 2 of the appeal must accordingly fail. As ground 1 of the appeal urging us to find the case not proved against the appellant beyond reasonable doubt was premised on the success of ground 2, it cannot be sustained in the face of our finding on ground 2 that the case against the appellant was proved to the required standard and equally fails.

Having upheld the conviction for the offence of murder, we now turn to consider submissions by the learned State advocate, Mrs Mwansa, that the sentence from the court below was wrong in

principle as there were no extenuating circumstances in this case. Citing S.201 (2) of the Penal Code, Mrs Mwansa argued that, the said section is very clear in its terms as states that **"an extenuating circumstance is any fact associated with the offence which would diminish morally, the degree of the convicted person's guilt."**

We agree with Mrs Mwansa, that the alleged marital problems in this case do not amount to an extenuating circumstance which could in any way be taken to morally excuse the appellant's blameworthiness for killing the deceased child. In the absence of extenuating circumstances, we set aside the sentence of life imprisonment and in its place retain the death penalty.

In passing, we wish to observe that although the learned trial judge in her judgment referred to the appellant's previous conviction for the offence of murder as part of her findings of fact, the conclusion reached appears not to have been influenced in any significant way. In this regard we also note that, **section 275 of**

the Criminal Procedure Code Act Cap 88 which provides for the procedure to be followed in dealing with previous convictions of an accused person appearing for a subsequent offence, encompasses the principle that an accused person is innocent until proven guilty. Hence, the provision in **section 275 (a)** that, even where the previous convictions are included in the information charging an accused based on the system of conduct (similar fact/evidence), they shall not be read out in court, nor shall the accused be asked whether he has been previously convicted as alleged in the information, unless and until he has either pleaded guilty to or been convicted of the subsequent offence. This ensures that the accused is only tried for the offence charged and not presumed guilty due to previous convictions on a similar offence. Even where an accused has thrown away his shield by introducing evidence of his own good character, and lays himself bare to cross examination on previous convictions, the opportunity cannot be used to show that he is guilty of the offence charged. As stated in **R v McLeod (12)**, the primary purpose of cross-examination on previous

convictions and bad character of the accused is to show that the accused is not worthy of belief and not to show that he has a disposition to commit the type of offence with which he is charged, as the prosecution attempted to do through the evidence of PW5, in the case in *casu*.

Appeal dismissed.

E.C.MUYOVWE
SUPREME COURT JUDGE

J.K. KABUKA
SUPREME COURT JUDGE

J. CHINYAMA
SUPREME COURT JUDGE