

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

HW/08/2012

**THE PEOPLE
V
RONALD MUSONDA
EZAYA MUSONDA
FRANCIS MUSONDA**

CORAM: SIAVWAPA J.

FOR THE STATE: MISS CASSANDRA C. SOKO AND MISS
MAKUMBA G. KASHISHI, STATE ADVOCATES

FOR THE DEFENCE: MR. JAPHET ZULU, LEGAL AID COUNSEL

J U D G M E N T

By Information filed by the Director of Public prosecutions, the three accused persons stand jointly charged with three counts of MURDER contrary to section 200 of the PENAL CODE chapter 87 of the Laws of Zambia. In the first count, it is alleged that on the 21st day of August 2010, at Mporokoso, in the Mporokoso District of

the Northern Province of the Republic of Zambia, jointly and whilst acting together with others unknown, the accused persons did murder PETER LUBULA.

In the second count it is alleged that on the 21st day of August 2010, at Mporokoso in the Mporokoso District of the Northern Province of the Republic of Zambia, jointly and whilst acting together with others unknown, the accused persons did murder JOEL MWALE.

In the third count, it is alleged that on the 21st day of August 2010 at Mporokoso in the Mporokoso District of the Northern Province of the Republic of Zambia, jointly and whilst acting together with others unknown, the accused persons did murder KABWE PALICHA. They all pleaded not guilty to all the counts.

The prosecution's case is supported by the evidence of PW1, the deceased's wife and PW2, the deceased's son. In her evidence in chief, PW1 testified that on 20th August 2010, she learnt of the death of Robert Chileshe. The following day, she was preparing to go to the funeral house with her husband Peter Lubula and her brother Joel Mwale, both deceased, around 11:00 hours when a mob of people arrived at her home. One of the men forcibly got the child Peter Lubula was holding on his lap and threw it to the ground. She named the person who threw down the child as Ervest Musenge. She went on to say that the said Ervest Musenge then swept Peter Lubula to the ground and tied both his hands and legs. Thereafter, Isaiah Musonda and Kwanga Sebuloni joined

Ervest Musenge in assaulting Peter Lubula all over the body with sticks and stones. She said that she knew the three because they used to meet although they lived in different villages. She further said that Ervest Musenge was her husband's nephew whom they had kept at some point.

She said that when the accused saw that Peter Lubula was dead, they stopped beating him. However, when Joel Mwale came out of the house, the accused turned on him and beat him to death as they had done to Peter Lubula. She added that the mob that went to her house had alleged that Peter Lubula and Joel Mwale were responsible for the death of Robert Chileshe. She stated that the two men were killed in front of her and that after the accused had killed the two men, they threw their bodies at her feet telling her to do as she pleased as they had done their job. She added that Peter Lubula her elder son witnessed the killing of his father and Joel Mwale.

She said that after all this, she went to Mporokoso police station where she reported the matter after which she went to the scene of the crime with police officers but found the bodies had been removed. They later went to the place where the bodies had been taken and observed that the bodies of the deceased persons had their faces, armpits and abdominal areas burnt. They also found the body of Robert Chileshe at the same place. The police officers then picked up the three bodies as well as the three accused persons. She identified Ervest Musenge as A3, Ronald Musonda as A2 and Kwanga Sebuloni as A1.

In cross-examination she said that it was the three accused persons who killed the two Peter Lubula and Joel Mwale. She also said that she recalled mentioning Kalumba Chitemwa to the police as one of the suspects. She however, said he did not take part in the assault. She further said that she knew A1 as Sebuloni Kwanga and A2 as Isaiah Kingi. She refuted suggestions that A2 was living in Lusaka at the time saying she saw him and knew where he used to live. She further said that Ronald Musonda prevented the burning of her house after the two had already been killed.

PW2, Peter Mulenga, testified that on 21st August 2010, while at his home around 07:00 hours, a group of people passed hurriedly. He decided to follow them and found them at Peter Lubula's home. On arrival he saw Kalumba Chitemwa strike Peter Lubula with a wooden pole. He then went to pick up the child who was just lying on the ground. Later, he saw Joel Mwale come out of the house and on asking the people why they had killed Peter Lubula, the men turned on him and struck him with a wooden pole and he fell to the ground. He named Sebuloni Kwanga, Ervest Musenge, Isaiah Kingi, Kalumba Chitemwa, Kabwe Rodrick and Chibwe Sebuloni as the people who beat up Joel Mwale with sticks and stones. He said that he identified the assailants because they were well known to him growing up together.

It was his testimony that after the incident, he ran into the bush with the children for fear that they would also be killed while PW1 also ran away to a place he did not know. Upon his return to the

scene of the crime later in the evening, he did not find the bodies. Two days later he decided to take the children to his uncle's home in the township. Later, whilst going to collect some food, he spotted the three accused persons at the National Registration Office. He went to alert the police officers and led them to the apprehension of the three accused persons.

In cross-examination, he said that Peter Lubula was his father and Joel Mwale his uncle. He said that he could not come to the rescue of his father as there were about seven people assaulting him.

PW3's evidence was to the effect that on 20th August 2010, a Friday, he received a report of murder from Frank Chileshe that his brother Robert Chileshe was murdered. He named the suspects as Peter Lubula, Joel Mwale, Isaiah Kalonde and Kabwe Palicha of Changwa village. The following day on 21st August 2010, while preparing to travel to Changwa village, he received a phone call from the said Frank Chileshe informing him that three of the named suspects had been murdered by a group of people. Shortly thereafter, PW1 arrived at the police station and reported that three people, among them her husband had been murdered. He and other police officers accompanied PW1 to the scene but on arrival they found that the bodies had been removed. They were however, able to follow a trail of blood that led them to the discovery of the bodies on the banks of Luanga River. At the place, they also found the bodies of Joel Mwale, Robert Chileshe and Kabwe Palicha. He observed several wounds to the heads and cuts and bruises on other parts of the bodies.

They picked up the bodies and took them to Mporokoso hospital mortuary. On interviewing PW1, she named Kangwa Sebuloni, Isaiah Kingi and Ervest Musenge as the people responsible for the murders. On 19th September 2010, they received information that the three suspects had been spotted at the National Registration Office. He said that the three were apprehended by another officer although he met them later.

In cross-examination he said that according to the information he received, Robert Chileshe was murdered two days before he received the information in circumstances associated to witchcraft. He said he was aware of the issuance of National Registration cards prior to elections but that it was on a mobile basis and that the accused persons were above the age.

PW4 was the arresting officer who testified that on 23rd August 2010 he was on duty at Mporokoso police station when he received a docket of murder relating to the death of Peter Lubula, Joel Mwale and Kabwe Palicha. He learnt that the murders were in connection to the allegations that the deceased persons were involved in the murder of Robert Chileshe. On 24th August 2010, he attended a post-mortem examination of Peter Lubula and Joel Mwale. Later, the accused persons were apprehended by another officer and on 20th September 2010, he interviewed the three accused persons. He then arrested and jointly charged the three with the subject offence. Under warn and caution in Cibemba the language they appeared to understand well, they each freely and voluntarily denied the charges. He identified the persons he

arrested and charged as Ronald Musonda, (A1), Isaiah Musonda (A2) and Francis Musonda (A3).

In cross-examination he said that his investigations revealed that Robert Chileshe was murdered by the three deceased persons thereby provoking the mob to murder the deceased persons in this case. He however, said in re-examination that his investigations did not reveal any relationship between the accused and Robert Chileshe.

Following a submission of no case to answer with respect to the third count which relates to the death of Kabwe Palicha, I ruled that the prosecution had failed to establish a prima facie case against the accused person in the third count and I acquitted them thereof. I however, found them with a case to answer on the first and second count and placed them on their defence.

In his defence, A1 said that he knew nothing about the case as he was at his farm on the date in issue and not at the scene. He further said that his name was Ronald Musonda Nonde and not Kwanga Sebuloni. He further said that on 16th September 2010 he took his daughter to the National Registration office for her to obtain a National Registration Card. In the process, Peter Lubula, PW2, pointed at him and police officers apprehended him.

In cross-examination he said Sebuloni was not his nick-name and that his National Registration Card bore the names Ronald Musonda Nonde. He also said that he had seven children and Grace Musonda, his first born, who was born in 1992, was the one

he had taken to obtain a National Registration Card. He said that he only met his co-accused in the police cell and that he only heard of Robert Chileshe when he appeared before the subordinate court.

DW2 testified that A1 was his elder brother and that he had never heard anyone call him Kwanga Sebuloni.

In cross-examination he said that he and A1 had the same father but different mothers. He denied knowing Abigail Kaemba and said Peter Lubula was not his uncle although he knew him. He said he used to see Peter Lubula although their villages were twelve kilometres apart and he had known him for two years. He further said that Peter Lubula used to go to their village but said he was not sure if A1 knew Peter Lubula although he believed that he knew him. He also said that he had heard about the death of Robert Chileshe but that he was not aware of any confusion after his death.

In his defence, A2 said that he did not know anything about the offence he was charged with. He however, admitted that he was apprehended on 17th September 2010 while at the National Registration Office to obtain a National Registration Card. He said that Kingi was not his name and denied knowing Robert Chileshe, Peter Lubula and Joel Mwale. He also denied knowing any of his co-accused before his arrest. He further said that while seated at the National Registration Office, around 14:00 hours, he saw two police officers in the company of a young man he did not know

and when they approached him they told him they had come for him. They then took him to the police station and on the way they handcuffed him. When he asked them why, he was told that he was at Changwa village when someone was murdered, which he denied. He further said that at the time the death occurred he was in Lusaka at his uncle's home in Chawama having left the village on 9th June 2010 and returned to the village on 1st September 2010.

In cross-examination he said that he said that he did not know any of the prosecution witnesses before his arrest and that they all told lies. He also said that he did not know any of his co-accused persons until they met in the police cell. He said it was by coincidence that he and A1 were apprehended at the same place on the same day. He also said that there was a directive from Chief Mukupa Koama for all residents to obtain National Registration Cards because refugees from Angola were to be repatriated.

A3's defence was that he did not know how his uncle, Peter Lubula died saying on 21st August 2010, he was in Mofya village throughout at his home with children. He also confirmed that Joel Mwale was Peter Lubula's brother in law but denied knowing Robert Chileshe. He further said that he was not Ervest Musenge and wondered where her aunt, PW1, got the name from. He said that he had enjoyed a good relationship with PW1 since childhood. He denied being at the scene when his uncle was killed.

Regarding his apprehension, he said he said it was on 17th September 2010 while he was at the National Registration Office to obtain a National Registration Card following an announcement by the chief that all those aged between 15 and 18 years should obtain National Registration Cards. He said that he was approached by his cousin, PW2, who informed him that he was going to Chanda Mali village. A short while later, PW2 returned in the company of two police officers. PW2 introduced him to the police officers and told them that he wanted A3 to mention the people who had killed his father from Mukupa Kaoma. He said he did not know the people from Mukupa Kaoma. He further said that he attended his uncle's burial and wondered why he had not been apprehended there and them.

In cross-examination he said that he met his co-accused in the police cell and that they discussed how they were jointly charged and how they would defend themselves.

I received written submission from both sides. The prosecution's submission was that the accused persons were sufficiently identified by PW1 and PW2 thereby excluding the possibility of mistaken identity more so that the accused persons were known to the two witnesses before the incident. The case of Chimbiyi V the People¹ was referred to. On the lack of medical certainty on the cause of death, the case of Kashenda Njunga & Others V the People² was cited. The case held that a lay person could in

¹ (1973) Z.R. 118

² (1988 - 1989) Z.R. 1

borderline cases confirm the cause of a person's death. It was also submitted that evidence of identification can negative defence of alibi and the case of The People V Chimbala³ was cited. It was finally submitted that, unexplained odd coincidences may be supporting evidence and the case of Ilunga Kabala & John Masefu V the People⁴ was cited.

On the other hand the defence has submitted that identity of an accused person must be proved beyond all reasonable doubt and therefore, that the inconsistency between the evidence of PW1 and PW2, as to the number of people they saw beating the deceased persons, is a case of questionable identity. It was further submitted that the difference in the names by which the two prosecution witnesses identified the accused persons and the names by which the accused persons are known raises the possibility of mistaken identity. The case of the People V Kamwandi⁵ was cited. As for A3's alibi, it was submitted that he informed the police about it and gave them the name and address of the person who kept him in Lusaka during the period and the same was not disproved by the prosecution. The case of Katebe V the People⁶ was cited. It was further submitted that since the relationship between A3 and the two prosecution witnesses is not in dispute, the prosecution ought to have called independent evidence to exclude the possibility of false

³ (1973) Z.R. 118

⁴ (1981) Z.R. 102

⁵ (1972) Z.R. 131

⁶ (1975) Z.R. 13

implication as PW1 and PW2 are witnesses with a possible interest of their own to serve.

The defence has also submitted by way of suggesting that A3 and PW1 knew who were responsible for the killing of Peter Lubula and Joel Mwale but that when asked by the police to name A2 and A3, he refused on principle. I must state immediately that the theory by the defence is not supported by evidence on the record and it must be dismissed accordingly.

The defence finally submitted that odd coincidences may be supporting evidence only if they are not explained as per the holding in the case of *Ilunga Kapala & John Mwasifu V the People*⁷. It was however, submitted that in the case of the accused persons in this case, they all offered reasonable explanations of how they found themselves at the National Registration office.

On the evidence before me, it is beyond dispute that the two deceased persons were assaulted by a mob of villagers who accused them of having murdered another person. The evidence of PW1 and PW2 is very critical in this matter being the ones that purport to have witnessed the murder of the two deceased persons. It is a fact that the incident happened during day time and as such there is no possibility of mistaken identity. Both witnesses have testified that they knew all the three accused persons before the incident. It is also not in dispute that A3 is a nephew to Peter Lubula and he testified that he had a very cordial

⁷ (1981) Z.R. 102

relationship with his aunt PW1 thereby excluding any motivation for false implication.

All the accused persons have, on the other hand, denied being part of the mob that went to Peter Lubula's house on the date in issue and have labelled PW1 and PW2, liars. Further, other than A3, the other two have denied knowing PW1 and PW2 before. They have also denied knowing each other before although DW2, who is A1's younger brother, testified that he knew Peter Lubula and opined that A1 should have known him as well. Given that A1 is older than DW1, It is incredible that A1 wants the court to believe that he did not know Peter Lubula. It is clear to me that the accused persons' evidence consists of nothing but general denials which cause no harm to the evidence of PW1 and PW2. The truth of the matter is that PW1 and PW2 saw the accused persons assault the two deceased persons until they died. It is also noteworthy that in his evidence, A3, states that he recognized, his cousin, PW2, when he found him at the National Registration Office on 17th September 2010. It must therefore, also be true that PW2, recognized his cousin A3 on 21st August 2010 when he assaulted and killed his father Peter Lubula and his uncle Joel Mwale.

The accused persons have also sought to rely on name identity as a defence. They have argued that the names namely, Kwanga Zebuloni for A1, Isaiah Kingi for A2 and Ervest Musenge for A3, by which PW1 and PW2 identified them were neither their real nor nick-names. Although the substance of the denial is not stated, it

seems to be an attempt to buttress their defence of mistaken identity or indeed false implication. Whereas it may be true that the said names were not their real names, there is a possibility that they could have been their nick names. However, even assuming that the accused persons never, at any time, answered to those names, it is my considered view that the true identification of a person is not in knowing what their name is but knowing who they are when you see them. For instance, would the fact that A3 is in fact not Ervest Musenge nullify the fact that he is Peter Lubula's nephew as described by PW1? Certainly not. The fact that PW1 and PW2 may have been mistaken as to the accused persons' names does not mean that they were also mistaken as to their identity.

In the case of Benson Phiri and Sanny Mwanza V The people⁸, the Supreme Court held that;

“The testimony of a single witness who knew the accused prior to the incident at issue is adequate to support conviction”

In the case at hand, there is more than adequate evidence as to the identity of all the accused persons because both PW1 and PW2 knew them before the incident at issue. It is therefore, immaterial that the two witnesses knew them by other names.

This will then lead me to the issue of the failure by the police to conduct an identification parade which was alluded to in cross-examination. It is my considered view that identification parades are not to be conducted as a matter of routine even where the

⁸ (2002) Z.R.

witnesses knew the culprits before the incident. These become necessary where the identity of the perpetrator is not certain. In this case, there was no need for the police to organize an identification parade because the culprits were known to the witnesses before the incident. Further, as I have stated already, the incident happened during the day. In any event, it is a fact that all the accused persons were apprehended with the help of PW2. So who would he be identifying at an identification parade?

The other factor to note is that all the three accused persons were apprehended at the National Registration Office on 17th September 2010. Other than A1 who states that he had taken his daughter to obtain a National Registration Card, the other two said they were there to obtain National Registration Cards for themselves following a directive by the chief for all people between the ages of 15 and 18 years to obtain the said cards. What is however, curious about that piece of evidence is that both A1 and A2 were already above that age bracket as the record shows at the time they were arrested, A2 was 23 and A3 was 19. Further, it is curious that all the three of them responded to the alleged directive, on the same day and at the same time.

Finally, it has been suggested that the murder of the two deceased persons was motivated by allegations of witchcraft, which if proved, would be considered as an extenuating circumstance to avoid the death penalty. I have considered the evidence in its entirety and find no strong allegations of witchcraft. The only testimony in that regard from the prosecution

witnesses is that the assailants alleged that the deceased persons had a hand in the murder of Robert Chileshe. The details of the circumstances leading to the death of the said Robert Chileshe are not part of the evidence. I would therefore, find no evidence of belief in witchcraft as the reason for the murder of Peter Lubula and Joel Mwale.

In the circumstances, I find all the accused persons guilty of murder contrary to section 200 of the Penal Code as charged and I convict them accordingly.

DELIVERED THE 26TH DAY OF APRIL 2012 AT KASAMA IN OPEN COURT

J.M. SIAVWAPA

JUDGE