

**IN THE HIGH COURT FOR ZAMBIA**

**HKS/25/2011**

**AT THE DISTRICT REGISTRY**

**HOLDEN AT SOLWEZI**

**(CRIMINAL JURISDICTION)**

**BETWEEN**

**THE PEOPLE**

**VS**

**CHARLES KAKONKANYA**

Before Honourable Mr. Justice I. Kamwendo in Open Court

For the People: Mrs. Kundachola - State Advocate

For the Accused: Mr. Mazyopa - Legal Aid Counsel

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**JUDGMENT**

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Cases referred to:

1. *The People vs Muchabi (1966) ZR 55 (2010 Edition)*
2. *The People vs Sitali (1972) ZR 139*
3. *Simusokwe vs The People (2002) ZR 63*

Legislation referred to:

1. *Section 200 of the Penal Code, Chapter 87 of the Laws of Zambia*

Works referred to:

1. *Wikipedia, Free Encyclopedia*
2. *Japanese Society of Internal Medicine Journal, Volume 46 (2007) No. 14 PP 113 - 1115*

The accused stands charged with the offence of Murder contrary to Section 200 of the Penal Code, Chapter 87 of the Laws of Zambia. The particulars of the offence is that, the accused on 27<sup>th</sup> July, 2010 at Solwezi, in the Solwezi

District of the North Western Province of the Republic of Zambia, did murder one Geoffrey Chiputa.

A plea of not guilty was entered in respect of the accused person.

At trial of this matter the prosecution called five witnesses.

PW1, Edwin Chiputa testified that on 12<sup>th</sup> April, 2011 he identified the body of Geoffrey Chiputa to the Police and a Pathologist. He testified that the deceased was his elder brother.

PW2, Simon Kangombe testified that on 26<sup>th</sup> July, 2010, he returned to his house from the fields. At around 16:00 hours, he went down near the school and then turned to Jifumpa where he found somebody selling fish. There was a lady coming from the direction of the school. The witness told the Court that when she reached this place she shouted to Chiputa to buy her some fish. The lady was given a bucket of fish. He testified further that, surprisingly, as he was still there, he saw the accused Charles Kakonkanya stabbing Geoffrey Chiputa with something that looked like a knife. The accused stabbed the deceased on the neck. He saw the deceased falling down and saw the accused undressing the deceased. He also threatened to stab the witness. He identified the accused by pointing at him in the dock. He also testified that he had known the accused for a long time. He said there was sunlight when this was happening.

In cross examination, he told the Court that he met the person who was selling fish around 16:50 hours and that he was with Maseka and Geoffrey Chiputa the deceased.

He further stated that he would not know what would have transpired before the accused stabbed the deceased. He testified that the accused stabbed the deceased. He testified that the accused used his hands on the deceased's private parts and later dressed him up. He said he saw the

accused pull the deceased's penis. He also testified that he saw the knife that the accused used to stab the deceased.

PW3. Lwiness Kankungwa testified that she had gone to the fields and when she returned to her village, she found that a person had been killed by another person. She did not know the date when this happened because she is not educated.

In cross examination, she told the Court that it was not normal for such an incident to happen in the village.

PW4, General Kabozha, testified that on 26<sup>th</sup> July, 2010, Joseph Jifuma went to his village and told him that Charles Kakonkanya had killed Geoffrey Chiputa. He was told of this incident because he was the Chairman of the neighbourhood watch. He then picked up his long baton and handcuffs and went to the groceries and told one member Edward Hotela. They rode a bicycle and went to Jifumpa village and found that Geoffrey Chiputa had died. They went to look for the accused in Kyabu village and later managed to apprehend him. They took him to the village where the dead body was lying. They called the Police Officers who found them seated where the dead body was. The Police took the body and also took the accused. He identified the accused by pointing at him in the dock. He also told the Court that the body had a cut on the neck.

In cross examination he told the Court that, the accused on being asked a third time, told him that the reason why he attacked the deceased was known to his wife.

PW5 Mpundu Peter, an Inspector with Zambia Police Service told the Court that on 26<sup>th</sup> July 2010, he received a phone call from Solwezi Signals Police that somebody had been murdered in Shilenga area, Chief Matebo in Solwezi. Upon receipt of that call together with other Police Officers, they went to Jifumpa village, where they found male Chiputa Geoffrey lying on the

ground in a critical condition. They checked the body and found that he had a deep cut on the throat, blood was coming from both ears and the nose, and had some injuries on the head, when they undressed him, they found that the foreskin on the male reproductive organ was peeled off. They picked him up together with the suspect who he suspected to have used a sharp instrument. The deceased was taken to the hospital and died on 27<sup>th</sup> July, 2010. When he contacted the relatives to the deceased, male Edwin Chiputa, told him that they had no money for a postmortem. He asked the relatives to bury the body in a shallow grave and mark it. On 29<sup>th</sup> July, 2010, he went to the hospital, and found that the Medical Certificate for the cause of the death was collected by the relatives to the deceased. He retrieved the Certificate and discovered that it had no stamp on it. He then went to Solwezi Central Police, where he had a chat with Divisional Criminal Investigation Officer and had a chance to have deceased put on the list of those to be exhumed. He told the Divisional Criminal Investigation Officer that the Certificate had no date stamp on it. On the same day he went back to Maheba Police Camp, where he cautioned male Charles Kakonkanya in connection with the alleged offence. In response, the accused said that the deceased used to go out with his wife. He thereafter made up his mind to arrest and charge the accused with the offence of murder. Under warn and caution statement in Kikaonde, a language he understood better, he gave a voluntary and free statement denying the charge. During the first Criminal Session, he was released on a nolle prosequi, but was later re-arrested and a caution statement taken from him and taken to Court. He further told the Court that on 12<sup>th</sup> April, 2011, a pathologist came from Lusaka and the body was identified by relative Edwin Chiputa with the coffin and to the Police Officers and the results are on the fax from Lusaka Police Forensic Department. He identified the accused in the dock. He told the Court that he was able to identify the postmortem report as it has a date stamp of the coroner, the name of the doctor and the name of the Magistrate and the name of the deceased and the signature of the Magistrate, there is the

badge of the Police and it is written Office of the State Forensic Pathologist and has the name of the relative who identified the body to the doctor and the Police. It also has the date stamp from the Department and the name and signature of the doctor. These documents were admitted in evidence and collectively marked as "P1".

In cross examination, he told the Court, that they went to the scene of the crime at 19:00 hours on 26<sup>th</sup> July, 2010 when they received the information. According to the information he had the deceased and the accused had been drinking beer together. The deceased left that place and went to another place and the accused followed him and accused him of sleeping with his wife. Thereafter, a fight started and the deceased ran away when he reached a certain village, he was badly beaten and this is the place where he fell down and become unconscious. He told the Court that the accused behaved in this way because the deceased used to sleep with his wife.

At the close of the prosecution's case, I found the accused with a case to answer and put him on his defence. His rights were explained to him. He elected to give evidence on oath and called no witness.

DW1, the accused testified that on 26<sup>th</sup> July, 2010, at around 13:00 hours, he was with the deceased, Simon Kangombe and Moffat Maseka who were drinking munkoyo as he played music for them. At 15:00 hours, the deceased, Geoffrey Chiputa left them saying that he was going back to his village. Later, they decided to follow the deceased because he had said that the village he was going to had bitter munkoyo. When they reached Jifumpa village, they were told that there was no munkoyo. They then proceeded to Kyabu village where they found the munkoyo. They then proceeded to Kyabu village where they found the munkoyo. They bought some. They asked for the whereabouts of the deceased because he had said that this is the place where they would find him. They were informed that the deceased had gone to his house. They then proceeded to the deceased's house. They

knocked and there was no response. When he opened the door he saw, the deceased lying on top of a woman. The deceased then got up and that is how he noticed that it was his wife he was lying with. That is how he got hold of Chiputa, the deceased, who got up so viciously and pushed him against the wall and went outside. He told the Court that he followed the deceased and when he ran for a distance of about 20 metres, they started fighting. The accused hit him and he fell down. When he got up he hit the deceased and he fell down. This fight was taking place in Mr. Jifumpa's yard. He told the Court further, that he got hold of the deceased's private parts and when he tried to pull he notice that there was a cut where he tried to pull and stopped. Thereafter he told the Court that he kicked the deceased beneath the chin and he was lying there. His friends Maseka and Kangombe were telling him to stop. His friends later left the place. He was later apprehended by neighbourhood watch members. He was handcuffed and taken to the place where Chiputa was lying. The Police arrived around 10:00 hours and took him together with Chiputa. He was later warned and cautioned and placed in Police custody.

In cross examination, he told the Court that, he had found the deceased on top of his wife and he was half naked. He also said that the wife ran away. Further, he said that he did inflict the injuries on the deceased's neck when he kicked him. He also said that he did not undress the deceased and that when he inserted his hand in his trousers, he observed that the deceased had an injury on his private parts. He also said that the deceased was on top of his wife doing his job and that if the deceased had injury on his penis he could not do the job.

This is the summary of the evidence before me from which I must make my findings and conclusions. I have borne in mind that the burden of proving the ingredients of the offence charged lies with the prosecution and that they must prove the case beyond reasonable doubt. Should I entertain any

doubt as to the guilt of the accused person, the benefit of doubt must be given to the accused person and should lead to an acquittal.

On the evidence before me, it is not disputed that, Geoffrey Chiputa lost his life on 27<sup>th</sup> July, 2010. The issue that should be resolved is whether the accused did unlawfully cause the death of the deceased.

On the evidence on record, I find as a fact that:

- (a) The accused found the deceased lying with his wife in the deceased's home.
- (b) Arising out of that incident a fight arose between the accused and the deceased.
- (c) The accused and the deceased fought at Jifumpa village on 26<sup>th</sup> July, 2010
- (d) The accused inflicted serious injuries on the deceased, as a result of which the deceased lost his life.

The evidence of PW2, was to the effect that he saw the accused stab the deceased, and that he had undressed the deceased and used his hands on the deceased's private parts. PW4 testified that when they apprehended the accused, he told them that he had attacked the deceased and the reason why he did so was known to his wife. PW5 also told the Court that, when he inspected the body, it had serious injuries on the neck, the head and that the foreskin on the penis had been peeled off. He also told the Court that the deceased said that he did this because he had found the deceased on top of his wife. PW5 also told the Court that a postmortem had been conducted by a pathologist from Lusaka. The accused told the Court in his defence that he had beaten the accused and he fell on the ground and that he never injured the deceased's private parts as he noticed that there was an injury to his private parts.

On the whole, I have found the evidence of the prosecution witnesses in this matter to be credible, and I believe their testimony. The injuries found on the

deceased's body to which, the accused himself admits, are evidenced by the findings on the postmortem report.

The accused's testimony to the effect that he never injured the deceased on his private parts I find to be a lie. I find that when he inserted his hands into the deceased's trousers, as he denied undressing him, he used such force that the foreskin of his penis was peeled off. This was continuation of the same serious of force that he used to inflict the serious neck injury and head contusions.

In the circumstances of the case above, I ask myself the question whether in the case before me, the accused can then be held to have committed the offence of murder, and that if he did, would a defence of provocation be available to him and whether the evidence before me the charge of murder can be reduced to manslaughter?

On the evidence before me, it is clear, from the postmortem report which lists three cause of death being:-

- (a) Cerebral contusion
- (b) Blunt force head injury
- (c) Chest and neck injury

that the amount of force used was excessive. The postmortem report shows that the decomposed brain was mixed with blood showing that there was blood in the brain. The report also shows that the deceased had pericardial



haematoma due to the fracture of the sternum and had a fracture of the right side ribs Nos. 5 and 6.

The excessive force used in this matter is confirmed by the works in the high science of medicine. According to the **Wikipedia, the Free Encyclopedia**,<sup>(1)</sup> Cerebral contusion is a form of traumatic brain injury, is a bruise of the brain tissue. It is often caused by a blow to the head and individuals may experience loss of consciousness. Its common cause includes a blow to the head from a motor vehicle crash, fall or **assault** as was the cause in this matter.

Further, the **Japanese Society of Internal Medicine Journal**<sup>(2)</sup> defines pericardial haematoma as a rare entity that is thought to arise as a consequence of blunt chest wall injury.

I would therefore, in answering the question that I paused to myself in determining the guilty of the accused say that considering the force that was used the charge in this matter cannot be reduced to manslaughter.

In the case of **The People vs Muchabi**<sup>(1)</sup> it was held that:

*“the discovery of one’s spouse in flagrant delicto constitutes grave provocation.”*

There is no doubt according to the evidence before the Court that the accused found his house in flagrant delicto and could plead the defence of provocation in this matter.

In the case of **The People vs Sitali**<sup>(2)</sup> Muwo J. referred to paragraph 2499, 26<sup>th</sup> Edition of Archbold as page 297 that:

*“if a man takes another in adultery with his wife and kills him directly upon the spot, this is manslaughter only ....”*

and quoting paragraph 2506 that:-

*“In all cases, to reduce homicide upon provocation to manslaughter, it essential that the battery, wounding, etc. should have been inflicted immediately upon the provocation being given, for if there is a sufficient cooling time for passion to subside and reason to interpose, and the person so provoked afterward kills the other, this is deliberate revenge, and not heat of blood, and accordingly amounts to murder,”*

It is one of my findings that the accused pursued the deceased to the place where PW2, Simon Kang’ombe and Museka were. The testimony of PW5, Peter Mpundu, to the effect that upon being found the deceased ran to the next village where the accused inflicted serious injuries on him is what I held to be the truth.

In the case of **Simusokwe vs The People** <sup>(3)</sup> it was held as follows:

*“(i) if a man and woman, who are not married are nonetheless in a stable relationship or intimacy, this will be treated on the same footing as married persons.*

*(ii) In a claim of provocation the reaction of the force must be proportionate with the result that any evidence of excessive force defeats the defence.”*

MMSW Ngulube, Chief Justice, as he then was at page 64 of the case I have referred to stated as follows:-

*“It has been pointed out in this particular case, that according to the postmortem report, far from using a stick, the appellant had inflicted serious injuries with an iron bar. That use of*

*excessive force immediately defeated any defence of provocation*

*so that it is not possible to reduce the case to manslaughter.”*

As the evidence in this matter clearly shows that excessive force was used, it cannot be reduced to manslaughter. However, the case of **Simusokwe vs The People** <sup>(3)</sup> that I have referred to above, it was held that a failed defence of provocation affords extenuation for charge of murder. I find that the marriage was an extenuation circumstance.

I find that the prosecution had discharged its burden of proof to the hilt, I hereby find the accused guilty of the offence of murder, contrary to Section 200 of the Penal Code Chapter 87 of the Laws of Zambia and convict him accordingly.

Delivered at Solwezi this ..... day of ..... 2011.

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**I. KAMWENDO  
JUDGE**