

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

Appeal No. 1/2023

BETWEEN:

ALBERT MAFO

AND

THE PEOPLE



Appellant

Respondent

Coram: Mchenga DJP, Banda-Bobo and Sharpe-Phiri, JJA
On 10 October 2023 and 14 November 2023

For the Appellant: Mrs K. Mandandi-Nyimbiri Senior Legal Aid Counsel of
Legal Aid Board
For the Respondent: Mr. S. Phiri, State Advocate of
National Prosecution Authority

J U D G M E N T

Sharpe-Phiri, JA, delivered the Judgment of the Court

Legislation referred to:

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

Cases referred to:

1. *David Zulu v The People (1977) Z.R. 151 (SC)*
2. *Dorothy Mutale and Richard Phiri v The People (1997) S.J. 51 (SC)*
3. *Chimbini v The People (1973) Z.R. 191 (SC)*
4. *Naweji v The People (unreported Supreme Court decision, 1981)*
5. *Ilunga Kalaba and Another v The People (1981) Z.R. 102*
6. *Khupe Kafunda v The People (2005) Z.R. 31 (SC)*

1.0 Introduction

- 1.1 On 22 February 2020, Mary Charity Mbangi ('the deceased') was found dead in her home. The postmortem investigations revealed that she was poisoned.
- 1.2 Her husband, Albert Mafo ('the appellant') was charged with her murder pursuant to **Section 200 of the Penal Code, Chapter 87 of the Laws of Zambia**. He denied the charge and the matter proceeded to trial.

2.0 Evidence in the High Court

- 2.1 The prosecution called 6 witnesses in support of their case. Their first witness, PW1, *Joseph Mbangi*, was the deceased's brother. He testified that on 22 February 2020, he was informed by his neighbour Vincent Litonga that the appellant had called to inform him that his [PW1's] sister Mary had died. The appellant was married to his sister. He proceeded to the funeral house with Gregory and Catherine. When they arrived at his sister's house, the appellant informed him that his sister had died suddenly without being ill.
- 2.2 PW1 further said that the appellant had informed him that they had gone together to a wedding on 20 February 2020 and after the wedding, he had left his wife at the place of the wedding where she spent the night and only returned home the following day. He said his wife was in good health at the time and that upon her returning home, he had prepared a meal for her which she had eaten and gone to sleep in a different room. At about 01:00 hours in the morning, he heard screams from the room where his wife slept.

When he went to check on her, he found her laying with her mouth wide open. He called for help from his neighbours, who came and confirmed that his wife was dead.

2.3 PW1 said his sister's body was taken to the mortuary and upon their request, a postmortem was carried out. The results revealed that she was poisoned. PW1 identified the appellant as his brother-in-law, who married his sister in 1985.

2.4 *Harriet Kalumbu* was the second witness, PW2. She testified that the deceased and her husband Mr. Mafo, (the appellant) had attended her daughter, Ruth Sengo's wedding on 20 February 2020. The deceased was the matron. After the wedding, the bride was taken to Kasima. The following day, they prepared meals and took the food to Kasima, where the meals were served and consumed. The deceased was amongst the several guests that had eaten the food they cooked. Later, she escorted the deceased out, who looked healthy when she left. The following day, they heard that the deceased had died.

2.5 The third witness, PW3 *Eziron Pupe*, testified that on 22 February 2020, whilst at Mongu Police Station, he received a report of murder in which PW1 reported that his elder sister Mary Charity Mbangi had died after allegedly being poisoned by her husband, the appellant. Acting on the report, he instructed his officers, Inspector Kawaza and Inspector Mbatia to visit the crime scenes at Kapulanga and Kasima areas, where the deceased had last eaten food. Upon returning from the two places, the officers informed him that they were unable to find the remains of the food that the

deceased had consumed at both places as all the plates and dishes had been cleared.

- 2.6 On 25 February 2020, he directed that a postmortem be undertaken to determine the cause of death of the deceased. A postmortem was conducted, and samples of body tissue of the deceased were collected and submitted to the University Teaching Hospital Toxicology Department.
- 2.7 On 11 March 2020, he met with the appellant and the brother of the deceased who he interviewed. Thereafter, he searched the home of the appellant and the deceased. In the sitting room, he found a plastic bottle which had a wax-like substance, which he marked as A1. He then searched the ceiling, where he found a red container with a white liquid. He marked this as exhibit B. In the same ceiling, he found a plastic paper with brownish powder, which he marked as C. In the kitchen, he found a bucket of mealie meal and next to it a plastic bottle with some powder in it. He marked the bucket as D and the mealie meal he marked as E. He identified all these items which were admitted into Court as evidence.
- 2.8 PW3 further stated that upon inquiry with the appellant about these substances, he indicated that he kept the chemicals to spray his garden, and they were hidden in the ceiling for safe keeping away from the children. He also said he had noticed that the appellant did not have a garden. He only saw one lemon tree.
- 2.9 PW3 stated further that he had interviewed the people at Katongo and established that the deceased had eaten at the wedding at about 15 hours. On 11 May 2020, he received a report from the UTH Toxicology

department revealing that a pesticide called Monocrotophos was detected in the tissue collected from the body of the deceased.

- 2.10 *Hillary Siamunzulu*, a Chief Analyst under the Ministry of Health at the Food and Drugs Laboratory testified as the fourth prosecution witness PW4. She stated that she had received various samples from PW3 for analysis which were labeled as exhibits A to E. She stated that the samples were analyzed which revealed a pesticide known as monocrotophos was detected in both the sprayer and the mealie meal. She added that they had also received body specimens of blood, liver, gall bladder and stomach contents from Inspector Kawaza. After analysis of these specimens, they detected the same monocrotophos in the specimens which were taken from the body of the deceased.
- 2.11 PW4 further confirmed that the monocrotophos chemical was toxic to animals and birds. If consumed, would affect the nervous system, and cause muscle spasms, high salivation, vision impairment, headache, vomiting and diarrhea and a person could die of heart failure. She stated further that the examination was undertaken by their analyst Richard Chomba, who was currently on suspension from work. The analyst report was identified and admitted in evidence.
- 2.12 PW5, *Peneya Kawaza*, a Chief Inspector in the police service and also a pathology assistant was the prosecution's fifth witness. He testified that on 25 February 2020, he was given a docket to investigate a case of murder in which Steven Mukonda had reported that his sister Mary Charity Mbangu had died on 22 February 2020. He attended a postmortem examination conducted by Dr. Kufwaulu on the body of the deceased. The examination

did not reveal any trauma to the deceased. The doctor collected some samples of blood, stomach content and part of the liver and gall bladder, which he took to the Forensic Laboratory at the Ministry of Health Food and Drugs Laboratory.

2.13 PW5 stated that his further investigations revealed that the deceased had returned home from a wedding on 21 February 2020, and she had eaten food that her husband, the appellant had prepared. She then went to sleep and at about 24 hours, she passed away. After receiving the analyst report positively confirming that the deceased had been poisoned, he proceeded to Kasima and Katongo, the venues of the wedding celebrations, to inquire whether any of the people that ate at the wedding had been unwell. He discovered that no-one had any health problems after consuming the food at the wedding. He then proceeded to charge the appellant with the offence of murder. He identified the appellant in Court.

2.14 The sixth witness was *Sharon Milambo Siatwinda*, PW6, a Human Resource Officer under the Ministry of Health. She testified that Richard Chomba, the public analyst who had analyzed the specimens given to him by the police and rendered a report, was on suspension over fraud allegations. She stated that he was therefore not available to adduce and tender in the analytical report into Court.

2.15 That marked the close of the prosecution case. Having considered the evidence adduced, the trial Judge was of the view that there was sufficient evidence to put the appellant on his defence. The appellant was accordingly put on his defence.

3.0 The Defence

- 3.1 The appellant opted to give evidence on oath and not to call any witnesses. He testified as DW1. He stated that on 20 February 2020, he went with his wife, the deceased to Katongo for a wedding ceremony. At 19:00 hours, he began his journey back home, leaving his wife at the wedding as she was the matron. On his way, he picked up his children from his elder daughter Sombo's house and they went home and slept.
- 3.2 The following day, his wife returned home between 19:00 and 20:00 hours in the evening. He informed his wife that he had already prepared the food for dinner. She then went to the market to buy tomatoes and cooking oil which she added to the beans that he had been cooking. He said his wife finished cooking the meal and served both him and the children.
- 3.3 The appellant stated that after dinner, his wife told him about how she had travelled from the wedding. Thereafter, he went to bed and the deceased remained cleaning the children's bedroom. Whilst he was asleep, he heard loud screaming. He quickly went into the children's room where the deceased had been sleeping and discovered she had fainted. Her mouth and eyes were wide open. He immediately went to call his neighbours Kelvin Muwema and Nyai Iwano, who came and checked on the deceased and confirmed that she was dead. Then they took her body to the mortuary.
- 3.4 He narrated further that a postmortem was conducted on 25 February 2020, and he was informed that the examination did not reveal anything, but that the police had taken samples from his wife's heart, liver and bladder. After a week, he was called to the police station where he was interviewed and

also on a few subsequent times. On 26 March 2020, the police led him to his house, where they conducted a search and took several items, including mealie meal and an empty sprayer found on the planks of the ceiling. He stated that he showed the police the garden where he grew vegetables.

3.5 Under cross-examination, the appellant confirmed that he had heard the evidence of the prosecution witnesses affirming that the mealie-meal found in his house contained pesticides which killed the deceased. He also confirmed that he had cooked the food that the deceased had eaten on the night in question. He confirmed that he had called the deceased earlier in the day to inquire whether she was returning home that night. He had also called Kelvin Kayata to inquire about the same. He also confirmed that he did not get ill after eating the food that night.

3.6 Under further cross-examination, the appellant denied that he was unhappy in his marriage or that he and his wife were sleeping in separate bedrooms. He claimed that his wife had died about 22:00 hours and denied having called his neighbours only at 01:00 hours in the morning.

4.0 **Trial Judge's findings**

4.1 Having taken all the evidence into account, the trial Judge established that the evidence of the toxicology report was a clear indication that the deceased's blood, liver, gall bladder and stomach content all contained Monocrotophos, an Organophosphate pesticide. She therefore found that the deceased died as a result of poisoning.

- 4.2 In considering the circumstantial evidence that links the appellant to the commission of the crime, the trial Judge noted that the deceased had returned home in good health after attending a wedding ceremony. At home, she found that the appellant had prepared nshima and beans for dinner which she ate. It was after having that meal that the deceased met her death.
- 4.3 The Judge further observed that the toxicology analysis of the mealie meal from the samples retrieved from the appellant's house indicated the Monocrotophos was found in the mealie meal.
- 4.4 The trial Judge held that *'it is therefore not in contention that the nshima that the deceased consumed contained Monocrotophos and therefore it is apparent as to why Monocrotophos was found in the internal organs of the deceased.'*
- 4.5 The Judge further held that *'it is the accused [appellant] who prepared the nshima for the deceased. The mealie meal sample contained the poison which coincidentally was also found in specimen collected from the body of the deceased. I have no doubt in my mind, and I must succinctly state that it was the accused who laced the mealie meal with poison and prepared the nshima using the same mealie meal which the deceased consumed and subsequently died as a result of the same.'*
- 4.6 The trial Judge further highlighted that it was apparent that the appellant and the deceased slept in separate bedrooms, and this denotes that they had marital problems and this presented evidence of *'something more.'* That the evidence against the appellant was overwhelming and taken the case

out of the realm of conjecture to that of cogency and that only an inference of guilt can be arrived at. The Judge therefore found that the prosecution had proved its case beyond all reasonable doubt and convicted the appellant for murder and sentenced him to death accordingly.

5.0 The Appeal

5.1 Being dissatisfied with the judgment of the Court, the appellant filed an appeal on 8 October 2023 advancing one ground of appeal.

5.2 In the ground of appeal, the appellant argued that the trial Judge erred in fact and in law when he held that an inference of guilt was the only inference that could be drawn from the evidence adduced.

6.0 Arguments by the parties

6.1 The appellants filed heads of arguments on 8 October 2023 and the respondent filed its arguments in response on 10 October 2023. We shall not repeat them verbatim but they will be referred to where relevant in our analysis and decision portion below.

7.0 Hearing of the Appeal

7.1 We heard the appeal on 10 October 2023. The appellant was represented by Mrs. K. M. Nyimbiri from the Legal Aid Board. The respondent was represented by Mr. S. Phiri from the National Prosecution Authority. Counsel made brief submissions at the hearing to augment their respective

positions. The same will be highlighted where necessary in the analysis and decision portion of this judgment below.

8.0 **Analysis and decision of this Court**

8.1 We have considered the appeal and note that the appellant's contention in this appeal is that the learned trial Judge erred both in fact and in law when he held that an inference of guilt was the only inference that could be drawn from the evidence adduced.

8.2 Mrs Nyimbiri's contention is that the evidence in *casu* was circumstantial, and that the prosecution bore the burden of proving the case against the appellant beyond reasonable doubt. She added that the only samples collected for the trace of monocrotophos were samples collected from the appellant's home and those taken from the deceased's body. This was despite the fact that the deceased had attended a wedding in Kapulanga area on 21 February 2020 and had also eaten a meal in the company of 11 others in Kasima area. She further stated that the deceased also consumed nshima at her home with the appellant and her children. She said that in fact, the deceased had purchased tomatoes and cooking oil on the material day, which was used to prepare the beans partly cooked by herself and by the appellant.

8.3 Counsel also submitted that the prosecution had not established any evidence to prove that the items collected from the appellant's home, P1 to P5 were taken and carried in sterilized containers or envelopes, prior to them being taken for analysis. She added that the source of the brown envelope, bottle of mineral water, bottle containing wax, and the other

bottle containing the brown substance is unknown. She contended that from the time the specimen was collected to the time the samples were taken for examination, a period of 1 month had lapsed, which was enough time for the monocrotophos to have been placed in the appellant's home in the red sprayer and mealie meal. She also added that the evidence on record was silent as to the quantity or dosage of the monocrotophos found in the deceased's body.

8.4 The appellant referred the Court to the cases of **David Zulu v The People**¹, **Dorothy Mutale and Richard Phiri v The People**², **Chimbini v The People**³ and the case of **Naweji v The People**⁴.

8.5 These cases were called in aid to emphasize the principles that where evidence against an accused is purely circumstantial and two or more inferences are possible, the Courts should adopt the inference which is more favourable to the accused if there is nothing in the evidence to exclude such inference. The appellant also added that there was clear dereliction of duty to investigate matters thoroughly by the prosecution, a fact which should lead to the acquittal of the appellant. The appellant stated that the evidence on record did not rule out traces of monocrotophos from any other place or body aside from the appellant's place or the body of the deceased. The appellant concluded by arguing that the prosecution had equally failed to prove any malice aforethought on the part of the appellant to justify a conviction of murder.

8.6 The respondent's Advocate, Mr. Phiri submitted in rebuttal that the evidence on record shows that the deceased came back home from a wedding ceremony on 21 February 2020 in good health. That there is no

dispute as the appellant admitted that he had prepared the nshima which the deceased ate on the fateful night. Counsel further argued that it was in contention that the meal was also eaten by the appellant and their two children because this evidence only came from the appellant in his defence.

8.7 Counsel for the respondent also submitted that the evidence of PW3, *Ezeron Pupe*, a Superintendent at the Zambia Police revealed that inquiries were made at Kasima where the deceased ate food earlier in the day and the results showed that no one who ate the food with the deceased was affected. That PW3's evidence further confirmed that the Toxicology report showed that the samples of mealie meal collected from appellant's house tested positive for the pesticide. That this was in conformity with the samples that were taken from the deceased's body. PW3 disputed that the said pesticide could not have been planted at the appellant's house as there was no motive by anyone else to do so. He contended that the only one inference that could be drawn from the circumstances of this case, is that it is the appellant who poisoned the deceased through the nshima he prepared for her. He added that no one else who ate food with the deceased in Kasima area was affected, implying that the food the deceased had eaten in Kasima was not poisoned.

8.8 Counsel added that the appellant prepared the food which the deceased ate around 20:00 hours and she died around 22:00 hours due to poisoning. That a search at the appellant's house revealed a sprayer containing pesticide hidden away, which conforms with the one found in the samples that were collected from the deceased's body. The appellant referred the Court to the case of **Ilunga Kalaba and Another v The People**⁵ where it was held that:

“It is trite law that odd coincidences, if unexplained may be supporting evidence. An explanation which cannot reasonably be true is in this connection no explanation”.

- 8.9 Counsel submitted that the appellant’s failure to clearly explain the odd coincidences goes to support the trial Judge’s inference of guilt on his part. He added that the appellant’s explanation that he hid the pesticide meant for his garden in the ceiling to prevent it from the children’s reach could not be reasonably true as he had no garden within the vicinity of his backyard or elsewhere.
- 8.10 Counsel argued that the circumstantial evidence in *casu* has therefore taken the case out of the realm of conjecture and it has attained a degree of cogency which only permit an inference of guilt on the part of the appellant. That by placing poison in the food served to the deceased, the appellant knew or ought to have known that such acts would cause death or grievous harm to the deceased and therefore the state had established that the appellant had malice aforethought.
- 8.11 We have carefully reviewed the evidence on record in considering the contention by the appellant that the trial Judge erred in fact and in law when he held that an inference of guilt was the only inference that could be drawn from the evidence adduced.
- 8.12 The evidence on record from the Toxicology report shows that the deceased died as a result of poisoning as her blood, liver, gall bladder and stomach content all contained Monocrotophos, an Organophosphate pesticide. The evidence on record further reveals that prior to her death, earlier in the day,

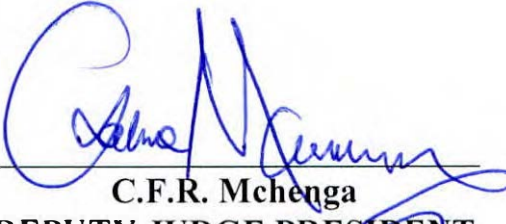
the deceased had eaten a meal at Kasima area with 11 other people at 15 hours and was well for several hours after that. The inquiries made by the police, through the evidence of PW3 found that none of the people that the deceased had eaten the meal with at Kasima area had experienced any discomfort or fallen ill.

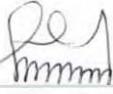
- 8.13 Our view is that the trial Judge correctly assessed the evidence presented before her. The evidence established that the deceased was poisoned and the chemical that caused her death was monocrotophos. The Police investigations ruled out the possibility of the deceased's poisoning to have taken place at Kasima area where she had eaten a meal with other people.
- 8.14 The samples of mealie meal taken from the appellant's house contained the same monocrotophos pesticide found in the deceased body. This chemical was also found in a sprayer hidden in the ceiling of the appellant's house.
- 8.15 The mealie meal that the appellant used to prepare the nshima was laced with this chemical substance and which nshima the deceased had eaten that evening before she died. We therefore agree with the trial Judge that the evidence against the appellant is so overwhelming and the only inference to be drawn from this circumstantial evidence is that the appellant intentionally caused the death of the deceased.
- 8.16 In the case of **Khupe Kafunda v The People**⁶, the Supreme Court dismissed the appellant's appeal and affirmed his conviction in the lower Court purely on circumstantial evidence even when there were no eyewitnesses to the offence. It was held in that case that:

'There was no direct evidence and no eyewitness to the incident that led to the death of the deceased. However, the circumstantial evidence was so overwhelming and strongly connected the appellant to commission of the offence.'

8.17 We are satisfied that there is overwhelming evidence imputing that the appellant caused the death of the deceased by lacing her meal with monocrotophos pesticide. We are also satisfied from the evidence on record that there is no other reasonable inference that could be drawn from the circumstances of this case other than the appellant's culpability.

8.18 We therefore have no basis on which to upset the judgment of the lower court and dismiss this appeal for lack of merit.


C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT


A.M. Banda-Bobo
COURT OF APPEAL JUDGE


N.A. Sharpe-Phiri
COURT OF APPEAL JUDGE