

IN THE HIGH COURT OF ZAMBIA
HOLDEN AT CHIPATA
(Criminal Jurisdiction)

HJ/45/2001

BETWEEN:

THE PEOPLE

AND

RICHARD MWANZA

Before the Hon. Mr. Justice Dr. P. Matibini, SC, this 25th day of February, 2011.

*For the People: Miss C. C. Soko, with, Mr. R. Masempela, State Advocates in
the Director of Public Prosecutions Chambers.*

For the Accused: Mr. J Phiri, Assistant Senior Legal Aid Counsel, Legal Aid Board.

J U D G M E N T

Cases referred to:

1. *Mbaye v The People (1975) Z.R. 74.*

Legislation referred to:

1. *Penal Code, Cap 87, ss 67, and 200.*
2. *Criminal Procedure Code, Cap 88 ss, 17, 160, 161, and 167.*
3. *Mental Disorder Act, Cap s. 9.*

The accused, Richard Mwanza, 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 are that on the 2nd August, 2001, at Petauke, in the Petauke District of the Eastern Province of the Republic of Zambia, did murder Mirriam Sakala.

This matter was first called on 7th February, 2002, before Justice A. J. Nyangulu. During the hearing Mr. A. M. Bwalya, Principal Legal Aid Counsel with the Legal Aid Board, intimated to justice A. J. Nyangulu, that he had just seen the accused for the first time in Court. And Mr. Bwalya was of the opinion that the behavior of the accused did not appear to be normal. Thus Mr. Bwalya applied to Court that the accused be sent to Chainama Hills Hospital in order to examine the accused's state of mind. The application was granted.

After allowing the application, justice A. J. Nyagulu, issued an Order dated 7th February, 2002. The terms of the Order were as follows:

“Whereas Richard Mwanza (hereinafter called “the accused has appeared before this Court at Chipata charged with murder contrary to section 200 of the Penal Code, Chapter 146 of the laws of Zambia.

AND WHEREAS the question has arisen whether the accused:

(a) is by reason of unsoundness of mind unfit to plead and incapable of making a proper defence; or

(b) was at the time of the commission of the alleged offence insane so as not be responsible for his actions:

AND THEREFORE it is hereby ordered as follows:

(1) The accused is remanded in custody;

- (2) *The superintendent of the State prison at Namuseche will convey the accused in custody to the Remand prison at Lusaka;*
- (3) *The officer-in-charge of the Remand Prison at Lusaka will communicate with the superintendent of Chainama Hills Hospital to ascertain when the accused may be received therein;*
- (4) *The superintendent of Chainama Hills Hospital will advise the officer-in-charge of the Remand Prison at Lusaka, immediately he is able to receive the accused whereupon the accused will be sent to the said hospital, and there kept in custody until delivered in due course of law;*
- (5) *The government Specialist Psychiatrist will in terms of section 17 of the Criminal Procedure Code examine the accused and furnish to this Court at Lusaka in triplicate as soon as possible his certificated report on (a) the accused's present mental condition; or (b) the accused's mental condition at the time of the alleged offence. A copy of the preliminary inquiry proceedings is/is not/will be forwarded.*

Dated at Chipata, this 7th day of February, 2002.

A.J. Nyangulu

Judge

*To: The Superintendent, State Prison.
The Officer in Charge, Lusaka Remand Prison.
The Superintendent, Chainama Hills Hospital.*

c.c Record.

According to the record, this matter was next called on 5th October, 2009, by justice E. M. Hamaundu, sitting at Lusaka. During the hearing justice E. M. Hamaundu, was informed by Mr. A. M. Mulonda, Assistant Senior State Advocate in the Director of Public Prosecutions chambers that the accused was ordered to be sent to Chainama Hills Hospital. However, the accused

was sent back to Chipata because Chainama Hills Hospital was not availed copies of depositions in this matter. As result, Justice E. M. Hamaundu, directed that the accused be sent back to Chainama to be examined his fitness to conduct his defence. And also his mental state at the time of the commission of the offence. Justice E. M. Hamaundu further directed that Chainama Hills Hospital should be availed copies of the depositions.

During the December, 2009, Session the matter was again called by justice C.B.C. Phiri. Justice C.B.C Phiri, was informed that the accused was still been attended to at Chainama Hills Hospital. Consequently, the matter was adjourned to the next session.

However, in a letter dated 18th May, 2010, Dr. P. C. Msoni Consultant Psychiatrist at Chainama Hills Hospital forwarded a copy of the Medical Report to the Deputy Registrar High Court at Lusaka. The Medical Report is in the following terms:

"MEDICAL REPORT ON RICHARD MWANZA HJ/45/2001

*This is to certify that as ordered by the High Court sitting at Lusaka on 5th October, 2009, I have examined **RICHARD MWANZA** in terms of section 17 of the Criminal procedure Code in order to ascertain his mental state at the time of the alleged offence and his current mental state. I had with me depositions of witnesses and results of Special Medical and Psychological Tests.*

PRESENTATION ON ADMISSION

RICHARD MWANZA was admitted at Chainama East on 28th December, 2009, for the purpose of Medical Report following a charge of MURDER

contrary to section 200 of the Penal Code, Chapter 87 of the laws of Zambia. He does not seem to comprehend the charge.

FORENSIC HISTORY

According to depositions of witnesses **RICHARD MWANZA** was seen chasing his mother, the deceased, and later hitting her with a pounding stick until she died. None of the statements indicates that he was provoked in any way.

BACKGROUND ON RICHARD MWANZA

RICHARD MWANZA is aged 25. He originates from kalizya Village in Chief Kalindawalo's area, Petauke District. He is the 2nd born in a family of nine (9) siblings. **RICHARD** could not give an adequate account about himself as he tended to be irrelevant and thought disordered. Collateral information from relatives was not available.

PHYSICAL EXAMINATION

RICHARD was physically healthy. He was clinically not pale nor jaundiced. He had no significant lymphadenopathy. The chest was clear. Heart sounds were normal with no murmurs. The abdomen was soft and non-tender. Neurological examination was normal.

MENTAL STATE EXAMINATION

Repeated Mental State Examinations revealed evidence of SCHIZOPHRENIC ILLNESS. He was unkempt, irrelevant, and had incongruous affect. He had

commanding auditory hallucinations and delusions of owning property and large sums of money. He was poorly oriented. Both recent and remote memory were impaired. He had no insight.

OBSERVATIONS ON THE WARD

RICHARD often isolated himself in the ward. It was difficult to engage him in ward activities. He was however not irritable nor aggressive. He took his medication without problems.

CONCLUSION

*On the basis of the above information, observations and findings, **RICHARD MWANZA** has a psychotic disorder, **SCHIZOPHRENIA**, which is running a chronic course. Retrospectively he may have had this illness prior to the offence. Collateral information is necessary to confirm insidious onset of the illness.*

*It is my opinion that he was laboring under this disorder at the time of the offence. **RICHARD** still has active symptoms. It is further my opinion that he is NOT fit to stand trial and follow proceedings of the Court.*

DR. P. C. MSONI
CONSULTANT PSYCHIATRIST
FOR EXECUTIVE DIRECTOR

On 8th February, 2011, this matter was scheduled for hearing before me. Ms. Soko and Mr. Masempela both State Advocates in the Director of the Public Prosecutions Chambers appeared on behalf of the State. And Mr. Banda and Mr. Phiri, Legal Aid counsel and Assistant Senior Legal Aid Counsel respectively, with the Legal Aid Board appeared on behalf of Richard Mwanza.

During the hearing, Mr. Phiri indicated to me that they were unable to proceed with trial of the action because they had failed to obtain instructions from their client. It appeared to Mr. Phiri that Richard Mwanza was not able to conduct a defence. Mr. Phiri also set out the background to the condition that culminated in an Order to refer him to Chainama Hills Hospital to ascertain his state of mind at the time of the alleged offence, and as well as to ascertain his fitness to plead and conduct his defence. In view of the foregoing, Mr. Phiri sought a brief adjournment to enable him peruse the law. And later make an appropriate application regarding how the matter should proceed. Ms. Soko had no objection to the application. Accordingly, I adjourned the matter to the following day; 9th February, 2011, for continued hearing.

On 9th February, 2011, Mr. Phiri indicated to me that he had since perused the relevant law and procedure. The relevant provisions, Mr. Phiri submitted, are to be found in sections, 160 and 161 of the Criminal Procedure Code Chapter 88 of the laws of Zambia. Ms. Soko concurred with the submission by Mr. Phiri. I also agreed with both counsel that the provisions governing the factual situation in this case are to be found in sections 160 and 161 of the Criminal Procedure Code. s160 is in the following terms:

“Where on the trial of a person charged with an offence punishable by death or imprisonment the question arises, at the instance of the defence or otherwise, whether the accused is, by reason of unsoundness of mind or of any other disability incapable of making a proper defence, the Court shall inquire into and determine such question as soon as it arises.”

And by section 161 of the Criminal Procedure Code, it is provided that:

“Where a Court, in accordance with the provisions of section 160, finds an accused incapable of making a proper defence, it shall enter a plea of “not guilty” if it has not already done so and, to the extent that it has not already done so, shall hear the evidence of the prosecution and (if any) for the defence.

(2) At the close of such evidence as is mentioned in subsection (1), the Court, if it finds that the evidence as it stands_____.

(a) Would not justify a conviction or a special finding under section 167, shall acquit and discharge the accused; or

(b) Would, in the absence of further evidence to the contrary, justify a conviction, or a special finding under section 167, shall order the accused to be detained during the President’s pleasure;

(3) An acquittal and discharge under subsection (2) shall be without prejudice to any implementation of the provisions of the Mental Disorders Act, and High Court may, if it considers in any case that an inquiry under the provisions of section 9 of that Act is desirable, direct that the person acquitted and discharged be detained and taken before a magistrate for the purpose of such an inquiry.”

The *locus classicus* on interpretation of sections 160 and 161 of the Criminal Procedure Code, is the case of *Mbaye v The People (1975) Z.R. 74*; The facts in the *Mbaye* case were that the matter originally came before the High Court on 7th February, 1972. The appellant had been charged for murder. A plea of not guilty was entered, and the appellant was, remanded in custody for trial on 3rd March, 1972.

On 3rd March, 1972, defence counsel made an application under section 17 (1) of the Criminal Procedure Code for the appellant to be medically examined in order to establish whether he could understand the nature of the proceedings, and also to ascertain his mental condition at the time of the alleged offence. The Court ordered that the appellant be medically examined.

On 9th May, 1973, defence counsel in the light of the psychiatrist's report that the accused was unfit to plead and on the basis that an attempt was made to treat him in order to make him fit to stand trial applied for an adjournment. The application was allowed.

On 7th October, 1974, the matter came up before another judge when a further plea of not guilty was entered and the matter was adjourned to the 9th October, for trial. The trial proceeded on that day, and at the conclusion of the trial, the Court made a special finding under section 167 of the Criminal Procedure Code that the appellant was not guilty by reason of insanity. The appellant appealed against that special finding.

In delivering the judgment of the Court, and after citing sections 160 and 161 of the Criminal Procedure Code, Baron Ag C.J. made the following observation:

"The first point which it is important to stress is that section 160 imposes a mandatory obligation on the Court not only to inquire into the question of the ability of an accused person to make a proper defence, but also to determine that question "as soon it arises." In the present case, no such determination has been made, nor are we able from the record even to speculate as to what was the learned judge's view of the appellant's condition."

Baron, Ag C.J. went on to observe that:

"The next important error was that the judge who first heard the case and counsel on both sides were clearly under the impression that where a person is sent for examination as to his fitness to plead and the report is that he is not so fit he can then be sent back to hospital for treatment. This is directly contrary to the clear provisions of section 161; that section requires the Court, which should of course have required the specific determination that the accused was unfit to plead to proceed to hear the evidence for the prosecution and (if any) for the defence. Instead, an order was made which was ultra vires the powers of the Court, namely that the appellant be sent back for treatment in order to render him fit to plead."

Further, Ag, C.J Baron C.J. observed that:

“Finally, we come to the special finding that the appellant was not guilty by reason of insanity. The Court has no power to make such a finding in cases where there has been a determination that the accused was unfit to plead. On the other hand, if the learned judge proceeded on the basis, the appellant was fit to plead, this was a determination directly contrary to the psychiatrist’s report of the 4th October, 1974, and one which we would be bound to upset as being a totally unreasonable view of the evidence. In either event the appeal must succeed.”

Ag, C.J. Baron concluded by recapitulating the steps to be followed in cases where an accused person’s mental condition at the time of the trial is in issue as follows:

“(1) The Court must immediately inquire into the question and after hearing the psychiatrist’s report and any other evidence it may deem relevant, must make a positive determination of the question of the accused fitness to plead;

(2) If the determination is that the accused is fit to plead then the trial proceeds in the ordinary way, and one of the options open to the defence is to plead insanity at the time of the offence and to ask the Court to make a special finding;

(3) If the determination is that the accused is unfit to plead, the trial must still proceed immediately. If at the conclusion of the evidence for the prosecution and if any of the evidence for the defence that evidence does not justify either a conviction or a special finding under section 167, the accused must be acquitted and discharged; but if the evidence would justify either a conviction or a special finding no conviction or special finding may be entered but the accused must be detained during the President’s pleasure; and

(4) Thereafter, if the President on the advice of a medical officer considers that the question of the accused’s capacity to make a proper defence should be re-examined he proceeds under section 165 of the Criminal Procedure Code; in other words, the President directs that the accused person be brought back before the Court for a further inquiry into and determination of the question of the accused’s fitness to plead, and if as a result of that further inquiry the accused is then found fit to plead he is called upon to plead the charge or information and the trial then commences de novo.”

In the instant case, the Medical Report in relation to Richard Mwanza referred to above indicates *inter alia*, that, “*he is not fit to stand trial and to follow the proceedings of the Court.*” In view of the foregoing, I made a positive determination that the accused is unfit to plead; entered a plea “of not guilty,” and ordered that the Court proceeds immediately to receive the evidence for the prosecution.

The prosecution called four witnesses. The first prosecution witness was Faston Mwanza. For convenience sake, I will continue to refer to Faston Mwanza as PW1. PW1 is 24 years old. And resides at Kalizya Village in Petauke District. PW 1 recalls that on 2nd August, 2001, he was at home with his mother by the name Mirriam Sakala. For convenience sake, I will continue to refer to Mirriam Sakala as the deceased. The deceased was on the material date laundering her clothes.

PW1 testified that later in the day, Richard Mwanza, his elder brother, and the accused in this matter arrived home. When the accused approached home, the deceased exclaimed happily that; “*here comes my son.*” In response, the accused retorted, “*you think I am happy about anything.*”

Shortly, thereafter the accused picked a log and struck the deceased repeatedly on her head. PW 1 testified that when all this was happening, he was within close range. The accused continued striking the deceased until the log broke. At that point, the deceased fled from the accused. The accused gave chase. The deceased ran towards her auntie’s house; Estelia Daka. Estalia Daka is also a grandmother to PW1, and the accused. Thus, the deceased sought refuge in Estelia Daka’s Kitchen. Estelia Daka was then with Jenipher Lungu, a cousin to PW1, and the accused.

The accused caught up with the deceased in the Kitchen. The accused then got a brick which he threw at Estelia Daka and hit her on the head. The

deceased then decided to run away again from the accused. The accused got into the kitchen where his mother had sought refuge, and grabbed a pounding stick from his cousin Jenipher Lungu. With a pounding stick in his hand, the accused continued pursuing his mother. When the accused caught up with his mother, he continued hitting her with the pounding stick until she fell down. Whilst helpless on the ground, PW 1 testified that the deceased repeatedly asked the accused to leave her alone, and told the accused that she was ready to give the accused whatever she wanted. PW 1 testified that the accused did not relent. He continued to strike the deceased on the head until she died.

PW 1 testified that after killing the deceased, the accused returned to the deceased's home. When the accused arrived at the deceased home, he started shouting that he was "*the President.*" At that point a lot of people had gathered around the home of the deceased. Present amongst the onlookers, PW1 testified, was headman Kalizya who directed that the accused should be apprehended. The accused was apprehended and tied. Thereafter, Headman Kalizya dispatched a young man to report the matter to the police. After the police were notified, they came to the Village and picked up the body of the deceased.

The second prosecution witness was Jenipher Lungu. For convenience sake, I will continue to refer to Jenipher Lungu as PW2. PW2 is 24 years old. And also resides in Kalizya Village, Chief Kalindawalo, in Petauke District. PW2, a peasant farmer, recalled the events of 2nd August, 2001. PW2 recalls that on the material day, he saw the accused around 16:00 hours chasing her auntie, the deceased. The deceased ran towards the house where she was sitted with her grandmother, Estelia Daka.

PW 2 testified that when the accused chased the deceased up to the house where she was sitted with her grandmother, the accused picked up a brick

from the ground, and threw it at his grandmother, Estelia Daka. The brick hit her on her head. PW2 testified that after her grandmother was struck with a brick by the accused, the deceased ran away from the accused. The accused grabbed a pounding stick from her, and continued chasing the deceased until eventually the deceased fell down. After the deceased fell down, the accused continued striking the deceased with a pounding stick on her head, until she died.

After the accused killed the deceased, PW2 testified that the accused got the Chitenge Material which the deceased was wearing and wrapped it around his waist. And started shouting that he was "*the President.*"

The third prosecution witness was Scaver Zulu. For convenience sake, I will continue to refer to Scaver Zulu as PW 3. PW 3 is 58 years old. And lives in Kalizya Village. He is the headman for the village. PW3 recalls that on the material date, 2nd August, 2001, he had gone visiting friends within the village. Sometime around 15:00 hours, PW3 heard some commotion, in the Village. Shortly afterwards, PW3 saw somebody running towards where he was sitting with his friends. That person informed him that a calamity had befallen the village; the accused had just killed the deceased.

PW 3 rose to his feet, and started running towards the scene of the crime. Upon arrival at the scene of the crime, PW 3 found the body of the deceased. The face of the deceased had been mugged and the eyes had been pluck out by the severe beating administered by the accused. The skull PW 3 testified had been crashed. PW 3 ordered the immediate apprehension of the accused person. After the accused was apprehended, PW 3 sent a young man to run to the nearby police station to inform the police about the incident that had occurred in the village. After a short while, PW 3's emissary returned to the

village with the police officers. The police officers collected the body of the deceased. And also apprehended the accused.

The defence did not call any witnesses.

After the trial, on 14th February, 2011, Ms. Soko filed her written submissions. In her submissions, Ms. Soko observed that the accused stands charged with the offence of murder contrary to section 200 of the Penal Code. The accused is alleged to have murdered the deceased on 2nd August, 2001. Ms. Soko submitted that in the instant case an inquiry was conducted into the accused's state of mind by the Court pursuant to section 160 of the Criminal Procedure Code. Ms. Soko contends that this case turns around the results of the inquiry conducted by the Court into the accused's state of mind. Ms. Soko recalled that on 18th May, 2010, Dr. P.C. Musoni a Consultant Psychiatrist at Chainama Hills College Hospital compiled a report relating to the examination of the accused. The report was laid before me. And I have referred to it in *extensio* above. Ms. Soko noted in particular that the conclusion of report is part in the following terms:

“Richard Mwanza has a psychotic disorder, SCHIZOPHRENIA, which is running a chronic course. Retrospectively he may have had this illness prior to the offence....”

Ms. Soko argued that on the strength of the report referred to above, and defence counsel's submission that he was unable to obtain any instructions from the accused, I invoked the provisions of section 161 of the Criminal Procedure Code, and entered a plea of not guilty. Ms. Soko recited the evidence of PW1, PW2, and PW3, outlined above. Ms. Soko contends that on the strength of the evidence of the prosecution, the accused murdered the deceased with malice aforethought. The evidence adduced by the prosecution witnesses, Ms. Soko maintains, is sufficient to justify a conviction for the offence of murder. However, Ms. Soko pointed out, that due to the

accused's state of mind, it is necessary to make a special finding in the instant case. In advancing this argument, Ms. Soko drew my attention to sections 160 and 161 of the Criminal Procedure Code. Ms. Soko also drew my attention to the *Mbaye case*. I have also already referred to the *Mbaye case* in *extensio*.

Ms. Soko following the *Mbaye case* stressed the point that a Court has no power to make a special finding that an accused person is not guilty by reason of insanity in cases where there has been a determination that the accused was unfit to plead. In light of the *Mbaye case*, Ms. Soko argued that if I accept the submission by the People that the prosecution evidence justifies the conviction for the offence of murder, then I should proceed to order that the accused be detain at the President's pleasure. However, if conversely, I do not accept the submission that the prosecution evidence justifies a conviction for the offence of murder, then I should proceed to acquit the accused. Ms. Soko however maintains that the evidence adduced by the prosecution justifies the conviction for the offence of murder. And that I should therefore proceed to hold and order that the accused be detained at the President's pleasure.

Mr. Phiri filed his submissions on 17th February, 2011. Mr. Phiri also observed that the accused stands charged with the offence of murder contrary to section 200 of the Penal Code. Mr. Phiri, also recalls that when this matter was called for trial during the February, 2002, High Court Criminal, and Civil Sessions held at Chipata before Justice A. J. Nyagulu, an application was made to refer the accused to Chainama Hills Hospital, in order to ascertain his state of mind at the time of commission of the offence, and as well as, his fitness to plead, and make a proper defence. In due course, Mr. Phiri submitted that Chainama Hills Hospital, through Dr. P. C. Msoni rendered a report on 18th May, 2010. Mr. Phiri observed that the medical report indicates that repeated medical examinations revealed that the accused is suffering

from a psychotic disorder, *schizophrenia*, which is running a chronic course, and that he may have had the condition prior to the offence. Mr. Phiri also submitted that when this matter was called in the current session; February, 2011, High Court Criminal and Civil Session, the accused appeared to be incapable of making a proper defence.

Accordingly, Mr. Phiri observed that I opted to invoke the provisions of s. 160 and 161 of the Criminal Procedure Code outlined above. Mr. Phiri also recited the prosecution evidence adduced by the three witnesses. Again, it is unnecessary for me to recite that evidence. Having set out the background of the case, Mr. Phiri argued that there is no doubt that the accused suffers from a very serious mental condition: a psychotic disorder Schizophrenia, which has incapacitated him from taking be plea, and conducting a proper defence.

Mr. Phiri also submitted that the report also indicates that it is most likely that the accused was suffering from the same condition at the time of committing the offence. Mr. Phiri submitted that from the evidence, it is very clear that the attack which led to the death of the deceased was unprovoked. It is also clear, Mr. Phiri went on, that the behavior of the accused was very strange during and after the attack. Mr. Phiri argued that there is evidence that firstly, when the accused was striking the deceased he was counting the number of times that he struck the deceased: Secondly, the accused after killing the deceased took a chitenge from the deceased body and wrapped it around his waist. And lastly, after he committed the capital offence, he was proclaiming to be President, and invited villagers to vote for him. In conclusion, Mr. Phiri drew my attention to the provisions of section 167 (1) of the Criminal Procedure Code which is in the following terms:

“Where an act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane so as not to be responsible for his actions at the time when the act was done or omission made, then if it appears to the Court before which such person is tried that he did the act or made the omission charged but was insane as aforesaid at the time when he did nor made the same, the Court shall make a special finding to the effect that the accused was not guilty by reason of insanity.”

Thus, Mr. Phiri contends that on the basis of the evidence adduced by Dr. P. C. Msoni, and the prosecution witnesses, it can be safely concluded that the accused was insane at the material time. Mr. Phiri therefore urged me to make a special finding that the accused is not guilty by reason of insanity in accordance with section 167 of the Criminal Procedure Code, and order that he be detained at the President’s pleasure in accordance with s 161 (2) (b) of the Criminal Procedure Code.

I am indebted to counsel for their submissions and arguments in this matter. On the basis of the testimony of PW1, PW2, and PW3, I am satisfied that the facts of this case justify a conviction for the offence of murder contrary to section 200 of the Penal Code. This case is also on all fours with the *Mbaye* case referred to above. In view of my finding referred to above, I order that the accused be detained during the Presidents pleasure.

Dr. P. Matibini, SC
HIGH COURT JUDGE

