IN THE COURT OF APPEAL FOR ZAMBIA **CAZ/017/018/2016**
AT THE LUSAKA DISTRICT REGISTRY
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

LAZAROUS KASONDE **1ST APPELLANT**
MAUREEN CHANDA **2ND APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: ***Makungu, Sichinga and Kondolo, J.J.A***

On the 17th day of January and 17th March, 2017

For the Appellants: Ms. G.N. Mukulwamutiyo – Senior Legal Aid Counsel

For the Respondent: Ms. M. Kapambwe Chitundu – Chief State Advocate

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JUDGMENT

C.K. MAKUNGU, JA delivered the Judgment of the Court.

Legislation referred to:

1. *The Penal Code Chapter 87 of the Laws of Zambia – Sections 22, 207 (a), (b), (d), 204 (a)*
2. *The Juveniles Act Chapter 53 of the Laws of Zambia as amended by Act No. 3 of 2011 – Section 122*
3. *The Court of Appeal Act, 2016 – Section 16*

Cases referred to:

1. *Patson Simbaiula v. The People (1991 – 1992) ZR 136*
2. *Raymond Mweetwa Banda v. The People SCZ Judgment No. 17 of 1984*
3. *R v. Smith (1959) 2 ALL E.R 193*
4. *Dorothy Mutale and Richard Phiri v. The People (1995/ 1997)ZR 277*
5. *Richard Daka v. The People SCZ Appeal No. 33 of 2013*
6. *Goba v. The People (1966) ZR 113*
7. *Mushanga v. The People SCZ Judgment No. 18 of 1983*
8. *Phillip Mungala Mwananubi v. The people SCZ No. 9/2013*
9. *Mbomena Moola v. The People SCZ Judgment No. 35 of 2000*
10. *Stanley Kasungani v. The people (1978) ZR 260*
11. *Wilson Masauso Zulu v. Avondale Housing Project (1982) ZR 172*
12. *Abel Banda v. The People (1986) ZR 105*

Initially both convicts appealed against conviction and sentence but on the hearing of the appeal the 1st Appellant through her advocate indicated to us that he was no longer desirous of prosecuting the appeal. He therefore applied that his appeal be dismissed. We then heard the state who strongly supported the conviction of the 1st Appellant for both counts. However, we reserved our ruling on the application to discontinue the appeal to the date of delivery of this judgment for reasons that will be disclosed in this judgment.

The record shows that the appellants were jointly charged with one count of murder of **JENNIFER MUKUPA,** contrary to Section 200 of the Penal Code Chapter 87 of the Laws of Zambia and one count of assault occasioning grievous bodily harm relating to Harrison Chanda and Contrary to Section 48(a) of the Penal Code Chapter 87 of the Laws of Zambia.

Particulars of the 1st count were that both accused persons on 14th February, 2013 at Luwingu, in the Luwingu District of the Northern Province of the Republic of Zambia jointly and whilst acting together did murder one **JENNIFER MUKUPA.**

Particulars of the 2nd count were that both accused persons on 14th February, 2013 at Luwingu, in the Luwingu District of the Northern Province of the Republic of Zambia, jointly and whilst acting together did unlawfully wound or cause grievous bodily harm to **HARRISON CHANDA.**

For the 1st count both appellants were sentenced to death. For the 2nd count both appellants were sentenced to 20 years imprisonment.

The two grounds of appeal are as follows:

1. The learned trial court erred in law and in fact by convicting the 2nd appellant of the subject offences in the absence of proof beyond all reasonable doubt, given the nature and quality of the evidence on record regarding the death of Jennifer Mukupa.

2. The learned trial court erred in law and in fact by receiving the evidence of a child on oath after a defective voire dire and ruling.

Evidence in the court below was in brief as follows:

Towards the end of January, 2013 the accused persons who were a married couple went out in the morning to work leaving their children Jennifer now deceased and Harrison Chanda at home. The children were A1's children step children and A2's biological children. Jennifer was at the material time three years old while Harrison was five years old. When the 1st accused i.e. the husband returned home that afternoon earlier than his wife, he found that both children had taken some of the beans that had been cooking on the brazier and eaten them. He then got angry about that and decided to boil some water. Thereafter he dipped the deceased's hands in it. His wife found that he had already dipped the girl's hands in the water. Jennifer consequently suffered severe burns on both hands and the skin came off. The couple then agreed that Harrison should also be taught a lesson not to eat relish without permission by dipping his hands in very hot water. Both accused then dipped Harrison's hands in the water but he managed to remove the left hand before it got burnt a lot. Therefore, he suffered severe burns only on the right hand which was swollen and the skin got off. The left hand only had superficial burns.

The children were however, not taken to the clinic or hospital until after about a week with the prompting of their extended family members. Jennifer was in a critical condition and bed ridden from the day she got burnt until she died in Luwingu District Hospital on 14th February, 2013. She had stayed in hospital for about six days

before she died. Her brother had also been hospitalized for the same period.

It was also in evidence that in a family meeting attended by both accused, PW1 Kellies Mukupa, PW2 Mandalena Musonda who is A1's sister, Tresford Kanyata their uncle and Harrison Chanda, both accused persons confessed to burning the children's hands as a measure of discipline because they had eaten some beans without permission.

According to the appellant's advocate's written heads of arguments filed herein on 20th January, 2017, the arguments and submissions were as follows:

At page 190 of the record, the trial court refers to the finding of the Government Medical Officer which is indicated in the Report on Post-mortem Examination that the cause of death was "kwashiorkor with septic burns." On the same page the trial Judge proffered her understanding of the said findings as follows:

> *My appreciation of the proposition "with" in the report entails that the death of the deceased child was caused by kwashiorkor accompanied by septic burns. I struggle to see how any other interpretation could be made to this non-technical, straight forward statement."*

Learned counsel's contention is that the Judge fell into error when she construed the finding in a rather superficial fashion. She said

interpretation, does not clarify the issues regarding the cause of death. Thus it was not prudent for the Judge to form an opinion on a complex medical subject in the absence of actual expert material on which she could have based an independent opinion.

She further submitted that there is no evidence on record that establishes the connection as a matter of causation, between the kwashiorkor and septic burns. There was no evidence from the prosecution detailing the medical treatment that the deceased had received. Therefore, she argued that these factors present lingering doubts as to what caused the death of the child.

She pointed out that at page 191 of the record, lines 6 - 7 the trial court stated that:

> *"It is common cause that the deceased child was suffering from kwashiorkor before the accused burnt her hands with hot water. In other words the kwashiorkor was preceded by the burns."*

In the light of the foregoing, she urged us to note that there is no evidence on record upon which a deduction that one medical condition preceded the other maybe premised. She therefore contended that the trial Judge misdirected herself by assuming facts not in evidence. She said it is uncertain from the record, what caused the deceased's death as mirrored by there being no details regarding the medical treatment received by the deceased on one

hand and the uncertainty regarding which of the two conditions preceded the other and possibly overwhelmed the other. To fortify these arguments she relied on the case of ***Patson Simbaiula v. The People*** [1] where the Supreme Court held that:

> ***"Where a person inflicts an injury and the injured person later dies of causes not directly created by the original injury, but caused by it, the requirement of causation is satisfied. Where the cause of death can be traced back in a clear chain to the actions of the persons causing the injury, it is not always necessary for direct evidence to be led that the injured person received proper medical treatment."***

In the light of the aforementioned authority, she submitted that the prosecution evidence herein does not prove a causal connection that imputes the cause of death in a clear chain of actions, to the alleged actions of the appellant. She said it was crucial for the prosecution to adduce direct evidence to establish the real cause of death by ascertaining the nexus between the two medical conditions and establishing whether the deceased received proper medical treatment.

She said Ngulube DCJ as he then was, distinguished the **Simbaiula case** from the case of ***Raymond Mweetwa Banda v. The People*** [2]. In so doing, he cautioned against the uncritical reliance on the principal set in the Raymond Mweetwa Banda case. The DCJ went on to highlight the peculiar facts of the Raymond Mweetwa Banda

case that informed the need for the prosecution to lead evidence of the deceased's treatment.

She went on to say that this case is also distinguishable from the Simbaiula case because the peculiar facts of this case are such that the post mortem report presents lingering doubt as to caution. Therefore direct medical expert evidence to establish the cause of death was required. She also relied on the case of ***R v. Smith*** [3] where the court Martial Appeal Court at page 198 stated that:

> ***".....it seems to the court that, if at the time of death the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating. Only if it can be said that the original wounding is merely the setting in which another cause operates can it be said that the death does not result from the wound. Putting it in another way, only if the second cause is so overwhelming as to make the original wound merely part of the history can it be said that the death does not flow from the wound."***

Based on the foregoing, she contended that the evidence on record does not establish whether the burn wounds were an operating or substantial cause. The state of the burn wounds at the time of the deceased's death, given the amount of time that had elapsed since they were sustained, is unclear from the record. Therefore there is

nothing from the evidence on record to exclude the inference that it was the effect of kwashiorkor that was so devastating that it rendered the burns, merely part of the deceased's medical history. She further submitted that on the record, a multiplicity of inferences could be made as for possible causes of the deceased's death. Three of them are as follows:

1. That the deceased's treatment was not employed in good faith or was employed without common knowledge or skill thereby causing her death in terms of Section 207 (a) of the Penal Code.[1]
2. That the deceased suffered from kwashiorkor which was the overriding cause of her death thereby making the septic burns merely a part of the deceased's medical history.
3. That the septic burns were preceded by the kwashiorkor and they hastened the deceased's death in terms of Section 207 (d) of the Penal Code.[1]

She said, had the trial court properly directed its mind in this regard, it would have proceeded as required by criminal law to resolve such doubts in favour of the accused. To fortify this argument she relied on the case of ***Dorothy Mutale and Richard Phiri v. The People.***[4]

She therefore prayed that on ground one, the appeal be allowed, the conviction be quashed on the first count and sentence be set aside and that the appellant be acquitted.

On the second ground of appeal Ms. Mukulwamutiyo submitted that after the voire dire, the trial court in its revised ruling on page 59 of the record had this to say:

> ***"As it is cited per Amendment No. 3 of 2011 of the Juvenile Act reverse the order that was made earlier. In light of having determined that the witness has sufficient understanding, he will give evidence on oath."***

She submitted that the trial Judge misapprehended ***Section 122 of the Juveniles Act*** (2) thereby misapplying the test envisaged for swearing of juvenile witnesses. She quoted the said Section as amended by the Juveniles Amendment Act No. 3 of 2011 which provides that:

> ***"Where, in any criminal or civil proceedings against any person, a child below the age of fourteen is called as a witness, the court shall receive the evidence, on oath, of the child if, in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of the child's evidence on oath, and understands the duty of speaking the truth."***

She said this test required under this Section is twofold; firstly the child must possess sufficient intelligence for the evidence to be

received on oath. Second, the child must understand the duty of speaking the truth. The Supreme Court's decision in the case of ***Richard Daka v. The people*** [5] is instructive about this case.

She therefore submitted that both the voire dire and the ruling were flawed. Therefore, following the case of ***Goba v. The People*** [6], the entire evidence of the child i.e. PW3 must be discounted entirely.She further submitted that this is not a proper case for a retrial, particularly with respect to count one, because there is no other reliable evidence to support the conviction. She prayed that the second ground be upheld as well.

Written submissions filed herein by the respondent's advocate on 20th January, 2017 in response to the appellant's submissions are to the effect that the court below was on firm ground when it convicted the appellants for the subject offences because there was overwhelming evidence on record, which proved beyond reasonable doubt that the appellants herein burnt their two children thereby causing the untimely death of one of them.

She adopted what she termed the learned Judge's sound reasoning on pages 190 lines 7-12 as regards the meaning of the words cause of death was "*kwashiorkor with septic wounds.*"She also relied on Section 207 (a) (b) and (d) of the Penal Code which provides that:

"A person is deemed to have caused the death of another person although his act is not the immediate or sole cause of death in any of the following cases:

(a) If he inflicts bodily injury on another person in consequences of which that other person under goes surgical or medical treatment which causes death.....

(b) If he inflicts bodily injury on another which would not have caused death if the injured person had submitted to proper surgical or medical treatment or had observed precautions as to his mode of living.

(d) If by any act or omission he hastens the death of a person suffering under any disease or injury which apart from such act or omission would have caused death....."

She submitted that based on the foregoing provisions of the law, it is the accused persons who caused the untimely death of the deceased. This is in accordance with the trial Judge's findings on page 192 among other things that:

"From the nature of the evidence, this i.e. the burns was actually the immediate cause of the death as the child became very sick after she was burnt. The accused as per Section 207 above can be said to have caused the death... even though the burns were not the only cause of death. The dead child was neglected by the two accused persons in that they failed to take

her to the hospital in good time, the result of which was the wounds becoming septic and young Jennifer dying."

Applying the case of ***R v. Smith*** [3], the state advocate submitted that the death did not flow from the kwashiorkor because; septic burns in this case, were so overwhelming as to make kwashiorkor merely part of the history.

Looking at the Sibaiula case[1], she submitted that failure to call an expert witness to categorically explain that it was the septic wounds which caused the death was not fatal to the case. The court went ahead and convicted on the basis of the overall evidence. She said in any case, expert evidence or opinion is not binding on the court. She relied on the case of ***Mushanga v. The People*** [7] where it was held that:

"The medical evidence presented to the trial court may or may not be conclusive. However, the court is bound to consider the medical evidence together with all other relevant evidence. Its quality and weight will be assessed in light of all the other facts and circumstances of the cases....."

She went on to draw our attention to Section 16 of the Court of Appeal Act, 2016[3] which reads in part:

16 (2) Despite subsection (1), where the court is of the opinion that the point raised in the appeal might be decided in favour of the appellant, the court may dismiss the Appeal if it considers that no miscarriage of justice has actually occurred.

In the light of the foregoing provisions of the Court of Appeal Act, 2016 she submitted that should this court find that the conviction was not safe or that it was passed on a misapprehension of the law, it should dismiss the appeal as there will be no miscarriage of justice.

She further submitted that kwashiorkor is caused by poor nutrition. Therefore, it is clear that the accused persons caused the death of their daughter by failing to take proper care of her.

The state opposed the second ground of appeal by stating that the lower court complied with the provisions of the Juveniles Act.[2] The voire dire was properly conducted. The Judge firstly decided that the child should give unsworn evidence but later changed her mind because she was of the view that the child had sufficient understanding and capable of giving evidence on oath. She relied on the case of ***Phillip Mungala Mwanamubi v. The People*** [8] where the Supreme Court held that:

> ***"Despite the voire dire being defective, there was some other evidence on record, warranting the***

conviction to stand. In the first place there was evidence from PW3 that at the police station, the appellant admitted that the prosecutrix had been to his house and that he was there when she came. His own admission put him at the scene of the crime when it was committed. Therefore, he had an opportunity to defile the prosecutrix. In an appropriate case, opportunity can constitute corroboration as to identity of the offender."

In the light of the foregoing, she argued that even though the voire dire may be defective; the evidence of PW3 was corroborated as per Section 122 (b) of the Juveniles Act.[2] She said both the medical report and report on post mortem examination confirm that the deceased person and PW3 suffered grave burns.

She added that both appellants admitted to burning the children in a family meeting attended by among others PW1, PW2 and PW3. She supported the trial court's position as regards the demeanor of the three witnesses that they had no motive to falsely implicate the appellants who were their close relatives. The family meeting did not involve people in authority; therefore the appellants freely and voluntarily made the confessions. She finally urged us to dismiss the appeal.

On the hearing of the appeal learned counsel for the appellants relied on the written heads of arguments. She added that the trial

Judge did not conduct a subsequent voire dire to inform her ruling. The state only relied on the written submissions.

We have taken into account the evidence on record, the judgment and the written and oral submissions. We do not accept the withdrawal of the appeal by the 1st appellant because the issues raised by 2nd appellant in her appeal also affect the 1st appellant's conviction and sentence and in the interests of justice he will be affected by the judgment.

As regards the 1st ground of appeal, our vantage point is the case of ***Stanley Kasungani v. The people*** [10] where it was held inter alia that:

> ***"It is highly desirable, save perhaps in the simplest of cases, for the person who carried out a medical examination of a victim of assault; including a fatal assault, and prepared the report to give verbal evidence in court."***

In this particular case, it was in our view necessary for the writer of the Report on Post Mortem Examination to be called as a witness by the prosecution, the court or the defence. That is because this is not a simple case. A child of tender years purportedly died of burns and her parents were charged with murder. The postmortem report showed that she died of "kwashiorkor with septic burns." The way in which the learned Judge in the court below interpreted this was

too simplistic to be accepted because that finding was not non-technical and straight forward as perceived by her especially in the light of the cases of Patson Simbaiula v. The People [1], Raymond Mweetwa Banda v. The People [3], R v. Smith [3] and Dorothy Mutale and Richard Phiri v. The People [4].

We agree with counsel for the appellants that there was no evidence that kwashiorkor preceded the burns. There was also no evidence establishing a connection between the kwashiorkor and the septic burns. There is also no record of the medical treatment which the deceased received so that it could be ascertained that her death was no fault of the medical practitioner who attended to her burn wounds which became septic were still an operating cause and a substantial cause at the time of death despite the kwashiorkor. The case of Patson Simbaiula v. The People applies because there was need under the circumstances of this case especially in the light of the cause of death stated in the post mortem report for the requirement of causation to be satisfied. It is only the author of the post mortem report who could have adduced evidence which would have guided the court in ascertaining the connection between the kwashiorkor and the septic wounds. The author would have most likely adduced evidence as to whether at the time of death; the wounds were an operating cause and substantial cause. As per Rv. Smith[2] it was a crucial requirement that it be established which of the two medical conditions occurred first and which one over whelmed the other if at all, so that the technicalities mentioned in the holding in that case could be addressed properly.

We also agree with counsel for the appellant that there are many possible inferences that can be made from the evidence on record, some of which have already been mentioned by the appellants advocate. We are of the view that the trial Judge was at pains in trying to interpret the findings as to the cause of death without expert opinion to guide her and she grossly misdirected herself. If she had properly directed herself, we believe she would have had lingering doubts and resolved such doubts in favour of both appellants especially on the 1st count as the case of Dorothy Mutale and Richard Phiri v. The People would have been applied.

The Supreme Court has in a plethora of authorities given guidance as to when the lower courts findings of fact can be interfered with by an appellate court. We shall only go by one of them which is ***Wilson Masauso Zulu v. Avondale Housing Project*** *(11)* where it was held that:

> ***"The appellate court will only reverse findings of fact made by a trial court. If it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts."***

In the present case we upset the findings of the lower court that the deceased was suffering from kwashiorkor before she was burnt and that the writer of the report meant that the death was caused by kwashiorkor accompanied by septic burns and that the statement

"kwashiorkor with septic wounds" was non-technical and straight forward. Further that the septic wounds were actually the immediate cause of death as the child was very sick after she was burnt because these findings were not supported by the evidence on record. The Judge applied Section 207 of the Penal Code without carefully examining the evidence on record. For the foregoing reasons the first ground of appeal is upheld.

Coming to the second ground of appeal, we accept the appellant's advocate's submission that the test required to be made under Section 122 of the Juveniles Act as amended by the Juveniles Amendment Act No. 3 of 2011 is indeed twofold. After properly conducting a voire dire, the court must firstly form an opinion as to whether the child is intelligent enough to give evidence on oath. Secondly the court should be satisfied that the child witness understands the duty of speaking the truth. (see Richard Daka v. The People [5]).

In the present case, the trial Judge erred in that it is unclear as to which test she applied when she determined that the witness had sufficient understanding and he would give evidence on oath. It is not clear whether it was the intelligence test that was being applied or the test whether the child understood the duty of speaking the truth. We reiterate that the child must pass both parts of the test before he or she can be allowed to give evidence on oath. We have no doubt that the *voire dire* and the amended ruling that followed were therefore defective. Therefore, following the case of Goba v.

The People [6] we hereby discount the evidence given by PW3 Harrison Chanda in its entirety. His evidence was given in support of both counts.

In the present case, it is clear that both appellants admitted to burning their children's hands in the family meeting attended by PW1, PW2, PW3 and another. The confessions were made to persons who were not in authority, therefore they were admissible. We are fortified by the case of ***Abel Banda v. The People*** [12] where the Supreme Court held inter alia that:

> ***A village headman is not a person in authority for purposes of administering a warn and caution before interrogating a suspect since his normal duties do not pertain to investigate crime. In the present case the family members, who heard the confessions had no duty to investigate crime. It is clear from the Abel Banda case that a person is considered to be in authority in criminal law when his duty is to investigate crime."***

The trial Judge did not make any finding in this regard perhaps because she placed a lot of weight on the evidence of PW3 and the Report on Postmortem Examination. However, that was not a fatal omission. Based on the evidence of PW1 and PW2 and the postmortem report, it is clear that both accused unlawfully burnt Harrison Chanda's hands thereby causing grievous harm to him. As a result the 2nd ground of appeal is also allowed.

We shall not apply Section 16 (2) of the Court of Appeal Act, 2016 because there was a miscarriage of justice in this case. Both appellants should not have been convicted of murder because there was no proof beyond reasonable doubt that they committed that offence. Instead the charge should have been reduced from murder to assault with intent to disfigure or disable as provided for under Section 224 (a) of the Penal Code. (1) This Section provides as follows:

"224 Any person who, with intent to maim, disfigure or disable any person, or to do some grievous harm to any person....

(a) Unlawfully wounds or does any grievous harm to any person by any means whatsoever.....

Is guilty of a felony and is liable to imprisonment for life."

Evidence on record shows that the 2nd appellant was probably not there when the deceased was burnt. She arrived late after the deceased's hands had been dipped into the hot water. We therefore hold the doubt in her favour.

We are of the view that both appellants had ample opportunities to defend themselves against the offence under Section 224 (a) of the Penal Code. This offence was proved against the 1st appellant only. We therefore quash the convictions and sentences for murder.

Instead we convict the first appellant of assault with intent to disfigure or disable Jennifer Mukupa contrary to Section 224 (a) of the Penal Code. We sentence him to life imprisonment.

The Judge cannot be faulted for finding that PW1, PW2 and PW3 had no motive to give false evidence. On the second page of the Judgment, the Judge noted that both accused were charged under a wrong Section in Count 2 i.e. Section 248 (a) of the Penal Code instead of Section 224 (a) of the same Act. She also noted that pursuant to Section 273 of the same Act, the court has jurisdiction to amend the information because reference to a wrong Section does not nullify the said powers. So we are left to wonder why she did not proceed to amend the information. She erred by omitting to amend the information. The information is accordingly amended.

The learned Judge correctly applied Section 22 of the Penal Code[1] to the facts of this case in finding that both accused persons had formed an intention to prosecute a common and unlawful purpose in conjunction with another on count 2. She also properly found in the last paragraph of the judgment that the accused persons jointly and whilst acting together, did unlawfully wound or cause grievous bodily harm to Harrison Chanda.

We have observed that the appellants were collectively convicted and sentenced. That was improper as the normal court practice is to convict and sentence each accused person separately where they are jointly charged.

We therefore set aside the defective conviction and sentence on count 2 and instead convict the 1st appellant of unlawfully wounding and causing grievous bodily harm to Harrison Chanda with intent to maim or disfigure contrary to Section 224 (a) of the Penal Code. We also convict the 2nd appellant of the same offence. The 1st appellant is sentenced to 20 years imprisonment with hard labour on the 2nd count. The 2nd appellant is sentenced to 20 years simple imprisonment on the 2nd count.

Dated this 17th day of March 2017

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

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D.Y.L. SICHINGA, SC
COURT OF APPEAL JUDGE

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M.M. KONDOLO, SC
COURT OF APPEAL JUDGE