IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 35/2017**
HOLDEN AT KABWE
(Criminal Jurisdiction)

BETWEEN:

JULIUS MUCHEKI **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Phiri, Muyovwe and Chinyama, JJS
On the 7th November, 2017 and 11th December, 2017

For the Appellant: Mr. S. Mweemba, Legal Aid Counsel, Legal Aid Board

For the Respondent: Mr. C.K. Sakala, State Advocate, National Prosecutions Authority

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JUDGMENT

MUYOVWE, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Choka vs. The People (1978) Z.R. 243**
2. **Khupe Kafunda vs. The People (2005) Z.R. 31**
3. **Mwewa Murono vs. The People (2004) Z.R. 207**

The appellant was convicted of the murder of his two children and sentenced to death by the High Court sitting at Lusaka.

The prosecution's case was anchored on the evidence of nine witnesses. It was established that on the 10th September, 2013 the appellant and his wife were granted divorce by the Local Court in Chibombo District. The appellant was unhappy at this turn of events. That very evening, Julius aged 6 years and 10 months and Eric aged 4 years and 10 months passed away and the postmortem examination revealed that the children had taken dichlorvos an organophosphate pesticide. It was established that the appellant had also ingested the pesticide and he was hospitalised. There was evidence that the appellant called his former wife PW1 to inform her that he was not happy with the divorce and that he intended to poison his children and commit suicide; he phoned his sister PW2 to inform her that he had taken poison together with his children because he was not happy with the judgment and bade farewell to her; he called his uncle to inform him that he had taken poison and that he had left a note with details of his creditors. Further evidence was to the effect that the appellant poisoned the children because he did not want them to suffer and that he had administered the poison by putting it in a bottle of a soft drink. The pathologist Victor Teludy who was PW6 in the court below explained

that he could smell the pesticide as he conducted the postmortem examination on the bodies and the toxicology report confirmed that the children had taken organophosphate poison.

In his defence, the appellant denied poisoning his children and attributed the tragic incident to the contaminated water which he used to prepare tea for himself and his children. According to the appellant, after they drank the tea, they all started vomiting.

In her judgment, the learned trial judge rejected the appellant's testimony that his children died as a result of drinking tea which he made from contaminated water. The learned trial judge found that the appellant deliberately administered the poison with the intention of killing the children and that he knew that the pesticide was deadly and would cause death. He found that the prosecution had proved its case beyond reasonable doubt and convicted him as charged.

On behalf of the appellant, Mr. Mweemba advanced one ground of appeal in which he alleged that the trial court misdirected itself in law and in fact when it convicted the appellant of murder

when it was not proved beyond reasonable doubt that he deliberately administered poison to the deceased.

It was submitted, *inter alia,* that it was not in dispute that the appellant phoned PW1, PW2 and PW3 to inform them that together with the children he had taken poison. Counsel argued that the issue in this appeal is whether this was a deliberate act on his part. It was contended that it was only PW1 who testified that the appellant phoned to inform her that he intended to commit suicide but that she did not mention that he said he was going to take poison and give some to the children. That PW1 being the mother to the deceased children and former wife of the appellant, she had an interest of her own to serve and her evidence required corroboration in line with our holding in the case of **Choka vs. The People**[1]. In **Choka** we held that:

> **A witness with a possible interest of his own to serve should be treated as if he were an accomplice to the extent that his evidence requires corroboration or something more than a belief in the truth thereof based simply on his demeanour and the plausibility of his evidence. That "something more" must satisfy the court that the danger that the accused is being falsely implicated has been excluded and that it is safe to rely on the evidence of the suspect witness."**

Further, it was pointed out that PW2 also did not state that the appellant phoned to inform her that he was going to take poison. That PW3's evidence was to the effect that he had taken poison. It was contended that the trial court misdirected itself when it found that the appellant phoned the three witnesses to inform them that he was going to take poison and give some of it to the children. According to Counsel, the appellant called the witnesses because he needed help and not because he was bidding farewell after deliberately administering poison to the children. Counsel took the view that had the appellant deliberately taken the poison, he would not have called the witnesses to "rush home". It was submitted that the evidence on record does not support the finding by the learned trial judge that the appellant deliberately administered poison to his children. We were invited to quash the conviction by the lower court.

In supporting the conviction, Mr. Sakala submitted that from the evidence on record, it was clear that the appellant had an intention not only to take his own life but that of his own children. It was submitted that the evidence of PW1 and PW2 pointed to this

fact. Mr. Sakala argued that the issue at hand is not the mode used in the killing of the children but rather the appellant's intention. Counsel conceded that PW1 was a witness with an interest to serve and that her evidence required corroboration and his view is that it was corroborated by PW2, PW3 and PW4. Mr. Sakala disputed the suggestion by Mr. Mweemba that the appellant made calls to the witnesses because he needed help. Counsel submitted that nowhere in his evidence did the appellant state that he called for help. In conclusion, Mr. Sakala argued that the learned trial judge was on firm ground when he found that, with malice aforethought the appellant caused the death of his own children and urged us to dismiss the appeal.

In this appeal we have been invited to determine whether the learned trial judge was on terra firma when he found that the appellant had deliberately poisoned himself and his children. According to Mr. Mweemba, the learned trial judge misapprehended the facts in that the appellant was merely calling for help when he phoned PW1, PW2 and PW3. Mr. Sakala's view is that the prosecution evidence pointed to the guilt of the appellant.

The record shows that there was no eye witness to the ingesting of the poison by the appellant and the children. However, it is noteworthy that this unfortunate incident which took the lives of the appellant's two children occurred hours after the Local Court divorced the appellant and PW1. The learned trial judge accepted and rightly so, that the appellant called PW1 to inform her that he intended to take poison and give to the children as well. PW2 Juliet Mucheki, the appellant's sister narrated the events of that day as follows:

> **"As I was at the garden I received a phone call from Clara Mubuki called me and told me that I should go home because the accused was planning to take poison. I said there was nothing I could do. After 10 minutes later....the accused person called me and said goodbye and he said that he had drunk poison together with children because he was not happy with the court judgment. I started off for home. I found the accused was vomiting and puffing....."**

Notably, the appellant did not inform his sister that he had taken the poison accidentally. We agree with the trial court that Juliet Mucheki confirmed the evidence of the appellant's ex-wife that she phoned her (Juliet) to raise alarm over the appellant's intended action.

Similarly, the learned trial judge heard from PW3 the appellant's uncle that he had called him to inform him that he had drunk poison. He did not tell him that he had taken the poison accidentally. The appellant told his uncle that he had left a note on the table with a list of his creditors. Surely, a man who has drunk poison by accident, as suggested by Mr. Mweemba, cannot have time to write a note or even mention such a thing let alone call to say goodbye. Had it been an accident, the appellant would simply have called for help. But in this case, going by the testimony of the prosecution witnesses, he called to inform the witnesses that he had taken poison together with the children.

The evidence from PW4 who had known the appellant for 25 years was that he visited the appellant at the police station after he was discharged from hospital and the appellant explained to him that he had given the children poison because he did not want them to suffer and that he had put the poison in a drink. The learned trial judge rightly found that the evidence of PW1, PW2, and PW3 was consistent with that of PW4.

We find that Mr. Mweemba's quest to convince us that the appellant was seeking help when he called his relatives cannot be sustained as it is not supported by evidence.

The prosecution evidence comprising mainly of the appellant's own relatives and friends left no doubt as to the intention of the appellant who deliberately put poison into the drink which he drunk and also gave to his children. His own relatives, that is, his sister and his uncle confirmed that he phoned them to bid farewell after taking the poison. He gave a reason for drinking the poison and for administering it to the children: he was hurt by the fact that his marriage to PW1 was dissolved by the Local Court and he did not want the children to suffer. There was overwhelming evidence that the appellant poisoned his children and that he also took the poison. The evidence was plain and straight forward and our firm view is that the prosecution proved the case against the appellant beyond reasonable doubt in line with our holding in the case of **Mwewa Murono vs. The People**[3] where we held that:

1. **In criminal cases, the rule is that the legal burden of proving every element of the offence charged, and consequently the guilt of the accused lies from beginning to end on the prosecution.**

2. The standard of proof must be beyond all reasonable doubt.

We cannot fault the learned trial judge when he found that the prosecution had discharged its burden to the required standard. In short, the appellant was properly convicted by the lower court.

We find no merit in the sole ground of appeal and we dismiss the appeal.

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