IN THE COURT OF APPEAL OF ZAMBIA **Appeal No. 130/2021**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

JACQUELINE MUSOMPANYIKA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Mchenga DJP, Makungu and Muzenga JJA
On May, 2022 and 25th July, 2022.

For the Appellant: Mrs. S. Lukwesa, Acting Chief Legal Aid Counsel, Legal Aid Board

For the Respondent: M. C. Mwansa, Deputy Chief State Advocate, National Prosecution Authority

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J U D G M E N T

MUZENGA, JA, delivered the Judgment of the Court.

Cases referred to:

1. **Phiri and Others v The People (1973) ZR 47(CA)**
2. **David Zulu v The People (1977) ZR 151**
3. **Dorothy Mutale and Richard Phiri v The People – SCZ Judgment No. 11 of 1997**

Legislation referred to:

1. **The Penal Code, Chapter 87 of the Laws of Zambia.**
2. **Criminal Procedure Code, Chapter 88 of the Laws of Zambia.**

1.0 INTRODUCTION

1.1 The appellant was convicted of murder contrary to **Section 200 of the Penal Code**[1] and was subsequently sentenced to death by the High Court (before Mrs. Justice S. Kaunda-Newa).

1.2 The particulars of the offence, alleged that the appellant on 8th November, 2020 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia did murder Emmanuel Chisala.

2.0 PROSECUTION EVIDENCE IN THE COURT BELOW

2.1 The appellant's conviction was secured by the evidence of four prosecution witnesses. A summary of the evidence of PW1, Bridget Milimo Bwengwe Chitambo the former employer of the appellant was that on 4th November, 2020 around 06:00 am, she was notified by the appellant's daughter that her mother had taken some poisonous substances. She quickly rushed to check on the appellant at the servant's quarter and she found the bedroom door locked. After a few attempts of asking the appellant to open the door, she finally agreed.

2.2 PW1 together with her neighbour took the appellant and her three-year-old son to the main house where they started asking the appellant if she had taken any poisonous substances. She denied having consumed any. While there, the appellant's three-year-old son started vomiting and they immediately rushed him to the hospital. Four days later, PW1 learnt of the demise of the appellant's son.

2.3 In cross-examination, PW1 told the trial court that she never saw any bottle or sachet for the poison. She further stated that the appellant loved her children and that she denied having taken any poisonous substances.

2.4 Dr. Himwaze Cordelia Maria testified as PW2. In her testimony, she stated that she conducted a post-mortem examination on the deceased, Emmanuel Chisala. She noted that there were no external injuries on the body. She further observed that the deceased was of good health status and all internal organs were in their normal place. She stated that in her examination she noted that the stomach had semi-digested food particles which had the smell of an organophosphate with a paraffin odour.

2.5 It was her testimony that she collected blood for toxicology examination at the Food and Drug Laboratory. She stated that at the end of the post-mortem examination, she filled in the Coroner's authority for burial, with the preliminary diagnosis being complications for the treatment of organophosphate toxicity. She stated that on 4th December, 2020 she received the toxicology results which were positive for organophosphate poison. She concluded her autopsy findings with the cause of death being complications from the treatment of organophosphate toxicity, entailing that the primary cause of death was organophosphate poisoning. She explained that when one smells a poison, they need to obtain scientific confirmation of the substance and that the toxicology report showed that there was the presence of monocrotophos in the sample, which is an organophosphate.

2.6 She told the trial court that Monocrotophos is one of the many organophosphates and that pesticides are poisons that are used to kill ants and other crawling insects that are destructive to vegetables, plants and sometimes household termites.

2.7 In cross-examination, she stated that the clinical history was one of the things that informed her findings as did the autopsy findings. She agreed that all the body organs were intact and that the contents in the deceased's stomach influenced her findings. That the laboratory results indicated that there were traces of organophosphate in the sample, but the quantity was not specified. She denied that phosphates in small quantities are not harmful, but agreed that there are medical drugs that contain phosphates.

2.8 In re-examination, she clarified that depending on several factors, phosphates in small amounts can kill a person. Thus, lethality or how strong a substance is, the health status of an individual, variability in absorbing, breaking down and excreting the substance, and the age of a person, are such factors. She also stated that history aids a pathologist in coming up with agreements or disagreements with the post-mortem findings and that in cases of poisoning, scientific evidence such as laboratory tests, is very cardinal in coming up with a conclusion. That is why before the laboratory results came out, she came up with preliminary findings until the laboratory results came out.

2.9 Judith Nkatwe testified as PW3 and her testimony was to the effect that on 4th November, 2020 the appellant called her around 06:00 hours and informed her that her husband had packed all his belongings and left. She told the appellant that he would return. A few minutes later PW1, her neighbour, called and told her that the appellant had taken poison. She rushed there. The rest of her evidence regarding how they went to PW1's house and later to the hospital is similar to that of PW1. She added that the appellant was equally drowsy and that both the appellant and the deceased were vomiting white stuff.

2.10 In cross-examination, PW3 reiterated that the appellant called her and they talked about the appellant's husband's decision to leave the house. She stated that the appellant was drowsy after the deceased started vomiting and that the appellant also vomited in the vehicle on their way to the clinic. She told the trial court that the appellant did not mention to her what had happened and that she did not check what the appellant had drunk or eaten. PW3 agreed that the appellant was in the habit of drinking a local drink called Munkoyo.

2.11 The last prosecution witness was the arresting officer Kennedy Mpezeni. His testimony was to the effect that on 10th November, 2020

he was allocated a docket in which the appellant and the deceased were alleged to have taken poisonous substances after a marital dispute. He told the trial court that his investigation established that the appellant took some poisonous substances and gave some to the deceased. He testified that after he received the post-mortem report he decided to pick the appellant for questioning. After receiving the toxicology report from the Food and Drug Laboratory which revealed the presence of a pesticide in the samples taken from the appellant and the deceased, he made up his mind to charge and arrest her for the offence of murder.

2.12 PW4 produced the toxicology report in court and he told the trial court that the appellant's daughter by the name of Charity had been taken to Monze and he did not know her whereabouts. However, according to his investigations, Charity informed PW1 what had happened. He also testified that he did not visit the scene due to a lapse of time, but that Detective Shonge did and did not find anything.

2.13 In cross-examination, he told the trial court that PW1 and PW3 did not witness the appellant give the poisonous substance to the deceased and that he charged the appellant based on the post-mortem and

toxicology reports. He further stated that the toxicology results for the appellant and the deceased showed that they had ingested the same substance. He agreed that both PW1 and PW3 were engaged in farming and that pesticides were found where farming is done. He told the trial court that the things found in the appellant's house were not subjected to a toxicology examination. He stated that no Munkoyo drink was recovered from the appellant's house.

2.14 That generally marked the close of the prosecution evidence. The appellant was found with a case to answer and was placed on her defence. She opted to give evidence on oath and called no witnesses.

3.0 THE DEFENCE

3.1 In her defence, the appellant testified that on 3rd November, 2020, they had bread for breakfast and around 12:00 hours, she got some vegetables from her boss's garden. The following day as she was preparing to go to work, the deceased woke up and started crying. She gave him the Munkoyo drink which was in the house and she also drank some. After this, she reported for work and as she was picking up the dog's droppings she suddenly felt her heart race, started

sweating and felt weak. She went back to her house, undressed and slept on the floor.

3.2 She then called her daughter Charity to go and inform PW1 that she could not manage to report for work as she was not feeling well.

3.3 In her continued defence, she stated that when PW1 and her neighbour came to her house to check on her, she asked her to open the door. She dressed up and opened the door. She put the deceased on her back and they went to PW1's house. While there, she was asked to sit alone with the deceased on her back. After a short time, she started feeling dizzy and weak. The deceased started vomiting and in the process, she passed out and only found herself at the University Teaching Hospital (UTH) when she gained consciousness. She told the trial court that when she was discharged, she found a police officer waiting for her and she was taken to the UTH Police Station, where she was asked if she is the one who killed her son and she denied it.

3.4 She told the trial court that thereafter she was taken to Sangalala Police Station and her aunt by the name of Buni informed her that the deceased had been buried and that all her belongings had been

removed from the servant's quarter by PW1. She denied calling PW3 to inform her that her husband had left. She stated that her husband had gone to get ARVs from Kasisi where he was registered.

3.5 In cross-examination, the appellant stated that she drank Munkoyo and gave some to the deceased, and when she started feeling unwell she asked her daughter Charity to go and tell PW1 that she would not manage to report for work.

3.6 This marked the end of the defence case.

4.0 FINDINGS AND DECISION OF THE LOWER COURT

4.1 The trial court considered the evidence and written submissions presented before it by both parties. The trial court found that this case solely depended on circumstantial evidence and that the prosecution had proved the case against the appellant beyond reasonable doubt as the indirect evidence in this matter had attained a degree of cogency that took it out of the realm of conjecture, permitting only an inference of guilt to be drawn. The court convicted her of murder and sentenced her to death.

5.0 GROUNDS OF APPEAL

5.1 Discontented with the conviction and sentence imposed by the High

Court, the appellant filed two grounds of appeal as follows:

1. **The trial court erred when it found that there was malice aforethought in the absence of evidence on the record supporting the court's finding.**

2. **The court below erred in law and fact when it convicted the appellant upon circumstantial evidence when the guilt of the appellant was not the only inference that could be drawn from the evidence on the record.**

6.0 APPELLANT'S ARGUMENTS

6.1 In support of ground one, the learned counsel for the appellant contended that the trial court erred when it made a finding not supported by evidence on the record. According to counsel, the trial court infused its inferences when it held that: **"the appellant was upset by the husband leaving, that she wanted to kill herself and the deceased and that in the execution of that desire, she administered the poison to the deceased and herself."** We were referred to the case of **Phiri and Others v The People**[1] in which it was guided that:

> **"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 . . . "

6.2 Mrs. Lukwesa contended that this did not come from the evidence of PW3 with whom the appellant had a conversation, nor other witnesses that were present. It was submitted that having rightly excluded hearsay evidence attributed to a Charity who was not called as a witness, the remaining evidence on the record to the effect that the appellant and her husband had a marital dispute was weak.

6.3 In concluding her submission on ground one, counsel contended that the finding of malice aforethought by the court below should properly be found as having been made without evidence to support it and that no court properly acting would have arrived at such a finding.

6.4 In support of ground two, it was contended that the trial court erred when it convicted the appellant on circumstantial evidence when the guilt of the appellant was not the only inference that could be drawn from the evidence on the record. It was contended that the danger of drawing a wrong inference must be excluded before a court can feel safe to convict. We were referred to the case of **David Zulu v The People[2].** It was submitted that on the totality of the evidence before

the court below, it cannot reasonably be said that the only inference possible was that the appellant caused the death of her son.

6.5 We were referred to the case of **Dorothy Mutale and Richard Phiri v The People**[3] where it was held that **"where two or more inferences are possible, the court will adopt the one that is more favourable to the accused if there is nothing to exclude that inference."** It was counsel's submission that the inference that is favourable to the appellant is that she did not know of any organophosphate substance but merely took and gave her son the local drink. She was merely a victim but not a perpetrator of the offence for which the lower court found her guilty.

6.6 In conclusion, we were urged to allow the appeal and set aside the conviction as it was unsafe, given the fact that the circumstantial evidence herein was weak and failed to attain a degree of cogency which could permit only an inference of guilt.

7.0 RESPONDENT'S ARGUMENT

7.1 The respondent did not file any written arguments.

8.0 THE HEARING

8.1 At the hearing of this appeal, learned counsel for the appellant Mrs. Lukwesa, Acting Chief Legal Aid Counsel, informed the Court that she would rely on the filed heads of arguments. On behalf of the respondent, learned Deputy Chief State Advocate, Mrs. Chipanta-Mwansa indicated that the State did not support the conviction. She submitted that the evidence of administering the poison to the deceased is not directly there and the evidence relied on by the convicting judge included hearsay evidence. According to learned counsel, Charity was not called by the State to give a clear picture of what was actually communicated to her by the appellant as she sought for help from PW1.

8.2 She conceded that the evidence was not strong enough to support the conviction as there are several inferences that could be drawn from it. It was counsel's further contention that the failure by the State to bring the toxicology expert to speak to the toxicology report was fatal. Counsel urged us to allow the appeal.

9.0 CONSIDERATION AND DECISION OF THE COURT

9.1 We have carefully considered the evidence on the record, the arguments by both parties and the Judgment of the trial court.

9.2 The issue in this appeal is whether the circumstantial evidence is sufficient to warrant only an inference of guilt. As we see it, this is the only issue arising from the appellant's grounds of appeal, which by virtue thereof we shall consider together.

9.3 We wish to firstly deal with the toxicology reports. The pathologist (PW2) during post-mortem examination took blood samples from the deceased and sent them to the Food and Drug Laboratory for toxicology examination. She received the report back, which according to her, confirmed her suspicion. She then proceeded to produce the toxicology report into evidence as **"P4."** The arresting officer (PW4) obtained the toxicology results for the appellant from the Food and Drug Laboratory, which according to him matched the finding of the report for the deceased. He proceeded to produce it in evidence as **"P5."**

9.4 We hold the view that the learned trial court should not have allowed the production into evidence of **"P4"** and **"P5"** without the expert who

conducted the examination giving evidence in court. **Section 192(1) of the Criminal Procedure Code**[2] deals with the production of reports of public analysts provides that such report can be admitted without the maker if it is in an affidavit. In this case the report was not in an affidavit. It should not have been admitted without the author being called to testify. We therefore expunge **"P4," "P5"** and any other evidence premised or birthed therefrom.

9.5 The circumstantial evidence, therefore, is that the appellant and the deceased were rushed to the hospital on the material day on suspicion of poisoning. The deceased died four days later. The appellant survived and was arrested shortly after being discharged from hospital on suspicion of having poisoned her son, the deceased. The question that arises is whether on these facts it can be said that an inference that the appellant caused the death of the deceased is the only inference which could reasonably be drawn from the facts?

9.6 In the case of **David Zulu** *supra* the Supreme Court held that:

> **"(i) It is a weakness peculiar to circumstantial evidence that by its very nature it is not direct proof of a matter at issue but rather is proof of facts not in issue but relevant to the fact in**

issue and from which an inference of the fact in issue may be drawn.

(ii) It is incumbent on a trial judge that he should guard against drawing; wrong inferences from the 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.

(iii) The appellant's explanation was a logical one and was not rebutted, and it was therefore an unwarranted inference that the scratches on the appellant's body were caused in the course of committing the offence at issue."

9.7 From the foregoing land mark decision, a conviction cannot lie if an explanation by the accused can reasonably be true. Further, in order to convict on circumstantial evidence, an inference of guilt must be the only inference which can reasonably be drawn from the facts. We agree with the learned Deputy Chief State Advocate and learned counsel for the appellant that the circumstantial evidence in this case is so weak that an inference of guilt is not the only inference which could reasonably be drawn from the facts.

9.8 In the circumstances of this case, it is possible that the appellant poisoned herself and her son. It is also possible that the container in which the Munkoyo was put could have contained some pesticides or the vegetables the appellant plucked from the garden. It has always been a cardinal principle of criminal law that where two or more inferences are possible, one more favourable to the accused person must be drawn (see **Dorothy Mutale** case *supra*).

9.9 We accordingly allow the appeal. We quash the conviction, set aside the sentence of death and set the appellant at liberty forthwith.

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C. F. R. MCHENGA

DEPUTY JUDGE PRESIDENT

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C. K. MAKUNGU

COURT OF APPEAL JUDGE

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K. MUZENGA

COURT OF APPEAL JUDGE