

THE PEOPLE v HOSIA MULUMBI (1995) S.J.

HIGH COURT
HON. MR. JUSTICE C B KABAMBA
12TH MAY 1995

Flynote

Murder and aggravated robbery - Prosecution's duty - Degree of proof required in a criminal case

Headnote

The accused pleaded not guilty to three counts of murder contrary to s.200 of the Penal Code; attempted murder contrary to s.215 of the Penal Code, and aggravated robbery contrary to Section 294(1) of the Penal Code. There was no dispute as to whether or not the elements of each offence were proved. The question was whether the offences were committed and hinged on credibility basically on the two prosecution witnesses and the accused

Held:

(i) The prosecution proved the offence of murder against the accused

For the State: Me M Chibiya - State Advocate

For accused: Mr F B Nanguzyambo - SLAC

Judgement

KABAMBA, J.: delivered the judgment of the court.

The accused pleaded not guilty to three counts of murder contrary to s.200 of the Penal Code; attempted murder contrary to s.215 of the Penal Code, and aggravated robbery contrary to Section 294(1) of the Penal Code. The particulars of the three offences are clearly set out in the information. All these offences were allegedly committed on 13th September, 1994 in Kabwe District.

The onus is always on the prosecution to establish the case of each and every offence charged beyond reasonable doubt. There is no burden on the accused to prove his innocence; and if and upon the consideration of the whole of the evidence, I am left with a reasonable doubt as to the guilt of the accused on each and every offence charged then the accused is entitled to an acquittal.

For the prosecution, Kazutoshi Aoyama (PW1) testified that on 13th September, 1994 he received information that Isaac Mutendwa was murdered in Kabwe and his car stolen. He had known the deceased personally and very well. He had even known the deceased's car. So on 14th September, 1994, while driving in Matero he saw the car from opposite direction he recognised as that of the deceased. He ordered the men in deceased's car to stop and when they did so he introduced himself as Police Officer and then took them to Matero Police Station where he handed them to the Police.

Fanwell Mutandwa (PW2) told the court that on a certain day before 13th September, 1994, the deceased informed him that the accused, Hosea Mulumbi, had some cattle to sell. on 13th

September, 1994 he and his elder brother the deceased set off for buying those cattle from accused. They met the accused at "Just take away" shop. From there they set off along Mulungushi Road going to the place where accused told them there was cattle for sale. As they reached Mulungushi Dam they branched into a smaller road along the powerline. They found a place with some furrows and accused warned the deceased to drive slowly there because of bumps. Accused suddenly took out Okapi Knife and stabbed the deceased while the vehicle was going towards the tree and the deceased said that he had been stabbed by the accused and he was dying. then the accused stabbed him too, twice on the right side of his chest. The two came out and began struggling as accused wanted to stab him on the left side of his chest, he raised his hand and the accused stabbed him on the arm.

During the struggle he grabbed the knife from the accused and broke it. Since both became tired and injured they got into the vehicle and drove off, while he was holding the deceased. when they reached a certain place accused stopped and ordered him to take out the brief case of the deceased and give him the money. The accused took the brief case behind the seat and broke it with a stone. He (accused) found only bounced cheques and a knife in the briefcase. then the accused drove on upto the junction of Chokonkomene Primary School and the Momboshi Roads where he stopped and ordered him to search for money from the pockets of the deceased. He did so and found K100,000 which he gave the accused.

At a later stage when accused ordered him to lie on the body of the deceased so that school children and the people around that place should not see the deceased, he realised that accused's intention was to stab him with his brother's knife. So he opened the door and ran away but accused chased him and caught him and they struggled and eventually he overpowered the accused and the accused went to the vehicle, made a 'U' turn and drove off and he went to Chokonkomene Primary School where he received assistance and first aid by one old man and after giving him first aid he took him to the military camp. From there the military police took him to the accused's parents and narrated to the accused's father what the accused had done. From there they went to Kabwe Central Police where he reported the matter. After that he was taken to the hospital for treatment. He had known the accused before as they were going to the same church (SDA) and to the camps. In cross examination he said that he had been normal since he had known him.

Victor Chibaya (PW3) told the court that on 14th September, 1994, accused went to his house and the accused was introduced to him by his cousin. Later he saw a car parked at the house of his brother. When he enquired about it, he was told that it was the accused who brought it there and accused confirmed that it was his vehicle which he had bought. Later in the evening around 17.00 hours they decided to go to Garden Compound and accused said that they were going to use his vehicle but since accused had a cut on his arm, he could not but instead he PW3 took over accused's vehicle. After driving short distance (2km) he was stopped by PW1 and the driver of PW1 narrated to him as to what had happened to the owner of that motor vehicle. when he asked accused about that the accused said he would take at the Police Station. On arrival at the Police Station the accused told the Police that he was not connected to the case and should be let free and he was released.

On the broken indicator lens accused told him that he broke it when he was reversing and would like him to find someone to replace it. In respect of the blood inside the vehicle accused said that it was the blood of a cow they had slaughtered. And the cut on the arm was sustained when they were skinning the same cow.

Sabina Mutandwa (PW4), the wife of the deceased, told the court that two months before the incident she and her husband met the accused at Telerental and introduced accused as a friend to her husband. then a week before the incident the deceased received a note from the accused asking him to meet accused at "Take way shop" and later they met accused there.

This was on 12th September, 1994. The next day her husband and a brother in law left for buying cattle from the accused but the deceased and his brother did not come back. Later she learnt about the death of her husband.

Mathews Wimba (PW6) told the court that whilst in CUSA Meeting at Chikonkomene Primary School he was called out and he found young man sitting under the Mango tree and had blood all over the body. He took charge and removed PW2' short and observed two deep cuts on the right arm. PW2 narrated to him what had happened. Then he washed him and took him eventually to Kabwe General Hospital after reporting the matter to the Police.

Det. Sub. Inspector Hamumbu (PW7) told the court that on 14th September, 1994 he received three dockets of murder, aggravated robbery and attempted murder. Acting on the information therein, he rushed to the hospital where he found PW2 and interviewed him and after that went back to his office and sent Police messages to all stations. On 15th September, 1994 he received a Police message from Matero Police station about the accused. The same day he went to Lusaka and collected the accused together with the said motor vehicle. On arrival here, he interviewed the accused in connection with the three counts. After that the accused led him to a certain place where he recovered front number plate of the said vehicle, a red hat, spectacles, one knife and a pair of black shoes. From there accused led him to another place in the bush where the accused showed him the body of the deceased. He observed one stab wound on the left chest and the other on the back. At that place he recovered one briefcase, a car mat and a blood stained knife. From there the accused led him to his village where he recovered blood trousers and T shirt - 500 metres from accused's house. From Muswishi stream he recovered accused's jacket submerged in water and had blood stains. On 16th September, he attended the postmortem thereafter he arrested the accused for three offences. According to him accused admitted all charges. He tendered 15 items as exhibits and were admitted as part of his evidence. In cross examination he said that photographs were taken but not developed and that no finger prints were lifted.

In his defence the accused testified that on 13th September, 1994 he left his house for his father's farm in Muswishi. And in tow he met the deceased and PW2 at "Take Away Shop". While having breakfast PW2 interviewed him as to how he was progressing. During the discussion he came to know that the two brothers were going to the farm in the same direction. So he asked for a lift. From there they went to Big Bite where they found Wisdom Chibuye who accompanied the deceased and PW2 to buy cattle. they left Big Bite and drove along Mulungushi Road then branched into Power line. Whilst driving along that road the deceased began speeding and he cautioned him because the road was bad. Later they left that road into a bush road and soon the vehicle stopped. He had a big black brief case. when the vehicle stopped Wisdom Chibuye came out and opened the passengers door where he was and grabbed his briefcase. Immediately he got out and grabbed Wisdom Chibuye. Then PW2 and the deceased came out and the three started beating him and eventually Wisdom Chibuye ran away with his briefcase and he remained struggling with the two. Then PW2 got the knife from the vehicle, then PW2 came straight to stab him, while the deceased was holding him from behind, but he dodged and instead PW2 stabbed the deceased. PW2 made a second attempt and stabbed him on the right palm. That was the time he heard the deceased scream. In his briefcase there was K3million which was from Maize sales and PW2 came to know about this money during the discussion.

When Fanwell stabbed him he ran a short distance and stopped but the deceased apologised for what had happened and PW2 broke the knife to assure accused's safety. After that all three got into the vehicle and drove off following Chibuye. After a short distance PW2 took over driving because deceased was not feeling well and after kilometres they left the deceased because the latter felt uncomfortable each time the vehicle hit a bump.

They could not reach Chibuye's home because PW2 was driving into impassable roads. So they began quarrelling. Then PW2 took a knife from the cash box and they started fighting. He took a bottle, broke it and injured PW2 on the hand. They then stopped fighting and got into the vehicle and came to Chikonkomene Road where PW2 asked him to take over driving because the injury on the hand was painful, and he drove up to Chikonkomene Primary School. He stopped there and wanted to ask villagers and school children as to Chibuye's place. When PW2 saw the people coming he opened the door and ran into the bush. He then drove back to where they had left the deceased but he did not find him so he drove to his house. From there he went to Zambia Railways Clinic where they referred him to Kabwe General Hospital where he found a lot of people. From there he went to Liteta Hospital where he was treated. After that he went to Lusaka and was driven by a passenger he found on the road to Lusaka. In Chunga compound he went to the house of his cousin Emmanuel Chibaya and this man said he would drive him back to Kabwe the next day. But the next day Mr Chibaya did not come back from work until 16.00 hours when Victor (PW3) who he said that he was going to Garden compound for funeral and since PW3' vehicle was not in perfect condition, he asked him to use his (accused's)vehicle. He agreed and around 15.00 hours they left for Garden compound.

On the way a white car went in front of them and stopped then PW1 went to them and informed them that the owner of the car were driving was reported dead. From there they were taken to Matero Police where he explained what had happened. The next day collected by Kabwe Police. The Police collected the shoes and K10,000.00 from his supposed to be exhibits.

In cross examination he testified that he came with K3m because he was going to Livingstone where the Customs Officials were auctioning motor vehicles as he wanted to buy one but he decided to go back home because he had forgotten the receipt of the deposit of his father's vehicle at Customs for clearance. He denied to have stabbed the deceased. that he drove to Liteta because of congestion at Kabwe General Hospital. That it did not occur to him to report the matter to the Police. That he told PWno5 that he was going to Livingstone to get his father's motor vehicle from South Africa. He could not report at Chisamba or Lusaka because his intention was to report here at kabwe. That he was not in a hurry to report because he was holding their motor vehicle against his money. That blood stains on his clothes were as a result of torture by the Police. He denied leading the Police where his clothes were, neither did he lead the Police where the body was as it was recovered before he was brought here.

In this case there is no dispute as to whether or not the elements of each offence were proved. The question is whether the offences were committed and hinges on credibility basically on the two witnesses i.e PW2 and accused. The evidence of PW2 must be weighed against that of the accused. the accused categorically denied stabbing the deceased but was stabbed by his own brother. In the case of attempted murder he raised the defence of self. As to aggravated robbery he said that PW2 allowed him to drive and on the way PW2 ran away into the bush.

In the charges of murder the lements are (i) with malice aforethought (ii) causing death of another person (iii) by unlawful act or omission. And malice aforethought is deemed to be established by evidence proving (a) an intention to cause death or grievous harm (b) Knowledge that the act or omission causing death will probably cause death or grievous harm (c) an intent to commit a felony using violence means in the commission of that felony. If the evidence of PW2 it to believed then there would be no doubt that the three lements mentioned above have been established as far as malice aforethought is concerned. There is no doubt that the deceased died as a result of unlawful act.

I return to a credibility there is sufficient evidence from PW2 and PW4 that the accused and the deceased made an arrangement to go to the farm to buy cattle from accused. This was why they had to meet at one place agreed upon. Therefore accused knew that the two brothers

had money for the venture. I do not think that a fourth person called Chibuye was in existence. He was a fiction of the accused. The accused's story of having K3m is high incredible. When he was asked why he was carrying it he was going to Livingstone and made conflicting statements as to what he would do with it in Livingstone. It would have been reasonable if he collected that money from the buyers of his maize and was taking it home, so the alleged aggravated robbery committed on him was false. The photographs and finger prints were necessary in this case since the issue of identity does not arise. Both accused and PW2 confirmed that they knew each other. Accused admitted to have struggled with PW2 and deceased. The accused's conduct betrayed him because he normal way of doing things was for him to report the aggravated robbery case for his K3m. He was to be given medical report to be treated at the hospital but he avoided doing any of these things. The story he gave why he went to Lusaka is nebulous. In Lusaka he posed to PW3 that he bought that motor vehicle. If he was robbed he should have told him what he told this court. His story that he did not find the deceased where they left him was false because he let PW7 where he threw the body of the deceased after PW2 had run away. He even led PW7 where he hid his blood stained clothes. This conduct cannot come from innocent person. Thus his story was wholly fabricated. I find it hard that PW2 stabbed his brother behind him in the manner the wounds were.

I find that the prosecution have proved the offence of murder that the reason for him to kill the deceased and intent to kill also PW2 was to steal their money and motor vehicle which he successfully did.

Both PW6 and PW7 observed two deep cut on right chest of PW2 and were supported by the Medical Report. Certainly the intention was to kill him too. There is therefore clear evidence that accused attempted to kill PW2. That count, too has been proved by the prosecution. Consequently the charge of aggravated robbery is proved. The money and motor vehicle were stolen after using violence with a knife. The defence of person under s.17 of the Penal Code cannot be availed to the accused as the entire defence was a patent fabrication which was cleverly tailored to deceive the court. All three counts have been proved beyond any shadow of doubt and I find accuse guilty as charged and convict him accordingly.
