

IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT REGISTRY
HOLDEN AT KITWE

HK/02/2012

(CRIMINAL JURISDICTION)

BETWEEN:

THE PEOPLE
VS
NICKSON KAUMBA

Before the Hon. Mr. Justice I.C.T. Chali in Open Court on the 20th day of January, 2011.

For the State: M.C. Hamachila - State Advocates

For the Accused: Mr. I Chongwe – Senior Legal Aid Counsel

JUDGMENT

Case referred to:

- 1. *Mwewa Murono v. The People (2004) Z.R. 207***
- 2. *Nzala v. The People (1976) Z.R. 221***
- 3. *The People v. Njovu (1968) Z.R. 132***
- 4. *Chimbo and Others v. The People (1982) Z.R. 20***
- 5. *Bwalya v. The People (1975) Z.R. 125***
- 6. *Kambarage Mpundu Kaunda v The People (1990/1992) Z.R. 215***

The Accused was charged 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 alleged that the Accused, on the 8th day of August, 2010 at Kitwe in the Kitwe District of the Copperbelt Province of the Republic of Zambia, did murder one TANA CHISOPO.

The Accused denied the charge.

At the trial I heard evidence from seven prosecution witness as well as from the Accused after he was found with a case to answer and was put on his defence.

Throughout the trial as well as during the writing of this judgment, I have borne in mind that the burden of proof lies on the prosecution from beginning to end. The prosecution must prove beyond reasonable all the ingredients or elements of the offence charged. Must I at the end of the day harbour any doubt as to the Accused's guilt, I must acquit him of the offence charged. This is the standard set in such cases as *MWEWA MURONO v. THE PEOPLE* (2004) Z.R. 207 and other decisions of Supreme Court.

The case for the prosecution was that at about 02:00 hours on 8th August, 2010, LINDA CHISOPO (PW1) was returning to her home in Mulenga Township of Kitwe from a social function she had gone to attend at JJ Bar in Luangwa Township. She was in the company of her sister, MARY KABAMBA, her brother, TANA CHISOPO (now deceased), and a friend of hers, SYLVIA. As they were going, a group of people started following them and later chasing PW1's group. One person from that group, whom PW1 said was NICKSON, caught up with PW1. He got hold of her arm and twisted it and in order to get her cell phone. A struggle ensued between PW1 and NICKSON while she was shouting for help. Her sister and the deceased run home to call their mother. By the time her mother arrived at the scene with TANA, NICKSON had left with the cell phone but TANA caught up with him a short distance away. The two, TANA and NICKSON, then started struggling in the process of which PW1 saw NICKSON get an object from his pocket and use it to stab TANA in the stomach. TANA fell to the ground bleeding from the wound he sustained. PW1 and others then rushed TANA to the Luangwa Township Clinic, but by then he was already dead. Around 04:00 hours, PW1 and other relatives took TANA's body to the Kitwe Central Hospital Mortuary.

At the trial, PW1 said the NICKSON she saw that night was the Accused in this case. She said she had known him for a year before the date of the incident and that he used to live in Mulenga Township where she also lived. She said on that night there was moonlight by which she had been able to recognize him. She said when he went

to grab her cell phone she had struggled with him for some time and she had even grabbed one of the upper garments he was wearing, a black jersey, in the struggle.

PW1 further said that some months later, she was called to Wusakile Police Station and asked if she could identify anyone at the identification parade. She then identified the Accused who was at position number 4 as the NICKSON in this case. The parade was disbanded and then re-assembled. She went back a second time and identified the Accused who, this time, was at position number 7, even after he had changed his clothes.

Under cross examination by Counsel for the Accused, PW1 said she had only been drinking soft drinks that night and was alright. She denied she was tired at the time she and her group left JJ Bar. She said when the Accused heard voices of her mother and TANA he run away but she showed TANA the direction Accused had taken. TANA went in that direction. She too followed and saw the confrontation between the two people. She said she was some 5 metres from them when she saw the Accused take out an object from his pocket and stab TANA with it. She said she saw the Accused's face very well when she had struggled with him over her cell phone.

PW2 was MARY KABAMBA CHISOPO, sister to PW1 and the deceased. She narrated the incident of 8th August, 2010 from the time her group had gone to JJ Bar to the time they decided to return home. As they got near their home in Mulenga Township, PW2 decided to enter their home while PW1 and TANA went on to escort SYLVIA to her home. As PW2 was preparing to go to sleep, TANA arrived shouting that he and PW1 had been attacked and that PW1 had been apprehended by their attackers. TANA and the mother rushed out of the house to go to LINDA's rescue, and PW2 followed shortly. As she got near the scene, PW2 saw a man holding TANA by his shirt. She then saw the man swing his hand striking TANA in the abdomen and then ran away. TANA then turned to PW2 and said "KABAMBA, I have been stabbed" and fell to the ground.

It was PW2's further evidence that on the night of the incident there was moonlight by which she saw the man who had struck TANA. As such she was able to identify

that man as the Accused in this case. PW2 said that although she did not know Accused's name at the time of the incident, she had been seeing him in Mulenga Township since 2009.

Under cross examination, PW2 said she had seen the Accused earlier that night at JJ Bar. She said when she arrived at the scene of the incident she had found the Accused holding TANA by the Tshirt while her sister LINDA was complaining of a painful arm. PW2 said their mother, PW3, arrived at the scene shortly after TANA had been stabbed.

PW3 was JOYCE CHILESHE, the mother of PW1, PW2 and the deceased. She said that she had been awakened by TANA who had arrived home that night to inform her that he and LINDA had been attacked. TANA and PW2 went to where their sister had been attacked while PW3 followed behind. As she was approaching the scene she called to her children to return home. However, MARY (PW2) answered to urge her to hurry forward saying that TANA had been stabbed. When she arrived at the scene PW3 found her son lying on the ground. He told PW3 "Mummy, take off my shirt. I feel very hot." When PW3 took off her son's shirt, she observed a stab wound on the left side of the body and that the intestines were outside. PW3 then called out to the neighbours and they managed to transport him only on a wheel barrow to Luangwa Police Post. By the time they arrived there, TANA was already dead. Arrangements were then made to have the body transported on a vehicle to Kitwe Central Hospital where, upon arrival, the Medical Doctor pronounced him dead.

PW4 was DANIEL KABAMBA, a cousin to the deceased. He said that on 11th August, 2010 he attended at Kitwe Central Hospital Mortuary and identified TANA's body to the Pathologist and the Police Officer before a Post Mortem Examination was conducted on the body. Before the Post Mortem Examination PW4 had observed a wound on the side of the deceased's stomach.

PW5 was Woman Inspector ROLLEN SIKABOLE of Wusakile Police Station. She said that on 18th February, 2011 she was assigned to conduct an identification

parade in a case of murder in which the Accused was a suspect. She paraded eight men whom she invited to take positions of their choice. Accused took position number 7. PW1 was then called out from the CID office to the parade and asked if she could identify anyone on that parade linked to the case. PW5 said PW1 went to identify the Accused at that position. The witness was then taken away. PW5 then asked the Accused if he wanted to change his position on the parade, to which the Accused agreed. Accused then changed his clothes and chose position number 4. When PW1 was recalled to the parade she proceeded and identified the Accused n that position. PW5 said that photographs of the parade and of PW1's identification of the Accused were taken by Sergeant MUSONDA. She said the function of an identification parade had been explained to all concerned at the start of the proceedings. At the end of the parade PW5 said she asked the Accused if he had any complaint as to the manner the parade had been conducted but the Accused said he had none. The parade was then dismissed.

PW6 was Detective Sergeant BERNARD MUSONDA, a Scenes of Crime Officer, who confirmed he attended at and took photographs of the identification parade at Wusakile Police Station on 18th February, 2011. He said he witnessed the identification of the Accused person at position numbers 7 and then at 4. His evidence was in most material respects similar to that of his fellow officer, PW5. He said he processed the photographs and compiled an album of four photographs he took which he produced at the trial and was admitted as exhibit P1.

The last prosecution witness was PW7, Detective Inspector DENNIS KABUDULA of Wusakile Police Station who investigated the case. He said that upon being assigned the case on 9th August, 2010, he interviewed PW1 who told him that she knew the person who had attacked her group and stabbed her brother. She even gave PW7 the name of that person as NICKSON.

On 11th August, 2010 PW7 attended a post mortem examination on the body of TANA CHISOPO which was conducted by Dr. Olga, a Pathologist, after the body had been identified by PW4. PW7 later received a Post Mortem Report which was produced in Court and admitted in evidence as Exhibit P.2.

PW7 said he sent out the description of the suspect in the case to his contacts in Mulenga Township. On 31st January, 2011 PW7 learnt that a person by the name of NICKSON KAUMBA was in police custody at Wusakile Police Station in connection with another matter. PW7 then informed his CIO who made arrangements for an identification parade to be conducted. He later learnt that such identification parade had been conducted and that NICKSON KAUMBA, now Accused, had been identified by PW1. He then interviewed PW1 and the Accused in the presence of Accused's mother. He later made up his mind and charged and arrested the Accused for the offence of murder, which Accused denied upon being warned and cautioned in the Bemba language which the Accused understood well.

Under cross examination, PW7 said that PW2, KABAMBA CHISOPO, had told him that she knew the person who had attacked her brother, though not by name. He said she was not called to the identification parade because she was out of town at the time. He denied that he had been at the Police Station at the time the identification parade was being conducted.

The Post Mortem Report, Exhibit P2, gave the cause of death as:

“STAB WOUND OF ABDOMINAL CAVITY WITH PROFUSE INTERNAL BLEEDING PAIN AND BLEEDING SHOCK”

Other significant finding recorded in the said report are:

“DEATH DUE TO STAB WOUND OF ABDOMINAL CAVITY WITH INJURY OF ABDOMINAL PART OF AORTA WITH PROFUSE INTERNAL BLEEDING (3.5 L OF FRESH BLOOD)”

The injuries recorded were **“ON UPPER PART OF ABDOMEN MORE LEFT SIDE STAB WOUND 2.5.CM”**.

At the close of the prosecution's case, I found the Accused with a case to answer and I put him on his defence. After his rights were explained to him, the Accused elected to give evidence on oath and said he had no witness to call.

In his defence, the Accused said that on 3rd and 4th August, 2010 he was not at JJ Bar in Luangwa but was at home. He denied all that PW1 and PW2 had said. He said that on 5th February, 2011, he was at home in Mulenga Township when a team of four Police Officers visited him and said he was wanted in connection with the theft of someone's shoes. He denied the allegation of theft but he was still taken to Wusakile Police Station where he was detained in the cells. Whilst in detention he saw PW7 who told him that there was a case of murder against Accused. Accused denied any knowledge of such a case. However, he was later taken with others from the cells to an identification parade at which a woman went to identify him. Accused said he complained to the woman officer who was conducting the identification parade that he did not know why the woman identifying witness had picked him out. The woman officer then advised accused to change clothes if he wished, which Accused did. Upon the group being re-paraded, the woman identifying witness again pointed the Accused out when she was taken to the parade. Thereafter the parade was disbanded and he was taken back to the cells. Accused said that a short while after the parade had been dismissed, he was taken to the CID Office where he found the woman identifying witness and another woman. He was asked if he knew the two women, to which he said he did not. However, the woman identifying witness told the Police Officers that she knew the Accused. He said he denied to the arresting officer that he had killed anyone. He said that at the time he was apprehended by the Police Officers he had denied the charge.

That is the summary of the evidence from the prosecution witnesses as well as from the Accused upon which I must now make my findings of fact.

Section 200 of the Penal Code under which the Accused was charged reads:-

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

On “**malice aforethought**” the relevant portion of Section 204 provides:

“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....”

From the foregoing, the main elements of the offence of murder, according to the case of THE PEOPLE v. NJOVU (1968) Z.R. 132, are

- (a) That the Accused caused the death of the deceased;
- (b) That death resulted from an unlawful act or omission; and
- (c) That it was with malice aforethought.

If any of these elements is not proved beyond reasonable doubt the charge falls away altogether.

There is no doubt in my mind, and I find as a fact, that the deceased died from a stab wound. This is according to the evidence of PW1 and PW2, who were with him at the time, as well as the Post Mortem Report produced before me. Also PW3 and PW4 observed those injuries on the deceased.

In my view the matter revolves around the identity of the person who stabbed the deceased.

The evidence of PW1 is that it was the Accused from the other group of people who had caught up with her and grappled with her in order to get her cellphone. The struggle, she said, took some time whereby she even managed to get his black jersey. In the process she was able, with the aid of the moonlight, to recognize her assailant as NICKSON, the Accused now. She said she later saw the Accused stab deceased with something he had taken from his pocket while the Accused was engaged in a struggle with the deceased. At the time PW1 saw the Accused stabbing her brother, she said she was about five metres from them. PW1 said that she had known the Accused for a year prior to that incident as she used to see him in Mulenga Township where she used to live.

It is worth noting that the Accused, during his evidence, gave his residential address as Mulenga Township where he also said the Police Officers found him when they went to apprehend him in connection with this case.

As already noted earlier, from her own evidence and that of PW7, PW1 had told PW7 when he went to interview the family the day after the incident that she knew the person who had stabbed her brother as NICKSON who lived in Mulenga Township. At the identification parade on 18th February, 2011, PW1 was able to identify the Accused as the NICKSON who had stabbed TANA on the material night. PW1's identification of the Accused was confirmed not only by PW5 and PW6, but also by the Accused himself during his evidence in his defence.

On the evidence of PW1, PW5 and PW6, and indeed on the evidence of the Accused himself, I am satisfied that the identification parade was properly conducted and that the Accused was not prejudiced in any way.

It will also be recalled that PW1 and PW2 had testified that they had earlier that night observed the presence of the Accused at JJ Bar in Luangwa Township.

PW2's evidence was that she saw the Accused strike her brother with something. She said she had known the Accused since 2009 from seeing him in Mulenga Township, although she did not know his name at the time of the incident. She said she was able to see and recognize him because there was moonlight and that she had seen him earlier when PW2 and her group were at JJ Bar. PW7 said that PW2 had told him on 9th August, 2010 that she knew the person who had stabbed her brother, though not by name. PW2 came to identify that person in court as the Accused.

Mr. Chongwe, Counsel for the Accused, has argued that there could be the possibility of an honest mistake on the part of PW1 and PW2 as to the identity of the Accused as the culprit in the case. In that regard Mr. Chongwe relied on the

Supreme Court case of CHIMBO AND OTHERS v. THE PEOPLE (1982) Z.R. 20. I have considered the said authority as well as that of BWALYA v. THE PEOPLE

(1975) Z.R. 125. Both cases require me to satisfy myself that the possibility of an honest mistake has been ruled out.

Indeed I have warned myself of the need to exclude the possibility of an honest mistake. I have considered that PW1 and PW2 were quite sober at the time. They denied, and I accept their denial, that they had taken any alcohol prior to the incident. They also denied the suggestion from Counsel for the defence that they were tired from the social function.

I have considered that PW1 and PW2 had known the Accused prior to the incident since they had been seeing him in Mulenga Township for a considerable time. They had seen him earlier at JJ Bar. And they had the benefit of moonlight at the time. They had both come in close proximity with the Accused to be able, in my view, to recognize him as a known or familiar figure in their community.

Apart from mentioning the name of the Accused to PW7, PW2 had identified the Accused at the identification parade of 18th February, 2011. In my opinion I do not find anything wrong or prejudicial in the manner that parade was conducted. In this respect I do not regard as fatal PW1's evidence as to the sequence in which she identified the Accused on the two occasions at the identification parade. The photo album appropriately put that matter to rest.

On the totality of the evidence before me, I find that the Accused was properly identified by PW1 and PW2.

Another argument by Mr. Chongwe in his submission was that PW1 and PW2 could have a possible interest of their own to serve, and that there was a danger to falsely implicate the Accused. In this regard, Counsel cited the case of KAMBARAGE MPUNDU KAUNDA v. THE PEOPLE (1990/1992) Z.R. 215 in which the Supreme Court held, inter alia,

“That prosecution witnesses who are friends or relatives of the prosecutrix may have a possible interest of their own to serve and should be treated as suspect witnesses. The Court should therefore warn itself of the danger of false implication of the Accused and go further to ensure that that danger has been excluded”.

I have warned myself of the possibility of false implication of the Accused, I have considered whether that indeed could have been so in the instant case. Relatives of a victim of crime may lie against a suspect for various reasons such as if they have harboured a grudge of some sort against the suspect. I have not found any grounds upon which to suspect such from PW1 and PW2. As such I am satisfied that the danger of those witnesses, and indeed other prosecution witnesses, to falsely implicate the accused does not exist.

At the time police officers went to apprehend the Accused at his home, he said he denied the charge. Even at the time of his arrest he denied the charge. Although in his evidence before me he referred to the dates as 3rd and 4th August, 2010 as the date of the incident, when he said he had been at home, I think he was referring to 8th August, 2010. In view of my findings, I have dismissed the Accused's evidence.

In conclusion, I find the action of the Accused to strike and wound the deceased in the manner that he did to have been an unlawful act. It was intended to avoid apprehension in the theft of PW1's cellphone. In the circumstances I find that the act was committed with malice aforethought. The Accused knew or ought to have known that the act of striking the deceased with whatever weapon he had would cause grievous bodily harm to the deceased.

I am therefore satisfied that the prosecution have proved the case against the Accused beyond reasonable doubt. I accordingly find the Accused guilty of the murder of TANA CHISOPO and I convict him accordingly.

Delivered at Kitwe in Open Court this 20th day of January, 2012

I.C.T. Chali

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JUDGE

