

**IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA**

(Criminal Jurisdiction)

Appeal No. 64, 65/2020

B E T W E E N:

MUYAUKA WAMUNDILA

APPELLANT

AND

THE PEOPLE

RESPONDENT

**Coram: Muyovwe, Hamaundu and Chinyama, JJS
on 6th October, 2020 and 10th November, 2020**

For the Appellant: Mr. M. Mankinka, Senior Legal Aid Counsel

For the Respondent: Ms. O. Muhwende, Senior State Advocate

J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court

Cases referred to:

1. **Alimoni Njovu vs. The People (1989/89) Z.R. 5**
2. **Ignatius Nyirenda vs. The People SCZ Appeal No. 359/2013**
3. **Goba vs. The People (1966) Z.R. 113**
4. **Richard Daka vs. The People SCZ Appeal No. 333/2013**
5. **Kashenda Njunga vs. The People (1988/89) Z.R. 1**
6. **Ndakala vs. The People (1980) Z.R. 180**
7. **Maketo and 7 Others vs. The People (1979) Z.R. 23**

This is an appeal against conviction. The matter was presided over by Mulenga J (as she then was) sitting at Mongu High Court

and the judgment appealed against was delivered on the 27th July, 2012.

The appellant was originally jointly charged with his first wife Mundia Mwangelwa and Mundia Sakubita of one count of abduction to murder and three counts of murder. It was alleged that on the 7th July, 2011 at Senanga in the Senanga District of the Western Province of the Republic of Zambia the trio jointly and whilst acting together they abducted PW4 a girl child aged 7 years with intent to murder. The appellant and his first wife Mundia Mwangelwa (who was the 3rd accused) in the court below were found guilty and convicted of count one and sentenced to 10 years imprisonment with hard labour and six years simple imprisonment respectively. Mundia Sakubita who was the 2nd accused in the court below was acquitted.

The appellant, his first wife and Mundia Sakubita were also charged with three counts of murder of three young children aged 4 years, 3 years and 2 years. It was alleged that on a date unknown but between 6th June, 2011 and 10th June, 2011 at Lyangati in the Senanga District of the Western Province of the Republic of Zambia

jointly and whilst acting together they murdered the three named children of tender years. The appellant was found guilty and sentenced to suffer death on the three counts of murder while his first wife and Mundia Sakubita were acquitted. In our judgment we will inevitably refer to the evidence relating to the appellant's first wife and Mundia Sakubita in order to complete the picture of the happenings in this rather tragic case. This is more so that the learned trial judge relied heavily on the evidence of the appellant's first wife.

Unfortunately, the record of appeal was incomplete. For example, the evidence of the appellant and his co-accused was not on record. Therefore, we placed much reliance on the judgment of the lower court to discern the facts of the case.

In her judgment, the learned trial judge noted that the case was anchored on the evidence of PW4 a child of tender years aged 7 years at the time of the incident and who gave unsworn evidence during trial after a *voire dire* was conducted. She testified that on the fateful morning, Mundia Mwangelwa called her and also told her to call her three siblings. At the time, PW1, the mother to the

children was not home though she was nearby and could hear the noise of her children as they played at her home. According to PW4, Mundia Mwangelwa handed them over to the appellant who took them in a canoe across the river to Lishekano village. On 6th June, 2011, PW1 and others in the village searched for the children but to no avail until 10th June, 2011 when they were found at Lishekano Village by PW3 who was passing by. Only PW4 survived while the other children were found dead.

The learned trial judge addressed her mind to the need for corroboration of PW4's evidence in line with Section 122 of the Juveniles Act. She found this in the evidence of PW6 the headman who witnessed the appellant's first wife leading the police to where she got the children from and where she handed them to her husband, the appellant herein. Having found the corroboration, she accepted that it was the appellant who took the children to Lishekano on 6th June, 2011. That there could be no mistaken identity of the appellant by PW4.

The learned trial judge found that the appellant's first wife's evidence was an afterthought and she found discrepancies in her evidence. She questioned her demeanour and credibility as she was unable to answer questions relating to the evidence of leading and contents of her confession. She noted that while the search was in progress, she did not reveal that her husband was the last person seen with the four children.

The learned trial judge found that malice aforethought was established taking into account the evidence of PW4 as to what transpired at Lishekano where the deceased were undressed and their arms twisted and were left lying on the ground asleep by the appellant and his colleagues and were found in that state. PW8 the police officer testified that the necks of the children were broken. There was only one inference: that the appellant and his colleagues caused the death of the three children.

She acquitted the appellant's first wife on the three counts of murder on the ground that there was no proof beyond reasonable doubt that she knew what was going to happen to the children and that this must be considered in her favour in line with the case of

Alimoni Njovu vs. The People.¹ The learned trial judge found that there was no common purpose or intention to commit murder and found her not guilty of the three counts of murder and acquitted her.

However, she found Mundia Mwangelwa guilty of count 4 on the ground that in her warn and caution statement she admitted that she called PW4 and handed her over to the appellant as requested. The learned trial judge relied on the confession, the evidence of leading, PW4's evidence and her silence during the search for the children revealed her guilty mind. The learned trial judge concluded that the first appellant's wife aided and abetted her husband in abducting PW4 with intent to murder her. She convicted her and sentenced her to 6 years simple imprisonment.

The appellant has raised three grounds of appeal. The first ground of appeal attacks the trial court for receiving unsworn evidence from PW4, a child of tender years, contrary to Section 122 of the Juveniles Act Cap 53 of the Laws of Zambia. Relying on the cases of **Ignatius Nyirenda vs. The People,**² **Goba vs. The People**³ and **Richard Daka vs. The People,**⁴ Mr. Mankinka's argument is

that PW4's evidence should be discounted in view of non-compliance with Section 122 by the trial court.

Ms. Muhwende conceded that the learned trial judge erred when she allowed PW4 to give unsworn evidence and agreed that the evidence should be discounted.

The record of proceedings in the court below shows that after conducting the *voire dire*, the trial judge made the following ruling:

“....the child does not seem to know the nature of an oath will let her give unsworn evidence....”

In this case it appears that the learned trial judge adopted the requirements before the amendment to Section 122. The Section is clear that the trial court must satisfy itself as to whether the child witness possesses sufficient intelligence to give evidence on oath and whether he/she understands the duty to speak the truth. If the child does not meet these criteria, the child has failed the test and will not be allowed to give evidence at all. In other words, there is no longer room for the reception of an unsworn statement of a child. The learned trial judge misdirected herself when she adopted the procedure which was repealed by Act No. 3 of 2011. We agree with

learned Counsel for the parties that the evidence of PW4 should have been and must be discounted. We find merit in ground one of the appeal.

In ground two, Counsel accused the trial judge of misapprehending the evidence which she considered to be corroborative of PW4's evidence. In her judgment, the learned trial judge made it clear that the appellant's conviction was based on the evidence of PW4 which evidence required corroboration. In the case of **Ignatious Nyirenda vs. The People**² which Counsel for the appellant referred us to, we guided that it is a misdirection to apply the repealed law and the evidence of the child witness was discounted. Similarly, in the case in *casu*, the trial judge misdirected herself when she relied on repealed law when she received unsworn evidence of a child of tender years contrary to the requirements under Section 122 of the Juveniles Act. It is, therefore, unnecessary to go into the question of corroboration of evidence which the learned trial judge should not have received and ought not to have relied on. Ground two succeeds as well.

In the third ground of appeal, Mr. Mankinka relying on the case of **Kashenda Njunga vs. The People**⁵ argued that the prosecution did not produce any medical reports as to the cause of death of the deceased and in his view, this was fatal to the prosecution case. In his argument, Counsel referred us to the unsworn evidence of PW4 which we have already held was inadmissible. In the main, Mr. Mankinka submitted that an inference of guilt was not the only inference to be drawn from the circumstances of this case. He submitted that there was more than one inference to be drawn. However, he did not shed light as to what the other inference was.

In responding to her learned friend's argument, Ms. Muhwende submitted that this was a borderline case and the absence of medical evidence as to the cause of death was not fatal. She pointed out that the evidence of the arresting officer confirmed that the necks of the deceased children were broken thereby indicating that there was an assault. We were urged to dismiss the appeal for lack of merit.

We have considered the third ground of appeal. We must state from the outset that learned Counsel have missed the real issue

pertaining to this appeal. The fact that no medical evidence was produced as to the cause of death is not fatal to the prosecution case. The fact that the three children died of unnatural causes at the hands of some unknown person or persons was not in dispute. The question is who killed the children? Is there evidence pointing to the guilt of the appellant as the murderer and is this the only reasonable inference going by the facts of the case? The evidence incriminating the appellant came from PW1 who stated that the appellant talked to her the morning the children went missing. The appellant offered to take her rice for sale to Lusaka, but she declined. According to PW1 the appellant soon disappeared into the bush and after a few minutes she could not hear the voices of the children. She, however, conceded that the children sometimes would leave her village and go to play at her uncle's place, and this was her initial thought. We take the view that PW1's evidence did not in any way link the appellant to the murder of the children.

Then there was evidence from Mundia Mwangelwa (3rd accused in the court below) who in her warn and caution statement confessed to have handed over PW4 to the appellant. According to

the learned trial judge the confession statement corroborated the evidence of PW4. In the case of **Ndakala vs. The People**⁶ the High Court had occasion to deal with this issue and held that:

(ii) **When an accused makes an extra-judicial statement in the absence of a co-accused, it cannot be regarded as evidence against the latter accused; but when the accused goes into the witness box at the trial and gives evidence which incriminates his co-accused, that evidence is admissible against the latter accused, and it may be regarded as evidence for the prosecution against him.**

In the case of **Maketo and 7 Others vs. The People**⁷ cited by the learned trial judge in her judgment, this court held that:

(i) **An extra-curial confession made by one accused person incriminating other co-accused is evidence against himself and not the other persons unless those other persons or any of them adopt the confession and make it their own.**

Going by the above authorities, the confession by Mundia Mwangelwa (3rd accused in the court below) was incriminating against herself and not the appellant. It certainly could not corroborate PW4's evidence and in any case, we have already held that PW4's evidence should not have been received by the trial court.

In conclusion, this case was dependent on the evidence of PW4 a child of tender years and her evidence having been discounted and taking into account the totality of the evidence, we find the inference

of guilt was not the only reasonable inference to be drawn from the facts of this case. The prosecution failed to adduce any evidence to connect the appellant to the commission of the offences he was charged with. The evidence adduced by the prosecution was very weak such that no reasonable tribunal properly directing itself could convict the appellant. We find the conviction unsafe. We set aside the conviction and sentence.



E.N.C. MUYOWWE
SUPREME COURT JUDGE



E.M. HAMAUNDU
SUPREME COURT JUDGE



J. CHINYAMA
SUPREME COURT JUDGE