

IN THE HIGH COURT FOR ZAMBIA

HK/43/2012

AT THE KITWE DISTRICT REGISTRY

HOLDEN AT KITWE

(CRIMINAL JURISDICTION)

B E T W E E N:

THE PEOPLE

VS.

ANDREW KAFWAYA (A1)

HOPKINS MUSONDA (A2)

FRACKSON MWANZA (A3)

**Before Honourable Mrs. Justice Judy Z. Mulongoti in
Open Court on the 17th day of September, 2012**

**For the People : Mr. M.C. Hamachila, State
Advocate,**

DPP's Chambers

**For the Accused : Mr. I. Chongwe, Legal Aid
Board Counsel**

J U D G M E N T

CASES REFERRED TO

1. *FAWAZ & CHELELWA VS. THE PEOPLE* [1995 - 1997] ZR 3 (SC)
2. *MUTALE AND PHIRI VS. THE PEOPLE* [1995 - 1997] ZR 227 (SC)
3. *KAMBARAGE MPUNDU KAUNDA VS. THE PEOPLE* [1990 - 1992] ZR 215 (SC)
4. *HAONGA & OTHERS VS. THE PEOPLE* [1976] ZR 200, 2002 (SC)
5. *THE PEOPLE VS. NJOVU* [1968] ZR 132
6. *R VS. TUBERE OCHEN* (1945) 12 EACA 63
7. *WILSON MWENYA VS. THE PEOPLE* [1990 - 2992] ZR 24 (SC)

8. *MACHIPISHA KOMBE VS. THE PEOPLE [2009] ZR 282 (SC)*

The accused, **ANDREW KAFWAYA** aged 60, **HOPKINS MUSONDA** and **FRACKSON MWANZA** both aged 28 were indicted on one charge of murder contrary to section 200 of the Penal Code. The particulars alleged that the accused, on 7th day of March 2012, at Chamboli Police cell in the Kitwe District, murdered **GRIVA NG'AMBI**.

When the charge was read and explained to the accused, they pled not guilty. Thus, it is encumbered upon the prosecution to prove all the essential ingredients of the offence of Murder, beyond reasonable doubt. An accused does not bear the burden to prove his innocence and should be convicted on the strength of the prosecution evidence.

Arising from Section 200, the following are the ingredients for the offence of murder:

- (1) *That there was death*
- (2) *The cause of such death was an unlawful act or omission*
- (3) *The death was caused with malice aforethought*
- (4) *The accused is responsible directly or indirectly in causing the death of the deceased*

In support of its case, the prosecution led evidence from five witnesses, hereafter referred to as PW1, PW2 etc.

PW1 SAMUEL MBULO, testified that on 7th March 2012, he was in detention at Chamboli Police Post. Around 20:00 hours, a group of people brought a suspect hereafter referred to as the deceased.

PW1 recognised one Frank, A3 herein from the group. The deceased appeared drunk. According to PW1, A1, who is a neighbourhood watch officer, was on duty and he was being assisted by a slim guy, A2 herein. A1 and the slim guy with the help of A3, brought the deceased into the cell where he, (PW1) was. A1 handcuffed the deceased because he was rowdy and was making a lot of noise. He was made to remove his belt, gumboots and bag of charcoal which he had was taken from him.

After a while, the deceased quietened down and the handcuffs were removed. The deceased later asked for permission to use the toilet. He was escorted by all three accused persons.

Whilst they were outside, PW1 heard someone saying "*he has broken my phone*". After a while, A1 returned to the cell and asked him if the deceased had eaten because he was taking too long in the toilet. PW1 answered in the negative. A1 left and he dozed off. A1 and A2 checked on him twice. He said he had failed to sleep because the floor was hard.

A1 returned for the third time and called his name but he pretended to be asleep. Then he saw A1 and A2 with the

deceased who was half dressed. A1 got into the cell backwards whilst he was holding the deceased then A2, who had the deceased's shirt, closed the door. A1 made the deceased stand by the door then A2 who was outside the door, took the shirt and tied it around the deceased's neck, and on to the door. Then the duo left. PW1 heard them talking to one another saying, "*is he sleeping?*".

A short while later, A1 reappeared and screamed saying, "*Samuel look, your friend wants to kill himself, get up quickly, hold him by the legs before he dies*". PW1 refused saying "*I do not want my fingerprints to be on his body*". A1 insisted and that is when he gave in and he got hold of the deceased's trousers. A2 also to assist and they caused the deceased lie on the floor in the cell. He was unresponsive.

A1 then rushed to Wusakile Police to report the matter. When the police came, PW1 and the deceased's body were picked and put in one vehicle. After he was released, a few days later, he went back to Chamboli Police Post. He met A1 in the street and greeted him. He did not recognize him and when reminded, A1 said "*please do not mention my name like I had told you earlier, this thing is happening to me for the second time*".

PW1 identified the accused in court. The court visited the scene of crime and PW1 demonstrated what transpired on the fateful day. He said the room was dark with a bit of light, from a bulb at the reception. He said he was lying down in a corner

pretending to be asleep when he saw A1 drag the deceased into the cell and A2 standing by the door, with A1's shirt.

In cross examination, PW1 reiterated that the deceased had a bag of charcoal when he came in. He could see it because he was about two metres away. He also testified that initially he heard the conversation about the phone, from the main entrance which was about four to five metres away. Later the voices were behind the cell.

In further cross examination, he testified that the deceased's legs were resting on the floor and not hanging, all along. He said he could see clearly because there was a bulb on the table at inquiries. He said he saw people park their vehicles at the Police Post and signing in at reception. He reiterated that A3 never returned after the trio took the deceased to the toilet. He insisted that the deceased was standing and not hanging, as recorded in the statement by the police.

When further cross examined, PW1 testified that after the incident, he spent the night at Wusakile Police. He gave his statement on 8th March 2012. He admitted stating on that day that *"I have actually decided to reveal what happened"*. He denied the assertion that before that, he was telling the officers something else.

When re-examined by the State Advocate, PW1 clarified that the statement was in Bemba and he said “*nabamukulika*” which the officers recorded as hanging.

PW2 DR. OLGA SADKOVSKA a Pathologist at Kitwe Central Hospital (KCH) recalled conducting a postmortem on the deceased, on 7th March this year. She identified the Postmortem Report and testified that she did both external and internal examination. She found strangulation marks on the upper part of the neck. The internal examination revealed marks on one side and lungs without air. In her opinion, the cause of death was strangulation by squeezing, without fracture of the trachea or air pipe.

PW2 further testified that she was not given any rope or anything to examine. This would have helped her determine whether the knot was mobile or not whether suicide or not.

Under cross examination, PW2 testified that the characteristics for hanging and strangulation were the same. She said it was just an opinion that she could not state as a fact whether the deceased committed suicide or not.

PW3 ANTHONY NG'AMBI, the deceased's elder brother, testified that on 3rd March, 2012, the deceased visited him at his home. This was around 18:30 hours. He had come to ask for charcoal which he was given and he left.

The following day, he learnt of the deceased's passing. He went to Wusakile Police where he was shown a bag of charcoal and shirt and referred to the mortuary at KCH. He identified the body. He noticed a scar on the upper lip and two front teeth were missing. On 7th March he attended a postmortem.

PW4 SERGEANT LIMBUWA WINFREDA testified that she attended the deceased's postmortem. A Postmortem Report 'P1', was prepared and stated the cause of death as strangulation.

PW5 SERGEANT JOSEPH KAMAMBA testified that on 3rd March 2012, he was on duty at Wusakile Police. Around 20:50 hours, he received a report from A1, who reported that a detainee had hanged himself in the cell at Chamboli Police Post.

When interviewed, A1 narrated how the deceased was apprehended by members of the public for impersonating a police officer. PW5 visited the scene in the company of A1. He found the deceased lying on the floor without a shirt but had on a blue jean trousers. He inspected the body and saw no physical injuries. He saw a shirt hanging on the grill door.

PW5 informed other senior officers who also visited the scene. The body was taken to the mortuary. According to PW5, when he interviewed PW1, he expressed ignorance, saying he was just awakened by A1. The deceased was certified dead at the hospital.

The police detained PW1 on 8th March 2012 when he had gone to get clearance to take to his place of work. The police then decided to interview him together with the accused. The police sat as a panel. PW1 narrated as he had testified before me. PW5 then charged the accused with murder of the deceased.

He said he collected the shirt, 'P2', which was hanging on the grill door. PW5 identified all the accused persons in court.

In cross examination, PW5 testified that when PW1 had gone to the police for clearance, A3 had not been apprehended. He said he was not sure when A3 was apprehended. He confirmed that PW1 was detained briefly on 8th March 2012, for a day or so, in order for him to assist with investigations.

He said he could not recall whether warn and caution statements were recorded from all four of them. That was the case for the prosecution, at the close of which I found the accused with a case to answer and placed them on defence.

A1 and A2 opted to give evidence on oath while A3 opted to make an unsworn statement.

A1 whom I shall also refer to as DW1, testified that on 3rd March 2012, he was on duty at Chamboli Police Post, where he worked as a neighbourhood watch officer. He had reported at 17:45 hours and found PW1 in the cell. Around 20:00 hours, he

received the deceased and A3. A3 told him that the deceased was impersonating a police officer.

According to DW1, he found the deceased wanting for not only impersonating but being armed with a walking stick which appeared like a gun and breaking a phone. He detained him and handcuffed him because he was rowdy. DW1 then asked A3 to report the following day regarding his phone and A3 left.

Later PW1's food was brought and he cautioned him against eating that late because he would not be allowed to go to the toilet should need arise.

Then the deceased asked to be uncuffed. DW1 uncuffed him since he was then peaceful. Around 22:00 hours, he went to listen to the news in another room. He heard a loud bang from the roof top and inquired from Eno who was inside. He continued patrolling. At 22:45 hours, he decided to check on the suspects in the cell and found the deceased by the grill door with his shirt around the neck. He rushed to get the key and awoke PW1 before opening the door.

DW1 informed the court that A3 left after leaving the deceased in the cell and that A2 was not a neighbourhood officer but stayed at a house next to the Police Post.

He occasionally sent A2 on errands. On that fateful day, he had sent him for eggs and talktime. When A2 returned he found

the incident had happened. DW1 then rushed to Wusakile Police and left him in charge.

When the officers visited the scene, he explained like he has testified before me. The officers picked PW1 and the deceased in one vehicle. He too was picked in another vehicle. A2 was left in charge.

Four days later, he was asked to report at Wusakile where he was detained and charged with murder. Later, A2 and A3 joined him.

He branded as lies PW1's testimony. He said the deceased was never taken to the toilet and he never pleaded with PW1 to protect him.

In cross examination, he testified that he was watching News from the T.V. room but he could see what was going on in the cell. He said the talktime, A2 had gone to buy was intended to be used to call the police after the incident. According to DW1, A2 was present at that time and was watching T.V when he sent him after the emergence arose.

When further cross examined, he said PW1 lied about A2, because he was in the T.V. room not where the cell was. He confirmed that both A2 and A3 were present at the Police Post but insisted he was the only one on duty.

A2 whom I shall also refer to as DW2, testified that on 3rd March 2012, DW1, sent him to Mwabana Bar. This was around 18:30 hours. When he returned, DW1 sent him to buy eggs from the makeshift shop at his house. After he took the eggs to DW1, he went back home, to take charge of the shop. Then he heard DW1, calling out his name "*Muso, Muso*", *give me talktime*". He said he did not have. DW1 told him go back and get some. He said "*cant you see what has happened*"?. That is when he noticed the deceased hanging by the grill door. DW2 then narrated like DW1, how the police arrived at the scene. He also testified on how he was detained and arrested. He testified that when he met PW1 at the police, he never recognized him and the police told him that this is Musonda who had gone to buy talktime. Then the officers called them to the CID room individually. PW1 was taken away for more than 45 minutes.

Later PW1 was released. The three of them were taken to the scene of crime.

In cross examination, DW2 testified that he was at the Police Post on the night of the incident and that he saw PW1 there. He confirmed that his house was very near to the Police Post.

A3 gave an unsworn statement. He informed the court that the deceased had confronted him on 3rd March 2012. The deceased told him he was an Inspector and he apprehended him. He took him to the neighbourhood watch at Chamboli Police Post. A3

also stated that when the deceased approached him, the duo struggled for a while and in the process, his phone broke.

When they got to the police, they met A1 and he narrated that he had been apprehended by the deceased. The deceased then introduced himself as Inspector Griva Ng'ambi. When A1 asked for his ID, he failed to produce it. Then A1 and another elderly person locked up the deceased. He started fidgeting and struggling with A1. He was then handcuffed. A3 complained about the phone. He was told to report the following morning and he left.

On 10th March, he was apprehended by a group of neighborhood watch officers and driven to Wusakile Police where he was interviewed about what transpired on 3rd March in relation to the deceased. Then he was interviewed together with A1, A2 and PW1. Later all four were taken to the scene where A1 and A2 demonstrated how the deceased hanged himself. That was the close of the defence.

The learned counsel, for the accused, Mr. Chongwe has submitted that the fact that the deceased may have committed suicide had not completely been ruled out. The question whether with that size of the grill gate, one could commit suicide by hanging him/herself should be looked at from a broader point of view. He cited the case of **FAWAZ & CHELELWA VS. THE PEOPLE [1]** where the Supreme Court observed that **“from a common sense point of view.....to**

strangle a person with sufficient force to cut off the flow of air through the windpipe would be bound to cause bruising or some other injury”

Mr. Chongwe argued that PW5 testified that there were no visible injuries. Furthermore, that it is not stretching imagination too far to say from PW2’s evidence that death was caused by something other than strangulation.

It has been further submitted that if the court found that the death of the deceased was not caused by the deceased hanging himself, there is still a question to be considered as to who and how was the strangulation done. He has contended that it is a possible inference that the death (strangulation) was caused by PW1, who was a suspect and was briefly detained.

The case of **MUTALE AND PHIRI VS. THE PEOPLE [2]** was cited wherein the Supreme Court held that **“where two or more inferences are possible, it has always been a cardinal principle of criminal law that the court will adopt the one that is more favourable or less favourable to an accused if there is nothing to exclude that inference. Where there are lingering doubts, the court is required to resolve such doubts in favour of the accused”**.

The court has been urged to adopt an inference that is more favourable to the accused. Moreso that the green shirt, the

alleged instrument was never presented to PW2, the Pathologist. In addition, PW5 never explained why he found PW1's story to be genuine. Reliance was placed on the case of **KAMBARAGE MPUNDU KAUNDA VS. THE PEOPLE [3]**, where the court stated **"it is precisely with regard to that evidence where the prosecution witnesses were in conflict with the appellant.....that it was necessary for the learned trial Judge to indicate why he preferred the evidence of the prosecution witnesses who had been found to have given untruthful evidence on certain issues"**

The court has been urged to arrive at its own conclusion and bear in mind that the evidence of an expert witness is an opinion only as elucidated in the case of **FAWAZ & CHELELWA VS. THE PEOPLE**, supra.

It is Mr. Chongwe's submission that the credibility of the prosecution witnesses must be treated with caution in light of the contradictory statements by PW1 and PW5, on whether PW1 was interviewed by PW5 prior to the 8th of March 2012. The case **of HAONGA & OTHERS VS. THE PEOPLE [4]** was cited in authority.

It has also been submitted that the evidence of PW1, who was a suspect witness, needs corroboration. According to learned counsel, PW1 would not have given the statement implicating the accused if he had not gone back to collect a clearance

report from Wusakile Police. It is his prayer that the accused be acquitted as the prosecution had not discharged the burden of proof.

I am grateful to Mr. Chongwe for the submission and note that the state opted to rely on the evidence on record. After analyzing the evidence and submissions, the following are common causes:

(1) *That the deceased and PW1 were detainees at Chamboli Police*

Post Cell, on the night of 3rd March 2012.

(2) *A1, A2 and A3 were all present at the Police Post that night. A3 arrived there in the company of the deceased*

(3) *Later that night, the deceased was found dead, on the grill door in the cell with his green shirt, tied around his neck and on to the door.*

(4) *A1, A2 and PW1 removed the body from the door and placed it on the floor, when police arrived at the scene, they collected the body, PW1 and A1 in different vehicles. A2 remained in charge of the Police Post.*

The issue for determination is whether the accused before me, murdered the deceased.

It is indisputable that the deceased is dead as testified by PW1, PW2 and PW3. Undoubtedly, this has been proved beyond reasonable doubt. The second ingredient is whether the death was caused unlawfully. It is settled law that all

homicide is unlawful unless excused by law. The postmortem report by PW2 revealed strangulation as the cause of death as testified by PW1, the only eye witness. There was no other evidence to suggest that the deceased died accidentally. Accordingly, the presumption that he died unlawfully has not been rebutted. It is therefore my conclusion that the deceased died unlawfully.

The third ingredient is that of malice aforethought. To establish it, the prosecution must prove either that the accused had the actual intention to kill or to cause grievous harm to the deceased or that the accused knew that his actions would be likely to cause death or grievous harm to someone. Per Blagden CJ (as he then was) in the **PEOPLE VS. NJOVU [5]**. It is well established that malice aforethought being a mental element is difficult to prove. However, it can be inferred from the surrounding circumstances of the offence such as:

- (a) the nature of the weapon used
- (b) the part of the body targeted
- (c) the manner in which the weapon was used etc.

This was elucidated in the case of **R VS. TUBERE OCHEN (1945) 12 EACA 63 [6]**. In the instant case, the deceased was said to have strangulation marks on the neck. He died due to lack of air in the lungs. Applying the Tubere Ochen case, supra, I am inclined to find that there was malice aforethought,

looking at the part of the body targeted. This ingredient has therefore also been proved beyond all reasonable doubt.

The last ingredient which is the most critical is whether the accused caused the death of the deceased. The evidence connecting the accused is from PW1. Let me state from the onset that I found PW1 to be consistent in his testimony as to what transpired on 3rd March 2012. He did not contradict himself even under extreme cross examination. I therefore accept his testimony.

I have noted the submission by Mr. Chongwe that his testimony needs corroboration. The postmortem report revealed the cause of death as strangulation. PW2 did testify that she observed strangulation marks on the neck. According to her, these were caused by a string or something was used, which was not presented to her. It is my considered view that this testimony perfectly corroborates PW1's testimony that A1 and A2 used the deceased's shirt, to tie it around his neck resulting in death.

I am unable to accept the submission that because PW5 did not allude to any injuries on the deceased, then it rules out strangulation as the cause. I do not accept that the gist of the case of **FAWAZ & CHELELWA VS. THE PEOPLE** is that in cases of strangulation, there must always be evidence of bruising or other injuries. The circumstances of that case are very different from the case in hand.

It was PW2's testimony that the cause of death was strangulation without fracture of the trachea. According to PW1, the deceased was brought in by A1, who was holding him, and then he made him stand by the door while A2 tied the shirt around his neck. There was no evidence of a struggle which could have caused bruises or some other injury.

Admittedly, PW1 was a suspect initially and I do concur that he could have an interest of his own to serve. However, it is settled law that the court can convict on the testimony of such a witness where there is corroboration. In **WILSON MWENYA VS. THE PEOPLE [7]**, Sakala JS, (as he then was), observed that **"where a witness is detained in connection with the same incident or does not report the incident to the police, the evidence needs corroboration"**.

I am also mindful of PW2's testimony that since she did not examine the instrument used or the knot, she could not say if it was suicide or someone else did it. This notwithstanding, I am inclined to find that A1 and A2 strangled him as testified by PW1. I find this to be sufficient corroboration.

In the case of **MACHIPISHA KOMBE VS. THE PEOPLE [8]**, the Supreme Court per Mwanamwambwa JS, held, **"the law is not static, it is developing. There need not now be a technical approach to corroboration. Further that corroboration is independent evidence which tends to**

confirm that the witness is telling the truth when he or she says that the offence was committed and that it was the accused who committed it.”

I thus find that PW1's testimony was corroborated by PW2 plus the post mortem report.

I am alive to the fact that the accused's version of what transpired is that the deceased committed suicide. Having visited the tiny cell, I do not accept that the deceased could have strangled himself without awakening PW1.

Their version cannot reasonably be true. The contradictions in the defence are equally noteworthy. Whereas A1 insisted that he was the only one on duty that night, A3 stated that there was another elderly neighbourhood watch officer. It is further noteworthy that all the accused admitted being present at the police cell that night as testified by PW1 who placed all of them at the scene. The contradictions between A1 and A2 regarding the errands are equally noted.

However, I must hasten to state that I am inclined to acquit A3. Although, he was at the scene, PW1 testified that A3 together with the other two, took the deceased to the toilet and never returned. It was his testimony that the deceased took long in the toilet and when he saw A1 holding him as he led him to the cell, A2 opened the door and held the deceased's shirt. A3 was not present.

On the facts and evidence before me, I therefore find that A3 did not participate in the strangulation of the deceased and I acquit him forthwith.

I find that the prosecution have proved a case of murder against A1 and A2 contrary to section 200 of the penal code. I am alive to the testimony by PW1 and A1 that the deceased was rowdy and cheeky. PW1 also testified that he appeared drunk. I therefore take this as an extenuating circumstance and I find them guilty of murder with extenuating circumstances in accordance with section 201 (b) of the Penal Code. I accordingly find them guilty of Murder of **GRIVA NG'AMBI** and I convict them.

Delivered at Kitwe in Open Court this **17th** day of **September** 2012

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Judy Z. Mulongoti
HIGH COURT JUDGE

