

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

HKS/46/2012

B E T W E E N:

THE PEOPLE

VS.

JOHN LUBOZHA

**Before the Honourable Mrs. Justice Judy Z. Mulongoti in Open
Court on the 13th day of November, 2012**

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

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

J U D G E M E N T

CASES REFERRED TO:

1. *LUBENDAI VS. THE PEOPLE [1983] ZR 54 [SC]*
2. *JACK AND KENENDY CHANDA VS. THE PEOPLE SCZ JUDGMENT NO. 29/2002*
3. *TUBERE OCHEN [1945] 12 EACA 63*

LEGISLATION REFERRED TO

1. *Section 200 of the Penal Code*

The accused **JOHN LUBOZHA** aged 28 was indicted on one charge of Murder, contrary to Section 200 of the Penal Code. The particulars alleged that the accused on the 22nd day of March, 2012 at Kasempa murdered **LWISI KAPAKA**, the deceased herein.

When the charge was read and explained to the accused, he pled not guilty. Thus, the onus is on the prosecution to prove all essential ingredients of murder beyond all reasonable doubt.

The following are the ingredients to be proved:

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.*

To prove its case, the prosecution led evidence from four witnesses herein after referred to as PW1, PW2 etc.

PW1 QUEEN KALUMENDO 46, testified that on 19th March, 2012, there was a funeral of her nephew Lazarous. She stayed at the funeral house for two days.

On 22nd March, 2012 after she had returned home, she was on her way from the fields when she met a boy who told her that John was causing confusion at her home. As she hurried home she met a lot of children along the way. When she reached home, she saw John under a mango tree hitting the mortar on the ground, about thirty metres away. The time was around 13:00 hours. When she asked Christopher why they were crying, he said John was killing their grandmother.

As she approached where John was, he also moved and they met midway. She saw him drop the mortar. He extended his hand and she shook it. Then John said "*your mother is there, she is talking*". When

she rushed to the mango tree, PW1 found her mother dead. The head was injured, one eye was plucked out and ribs were broken. When she confronted John, she ran to another village. She gave chase and apprehended him with help of the neighbourhood watch.

It was PW1's testimony that after John dropped the mortar, she examined it and saw that it had blood on it. The mortar was identified in court as exhibit 'P1'. She identified the accused as John and that she had known him for about five to six months prior to the incident.

In cross examination, PW1 testified that she found Christopher Mukwima and his wife at home when she saw the accused hitting the ground.

She also testified that John never said anything when asked why he had attacked the deceased.

When further cross examined, PW1 testified that she wouldn't know if John was drunk but he had tujilijili beer wrapped around his neck.

PW2 HILDA MUHONGO testified that on 22nd March 2012, she and her husband Christopher Mukwima were seated in a shelter. It was around 13:00 hours. They saw John coming from the bush. When he got to the shelter where the couple sat with their four year old child, John grabbed Christopher and beat him up as he asked for the whereabouts of the deceased. He also threatened to kill the child if he was not told where the deceased was. PW2 shouted for help. Then the deceased who was in the bathroom, responded wondering what was happening. Then John noticed where she was coming from and advanced to where she was. He beat up the deceased. PW2 heard her screams for help. She and her

husband rushed there and found the accused hitting the deceased with a mortar. PW2 noticed that the deceased had died and she was bleeding on the face, one eye was gouged out and she had injuries on the chest.

It was PW2's testimony that John had picked the disused mortar from under the mango tree. She testified that PW1 appeared on the scene and found John still hitting the deceased. She identified the mortar, exhibit 'P1' and the accused as John who she had known prior to the incident.

In cross examination, PW2 testified that when John assaulted the deceased, he never said why he was attacking her. She confirmed that John had a packet of beer around his neck and he was drunk. She said she was about seventy five metres away when John attacked the deceased.

In re-examination, PW2 reiterated that she saw the accused John assault the deceased.

PW3 CHRISTOPHER MUKWIMA testified that on 22nd March 2012, he was home with his wife PW2. It was around 13:00 hours when John the accused, herein, approached him asking for the whereabouts of his grandmother, the deceased herein. He said she was not around. John threatened to kill PW3 and his child if he didn't reveal the whereabouts of his grandmother. When the deceased who was in the bath asked what was going on, John realized where she was and went after her. He assaulted her and hit her in the ribs and forehead about five to six times

with the mortar. The court was told that John was drunk and had carried some beer at that time.

PW3 identified the accused as John whom he had known prior to the incident.

PW4 Detective Chief Inspector **Gidian Mukosa** 39, testified that on 22nd March 2012, a round 17:00 hours, he received a report of murder. The murder was of Lwisi Kapaka of Kamakechi village of Kasempa. The report was made by Yengayenga who alleged that the accused had killed the deceased because she was suspected of causing the death of Lazarous. The accused was apprehended by villagers and brought to Kasempa police.

When he visited the scene, he found the deceased lying under a mango tree about 8 metres from the house. He noticed multiple head injuries, bleeding from the nose and mouth, and a mortar nearby. The body was taken to Mukinge hospital where a postmortem was done on 23rd March 2012.

When he interviewed the accused, he denied beating the deceased and said she was attacked by a lot of people. PW4 identified the accused by pointing. He confirmed that he collected the mortar, exhibit 'P1' from the scene.

In cross examination, PW4 testified that when he visited the scene he left the accused behind in detention because he feared he could have been attacked.

It was PW4's testimony that the deceased was attacked for being suspected to have caused the death of Lazarous Kankonkanya through witchcraft.

He confirmed the accused appeared drunk though he never investigated this further.

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 himself, the accused hereafter also referred to as DW, opted to give evidence on oath and called no witnesses. He testified that on 22nd March, 2012, he was on duty at Jifumpa mine. Around 07:00 hours, he was informed by a male person whose names he did not know, that his uncle Frank Kankonkanya's son had passed on.

He asked for permission from his employer and he was allowed to attend the funeral. He arrived at the house of mourning around 12:00 hours. He found that "*mumone*" (medicine believed to lead the coffin to the person who had caused the death of the person in the coffin) had been applied.

According to the accused, even the "*kikondo*" (belief that the coffin moves and directs the people to the person responsible for the death) had been performed and the person responsible had been killed. When he inquired who had been killed by the "*kikondo*", all the people refused to tell him because he was drunk.

It was his testimony that only PW1 spoke to him and he inquired from her why she was hiding her mother. The accused further testified that actually, later on people had told him that PW1 was hiding her mother hence his inquiry about it. People told him after he had become difficult.

The court heard that Brian Shiomba and PW3 had told the accused to say "*why are you looking for PW1's mother when you were not there?*". The duo had actually followed him to the roadside after he left the house of mourning.

The accused branded PW1, PW2 and PW3's testimony before me as lies. According to him, he was apprehended for being drunk and was surprised that he was even detained.

In cross examination, he reiterated that the deceased had already been beaten when he got there. He testified that it took him five hours to get to the village, from 07 to 12 hours, because he stopped at kalyongo to buy some alcohol. He bought twelve sachets and drunk along the way. He cycled to the village and never lost his directions despite taking the alcoholic drinks. That was the case for the defence.

The learned State Advocate, Mr. Waluzimba, submitted viva voce that the prosecution had proved its case beyond reasonable doubt. The evidence of PW1, PW2 and PW3 showed that the accused was the assailant and being related to him had no motive to falsely implicate him.

The State Advocate admitted that there was evidence that the accused was drunk. He argued that this did not affect his mental faculties as to render him incapable of forming the necessary intent.

The accused's own testimony revealed that his mind was not adversely affected. He moved well and appreciated what was happening. Section 13 (1) of the Penal Code was relied upon.

Mr. Waluzimba argued that the accused intoxicated himself and the defence in Section 13 (1) was thus not available to him.

It was argued that there was no evidence on record that the accused's mental capacity was greatly affected by tujilijili to render him unable to form the necessary intent to form the death of the deceased. The case of **JACK AND KENNEDY CHANDA VS. THE PEOPLE [2]** was cited as authority that **"the failed defence of provocation, witchcraft, evidence of drinking can amount to murder with extenuating circumstances"**

Accordingly, he has urged me to convict the accused of murder with extenuating circumstances.

The learned Defence Counsel, Mr. Mazyopa, opted to rely on the evidence on record.

The issue for determination is whether the accused before me, murdered the deceased by hitting her several times with a mortar.

It is indisputable that the deceased is dead. This was confirmed by the testimony of PW1, PW2, and PW3 plus the Postmortem Report. Thus the first ingredient has been proved.

The evidence before me shows that the deceased was hit with a mortar. She suffered head injuries etc. The cause of death was severe head injury. There was no evidence to suggest her death was accidental. Thus, I find that her death was unlawful and the second ingredient is therefore proved.

The third ingredient is that of malice aforethought. This can be proved by showing that the accused had the actual intention to kill, or to cause grievous harm to the deceased or that the accused knew that his or actions would be likely to cause death or grievous harm to someone. Being a mental element, malice aforethought is difficult to prove. However, it can be inferred from the surrounding circumstances 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 or after the attack.

This was elucidated in the East African case of **R VS. TUBERE OCHEN [3]**. Applying this case in casu, the Postmortem Report 'P1' reveals the cause of death as severe head injury with abnormal findings of 3cm laceration to the forehead, fractured right ribs 1,2,6,7 and 8 left ribs 1 to 4, fractured nasal bones, etc. There was evidence that the deceased was assaulted with a mortar.

I therefore infer that malice aforethought had been established from the nature of injury suffered, the weapons used and the parts of the body targeted. It is my considered view that malice aforethought has been proved beyond reasonable doubt.

The last ingredient is the most critical, which is whether the accused directly or indirectly participated in causing the death of the accused. The prosecution contended that it was the accused who killed the deceased. The accused, on his part, gave sworn evidence denying assaulting the deceased.

The evidence linking the accused to the death of the deceased was from PW1, PW2 and PW3. All the three testified that they saw the accused hitting the deceased with a mortar. I am inclined to accept their testimony.

I note that all the three knew the accused prior to the incident. The assault happened in broad daylight. They all had an encounter with the accused. PW2 and PW3 testified that the accused approached them asking for the whereabouts of the deceased. He beat up PW3 when he refused to disclose where the deceased was. It was the duo's testimony that immediately he noticed the deceased, he advanced to where she was and attacked her. When the duo rushed there, after they heard her screams for help, they found the deceased hitting her with the mortar and she lay bleeding on the face and head.

I am inclined to accept their testimony as they were candid and did not contradict each other in any way. I found that the accused's version of what transpired as an attempt to confuse the court. The accused actually testified as did PW1, PW2 and PW3 that he was drunk. His testimony actually reveals also that he inquired of the deceased's whereabouts. The people refused to tell him because he was drunk. He even inquired from PW1 why she hid her mother.

I discern from his testimony, that the people refused to disclose the whereabouts of the deceased because they knew his intention. He actually testified that it was after he became difficult that he was told that the deceased had been assaulted by the '*kikondo*' (moving coffin).

It is unbelievable and pointless that people would refuse to tell him that the deceased had been assaulted, because he was drunk and became difficult. The converse is true, as discerned, that they refused to tell him because they feared he would assault the deceased, and was only told after he became difficult, leading to him assaulting the deceased and thus causing her death.

He also admitted encountering PW1 and PW3, except he gave his own version, which as noted is a complete fabrication meant to confuse the court.

It is my considered view that the three prosecution witnesses identified the accused as the assailant. They saw him attack the deceased in broad daylight. I therefore find that the prosecution has proved the last ingredient beyond all reasonable doubt.

It is trite that PW1, PW2 and PW3 being related to the deceased are witnesses with a possible interest of their own to serve. It is also trite law that their testimony could be safely relied upon where there is corroboration.

As already noted, the postmortem report 'P2' corroborated the testimony of the trio. The postmortem revealed severe head injury, fractured ribs laceration to the forehead, etc. This corroborated the trio's testimony that

they observed the deceased bleeding from the face, head and mouth after being hit several times with the mortar. He hit her all over the body as the exhibit revealed.

I must hasten to state that the facts before me reveal a belief in witchcraft and an element of drunkenness. The accused testified that he was drunk but confirmed that he was able to cycle to the village. He also testified that he bought twelve sachets of tujilijili beer. PW1, PW2 and PW3 testified that he was drunk and had some sachets of beer hanging in his neck. I therefore take it that he did not consume all the twelve sachets and as argued by Mr. Waluzimba, he was not so drunk as to affect his mental faculties to render him unable to form the necessary intent. Drunkenness can only be a defence where the accused is so intoxicated as not to know what he or she is doing. As pointed out by the State Advocate, the accused moved well to the village and knew what was going on. He went in search of the deceased, beat up PW3 and threatened to kill him or his child if they did not reveal the whereabouts of the deceased.

The moment he discovered that the deceased was present at her home, he went after her. Clearly, his drunkenness did not affect him so much that he did not know what he was doing. Accordingly, the defence of drunkenness fails in this case.

This notwithstanding, it is available as an extenuating circumstance as canvassed by Mr. Waluzimba. As noted, the belief of witchcraft has also come to the fore and is also an extenuating circumstance.

I therefore find the accused guilty of murder with extenuating circumstances and convict him accordingly.

Delivered at **Solwezi** this **13th** day of **November**, 2012

.....

Judy Z. Mulongoti
HIGH COURT JUDGE