

IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICTREGISTRY
HOLDEN AT KITWE

HK/03/2012

(CRIMINAL JURISDICTION)

BETWEEN:

THE PEOPLE
VS
NICHOLAS BWALYA MWABUKA

Before the Hon. Mr. Justice I.C.T. Chali in Open Court on the 20th day of January, 2012.

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

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

JUDGMENT

Case referred to:

- 1. *Mwewa Muroho v. The People (2004) Z.R. 207***
- 2. *The People v. Njovu (1968) Z.R. 132***
- 3. *Muvuma Kambanja Situna v. The People (1982) Z.R. 115***
- 4. *Katebe v. The People (1975) Z.R. 13***
- 5. *Machipisha Kombe v. The People (2009) Z.R. 282***

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 4th day of August, 2011 at Kitwe in the Kitwe District of the Copperbelt Province of the Republic of Zambia, did murder one EDWARD MULENGA.

The Accused denied the charge whereby the case proceeded to trial in which I heard three prosecution witnesses.

I would like to outline the case for the State, first, by the evidence of PW2, Sergeant CHOOBE CHOOBE of Mindolo Police Station, Kitwe. He said that he was on duty at the Station on 4th August, 2011 when, around 06:35 hours while he was at the entrance of the Police Station, he saw a naked man near the road who was holding a piece of timber in his hand. Within a few seconds, PW2 saw another man cycling in the opposite direction to that in which the naked man was going. As the cyclist was about to pass the naked man, the naked man got the piece of timber he had and struck the cyclist to the head with it. The cyclist fell to the ground. PW2 then got a firearm from his colleague in the inquiries office and rushed to rescue the cyclist. As PW2 was approaching the scene the naked man started running away. PW2 then fired a warning shot in the air from his weapon. With help from members of the public, PW2 managed to apprehend the naked man and took him to the Police Station where the man was detained. PW2 later came to know the naked man as NICHOLAS BWALYA MWABUKA, now the Accused. PW2 then proceeded to where the cyclist had fallen. From another cyclist or second cyclist who had been following the cyclist who had been hit, PW2 learnt the first cyclist's name to be EDWARD MULENGA. PW2 retrieved the piece of timber that had been used to hit EDWARD MULENGA which he identified at the trial and produced as part of the evidence.

At the scene PW2 observed that EDWARD MULENGA had sustained a wound on his head and was unconscious. PW2 mobilised some transport and was assisted by the second cyclist to take EDWARD MULENGA to Kitwe Central Hospital. Upon arrival at the Hospital EDWARD MULENGA was pronounced dead by the Medical Doctor at hand. The body of the deceased was later deposited in the hospital mortuary.

PW1 was ROBERT KASONDE KABAMBA, the younger brother to the deceased. He said that in the morning on 4th August, 2011 whilst on duty in Garneton, Kitwe, he received information from his brother's workmate that his elder brother had died. PW1 then rushed to Mindolo Police Station where he was informed that his brother had been taken to Kitwe Central Hospital. Accompanied by a Police Officer, PW1

proceeded to the Hospital where he found the body of his brother. He checked the body of his brother and observed injuries to his head and the face. A few days later, PW1 identified the body of his brother, to the police and Doctor before the Post Mortem examination was conducted on it by the Doctor.

The last prosecution witness was Detective Sergeant LEBSON KABINDA of Mindolo Police Station. He was the investigating officer in this case. In the course of those investigations PW3 said on 8th August, 2011 he attended at Kitwe Central Hospital Mortuary where the body of the deceased was identified to the Pathologist Dr. MUBIKAYI before a post mortem examination was conducted on it. PW3 later received the Post Mortem Report in the case which he identified and produced before court as part of the evidence. PW3 then arrested and charged the Accused with the subject offence which Accused denied after being warned and cautioned.

According to the Post Mortem Report the cause of death was "SKULL FRACTURE + SUBDURAL HEMORRHAGE". Other significant findings by the Pathologist included.

1. A large cut on the head 5cm.
2. Long fracture of the skull 6cm.
3. Blood in the nostrils and ears
4. Head swollen and deformed.

At the close of the case for the prosecution I found and ruled that the prosecution had established a prima facie case of murder against the Accused. I accordingly found Accused with a case to answer and I put him on his defence.

After his rights were explained to him as to how he could defend himself, the Accused elected to give evidence on oath and said he would not call any witnesses.

The summary of his sworn evidence is that on 4th August, 2011 he left home in Kawama Township of Kitwe at 05:00 hours to go to town. He said he was walking along the Kitwe Chingola Road. He said he was walking on the eastern side of the road, the side on which Chimwemwe Township is situated. He said that at a point

near Mindolo Police Station, which is on the western side of the road, he decided to cross to the other side. He first waited for the road to be clear of the vehicles and when it was clear, he crossed over to the western side. When he crossed the road he saw two cyclists on bicycles going south down the slope in the direction of town. He said the cyclist in front saw him at a very short distance and tried to manoeuvre to avoid hitting the Accused. However the cyclist slipped and fell by himself. That is when PW2 arrived at the scene and apprehended the Accused and took him to the inquiries office at the Police Station.

The accused denied that he had any plank or piece of timber on that day. He only found it later in the CID office. He said when he was apprehended he saw the cyclist who had fallen was sitting on the ground. He said the cyclist was not unconscious but was bleeding from the right ear. He said there were a lot of on lookers and passersby at the time of the incident.

That is the summary of the evidence from both the prosecution and the defence from which I must make my own findings and conclusions.

Before I do so I must pause and remind myself that in all criminal cases the burden of proving the guilt of an accused person lies on the prosecution throughout; the Accused has no duty to establish his innocence. The standard of proof is high. The prosecution must prove the case against the Accused beyond reasonable doubt.

If, after, analyzing the evidence before me, I find some doubt as to the Accused's guilt I am obliged to acquit him.

This is the approach the Supreme Court has set in such cases as MWEWA MURONO v. THE PEOPLE (2004) Z.R. 207.

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”.

In the case of THE PEOPLE v. NJOVU (1968) Z.R. 132 the ingredients or essential elements in the case of murder are simply listed as:

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

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

In this case I find as a fact that EDWARD MULENGA died on 4th August, 2011 from the injuries he had sustained particularly to his head as reflected in the Post Mortem Report.

The question is how the deceased sustained those injuries. The answer to that question will in my view resolve the three issues as raised in the NJOVU Case. According to PW2, those injuries were a result of a blow administered to him by the Accused with a piece of wood. PW2 claimed to have witnessed the events as they unfolded by the roadside as he stood at the door of the Police Station looking outside. Accused did not deny that he was by the roadside that day. His version of the event is that after he had crossed the road over to the western side where the Police Station is located, the cyclist came to fall from the bicycle all by himself when he attempted to avoid running into the Accused. The Accused denied having struck the deceased with the piece of timber that was produced in court. Accused said he only saw that piece of timber in the CID Office of the Police Station. Accused, however, admitted that he was apprehended by PW2 at the scene where the deceased had fallen. Accused also said the deceased had been injured and was bleeding from one ear. Accused further said he was apprehended by PW2 and there were a lot of people around.

In resolving the issue before me I am alive to the fact that PW2 was the only witness who claimed to have seen how the deceased got injured. In that event I am guided by the decisions of the Supreme Court, particularly in the case of MUVUMA KAMBANJA SITUNA v. THE PEOPLE (1982) Z.R. 115 in which it held:

“The evidence of a single identifying witness must be tested and evaluated with the greatest care to exclude the dangers of an honest mistake”.

In accepting PW2's evidence as to the identity of the person who assaulted the deceased, I have considered that the incident occurred at about 06:35 hours, which suggests that there was light. PW2 saw the Accused with a piece of timber. The distance between where PW2 stood at the door of the Police Station and the place where the incident took place was given by the Accused as two lengths of Court No. 1 – a distance of about 40 metres in my estimation. That, in my view, was close enough to enable him to accurately observe what was happening. Immediately, PW2 saw the Accused hit the deceased he rushed over to rescue the cyclist. He gave chase and, with members of the public, managed to apprehend the Accused. Accused admitted having been apprehended by PW2, although he denied having attempted to run away. I am satisfied that the prevailing conditions were such that there was no mistake as to the person who had hit the deceased.

I have further considered the case of KATEBE v. THE PEOPLE (1975) Z.R. 13 and MACHIPISHA KOMBE v. THE PEOPLE (2009) Z.R. 282 in which the Supreme Court emphasized the need for the trial court to ensure that the danger of the false implication of or allegation against an accused are excluded. In the instant case I have been unable to find any motive for PW2 to deliberately and dishonestly make such allegation. I find PW2's evidence as to the identity of the culprit to be reliable. I find that there was ample opportunity for PW2 to make a positive and reliable identification.

The conduct of the Accused of striking the deceased with a piece of timber, without any lawful excuse, was unlawful and of malice aforethought as defined in section 204 of the Penal Code.

I therefore find that the prosecution have proved the case against the Accused beyond reasonable doubt.

In the circumstances, I find the Accused guilty of the murder of EDWARD MULENGA and I convict him accordingly.

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

I.C.T. Chali
JUDGE

