

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

HKS/43/2012

B E T W E E N:

THE PEOPLE

VS.

DONALD TAULO (ACCUSED 1)

WATSON MBOKO (ACCUSED 2)

Before the Honourable Mrs. Justice Judy. Z. Mulongoti in Open Court on the 12th day of November, 2012

**For the State : Mr. K.I. Waluzimba, State Advocate,
DPP's Chambers**

For the Accused : Mr. E. Mazyopa, Legal Aid Board

J U D G M E N T

CASES REFERRED TO:

1. *CHIMBINI VS. THE PEOPLE [1973] ZR 179 [SC]*
2. *DICKSON SEMBAUKE VS. THE PEOPLE [1988 – 89] ZR 144 [SC]*
3. *ERNEST MWABA AND OTHERS VS. THE PEOPLE [1990-92] ZR 199 [SC]*
4. *KAMBARAGE MPUNDU KAUNDA VS. THE PEOPLE [1990-92] ZR 215 [SC]*
5. *MOOLA VS. THE PEOPLE SCZ JUDGMENT NO. 35 OF 2000*

LEGISLATION REFERRED TO

1. *Section 200 of the Penal Code, Chapter 87 of the Laws of Zambia*

The accused **DONALD TAULO** aged 40 and **WATSON MBOKO** aged 34 were indicted on one charge of murder contrary to section 200 of the Penal Code. The particulars were that on the 18th day of April, 2012 at

Kasempa in the North Western Province of Zambia, the accused jointly and whilst acting together with others unknown, murdered **MONICA KABONDO** the deceased herein.

At the hearing, the accused pled not guilty. Thus, it is encumbered upon the prosecution to prove all the essential ingredients of the offence of murder beyond all reasonable doubt. To prove its case, the prosecution led evidence from four witnesses, hereafter referred to as PW1, PW2, etc.

PW1 JENNIPHER KIFWANIKENI, aged 44 of Kabondo Village of Kasempa, testified that on 18th April, 2012, she was at home with her grandmother, the deceased. The time was around 11:00 am. Also present at home were her young siblings Brenda and Michael. Her sister-in-law was also there.

She heard a noise and saw a group of people approaching her village. One person in the group was carrying a coffin of a child. She identified Taulo and Mbanjo from the group. When the group got to where PW1 and the deceased were, the coffin began to hit the deceased. She ran into the house but the group followed her there.

The court was told that PW1 could hear the deceased crying "*I am being killed*". PW1 forced her way into the house which was two roomed and saw the deceased lying on the floor, with her head and face covered in blood. The group of people left and proceeded with their coffin. About twenty of them had entered the house following the deceased. On their way out, Taulo and Mbanjo got the deceased's blanket, chitenge, sweater and a goat.

It was PW1's testimony that the group did not utter a word when they came and left without a word.

The police were alerted. The deceased was rushed to the hospital but died on the way. PW1 identified the accused by touching saying the first accused was Taulo and the second accused was Mbanjo.

In cross examination, PW1 confirmed that the coffin was carried by one person who she did not know. She testified that when she entered the house, she saw the accused near to where her grandmother was right in the front but she did not see them get a stick.

PW2 BRENDA KAYAMBA 32, testified that on 18th April, 2012, between 10 to 12 hours in the morning, she was at her village with the grandmother, the deceased herein. When she heard a group of people approaching, making a lot of noise with Mbanjo Watson carrying a coffin of a child. She also recognized Taulo and Lukungu from the mob. When the group reached her village, they went to where PW1 and the deceased were. The coffin started beating the deceased and Mbanjo who was carrying it also beat her. The deceased ran inside the house and the group including Mbanjo, Taulo and Lukungu followed her.

PW2 also entered the house, though she was in a separate room, she said she could see what was happening in the bedroom where the group and the deceased were. There was nothing separating the rooms and it was daytime and sun light lit the house. She saw Lukungu and Taulo kick the deceased. The group left the deceased lying unconsciously, bleeding from the face and head. The group also confiscated the deceased's chitenge, blanket, sweater and a goat.

PW2 identified the accused by touching saying first accused was Taulo and second accused was Mbanjo.

In cross examination, PW2 testified that the pall bearers of the coffin exchanged and Mbanjo was one of them. Taulo grabbed the deceased and when she fell, he started kicking her. She confirmed that some people entered the house while others stayed outside. She said she could see what was going on in the bedroom because it had no windows and it was not dark, with a bit of light coming from outside.

In re-examination, PW2 testified that there was light in the bedroom because the main door was removed and light came through the roof.

PW3 Detective Inspector MELELE MUSONDA testified that on 19th January, 2012, he received a report of murder in Kasempa. On 20th January, 2012, he attended the postmortem of the deceased. He observed bruises on her chest and blood oozing from the nose. When shown the postmortem report, PW3 testified that the postmortem was conducted on 20th April, 2012. He received the report on 19th April, 2012 not 19th January, 2012 as earlier stated.

In cross examination, PW3 reiterated that the incident occurred on 19th April, 2012 and it was a mistake for him to have stated 19th January, 2012.

PW4 Detective Sergeant MUSONDA MWILA testified that on 18th April, 2012, he received a report of a murder in Kafunfula area of Kasempa. Kasinda Kabindo had reported the murder of his aunt, the deceased herein, by a mob. Among the mob was Donald Taulo and Watson Mboko

commonly known as Mbanjo. The deceased was murdered after being suspected of bewitching Taulo's child.

On 17th May, 2012, PW4 received information that Mbanjo was at Kasempa turn off. The police rushed there and apprehended him. On 22nd May 2012, Donald Taulo was also arrested after a tip off from members of the public. DW4 then arrested the two jointly and charged them together with others at large for the murder of the deceased.

PW4 identified the accused by touching saying first accused was Donald Taulo and second accused was Watson Mboko aka Mbanjo.

In cross examination PW4 testified that he went to the scene on 24th April, 2012 where he interviewed PW1.

When further cross examined, PW4 testified that he was informed that there were many people during the '*kikondo*' who had come from another village. He never visited the other village because people were hostile. He clarified that PW2 and others were interviewed at Kasempa police not at the scene.

In a nutshell, that was the case for the prosecution, at the close of which I found the accused with a case to answer. When called upon to defend themselves, the accused opted to give evidence on oath.

Accused 1 **DONALD TAULO**, also referred to as DW1, testified that on 17th April, 2012 his son aged two died and burial was set for 18th April, 2012. A coffin was prepared by about fifteen people. On the way to the grave yard, the coffin was carried by different pall bearers. Then the

coffin turned and started going in the bush. Then DW1 chased the coffin and the one carrying it saying *“let’s just go to the grave yard, you will put me in problems”*. But John who was carrying the coffin said *“let’s just reach where it is leading us”*. The mob agreed with John.

As they moved along, DW1 met the second accused who was coming from where the coffin was headed. He explained to him what was happening and that he had tried to stop the people from going anywhere but the burial site, to no avail.

The court heard that when the group arrived at Katolo’s village, John who had the coffin started attacking Katolo’s wife, the deceased herein. The deceased ran inside the house and the people followed her there. The second accused, who had joined the group also entered the house and continued telling the people to stop attacking the deceased. DW1 remained outside near the entrance. After a while, people started running out of the house due to the deceased’s injuries. According to DW1, she saw the deceased coming out of the house with injuries as people fled. Then the procession continued to the burial site.

In cross examination, he reiterated that he never entered the deceased’s house and stood about two metres from the door. He could see people who were inside because there was a door which was wide open.

It was his testimony that he saw PW1 outside then later, she entered the house when people were coming out. He said he never saw PW2 at all that day and that he never saw Mbanjo carry the coffin. He never instructed anyone to put medicine on the coffin of his son. He admitted that since he was outside, he would not know if Mbanjo had participated

in the assault. He confirmed that Mbanjo was the other name for the second accused.

In response to a question from the court, DW1 admitted knowing Lukungu but intimated that he had remained in the village that day.

Accused 2 **WATSON MBOKO**, hereinafter also referred to as DW2, testified that on 18th April, 2012, he was walking to his wife's village at Dengwe. He met a group of people coming from Dengwe with one person carrying a coffin. He recognized the first accused in the group and inquired from him what was going on. Accused 1 told him that he was equally surprised that the coffin which was supposed to be taken to the burial site had turned in another direction. DW2 then decided to join the group.

According to him, the group was divided in two. One with the coffin was ahead of the second group in which him and Accused 1 were. The groups arrived at Katolo village and people said Katolo's wife would be beaten by the coffin. He mentioned to DW1 that it was an offence for people to do that. Accused 1 said he had cautioned the people but to no avail.

DW2 and others entered the house. He and Mike Kifwanikeni, who is the deceased's grandson told the people to stop beating the deceased. The two of them picked up the deceased and took her outside. PW1 even thanked him for saving her life. He advised them to massage her with some water and left. He branded PW2's testimony as lies adding that he did not even know PW2.

In cross examination DW2 denied carrying the coffin but confirmed entering the house. He said it was one roomed divided into two by chitenge materials. He saw Accused 1 standing at the door. He said there was light coming through the door.

Under further cross examination, DW2 denied knowing Lukungu but confirmed knowing PW1. He said he got to know the deceased on the day of the incident.

That was the case for the defence.

Both counsel submitted viva vice. The learned State Advocate, Mr. Waluzimba, submitted that the accused be convicted of murder. He urged the court to note that the accused have not raised belief in witchcraft as a defence.

He contended that going by the principle of common purpose, all the people who took part in the assault had formed a joint enterprise thereby rendering them all guilty. That Accused 1 knew what was going to happen by allowing fifteen to twenty people to prepare a coffin. This conduct led to the assault of the deceased.

Learned counsel submitted that PW2 was the single identification witness. He argued that it was competent for me to convict on this single identifying witness since the assault happened during broad daylight. There was light in the house which fact was acknowledged by Accused 2. The case of **CHIMBINI VS. THE PEOPLE [1]** was cited as authority that it was competent to convict on the evidence of a single identifying

witness, so long the court was satisfied that the observation was reliable and the possibility of an honest mistaken identity was ruled out.

It was argued that, in the case in hand, PW2 knew the accused prior to the incident. She also had an opportunity to observe the assault as she was not attacked and was inside the house unlike PW1.

It is also learned counsel's submission that there is strong circumstantial evidence from PW1 which permits an inference that the accused participated in the assault of the deceased. PW1 saw the duo enter the house and she later heard the deceased crying "*am being killed*". After people exited the house, PW1 entered and found the deceased lying on the ground. Accordingly, her testimony was compelling to draw the conclusion that the accused participated in the assault.

Mr. Waluzimba admitted that being related to the deceased, PW1 and PW2 were witnesses with interest of their own to serve. However, he argued that the evidence revealed that these witnesses did not exaggerate or implicate the accused falsely.

In addition that PW4's testimony that he could not get independent witnesses because the villagers were hostile was a valid and reasonable explanation.

The court has been urged to convict the duo with murder and to consider their testimony especially their attempt to dissociate themselves from PW2 as an afterthought. Accused 1's testimony that he tried to stop the group was a lie.

The learned Defence Counsel Mr. Mazyopa, submitted that the court should take judicial notice that among the Kaondes, especially those of Kasempa, kikondo or “*moving coffin*” was practiced especially after the death of someone. There was always suspicion of witchcraft. The Kaondes believe that after medicine had been applied, the coffin would lead them to the person responsible for the death of the deceased person in the coffin. In the case in hand, the fact that the pall bearers were led to the house of the deceased, revealed that the people suspected her to have bewitched the person in the coffin. Thus, the element of witchcraft was at play.

Section 200 of the Penal Code, which provides for murder envisages the following ingredients to prove it:

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

The issue I have to resolve is, whether the accused before me caused the death of the deceased. It is thus encumbered upon the prosecution to prove all the ingredients beyond all reasonable doubt.

With regard to the first ingredient, it is indisputable that the deceased is dead. All the prosecution witnesses including the accused testified to this fact. The Postmortem Report ‘P1’ also confirmed this fact. Accordingly, the first ingredient has been proved.

Regarding the second ingredient, it is settled law that all homicide is unlawful unless excused by law. The evidence before me revealed that the deceased was assaulted with the coffin. She was also kicked leading to her death. She died shortly after the assaults. The postmortem disclosed that the cause of death was injury to the head with slight bruising and grazing to the left and right arms. Bruising to the right forehead, cheek and upper lip, collection of blood compressing the brain, fractured right ribs 2,3,4 with surrounding bleeding and bruising to the right lower lateral chest.

There was no other evidence to suggest the death was accidental. Accordingly, the presumption that she died unlawfully had not been rebutted. It is therefore, my conclusion that she died unlawfully. The second ingredient has therefore been proved.

The third ingredient is that of malice aforethought as provided in section 204 of the Penal Code. To establish it, the prosecution must prove either, that the accused had the actual intention to kill or to cause grievous harm or that the accused knew that his or her actions would be likely to cause death or grievous harm, to someone. 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 case such as the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.

In the case of **DICKSON SEMBAUKE VS. THE PEOPLE [2]** the Supreme Court held that **“it is a question of fact whether a reasonable person must know or foresee that serious harm is a**

natural and probable consequence of throwing someone out of a moving train. If armed with this realization and foresight, knowing that serious harm could result, an intent founded on knowledge of the probable consequences will be evident and will be sufficient to satisfy section 204 of the Penal Code”.

For the foregoing, it is my considered view that malice aforethought has been proved herein. The group that assaulted the deceased with kicks and the coffin as testified by all the witnesses must have known or foreseen that serious or grievous harm would result in death.

Further with their belief in witchcraft, their intention was to kill the deceased for having bewitched Accused 1's child. I therefore find that the third ingredient has equally been proved beyond reasonable doubt.

The last ingredient which is the most critical is whether the accused before me, with others unknown caused the death of the deceased. The duo were linked to the offence by PW1 and PW2. Admittedly, PW1 did not witness the duo actually assaulting the deceased. However, she placed both the accused at the scene, when in a group of others they stormed her village and attacked her grandmother. PW1 said the coffin, which was being carried by an unknown person, beat the deceased who was outside with her. Then the deceased ran into the house. PW1 remained outside, but the group about twenty, including the accused followed her inside the house. PW1 heard the deceased crying “*am being killed*”. Shortly, the people stormed out of the house, PW1 rushed inside and found the deceased lying on the ground bleeding.

I am inclined to accept PW1's testimony. I found her to be a credible witness. I observed her to have been very consistent and very candid. She candidly admitted that she did not witness the accused's actual assault of the deceased.

PW2 is the star witness and the only one to have testified that it was actually the second accused who carried the coffin when it assaulted the deceased. Further, that she saw the duo kick the deceased. She had entered the house and was in the sitting room. She could see what was happening in the bedroom, where her grandmother was being attacked . it was during daytime and sunlight lit the house. There was no door separating the two rooms.

I am equally inclined to accept PW2's testimony. I observed her to be consistent and articulate. When cross examined, she did not contradict herself. She maintained that the accused assaulted her grandmother. She said she knew the accused prior to the incident because they used to come to her village asking for piecework from her grandmother.

It is my considered view that the accused were properly identified. It is trite that identification is aided by factors like visibility, lighting, prior knowledge etc which factors were present herein.

Both PW1 and PW2 knew the accused prior to the incident. The incident occurred in broad daylight and they recognized them from the group. It is ironical that the accused testified that they did not know PW2. I opine it was because of her testimony against them. They both confirmed knowing PW1.

Accordingly, I concur with Mr. Waluzimba that it is competent to convict on the testimony of a single identifying witness provided the possibility of an honest mistaken identity has been ruled out.

I am of the considered view that the question of mistaken identity has been ruled out. The accused admitted being at the scene and never raised any alibi. PW1's testimony also corroborates PW2's testimony to that extent. In addition as argued by Mr. Waluzimba, there is strong circumstantial evidence by PW1 which can only lead to an inference that the accused participated in the assault of the deceased.

I am alive to both the accused's testimony that they never participated in the assault. Their version of what transpired is incredible and I do not accept it. I do not accept that PW1 and PW2 would falsely implicate accused 2 if he in fact assisted the deceased. Accused1 was obviously hurt by the death of his son and thus had the motive to harm the deceased. The contradictions between their testimony are equally incredible and a clear afterthought as argued by Mr. Waluzimba.

I note also that the accused testified to have known each other prior to the incident. I do agree with the State Advocate that the accused had a common purpose with the group, which was to assault or kill the deceased for causing the death of Accused 1's child through witchcraft.

Furthermore, it is the law that, the fact that others may have assaulted the deceased can not relieve the accused of responsibility or liability as canvassed in the case of **ERNEST MWABA AND OTHERS VS. THE PEOPLE [3]**

I am alive to the fact that PW1 and PW2 being the deceased's granddaughters are witnesses with a possible interest of their own to serve as elucidated in the case of **KAMBARAGE MPUNDU KAUNDA VS. THE PEOPLE [4]**. However, it is the law that the testimony of such witnesses can be relied upon where there is corroboration or lack of motive to lie.

I find that PW1 and PW2's testimony that the deceased was assaulted is corroborated by the postmortem report which revealed multiple injuries sustained by the deceased. This is in concert with the testimony that she was hit and kicked all over her body.

For the foregoing, I find that the prosecution has proved the last ingredient beyond all reasonable doubt.

I find that the accused jointly and whilst acting with others at large caused the death of the deceased. I find the accused guilty of the murder of the deceased and convict them accordingly.

Let me hasten to say that I do concur with Mr. Mazyopa that the facts and evidence revealed the belief in witchcraft and the '*kikondo*' practice by the Kaondes. Thus, I find the belief in witchcraft to be an extenuating circumstance as canvassed in the case of **MOOLA AND OTHERS VS. THE PEOPLE [5]**.

The accused are thus convicted of murder with extenuating circumstances.

Delivered in Open Court this **12th** day of **November**, 2012

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Judy Z. Mulongoti
HIGH COURT JUDGE