

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY LUSAKA
HOLDEN AT LUSAKA
(Criminal Jurisdiction)**

HP/44/2015

BETWEEN:

THE PEOPLE

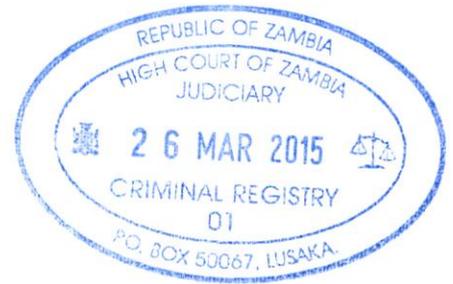
VS

CONSLATA TEMBO

CORAM: HONORABLE JUSTICE MR. MWILA CHITABO, SC

For the State: Mrs. A.K. Mwanza – State Advocate

For the Accused: Mrs. W.S. Mwanza – Legal Aid Board



JUDGMENT

Legislation referred to

1. *Section 200 of the Penal Code cap 87 of the Laws of Zambia*
2. *Section 291 (2) of the CPC cap 27*

Cases referred to:

1. *Kashenda Njunga vs The People 1988 ZR 1*
2. *Mwewa Murolo v The People SCJ No. 23 2004/Appeal No. 54/2004*
3. *Dorothy Mutale and Richard Phiri v The People (1997) SJ 51 (SC) SCZ Judgment No. 11 of 1997*

4. *The People vs Davies Chanda Lubau* (2012) 2 ZR 334
5. *The People vs Njovu* (1968) ZR 132
6. *Khupe Kafunda v The People* (2005) ZR 31
7. *The People vs Jerusalem* (2012) 3 ZR 533

The genesis of this case is that **CONSLATA TEMBO** who we shall herein after refer to as Accused was charged of the capital of offence of murder contrary to section 200 of the Penal Code Cap 87 of the Laws of Zambia.

The particulars of the offence are that the Accused on 6th November, 2014, at Lusaka District in the Lusaka province of the Republic of Zambia did murder a newly born baby.

The prosecution called 3 witnesses. PW1 was 16 year old girl. We shall withhold her identity to protect her from publicity and in this judgment we shall refer to her and christen her as “Eva”.

She testified that in 2013 she used to go to school in grade VII at a named Basic school. In March, 2014 she fell pregnant; the person responsible for the pregnancy was a young man or boy only known as Bruce.

When Eva’s mother, the Accused came to learn about the pregnancy she was very annoyed and used to shout at her. Accused gave her a concoction of Aloe vera (itembusha) to drink to terminate the pregnancy. She took the concoction and on 13th December, 2013 she aborted.

Her mother never wanted that pregnancy. This was the 1st pregnancy. In respect of the 2nd pregnancy, Eva testified that in March, 2014 she fell pregnant by the same aforementioned Bruce. She informed her neighbor Florence Mulenga about this development who in turn informed Eva's aunt Miriam Tembo, the sister to the Accused.

The Accused was very enraged; she said she had nothing to do with the pregnancy and she couldn't understand why Eva could not wait until she finished her education.

After about a month following the discovery of the pregnancy the Accused took a cup of Aloe vera concoction and instructed Eva to take it and drink it. When Accused went out of the house, Eva emptied the contents of the concoction in the flower bed. She did not drink it.

After some time Accused checked on her and wanted confirmation that she had drunk the concoction. Eva lied to her and said she had drunk the medicine (concoction).

Two days later she gave her aloe vera concoction to drink, but pretended that she had drunk it. Accused asked her how she was feeling in the tummy, Eva responded that she was not feeling anything, whereupon Accused soaked some soda in a cup with instructions for her to drink. Eva poured the stuff in the flowerbed. Shortly thereafter, Accused inquired how she was feeling. Eva said she was not feeling anything.

Accused then gave her K1 to buy panadol and cafemol 50n each. (3 packets of each medicine). After buying, Accused instructed Eva to take the whole lot of cafemol and panadols at once. When Accused left, Eva quickly threw the panadols and cafemol in the flowers outside the house. She confided in her aunt Miriam Tembo.

It was Eva's testimony that every time Accused sent her to the market to buy relish she would take some money meant for the relish and buy baby clothes for her expected baby. She would give the clothing to her neighbor Florence for safe custody.

On 6th November, 2014, Eva started feeling some stomach pains. She informed Florence, who in turn informed her aunt Miriam. Miriam then instructed Eva to go with her to her mother (the Accused). She followed her aunt to her mother's place where Eva used to live with Accused. When she reached the house she found Accused shouting, scolding both Florence and her aunt Miriam declaring that she could not waste her time taking Eva to the clinic.

Her aunt got very sad and she left with Florence. Eva went inside the house. The labor pains were getting worse, the pain was excruciating. Accused taunted her saying

“Yes you will see today that pregnancy is so painful”.

It was her testimony that Accused assisted her to deliver and she heard the child cry once. She did not pay attention since she knew the mother would take care of the child.

About 3 minutes later, Accused told Eva “*mwana aonongeka*” meaning the child is dead. Eva told her mother that she had heard the child crying how could she say the child was dead? Accused retorted that Eva could not tell her anything, she had given birth before.

Accused then instructed Eva to wrap her chitenge around herself from her breasts and to lie down. Accused started cleaning the mess. She wrapped the baby in Eva’s old black shirt. Eva looked at the child, the child looked “okay”, the child did not look injured but it was dead.

Accused then put the child in a basin and put it under the bed. It took 2 hours from time Eva’s aunt had left up to the time the child was killed. Auntie left about 11:00 hours. They were the only two of them, Eva and the mother (the Accused).

Eva then slept. She was awakened about 19:00 hours by accused, who put the baby into a sack and put some liter over the baby in the sack and instructed Eva to accompany her to go and dump the baby at the dumping site near the Blue water dam in Chawama.

Accused was carrying the baby; on the way Accused instructed Eva to carry “chikatundu chako” i.e her baggage. Eva carried her child, the dead child on her head. After about 20 minutes walk she was instructed to dump the child.

They went home and slept; the following day her mother left for the market with instruction that she must not go out of the house.

However, after Accused had left, Eva went outside and called Florence and narrated the ordeal. Florence told her that she was actually taking the concoctions when all along she was saying she not drinking the same.

Eva protested her innocence that she was not taking the concoctions. Florence said Accused had told her sister Miriam and herself that she had delivered a still or dead baby. Eva testified that she was 9 months pregnant when she delivered.

The following day, the police went to Accused residence and picked Accused, herself, Florence and her aunt. A search was conducted at the dumpsite. The child was not found. After one week Eva underwent medical examination at University Teaching Hospital, a scan was done too and she was given a medical report ID1 which showed that Eva had truly been pregnant.

Cross examined by Mrs. Mundia, Eva stated that she was 15 when she had her 1st pregnancy and 16 when she had her 2nd pregnancy. The person responsible for both pregnancies was Bruce. She did not go to ante natal because it was the mother who was supposed to take her there. She refused to take her there; it was usual for her to get upset over her pregnancy.

She was aware of dangers of giving birth at home. Her pregnancy was visible after her refusal to take the medicine given to her by the Accused. Accused used to work for a Lebanese.

She was not a qualified midwife nor was she a traditional birth attendant. At the time of giving birth she was lying down and she could not see what was happening. She heard the baby cry but could not physically check on her baby because of the physical condition she was in.

Re-examined by Mrs. Mwanza, Eva testified that her mum, (accused) used to stop her from going to clinic. She did not know why she was stopping her from going to clinic (hospital) she could not go to clinic when she was in labour pains because she could not walk.

Her father had passed away; Accused had stopped her from seeing Bruce but he used to see her at home. Bruce was not aware about her labour. She did not inform him about her going into labour.

PW2 was Miriam Tembo 31 years of house No. 179/17 old Chawama; a business lady. She testified that EVA was her niece, and Eva informed her about her pregnancy so that PW2 could inform Eva's mother.

Accused was informed, she flatly refused to accept that Eva was pregnant pointing out that she knew the periods of Eva, this was about August, 2014. Her elder sister Charity Chisulo was updated. Accused was again approached but she adamantly refused to accept the pregnancy of the daughter.

The pregnancy grew and it was visible. The subsequent time they spoke about Eva's pregnancy with Accused was the day Eva went

into labour. She reacted that she had nothing to do with the pregnancy and since PW1 knew so much about it, she could take her to the clinic. Besides Eva knew where the clinic was. She felt very bad and left.

The following day, Eva informed the aunt that when PW1 left her with the mother, she had delivered a live child, she heard it cry and they had disposed off the child. She decided to inform their elder brother the uncle to Eva.

Eva had told her that after the child had cried, it stopped crying after sometime when she inquired as to why the child had stopped crying, Accused told Eva she had delivered a dead child. Eva challenged the mother as she had heard the child cry.

It was her testimony that Eva told her that Accused wrapped the child in a cloth put it in a dish and pushed the dish under the bed. During the night the baby was wrapped in a sack and taken for disposal at the dumping site.

Later on the 3rd day the police moved in and Accused, Eva, Florence and PW2 were apprehended. Everyone was released after interviews except for accused who was detained. Eva was taken to University Teaching Hospital in her presence and she was examined and scanned. Eva used to stay with Accused even after the pregnancy.

She came to learn about the details of the abortion of the 1st pregnancy at police station in respect of medicines that induced the abortion. She identified Accused in the dock.

Cross examined by Mrs. Mundia – witness said she had a close relationship with Eva. She had told her who had caused the pregnancy. She left Eva with Accused because she felt very bad on Accused' attitude. Accused is not a midwife; she knew the effect of home delivery complications.

Re-examined by Mrs. Mwanza – PW2 said when Accused said they could take her to the clinic it was not in a good way, it was like she was daring her and Florence.

PW3 – was Detective Inspector Masililo Sandie No. 9205; 35 years of Chawama Police. His evidence was to the effect that he received a report of murder from Eva to the effect that her one day old baby was strangled to death by Accused Conslata Tembo.

He conducted investigations and in the course of his investigations Accused and Eva led him to the dump site where the child had been dumped. The body was not recovered after 2 hour search. The chances were that scavenger dogs had eaten the remains of the child.

Subsequently he took Eva to the University Teaching Hospital to undergo medical and scan examination. A report was issued which was admitted as exhibit P1. He later made up his mind and arrested Accused of the subject offence.

Cross examined by Mrs. Mundia – the witness said he could not establish that the cause of death was strangulation. Cause of death was not established.

Re-examined by Mrs. Mwanza – PW3 testified that the body of the deceased was not recovered so the cause of death could not be determined. Accused told him she had dumped the body at dumping site which is not a burial site.

That marked the close of the prosecution's case.

At the close of the prosecution's case I found the Accused with a case to answer in line with the provisions of section 291 (2) of the Criminal Procedure Code Cap 88 and put her on her defence on the charge of murder C/S 200 of the Penal Code chapter 87 of the Laws of Zambia.

The Accused elected to give evidence on oath and did not call any witnesses.

DW1 was Accused herself **Conslata Tembo**, 38 years old house number 179/15 Chawama Lusaka. Unemployed. She testified that Eva was her biological daughter. Her father died in 1999. At the age of 15 Eva got pregnant, the boy responsible was Bruce according to what Eva told her. She only came to know about the pregnancy after the miscarriage.

Eva was taken to the clinic where she was told they should go and bury since it was a big baby 5 months. Eva got pregnant again

when she was 16. She was very upset since she had a lot of plans for the child to have good education.

It was her young sister PW2 who had informed her about the pregnancy. She never administered any substance to induce her abortion. She did not want any pregnancy in her house and she told her to take it to whoever was responsible.

On 6th November, 2014 Eva fell sick. Florence, Mulenga's mother is a neighbor – she told her to take Eva to the clinic since she knew more about pregnancy and Eva used to tell her everything. Eva was in the house between 11 and 13 hours whilst Accused was seated outside. She did not go into the house in a long time.

After 14 hours she went into the house and found that Eva had delivered but the child was not shaking, it was dead. She asked Eva what had happened, she said she did not know what had happened as she wasn't looking.

She wrapped the baby in a cloth then she got scared. She had no money to host a funeral, like the previous funeral. She did not tell any person, his brother could not help. He had lent money to her for 1st burial which she had not finished paying. She decided to dump the baby between 18 and 19 hours. She denied strangling the baby. She was old enough and she had given birth before; she knew baby was dead.

Crossed examined by Mrs. Mwanza – the Accused said she had 2 children. The first one is 22 years; she is at college for teachers.

She had great plans for Eva for her to become a teacher like the sister. She had first child when she was 16. She was very angry about pregnancy but did not plan to terminate the pregnancy of Eva.

She delivered her first child at Kasisi at the hospital. She knew the pains and pangs of labour. Her heart was paining when Eva was inside the house that's why she stayed outside the house. She did not want to assist because she is incorrigible. She was angry from the time Eva got pregnant. She wanted the baby.

She did not show Eva that she was annoyed with her, they continued staying together. Eva just framed up the story of Aloe vera, cafemol, panado and soda. She did not know why Eva would tell lies against her.

The court should believe that Eva wanted to deliver alone just as what happened during 1st pregnancy. A person who has not delivered before would not know when to push, where to push and how to push. A woman in labour would scream or be crying. Eva wasn't screaming, she had an abortion before. The level of pain in miscarriage is lower than the level of pain in labor.

She had been cooking outside and wanted something in the house. She did not assist Eva in labour when she entered the house or room. She found child on mat between Eva's legs. She never heard child cry.

She admitted that failure to assist Eva was as good as ensuring that the child dies. She cut the umbilical code. By that time child was dead. She was neither a trained midwife nor had she before the incidence assisted any one to deliver.

She did not tell anyone because neighbors would blame her that she had failed to guide Eva properly and that is why she got pregnant. She denied that she had planned to conceal the birth. She had told her sister (PW1) about the delivery the same day. There is never a funeral for a foetus.

Re-examined by Mrs. Mundia – she said she had told PW1 about the baby and that she had thrown it away. That was after dumping of the child.

The defence rested.

Learned State Advocate made oral submissions. The essence of which is that the State had discharged its burden of proof beyond all reasonable doubt. It was submitted that the State does not need the body to prove that the child had died; that laymen are quite capable to give evidence that a child had died.

She referred to the case of ***Kashenda Njunga v The People***¹. It was her submission that the Accused had intended to cause the death of the unborn child by deliberately attempting to terminate the child's life by actions and inaction towards the daughter which formed the necessary mensrea.

Mrs. Mundia learned counsel for the Accused submitted that the State had not discharged its burden of proof beyond all reasonable doubt. She referred to the case of ***Mwewa Muroho vs The People***², where it was held that the prosecution had to prove all the ingredients of the offence before a conviction can be safe, that is

- (1) The unlawful act or omission that causes the death of a human being;
- (2) Malice aforethought that is the intention to cause death or grievous bodily harm.

She also made reference to the case of ***Woolmington vs DPP (1935) ALL ER 1***. She finally made reference to the case of ***Dorothy Mutale and another vs the People***³

“that where there are a number of inferences that can be drawn with regards to a particular case, the favorable inference should be resolved in favor of the Accused”.

She pointed out the possible inferences are that:-

- (1) The Accused could have caused the death;*
- (2) The child could have died upon being delivered;*
- (3) That the child could have died from natural causes.*

She urged the court to resolve in favour of the Accused.

I am indebted on the researchful industry of the Learned Counsel for both the Prosecution and the Defence. The law cases cited by the parties are relevant and there is no dispute on the status of the law.

The only issue is the application of the facts to the case. It is also common cause and I find the following as uncontroverted facts.

1. *Eva was pregnant and gave birth to a child in the 9th month of her pregnancy on 6th November, 2014.*
2. *The Accused was the biological mother of Eva her 16 year old 2nd born daughter.*
3. *The father to Eva died in 1999 when Eva was barely about a year old. The Accused was therefore a ~~single~~ ^{parent} ~~mother~~ who had the task of bringing up her 2 daughters and providing for them.*
4. *Eva's child died at birth in the 9th month of conception. The child that died was a human being.*
5. *The umbilical cord of the child was cut by the Accused.*
6. *The Accused concealed the birth of the child and disposed of the remains of the baby (child) at Chawama dumping site.*
7. *At all material times during the pregnancy of Eva the Accused refused, neglected to convey the juvenile Eva to the antenatal clinic.*
8. *The accused had a legal and moral duty to take Eva to the clinic for antenatal attendance and also to take Eva to the clinic when her daughter went into labour.*

I now proceed to examine the ingredients of the offence of murder.

The Law

“In criminal law cases, the burden of proving the guilt of an Accused lies from the beginning to the end on the prosecution. They must prove each element charged beyond reasonable doubt”.

I respectfully refer to the judgment and holding number 1 of Chali, J in the case of ***the People v Davies Chanda***⁴. The above statement of law was also pronounced in the dicta of Bladgen, CJ in the case of ***The People v Njovu***⁵ at pages 133 – 134.

In the case of murder the essential ingredients are

- (1) *The causing of death of a human being by the Accused.*
- (2) *With malice aforethought to kill or cause grievous bodily harm.*

Applying the law to the facts

(1)(a) Killing of a human being

I have already found as a fact that there was a killing of a human being.

(b) Did the Accused kill Eva’s baby

The evidence of Eva (PW1) is that the Accused assisted her to deliver and she heard the child cry. A few minutes later Accused pronounced that Eva had delivered a dead child. She did not look at the child when she was crying because she trusted the mother would take care of the child.

The Accused’ version is that she did not assist Eva to deliver because she was so annoyed with her. When Eva was suffering

excruciating pains of labour Accused was seated outside the house/room. When she finally went in she found a baby on the mat between the legs of Eva.

Under heated cross examination she conceded she cut the umbilical cord but by that time the child was dead.

At this point in time, I warn myself of the danger of relying on the evidence of Eva whose child died. I place her in a category of witness whose evidence need to be treated with caution and require corroboration or something more.

There is nothing magical about the term “corroboration or something more” it simply means any evidence that may tend to support the evidence of the witness placed in the category of witnesses requiring “other supportive evidence”.

In the case of ***Khupe Kafunda v The People***⁶ it was held in ruling number 1 as follows

“There was no direct evidence and no eye witness to the incident that led to the death of the deceased. However, the circumstantial evidence was so overwhelming and strongly connected to the Appellant to the commission of the offence”.

In the case of ***The People vs Jerusalem***⁷ Dr, Matibini, SCJ as he then was made important pronouncements of settled law in the following holdings

- (i) *“There was no direct evidence surrounding the death of the deceased, it was all circumstantial evidence”.*
- (ii) *“It is competent for a court convict on the basis of circumstantial evidence, as it is to convict on any other types of admissible evidence”.*
- (iii) *“Circumstantial evidence is evidence from which a Judge may infer the existence of a fact in issue which does not prove the existence of the fact directly”.*
- (iv) *“There is one weakness peculiar to circumstantial evidence, it is not direct proof of a matter at issue, but rather proof of facts not in issue but relevant to the fact in issue and from which an inference of the fact may be drawn”.*
- (v) *“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”.*
- (vi) *“In order to feel safe to convict the trial Judge must be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such degree of cogency which can permit only an inference of guilt”.*

I have painstakingly anxiously and carefully addressed my mind to the above six point instructive guidelines. I have already found as a fact that the Accused had a moral and legal duty to take Eva to the antenatal clinic during the pregnancy and emergently when the hour of labour struck.

I have further found as a fact that she concealed the birth and death of the child and actually commanded Eva to carry the child's remains on her head and dump it at the dumping site.

The Accused in her testimony conceded that she did not intend or want to assist Eva to deliver as she was annoyed with her. In my view, that stance was as good as consigning to death not only the child to be delivered but also the mother.

In my view there is sufficient cogent evidence to find that the only irresistible inference is that the Accused killed the child after she was safely delivered.

Assuming that I am wrong, the failure to take the juvenile Eva to the clinic coupled with the post facto conduct of the Accused in disposing off the baby remains would draw a similar conclusion of the fact that the Accused killed the child.

Even assuming that I am further wrong; and even accepting the Accused' version that she sat outside the room where her daughter was laboring alone in labour demonstrates willful neglect of a duty to assist the girl who was in peril, excruciating pain and fatal danger of dying in child birth. She cut the umbilical cord of the

child; by that time if her story is to be believed it was too late in the day to save the baby.

In the case of ***Dorothy Mutwale and Richard Miti v The People***³, Ngulube, CJ as he then was instructively and authoritatively succinctly pronounced himself as follows:-

“Where two or more inferences are possible. It has always been a cardinal principle of Criminal Law that the court will adopt the one that is more favorable to an Accused if there is nothing in the case to exclude such inference”.

In the case in casu, there is everything to exclude any possible favorable inference taking into account the conduct, acts and omissions of the Accused as catalogued in the preceding paragraphs. I must comment too on the credibility of the Accused.

She impressed me as a very hard hearted mother who distanced herself away from her juvenile daughter when Eva most need her mother as she was about to give birth and life to a human being.

She was detached from any emotion. In her view Eva was being taught a lesson for falling pregnant for the 2nd time. As regards Eva; she recounted her ordeal without passion, she recounted how she went through excruciating pain of labour amidst taunts of her mother about how painful giving birth is. She had resigned herself to the situation.

To crown it all she had to carry her dead baby. The baby she had been preparing for and buying the unborn expected child clothes which she used to hide at Florence's house, the neighbor.

I have no hesitation to prefer her evidence to that of the Accused.

On the foregoing, I am satisfied that the prosecution has proved and discharged their burden of proof beyond all reasonable doubt that **Conslata Tembo** murdered a newly born baby on 6th November, 2014 and find her guilty as charged and I convict her of the offence of murder contrary to section 200 of the Penal Code Chapter 87 of the Laws of Zambia.

Delivered this *26th* day of March, 2015



Mwila Chitabo, SC
Judge