IN THE COURT OF APPEAL OF ZAMBIA **Appeal No.158/2021**
HOLDEN AT LUSAKA AND NDOLA
(Criminal Jurisdiction)

BETWEEN:

KACHINGWE DAKA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Mchenga DJP, Sharpe-Phiri and Muzenga, JJA

ON: 15th June 2022 and 22nd February 2023

For the Appellant: **E. Mazyopa, Senior Legal Aid Counsel, legal Aid Board**

For the Respondent: **N. Munkombwe, State Advocate, National Prosecution Authority**

J U D G M E N T

Mchenga DJP, delivered the judgment of the court.

Cases referred to:

1. Kashenda Njunga, Francis Kandonga Kangeya, George Musenga Chikatu, Chimunga Kangol Shamuzala and Oscar Maseke Makuwa v. The People [1988-1989] Z.R. 1
2. Michael Njobvu v. The People [2011] 2 Z.R. 358
3. R v. Onufrejczyk [1955] 1 All. ER. 247
4. John Mpande v. The People [1977] Z.R. 440

Legislation referred to:

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

1. INTRODUCTION

1.1. The appellant appeared before the High Court (Chenda, J.), on a charge of murder contrary to **Section 200 of The Penal Code.**

1.2. He denied the charge and the matter proceeded to trial.

1.3. At the end of the trial, he was convicted of the lesser offence of manslaughter, contrary to **Section 199 of The Penal Code**, and sentenced to 99 years imprisonment.

1.4. Although the appeal is only against the sentence, the question the matter raises is whether it was proper for the trial court to convict the appellant of the offence of manslaughter.

2. CASE BEFORE THE TRIAL JUDGE

2.1. The case against the appellant was that one morning, in the year 2018, he visited the house of Dorothy Phiri in Chipote Village, in Chief Mumbi's area in Petauke. Although they were not married, the two had a daughter named Juliana. She was two years old at the time.

2.2. The appellant told the Child's mother that, he had come to collect Juliana so that his parents could see her, and that he would bring her back later that day.

2.3. He was allowed to collect Juliana but he did not take her back to her mother when he returned to the village, that evening.

2.4. The appellant told Juliana's mother that his cousin would bring her the following morning. But no one took her back the following morning or subsequently.

2.5. Thereafter, whenever the appellant was asked about the whereabouts of Juliana, he would claim that she was with his parents in Lusaka. But his parents denied ever seeing the child.

2.6. In April 2019, Juliana's mother reported the missing of the child to the chief. The chief redirected her to the police in Petauke.

2.7. Towards the end of April 2019, Emmanuel Lungu, a Community Crime Prevention Unit (CCPU) member, was instructed by the police to apprehend the appellant.

2.8. Emmanuel Lungu and other members of the CCPU followed the appellant to a village within Petauke District, where he was reported to be repairing a hammer mill.

2.9. On seeing them, the appellant ran away, but they managed to apprehend him and they handed him over to Detective Chief Inspector Mutale, of Petauke Police Station.

2.10. On the 24th of April 2019, the appellant led the police to a grave where human bones were recovered.

2.11. The bones were examined by Dr. Victor Telendiy, a forensic pathologist, on 16th November 2020.

2.12. He opined that they were for a child aged between two and three years. However, he was unable to tell the sex of the child, nor the cause of its death.

2.13. In his defence, the appellant admitted collecting Juliana from her mother. He said he went drinking soon after collecting her, and the child went missing whilst he was at the drinking place.

2.14. He could not remember the people he was drinking with and he was scared to report that the child was

missing, although he continued looking for her up to the day of his apprehension.

2.15. He admitted leading the police to the recovery of the bones of a child, but said he took them to the grave after they beat him and insisted that they wanted the child.

3. FINDINGS BY THE TRIAL JUDGE

3.1. The trial Judge found that the bones that were recovered where for Juliana because there was evidence that she was about 2 years old at the time she disappeared, and the recovered bones were for a child aged between 2-3 years.

3.2. He also found that since the appellant was the last person to be seen with the child alive, the appellant had the opportunity to commit the crime.

3.3. Further, the trial Judge found that there was no evidence that the appellant intended to take the child to a relative on the day he collected her.

3.4. In addition, the trial Judge found "unexplained odd coincidences", that he concluded, incriminated the appellant.

3.5. While the police were looking for a child, the appellant led them to a grave, where he pointed at a spot where the bones of a child, of the missing child's age, were buried.

3.6. The appellant never informed anyone of the child going missing, nor did he call any people from the place where he claimed he was drinking at the time the child went missing, to give evidence on his behalf.

3.7. Finally, the appellant fled at the time when CCPU members went to apprehend him.

3.8. However, the trial Judge concluded that *malice aforethought,* was not proved and that being the case, the evidence did not support a charge of murder. He came to this conclusion after noting that although the pathologist found that the recovered bones showed signs of damage on them, he could not determine whether it was occasioned before or after, the child had died.

3.9. Consequently, he convicted the appellant of the lesser offence of manslaughter.

4. <u>CONSIDERATION OF THE APPEAL AND DECISION OF THE COURT.</u>

4.1. Although this appeal is only against the sentence, **Section 16(4) of The Court of Appeal Act,** allows us to consider the propriety of the conviction. This provision reads as follows:

> **"The Court may, on appeal, whether against conviction or sentence, substitute a judgment of guilty for such other offence as the trial court could have entered and in the case of an appeal from the judgment of the High Court in the High Court's exercise of appellate jurisdiction, the court shall, in addition, have power to restore the conviction of the trial court."**

4.2. Crucial to the determination of the propriety of the conviction in this case, is the question whether there was sufficient evidence before the trial Judge to warrant the finding that Julian was dead and that she did not die of natural causes.

4.3. Section 207 of The Penal Code defines causing death in the following manner:

> **"A person is deemed to have caused the death of another person although his act is not the immediate or sole cause of death in any of the following cases:**
>
> **(a) If he inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes death. In this case it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith**

and with common knowledge and skill; but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith or was so employed without common knowledge or skill;

(b) If he inflicts bodily injury on another which would not have caused death if the injured person had submitted to proper surgical or medical treatment or had observed proper precautions as to his mode of living;

(c) If by actual or threatened violence he causes that other person to perform an act which causes the death of that person, such act being a means of avoiding such violence which in the circumstances would appear natural to the person whose death is so caused;

(d) If by any act or omission he hastens the death of a person suffering under any disease or injury which apart from such act or omission would have caused death;

(e) If his act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons"

4.4. Ordinarily, the cause of death is proved by expert medical evidence, following a post-mortem examination of the body.

4.5. However, there are instances where even in the absence of medical evidence, a witness who is a layman, can give evidence that proves the cause of

death; see the cases of **Kashenda Njunga and Others v. The People**[1] and **Michael Njobvu v. The People**[2].

4.6. In both the situations we have just outlined, the medical expert or the eyewitness, would have respectively, either examined or seen the body of the dead person.

4.7. In this case, the body of the missing girl was not found.

4.8. Further, even though the trial Judge concluded that the bones that were recovered after the appellant led the police to a grave, belonged to the missing girl, the pathologist failed to determine the cause of the child's death.

4.9. The question that then follows, is, was it competent, in the circumstances of this case, for the appellant to be convicted for the offence of manslaughter, when there was no medical evidence of the cause of death?

4.10. In the case of **R v. Onufrejczyk**[3], the appellant was tried and convicted of the murder of one Sykut, his partner in a farming partnership.

4.11. The partnership had failed and Sykut had expressed the desire to leave. Sykut disappeared completely without trace and his body was not found.

4.12. Some minute amounts of Sykut's blood where found on the wall and ceiling, in the house the appellant and his partner lived.

4.13. After the disappearance of Sykut, the appellant gave an account of his partner's disappearance, that was improbable and inconsistent with an account he had given to a public official. He also wrote letters that created the impression that Sykut had left and did not intend to return.

4.14. The appellant also endeavoured to persuade a blacksmith to say that his partner had visited him on a date later than he had actually done.

4.15. An issue that arose during the hearing of the appeal was whether it was competent for the appellant to have been tried and convicted on a charge of murder, when the body of the murdered man had not been found.

4.16. The Court of Appeal for England, held that:

> **"On a criminal charge, the fact that the murdered man was killed, like any other fact, can be proved by circumstantial evidence, being evidence which leads only to that one conclusion of fact, although no body is found"**

4.17. The court also held that:

> **" in the present case there was evidence from which the jury could infer that S. was dead, and, if he was dead, the circumstances of the case pointed to the fact that his death was not a natural death, and accordingly, the jury having been warned that the circumstantial evidence must be so cogent as to convince them that the facts could not be accounted for on any other rational hypothesis than murder, a corpus had been established and the jury where entitled to find that the appellant murdered S."**

4.18. From the holding in the case the case of **R v. Onufrejczyk**[3], it is clear that circumstantial evidence can be used not only to prove that a person is dead but also that the person was murdered.

4.19. This is possible, in a case where the evidence is so cogent, that the only inference that can be drawn is that the person was dead and was murdered.

4.20. In this case, we cannot fault the trial Judge for coming to the conclusion that Juliana was dead. The circumstantial evidence points to that fact. The appellant collected Juliana on the pretext that he

appellant collected Juliana on the pretext that he was going to take her back after presenting her to his parents. He never took the child to his parents nor did he take her back to her mother.

4.21. When he was pressed for the child, he led the police to a grave, where the bones of a young child where recovered, yet in court, for the first time, the appellant claimed that the child had gone missing.

4.22. His explanation for leading the police to the grave was that it was because they beat him and insisted that he makes the child available. This claim was rejected by the trial Judge, and rightly so, in our view.

4.23. This evidence, be it circumstantial, proves that Juliana is dead.

4.24. However, we take issue with the trial Judge's finding the prosecution failed to prove that Juliana was murdered, because they did not prove *malice aforethought* and hence he convicted him for the lesser offence of manslaughter.

4.25. The offence of manslaughter is set out in **Section 199 of The Penal Code.** It reads as follows:

> **"Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed "manslaughter". An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm"**

4.26. On the other hand, the offence of murder, which is set out in **Section 200 of the Penal Code**, reads as follows:

> **"Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder"**

4.27. *Malice aforethought* is defined in **Section 204 of The Penal Code.** It provides as follows:

> **"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:**
>
> **(a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;**
>
> **(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**
>
> **(c) an intent to commit a felony;**

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony"

4.28. From the foregoing, it is clear that a conviction for manslaughter, is appropriate where there has been a killing and the act that caused death was unlawful, yet there was no intention to cause death or the act was unlikely to cause grievous harm.

4.29. In the case of **John Mpande v. The People**[4], it was held that:

(i) The offence of manslaughter does not consist simply in an unlawful act resulting in death; the act must at the same time be a dangerous act, that is, an act which is likely to-injure another person.

(ii) The unlawful act must be such as all sober and reasonable people would inevitably recognise must subject the other person to at least the risk of some harm resulting therefrom, albeit not serious harm.

(iii) The likelihood of harm may stem not only from the violence of the unlawful act itself, but may arise also because of the circumstances in which the violence took place.

4.30. However, even where the act causing death was unlawful and there was an intention to cause death or to cause grievous harm, or where it was probable that the unlawful act or omission, would cause death or grievous harm, one can be convicted of the offence

of manslaughter if he successfully raises the defence of provocation under **Section 205 of The Penal Code.**

4.31. The appellant having led no evidence on the circumstances in which Juliana lost her life, it is our view that there was no evidence on which the trial Judge, could have drawn the inference, or come to the conclusion that an unlawful act by the appellant, which act was not intended to cause death or cause grievous harm, caused Juliana's death.

4.32. This being the case, the trial Judge erred when he found that *malice aforethought* was not proved. Although the actual cause of death was not determined by the post-mortem, the only inference that could have been drawn from the evidence that was before the trial Judge was that after the appellant collected the child, he murdered the child.

4.33. Consequently, we set aside the appellant's conviction for the offence of manslaughter. We also set aside the 99 years sentence.

4.34. In its place, we convict him of the offence of murder contrary to **Section 200 of The Penal Code.**

4.35. In view of our decision to set aside the appellant's conviction for the offence of manslaughter, the grounds in support of this appeal, that related to the sentence for the offence of manslaughter, have been rendered otiose.

5. VERDICT

5.1. Having convicted the appellant for the offence of murder, we are obliged to consider whether there were any extenuating circumstances in his favour.

5.2. It is our finding that there are none.

5.3. We note that at the time the appellant was tried, capital punishment was the mandatory penalty where a person was convicted of the offence of murder and there were no extenuating circumstances.

5.4. However, following **The Penal Code Amendment Act No. 23 of 2022,** the courts no longer have the power to impose such a punishment. This is the position even in cases where capital punishment was the penalty at the time the offence was committed or the accused person was arraigned for trial.

5.5. This being the case, we sentence the appellant to life imprisonment.

.....
C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT

.....
N.A. Sharpe-Phiri
COURT OF APPEAL JUDGE

.....
K. Muzenga
COURT OF APPEAL JUDGE