

**IN THE COURT OF APPEAL OF ZAMBIA**

**APPEAL NO. 27/2024**

**HOLDEN AT LUSAKA**

*(Criminal Jurisdiction)*

**BETWEEN:**

**COLLINS NC'UBE**

**AND**

**THE PEOPLE**



**APPELLANT**

**RESPONDENT**

**CORAM: MCHENGA, DJP, NGULUBE AND CHEMBE, JJA.**

***On 13<sup>th</sup> January and 18<sup>th</sup> February, 2025.***

***For the Appellant*** : *Ms. M. K. Liswaniso, Deputy Chief Legal Aid Counsel, Legal Aid Board*

***For the Respondent*** : *Mrs. R. Malibata Jackson, Senior State Advocate National Prosecutions Authority*

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## **J U D G M E N T**

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**NGULUBE, JA** delivered the Judgment of the Court.

**Cases referred to:**

1. *David Zulu vs The People (1977) ZR151*
2. *Mbinga Nyambe vs The People, SCZ Judgment Number 5 of 2011*
3. *Saidi Banda vs The People SCZ Appeal Number 114 of 2015*
4. *John Mbao vs The People SCZ Appeal Number 115 of 2011*

5. *Eziuous Munkombwe and others vs The People CAZ Appeal No. 7, 8, 9 of 2017*
6. *Chimbini vs The People (1973) Z.R. 191*

**Legislation referred to:**

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

**1.0 INTRODUCTION**

- 1.1 The appellant was tried and convicted of the offence of Murder by Banda – Bobo, J, (as she then was) sitting at the High Court in Lusaka. It was alleged that on an unknown date but between 11 May, 2015 and 21 July, 2015, in Lusaka, the appellant murdered Precious Semu.

**2.0 CASE BEFORE THE TRIAL COURT**

- 2.1 The facts established by the court below are that on 11 May, 2015, Edna Kapalamoto (PW1) returned home from work and was informed that one of her three children, Precious Semu had gone missing. PW1 was given the description of the person who went away with her daughter and from that, she concluded that it was the appellant as he fitted the description and was a regular visitor at her home. PW1 went to the place where the appellant

lived and was informed that he had shifted to an unknown place. She then went to the church elder's house to inquire whether he had seen the appellant that day and she learnt that infact, the church elder's wife had seen the appellant pass by her house with a child who she did not know earlier that day.

2.2 PW1 reported the matter to the Police and did not see her daughter again until she was called by the police a month later. She was asked to go and see remains of a child that were found in the bush near Ibex Hill. PW1 identified the remains to be those of her missing daughter Precious although they were partially burnt. She identified the pair of pink trousers that the child wore on the day that she disappeared and also identified the hairstyle that she plaited her daughter's hair into before the child met her fate.

2.3 PW1 knew the appellant well as he was married to her cousin. She had a cordial relationship with him and her daughter was fond of him and referred to him as her uncle.

2.4 PW2, Ethel Mbewe's evidence was that she was with Precious on the material day when she was picked up by an uncle but did not

return home. PW2 stated that she could not identify the uncle who picked up Precious.

2.5 PW3, Emelia Mubamba's testimony was that she discovered the skeletal remains of a child in the bush in Ibex Hill area and reported the matter to the police.

2.6 PW4, Kelvin Muya was PW1's bother-in-law. He accompanied her to the police when she went to report that her daughter was missing. He made efforts to meet the appellant to find out where the missing child could be but the appellant was elusive and was not available.

2.7 PW5, Bridget Mutumba's testimony was that she was at home with Precious and her siblings on 11 May, 2015 in the morning. She saw the appellant with Precious and another child at the roadside and observed them for a while before she went back into the house. When she returned, the appellant and Precious were not there anymore. She knew the appellant as an uncle to the children. He stood at the roadside for about 10 minutes on the material day and PW5 observed him for about five minutes.

2.8 PW6, Kennedy Kapalamoto's testimony was that he was involved in the search for the missing child and went to the appellant's

house but he eluded him. Eventually, the appellant, who he had known for 15 years was apprehended and taken to the police.

2.9 PW7, Walter Kumetsa's testimony was that he was involved in the search for the appellant, who was found in Salama Park on 12 May, 2015. When he was questioned about the whereabouts of the missing child, the appellant told PW7 that he parted with her after he gave her a 50 ngwee coin. When the appellant was asked to accompany PW7 and the other people to the police, he wore a jacket and strangely, he vanished before their eyes. PW7 stated that his wife told him that she saw the appellant pass by their home with a young girl in the morning on 11 May, 2015.

2.10 PW8, Clara Kumetsa's testimony was that on 11 May, 2015, she sat outside her house in Chainda, which was along the road to the market. She saw the appellant pass by her house in the company of a girl aged about 9 years, who wore a pink pair of trousers. The appellant told PW8 that he was on his way to visit his sister, Bana Natasha at her house which was about 150 metres away. He passed by her house around 10:00 hours and PW8 stated that she knew the appellant well because they attended the same church.

- 2.11 PW9, Shabang'amba Choongo, the arresting officer testified that on 21 July, 2015, the remains of a juvenile child were found in the bush in Ibex Hill and were identified by the mother to be those of Precious Semu, the child who had gone missing in May, 2015.
- 2.12 A postmortem examination that was conducted revealed that the child died as a result of head injuries. He arrested the appellant for the subject offence.
- 2.13 In his Defence, the appellant denied any knowledge of the missing child. He admitted knowing PW1 and her children and that he went to the same church as PW8 but maintained that all the witnesses gave false testimony against him.

### **3.0 FINDINGS BY THE TRIAL JUDGE**

- 3.1 The trial Judge took the view that the case against the appellant was anchored on circumstantial evidence. She noted that the cause of the child's death, as per the postmortem report, was brain hemorrhage due to hematoma of the head and blunt force head injury.
- 3.2 The court further found that the appellant was very familiar with the child as they lived together in one house at one point. The

court further found that the appellant passed by PW8's house in the company of the child on the fateful morning.

3.3 The court went on to find that the appellant placed himself at the scene because he admitted meeting PW8 near a shop and he told her that he was going to Mike's father's home which was near his sister's home. The court found that when the appellant was told about the missing child, he left Chainda and went back to Mtendere East where he had shifted to, without helping with the search for the missing child.

3.4 The court found that PW8 saw the appellant pass by her house with a girl who wore pink trousers and these were, the clothes that fitted the description of what Precious wore the day she disappeared. The court concluded that the circumstantial evidence linked the appellant to the commission of the offence and that PW5 and PW8 corroborated each other, that the appellant was the last person who was seen with the child while she was alive.

3.5 The court concluded that the only inference that could be drawn was that the appellant murdered the child and he was convicted and sentenced accordingly.

#### 4.0 GROUND OF APPEAL AND ARGUMENTS IN SUPPORT

4.1 The appellant was dissatisfied with the decision of the court and appealed to this court, advancing one ground of appeal couched as follows-

**1. *The learned trial court erred in law and fact when the court found that the circumstantial evidence in this matter had taken the case out of the realm of conjecture such that the only inference left was that the appellant was the one who committed the crime and convicted him accordingly.***

4.2 It was contended that although PW2 testified that the missing child was picked up by an uncle, she did not know him and had not seen him before. It was further contended that although PW5 stated that she saw the appellant stand at the roadside with Precious, she did not see him leave with her.

4.3 The cases of ***David Zulu vs The People***<sup>1</sup> and ***Mbinga Nyambe vs The People***<sup>2</sup> were referred to, where the court emphasized that a conclusion based purely on inference can be drawn only if it is the only reasonable inference on the evidence.

4.4 It was submitted that the appellant was with Precious the day she went missing and gave her a 50 ngwee coin thereafter they



parted. It was contended that although PW8 stated that she saw the appellant with the child on the fateful day, this did not place the appellant at the scene of the crime as the scene of crime was the place where the child's remains were found.

4.5 It was submitted that there was no evidence on record that connected the appellant to the killing of Precious, whose body was found one month after she went missing.

4.6 It was argued that Precious could have been attacked and killed by anyone. We were urged to allow the sole ground of appeal, quash the conviction and set the appellant at liberty.

## **5.0 STATE'S RESPONSE**

5.1 The respondent informed the court that they were in support of the conviction.

5.2 In response to the argument that the inference of guilt was not the only inference that could be drawn in the matter, the State referred to the case of ***Saidi Banda vs The People***,<sup>3</sup> where the Supreme Court guided on the steps that a Judge must take when the prosecution's case rests solely on the circumstantial evidence.

- 5.3 It was submitted that the prosecution must establish basic facts and infer from a combination of those facts that further facts exist. The court must then be satisfied that those further facts point to nothing else but the guilt of the accused person. It was submitted that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human possibility, the offence was committed by the appellant.
- 5.4 It was submitted that the evidence from PW2, PW5 and PW8 was that the appellant was with Precious on the day that she went missing and that he was the last person that was seen with the child before she left home.
- 5.5 Our attention was drawn to the case of ***John Mbao vs The People***,<sup>4</sup> where the Supreme Court stated that opportunity to commit a crime can amount to corroboration.
- 5.6 It was contended that the only reasonable inference that can be drawn from the combination of facts is that of the appellant's guilt. We were urged to dismiss the appeal for lack of merit.

## **6.0 HEARING**

6.1 At the hearing of the appeal, both Counsel relied on their respective arguments with brief augmentation.

## **7.0 CONSIDERATION OF THE APPEAL AND THE COURT'S DECISION**

7.1 We have considered the submissions from learned Counsel. The sole ground of appeal contends that the learned trial Judge convicted the appellant on circumstantial evidence, which did not point at the appellant as the person who murdered the child.

7.2 In the case of **David Zulu vs The People** (*supra*) the Supreme Court guided 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."***

7.3 In the case of **Eziou Munkombwe and others vs The People**,<sup>5</sup> this Court stated that-

***"When considering a case anchored on circumstantial evidence, the strands of evidence making up the case against the appellant must be looked at in their totality and not individually."***

7.4 In the case at hand, it is not in dispute that the appellant was with Precious on 11 May, 2015, the day that she was last seen alive. Two persecution witnesses, PW5 and PW8 testified that they saw the appellant with Precious and that he even walked with her on the road leading to Chainda market. The appellant however maintained that he gave Precious a 50 ngwee coin and that thereafter, they went their separate ways.

7.5 We note that the appellant, when contacted to give details and help in the search for the missing child offered no assistance and eluded the group of people who were looking for him. The appellant opted to return to Mtendere East, a place he relocated to soon after the child went missing.

7.6 We agree with the trial Judge that this case rests on circumstantial evidence as none of the prosecution witnesses testified that they saw the appellant kill Precious. In some cases, circumstantial evidence may be the best form of evidence as it is proof of facts not in issue from which an inference may be made which settles matters in issue. In order to convict on circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of

explanation upon other hypothesis than that of the accused's guilt.

7.7 In the case of **Saidi Banda vs The People** (*supra*) the Supreme Court guided that-

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

7.8 What we derive from the set of facts in the record is that the appellant picked up Precious from her mother's house and was

seen walking with the child later that morning, by PW8. The child was not seen alive again and her remains were discovered in the bush on 21 July, 2015. The mother (PW1) identified the remains to be those of her daughter and when DNA tests were carried out, this was also confirmed.

7.9 In her Judgment, the learned trial Judge stated that-

***“I believe strongly that the circumstantial evidence has effectively linked the accused herein to the commission of the crime. The accused herein was placed at the scene of crime. He was in the vicinity of the crime scene according to his own evidence and was actually seen by credible witnesses, one of who saw him with a child which child I find was the missing child.”***

7.10 We are satisfied that the learned trial Judge was on firm ground when she drew the inference of guilt on the basis of the circumstantial evidence before her. The totality of this circumstantial evidence which is that the appellant was the last person seen with the child before she went missing and was found dead in the bush two months later, takes this case out of conjecture.

7.11 We take the view that the circumstantial evidence against the appellant is so cogent and strong that the lower court drew only

one reasonable inference, that the appellant is the one who murdered the child.

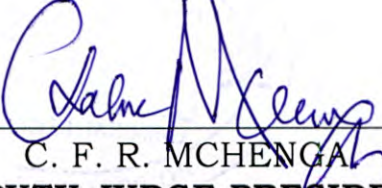
7.12 The fact that the appellant was elusive and did not want to be involved in the search for the missing child when he was the last person who was seen with her is indeed an odd coincidence, which suggests that the appellant was running away because he knew what he had done wrong.


7.13 In view of the circumstantial evidence, we do not find it to be reasonable, the appellant's explanation that he parted ways with the child after he gave her a 50 ngwee coin and that she could have been murdered by anyone. The evidence of PW8 is even more damning as she stated that she saw the appellant walk with the child along the Chainda market road and he told PW8 that he was going to his sister, Bana Natasha's house. This evidence, in no way, suggests that the appellant merely gave the child 50 ngwee and then parted ways with her.

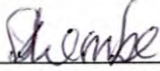
7.14 We therefore find that the circumstantial evidence in this case was so cogent that it left only one inference to be drawn and this is that the appellant is the one who murdered the child. In the case of ***Chimbini vs The People***,<sup>6</sup> the Supreme Court held that-

***“Where the evidence against an accused person is purely circumstantial, and his guilt entirely a matter of inference, an inference of guilt may not be drawn unless it is the only inference which can be drawn from the facts.”***

7.15 For the reasons given above we find no merit in this appeal. We uphold the conviction and sentence of the lower court. The appeal is accordingly dismissed.

  
C. F. R. MCHENGA  
**DEPUTY JUDGE PRESIDENT**

  
P. C. M. NGULUBE  
**COURT OF APPEAL JUDGE**

  
Y. CHEMBE  
**COURT OF APPEAL JUDGE**