

TAKWANA                  KELVIN                  MUTYORAURI  
    v  
THE                  STATE

**SUPREME COURT OF ZIMBABWE  
ZIYAMBI JA, GARWE JA & HLATSHWAYO JA  
BULAWAYO, MAY 5 & 8 2014**

*D Dube*, for the appellant  
*S Ndhlovu*, for the respondent

**ZIYAMBI JA:**      The appellant in this matter was charged before the High Court sitting at Gweru with the murder of Gamuchirai Dumba a girl aged three years. It was alleged that on 18 July 2011 at Village Chikwakukire, Chief Chireya, Gokwe North in the Midlands Province, the appellant, unlawfully and with intent to kill, struck the deceased with an unknown object instantly causing her death. He was twenty-five years old at the time of the offence. The appellant pleaded not guilty to the charge of murder but was found guilty by the High Court and sentenced to death. He now appeals against both the conviction and the sentence.

At the trial, it was not in issue that the appellant caused the death of the deceased. The issue which fell for

determination by the court was whether the appellant had deliberately killed the deceased. The doctor who performed the post-mortem on the body of the deceased was uncertain as to the cause of death because of the advanced state of decomposition of the body at the time of his examination. He found parts of the deceased's body to be missing.

The appellant gave oral evidence in his defence. He told the court that he approached the deceased who was playing under a tree and asked for her mother. The deceased told him that her mother had gone to fetch water but would be back shortly. He decided to await the return of the deceased's mother and, as he was tired, he leaned against a ladder which was propped up against the tree. The ladder accidentally fell and hit the deceased who became unconscious. His attempts to administer first aid to the deceased failed and, fearing the reaction of the people of the neighbourhood, he lifted the deceased and took her into a nearby bush in order to resuscitate her far from the public eye. The deceased did not recover and he abandoned the body in the bush and ran away.

Evidence was led by the State from Francisca Chirozva. She resides at Village Chikwakure. She knew the deceased as a

niece of her sister in law. On the night of 17 July 2011, she was away from home. She returned on 18 July at about 9am. Shortly thereafter her sister in-law Tendai Sibanda arrived at her home asking whether she knew of the whereabouts of the deceased. The witness did not and enquired as to why she was looking for the deceased. It was then that she was told that the deceased had not come with the other children when they were called for tea nor was she to be found at her grandmother's homestead. She began to search for the deceased and traced the footprints of the deceased from the place where she had been playing with the other children. In so doing they observed a big boot print belonging to a man with a child's footprint alongside the boot print. As they followed the trail the child's footprint suddenly disappeared but the boot print could still be seen and it was followed and led them to a stream and a bushy area. They continued to track the shoe print and came upon two deposits of human faeces and a pair of shorts soiled with human waste across the stream. The police were called and a report made to them. After they had left, the witness together with others continued the search. They were about to give up when, on 27 July, as she was going in search of cattle the witness detected a putrid smell. As she looked around to ascertain the source of the smell she observed some dogs

fighting over something which turned out on further investigation to be a human skull - a child's skull. With the help of the dogs they located the body some three kilometers away from the homestead where the deceased had last been seen playing, in a bushy area which was not easily accessible. What was left of the body was the lower part thereof from the waist downwards. They identified it as being that of the deceased by the pink dress which was still in a hole which contained water. The body appeared to have been dragged out of the hole by the dogs into the open where it was now visible. This witness was adamant that there was no ladder at the homestead. Also she said that the tree where the deceased had been playing was so small that one could not lean a ladder on it.

Evidence was also heard from Tonderai Sandawu who is a son of the appellant's sister Miriam Sandawu. His evidence was to the effect that the appellant who had been visiting his family since May 2011 when he came to pay condolences, had packed all his belongings and left their homestead on the 17 July without bidding them farewell. He identified the black shorts found near the place of discovery of the deceased's body as belonging to the appellant.

A warned and cautioned statement made by the appellant and confirmed by a Magistrate on 5 October 2011 was produced as an exhibit. In that statement he said:

"I admit that I killed a three year old child. I left Masiya area for Bande. I then came to a homestead where there was this child playing under a tree. On that tree there was a ladder that was leaning against it. I leaned against that ladder which then fell on top of the child who was playing under the tree and the child died. I lifted the child who had died and hid her, a distance from her homestead. I did not rape her but I just lifted her and went with her thinking that she would come back to life but she did not. That is when I fled away."

The oral evidence given by the appellant differs from what he said in his warned and cautioned statement. In that statement he stated among other things that the deceased was already dead when he carried her away from her homestead. That claim is in direct conflict with the evidence of Francisca who said that two sets of footprints, that of a child and a man left the homestead. The court unreservedly accepted Francisca's evidence. The conclusion must therefore be that the deceased and the appellant walked some distance from the homestead before he carried her.

The appellant also told the court that he gave the police a false name when arrested for another offence in order to avoid being linked by the police with this offence.

The court found the appellant to be untruthful, in its words 'a hopeless liar'. It found that the state witnesses were truthful and that their evidence was clear and credible. It was alive to the fact that it was dealing with circumstantial evidence and it found that all the proved facts established that the appellant brought about the death of the deceased deliberately and not accidentally. It therefore returned a verdict of murder with actual intent to kill.

The proved facts were that the appellant found the deceased playing at her home alone, that he took the deceased away from the homestead and brought about her death, that he then concealed the body in such a way that the first team of local villagers were unable to locate the body over a number of days, that the police attended the scene but failed to locate the body of the deceased, that the appellant deliberately concealed his involvement in the death of the deceased person, he tried to obviate any linking of himself to the offence by

changing his name when he was arrested for a different offence, and that he was found by the court to have lied on material facts.

Mr *Dube*, who appeared for the appellant, was unable to fault the findings and reasoning of the trial court. He was unable to find any misdirection on the part of the court *a quo*.

This Court is also of the view that the trial court did not misdirect itself. It properly took into account all the relevant factors. The inference which it drew namely, that the appellant deliberately brought about the death of the deceased, was consistent with all the proved or common cause facts and its conclusion that the appellant is guilty of the murder of the deceased with actual intent to kill is unassailable.

Regarding the question of extenuating circumstances, Mr *Dube* was unable to make any meaningful submissions. Indeed he was constrained to concede there were no extenuating circumstances. It is now trite that a finding by the trial court that no extenuating circumstances exist will not be upset by this Court in the absence of a misdirection or irregularity. This was a murder of an innocent child for purposes which the appellant has chosen not to reveal. It seems to me that the court *a quo*

took into account all the relevant factors in arriving at its conclusion. There is no basis apparent on the record for interference with its finding.

Accordingly the appeal is dismissed.

**GARWE JA:** I agree

**HLATSHWAYO JA:** I agree

*Cheda & Partners*, appellant's legal practitioners.

*The Attorney General's Office*, respondent's legal practitioners