

IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT REGISTRY
(CRIMINAL JURISDICTION)

HK/79/2011

BETWEEN:

THE PEOPLE
VS
KAISA KASENKE DANIEL

Before the Hon. Mr. Justice I.C.T. Chali in Open Court on the **18th** day of **August**, 2011

For the State : Mr. M.C. Hamachila – State Advocate

For the Accused : Mr. Simwanza – Law Association of Zambia

JUDGMENT

Case referred to;

1. *Mwewa Munoro v. The People (2004) Z.R. 207*
2. *The People v. Japau (1967) Z.R. 95*

Legislation referred to;

1. *Penal Code Chapter 87 of the Laws of Zambia*

Initially in this case the Accused juvenile was jointly charged with one CHILESHE SINKALA with one count of murder contrary to Section 200 of the Penal Code Chapter 87 of the Laws of Zambia.

The particulars of the offence were that the Accused and the said CHILESHE SINKALA, on the 1st day of January, 2011 at Chililabombwe in the Chililabombwe District of the Copperbelt Province of the Republic of Zambia jointly and whilst acting together with another person unknown, did murder one MANASE MBEWE.

In my Ruling of 15th August, 2011 at the close of the prosecution's case, I found that a case had not been made out against SINKALA sufficiently to require him to make a defence. I accordingly dismissed the case against SINKALA and acquitted him of the subject offence. That left only the present Accused juvenile with whom I am now concerned.

At the commencement of the proceedings, the Accused juvenile had pleaded not guilty to the charge whereby the matter went to trial in which the prosecution called eight witnesses.

PW1 was MAGARET BANDA who testified that during the night of 31st December, 2010 between 23:00 hours and 24:00 hours whilst she was sleeping in her home, she heard a knock at her door and the voice of the person who identified himself as Bashi Esnart (the father of Esnart) who said he wanted some matches to light his cigarette. PW1 opened the door and gave Bashi Esnart the matches. As he was lighting his cigarette there suddenly came a group of three young men who started beating Bashi Esnart whilst telling him **"you small old man, today you will die"**. PW1 tried to stop the fight but one of the young men hit her with a fist. She then started shouting calling to the neighbours for help. She suspected the people in the neighbourhood were not hearing her since there was a lot of music and noise from the new year's eve celebrations. Instead she went to awaken another neighbour, the father of GIFT (Bashi Gift) to tell him of what was happening to Bashi Esnart. When they returned to the scene of the fight, Bashi Gift tried also to stop the fight and held one of the young men but both were overpowered and had to go and seek the help of the area Crime Prevention Unit or Neighbourhood Watch Chairman, a Mr. MOFYA. When the bigger group returned to the scene with the Chairman, they found that the young men had left taking Bashi Esnart with them. A search ensued until finally the group found Bashi Esnart lying on the ground while one of the young men was standing nearby. Bashi Esnart was apparently dead by then. The young man at that scene was apprehended and taken to the Police Station whilst the body of Bashi Esnart was taken to Lubengele Clinic and later to the mortuary.

PW1 said among the three young men she had seen that night she knew one of them who was known by the name YAMA who lived in the same compound with her, PP Zambia Compound, but that young man was not before court. She also said the young men appeared to be drunk and smelt of beer. She spoke to them in an attempt to stop them from beating Bashi Esnart and that each time she did so they chased and tried to beat her. She did not ask them why they were beating Bashi Esnart who for his part only asked why they wanted to kill him.

PW2 was BRIGHTON KAKOMA a neighbour to PW1. He said when he was awakened by PW1 he went outside and saw three young men two of whom he recognized, by the light from the torch on his cell phone which he had switched on, as KAISA and YAMA. He did not know the third one. When he turned the beam of the light on the person that was being attacked, PW2 recognized that person as MANASE, PW2's neighbour also. PW2 tried to separate the fight but could not sustain the effort because one of his fingers was sore and he got hurt. He then left to seek other help and returned with Bashi Mofya who had been woken up by Bana Bright. When they did not find the young men and MANASE at the scene of the fight, PW2's group mounted a search in the compound until they linked up with another group which had located the victim and one of the young men who had by then been apprehended.

PW2 said he was able to recognize KAISA and YAMA because he had been living with those young men in the same compound, PP Zambia Compound, for four years before the incident. In court PW2 identified the accused person as the KAISA he had seen that night. He said he knew KAISA very well including where he lived with his parents.

PW3 was PRUDENCE NAPANJE KAKOMA, the wife of PW2. Her evidence was in most respects similar to her husband's evidence. She said she recognized KAISA and YAMA among the three young men who were beating MANASE. She said she saw them by the light which was shone on them from PW2's cellphone torch. The two young men she recognized that night were her neighbours in the same compound. She said she saw KAISA kicking MANASE together with his two friends.

PW4 EDWARD SIMPOSYA's testimony was that he only heard people saying "**Kaisa, you are killing the man**". But he did not actually see either KAISA or YAMA when he went out of the house after he heard of the fighting in the neighbourhood.

PW5 was SAMUEL MOFYA, Chairman of the Crime Prevention Unit in the area, who said that when he was woken up over the incident he went out with other people to look for the young men and the victim. He said his group finally located a young man he knew as KAISA who was trying to lift the unconscious victim. PW5 said he apprehended KAISA, whom he identified in Court as the Accused, and later handed him to the Police.

That same night the deceased's father Reverend SAILOTA MBEWE (PW6) received a report of his son's fate and went to the scene where the body was lying and made arrangements for it to be moved to KAKOSO Mortuary after reporting to the Police. He said the body was clad in jeans trousers but without a shirt. He could not see any visible injuries when he checked the body with the Police that night.

The last Prosecution witness was Detective Sergeant MICHAEL BANDA (PW8) who investigated the case and finally charged and arrested the Accused for the subject offence as earlier outlined. He said under warn and caution in the Bemba language which the Accused appeared to understand well, the Accused gave a free and voluntary reply denying the charge of murder.

PW8 said that in the course of his work on the case he attended a post mortem examination on the body of the deceased which was conducted by Dr, Olga a Pathologist at Kitwe Central Hospital after the body was identified to him and the Doctor by PW7, HARRISON PHIRI, a cousin to the deceased. He produced the Report on Post-Mortem Examination which was admitted in evidence as exhibit "P1".

Exhibit P1 shows the cause of death as:

“Profuse internal bleeding, pain and bleeding shock”

Other significant / abnormal findings at examination are:

“Death due to rupture of liver and spleen, rupture of right lung by fractured 5th rib with profuse internal bleeding, pain and bleeding shock, on the body numerous bruises”.

Upon being found with a case to answer and being put on his defence, the Accused elected to give evidence on oath and said he had no witnesses to call. He said that early in the evening on 31st December, 2010, he decided to go to a place called ERESONS in the same compound where he said people used to gather for social events. He found some people dancing to music and was tasked to be the deejay, which he took up. He stayed on until around 19:00 hours when he started winding up. As he was packing away the speakers, he said at about 20:00 hours a person he knew as Bashi Mofya approached him and asked his name. Accused gave his name as KAISA. Bashi Mofya then asked accused if he knew YAMA, to which the accused admitted because he used to go to KAKOSO Basic School with YAMA before the Accused was transferred to Chililabombwe Basic School. Bashi Mofya then asked the Accused to go with him to the road side to talk and Accused obliged. Accused said he found a lot of people by the road including two members of the Crime Prevention Unit. When he was asked if he had been with his friends including YAMA that day, the Accused denied. The Crime Prevention Unit members, however, insisted he had been with the people they were mentioning. Shortly thereafter the people started beating him, and beat him very badly, while alleging that he and his friends had killed a person. He was then taken to Chililabombwe Police Station and handed over to the Police who detained him.

He denied having known or seen the person he was said to have killed. He refuted what Bashi Mofya (PW5) had told the court about how Accused was apprehended.

He said he was just picked up at random while he was innocently playing music at ERESONS.

That is the summary of the evidence from both the prosecution and the defence from which I must now make my findings and conclusions in accordance with the legal provisions.

Throughout the proceedings I have borne in mind, and I still remind myself at this stage, that in criminal cases the legal burden of proving every element of the offence charged and consequently the guilt of the accused lies on the prosecution from beginning to end; the standard of proof is very high, one beyond reasonable doubt (see the case of **Mwewa Murono v. The People (2004) Z.R. 207**). I am legally bound at the end of the day to acquit the accused if I find that there is doubt as to his guilt.

Section 200 of the Penal Code under which the accused was charged provides:

“200. Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder”.

The definition of “malice aforethought” is given under Section 204 of the Code of which the relevant portion provides:

“204 Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

- (a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;**
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused”.**

“Malice aforethought”, in simple language, means an intention. That intention can be expressed openly for the world to hear, such as when one tells another **“I am going to kill you now”** and proceeds to shoot the victim. It can also be inferred through a person’s action of, for example, willfully inflicting an injury on his victim which injury he knows or ought to know will probably cause the death of that person. Further, where a person unlawfully wounds or causes grievous harm to another, by any means whatever, with intention to maim, disfigure or disable the victim, he commits a felony. If death results from such conduct, it amounts to murder.

I find the following facts as having been proved. MANASE MBEWE died following a beating he received at the hands of some people on the night of 31st December, 2010 at PP Zambia Compound in Chililambombwe. His body was picked up by his father, PW6, from the said compound where it had been traced by the neighbours and members of the Crime Prevention Unit. These included PWs 1, 2, 3, and 5. Before the post-mortem examination was conducted, it was also identified to the Pathologist by PW7 in the presence of PW8. Further, from the injuries listed in the Exhibit P1, it is my finding that he did not die from natural causes but from injuries unlawfully inflicted on him.

There is evidence on the record from PWs 1, 2 and 3 who witnessed some three young men beating the deceased. PW2 said when he arrived at the scene he shone the beam of his cell phone torch on the people who were fighting and recognized two of the young men to be KAISA and YAMA whom he knew before that date having been living in the same compound with him for a long time. Even PW3 saw those young men and recognized them. Both witnesses also recognized the victim to be the deceased now. Although these two witnesses had to leave the scene of the fight to go and call for help they returned and traced and located the victim to somewhere within the compound where they found him lying on the ground. By then they had been joined by PW5 Bashi Mofya. The witnesses all said at the place where they found MANASE, there was one of the young men standing nearby. PW5 said that young man was trying to lift MANASE to take him towards the dam.

In my view, the identity of the persons who attacked the deceased that night is not in doubt. I find it as proved that the Accused was among the three young men who went to attack the deceased at PW1's house as he was lighting his cigarette. He was recognized by both PW2 and PW3 at the scene where they were beating the deceased. Accused was seen kicking the deceased. Those are witnesses who had known the Accused before that date having been living in the same compound for a long time as neighbours.

The evidence of identification was not seriously challenged under cross examination of those witness. In fact from the line of cross examination of those two witnesses (PW2 and PW3) I formed the view that the Accused's defence was something not to do with his identification as one of the attackers of MANASE. The only witness who was seriously challenged as to the identity of MANASE's attackers was PW4, SIMPOSYA, who ended up admitting that he only heard voices of people saying "**Kaisa, you are going to kill the man**". However, that still confirmed that the people who had uttered the words alluded to by PW4 had recognized that Kaisa (Accused) was one of the people beating up the deceased. Further PW5's evidence was that Accused was found at the scene where MANASE was lying unconscious; that Accused was trying to lift him. That was shortly after the young men had dragged MANASE from PW1's yard. It had not taken long for Accused to be located after leaving PW1's yard with his accomplices. It is an odd coincident which I cannot ignore.

In the circumstances I am satisfied that Accused was among the three young men who assaulted the deceased that night. I find difficulty in believing the story by the Accused that he was just picked at random and accused as having been with YAMA and another person who beat up the deceased. He admitted that he knew the YAMA the prosecution witnesses spoke of; he said he had been at same school once before Accused transferred to another school. He used to meet and chat with YAMA some times. Accused and the said YAMA lived in the same compound as the other prosecution witnesses for a long time. The fact that the prosecution witnesses knew Accused before that date was not challenged in cross examination.

In the circumstances, I have ruled out mistaken identity. I have also found no grounds for concluding that the witnesses falsely implicated Accused or that they had any interest of their own to serve. On those facts I have rejected the story by Accused that he was falsely implicated. The grounds for such perception cannot be shown on the evidence on the record.

The prosecution witnesses said that the three young men, including the Accused, were beating and kicking the deceased. In legal parlance, beating another person without lawful justification, such as by way of defence, is an unlawful act called assault under Section 247 of the Penal Code punishable with imprisonment. In the instant case, the three young men had set out to punish the deceased. When they set upon him at PW1's yard they said to him "**you small old man, today you will die**". The deceased's response was to ask why they were going to kill him, to which the young men do not seem to have responded. I find no justification in that assault. In my considered opinion, malice aforethought was uppermost in the minds of the young men. The result of their actions is clear from the Report on Post-Mortem Examination (Exhibit P1), namely *inter alia*, a ruptured liver and spleen and a broken 5th rib leading to profuse internal bleeding. That is what led to the death of MANASE.

It is my conclusion that the prosecution have proved the charge against the Accused beyond reasonable doubt. I accordingly find the Accused guilty as charged and I so order.

Delivered at Kitwe in Open Court this **18th** day of **August**, 2011

I.C.T. Chali
JUDGE