

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

**HKS/05/2012**

**B E T W E E N:**

**THE PEOPLE**  
**VS.**  
**KENNY KALENGA**

**Before the Honourable Mrs. Justice Judy Z. Mulongoti in Open Court on the 13<sup>th</sup> 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**

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## ***J U D G M E N T***

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**CASES REFERRED TO:**

1. *MBAYE VS. THE PEOPLE (1975) ZR 74 [SC]*

**LEGISLATION REFEREED TO**

1. *Sections 161 (2) and 167 of the Criminal Procedure Code*

The accused, **KENNY KALENGA**, was indicted on one count of murder contrary to Section 200 of the Penal Code Chapter 87 of the Laws of Zambia. The particulars of offence alleged that on the 25<sup>th</sup> day of September, 2011 at Solwezi in the North Western Province of Zambia, the accused murdered **ROBINSON KALENGA**, the deceased herein.

The accused first appeared before Justice I. Kamwendo on 7<sup>th</sup> February, 2012. Before he could take plea, his counsel, Mr. Mweemba, of the Legal Aid Board made an application, pursuant to section 17 read together with section 167 of the Criminal Procedure Code (CPC) Chapter 87 of the Laws of Zambia. The application was that the accused be examined as to his state of mind, to determine whether he was fit to take plea.

The learned State Advocate, Mrs. Nkumbiza did not object to the application, in the interest of justice.

The Judge made the following order: **“the application to have the accused medically examined is granted. I will order that the accused be medically examined at Chainama Mental Hospital in Lusaka, to determine his suitability of taking plea and standing a trial. The medical report to be presented to court at my next criminal session at Kitwe, the accused is remanded in custody.”**

On 11<sup>th</sup> July 2012, Dr. P.C. Msoni the Consultant Psychiatric at Chainama Hills Hospital, sent his Medical Report on the accused. It stated that after examining him, he concluded that **“Kenny Kalenga has a major psychiatric disorder “SCHIZOPHRENIA” which was not treated before the alleged offence. With medication and rehabilitation the prognosis is good”**.

The doctor also stated **“it is my opinion that he was laboring under the influence of the psychotic disorder at the time of the alleged offence. It is further my opinion that he is NOT FIT to make a plea, stand trial and follow the proceedings of the court”**.

On 5<sup>th</sup> November, 2012, the accused appeared before me. The learned State Advocate, referred to the Medical Report by Dr. Msoni and applied that the State be allowed to proceed to lead evidence and the court could later make an appropriate order under Section 161 of the Criminal Procedure Code.

Taking into account the Medical Report, I allowed the State's application. I entered a plea of not guilty and proceeded to hear the prosecution's case. The prosecution called three witnesses hereinafter referred to a PW1, PW2 and PW3.

**PW1 GEOFFREY KALENGA** of Zambia Compound, of Solwezi testified that on 25<sup>th</sup> September, 2011 around 08:00 to 09:00 hours, his mother decided that they should take his young brother Kenny, (the accused herein) who was mentally disturbed for prayers. PW1, his elder brother Felix and their young brother Kingsley aka Kapila, attempted to get hold of the deceased. When Felix tried to hold the accused, he produced a knife and tried to stab him. Fortunately, he missed but managed to tear his shirt. However, their father Robinson (the deceased herein), who was standing behind the accused ended up being stabbed on the head. The deceased had rushed to where Felix and the accused were, when he saw the accused produce a knife.

After the deceased fell to the ground, the accused bolted but PW1, Kingsley and onlookers gave chase and caught up with him. They took him to Kyawama Police Station. Around 14:00 hours, they got news that the deceased had passed on.

PW1 identified the accused as Kenny. He testified that he saw the knife that Kenny had and could identify it if shown.

When shown a knife that was in police custody, PW1 identified it as the knife the accused had used to stab the deceased. He also said that he had actually retrieved the knife from the accused after he had stabbed the deceased.

In cross examination, PW1 testified that prior to the incident, the accused had never attacked anyone.

**PW2 FELIX KALENGA** of Zambia Compound, Solwezi, testified that on 25<sup>th</sup> September, 2011, he was at home with his aunt Judy Luabakasa and his step father the deceased herein. They were discussing the accused who was demonic possessed. The accused was staying at the farm, and had moved out of the house into the toilet.

According to PW2, the family noticed that the accused was demon possessed while he was in South Africa, where he had gone to work as a truck driver. When he returned to Solwezi in September, 2010, he would behave abnormally. After some prayer sessions, he improved a bit. The court was informed that the accused never fought anyone.

However, his behaviour began to change again. PW2 asked the deceased to send him to town so he could stay with him. They stayed together well then his behaviour changed, he stopped bathing, started cooking in tins etc. He would pick useless stones and say am taking this gold to South Africa.

On the material day, of 25<sup>th</sup> September, 2011, the family decided to take him for prayers. They checked his room, but he was not there. They located him in the toilet. He had climbed the walls as the toilet had no roof. The deceased urged him to come down and prayed for him. He did not move. He started insulting the deceased. When PW2, PW1, Kapila and Evaristo a neighbour appeared on the scene to try and lift him, the accused then got down from the wall. He started walking away, PW2 walked in front of him urging him to go inside the house. Then he produced a knife and tried to stab him. He missed but managed to tear his shirt. The deceased thought PW2 had been stabbed, he drew nearer to where the two were and as the accused tried to turn around, he ended up stabbing the deceased who was behind him.

The accused ran away but was apprehended after they gave chase. The accused was taken to the police and the deceased was rushed to the hospital but died two to three hours later.

The accused was identified by pointing. When shown the knife in police custody, PW2 said it was not the knife the accused had stabbed the deceased with.

In cross examination PW2 testified that the accused was his step brother who he had known from his childhood.

PW3 Detective Inspector **BEN KANSAKWA** testified that on 25<sup>th</sup> September, 2011, he received a report of murder that the accused had stabbed his father (the deceased) with a knife. He sustained a deep cut on the head and later died at Solwezi General Hospital.

PW3 visited the scene, where he retrieved the knife. He later interviewed the accused who was already in custody. The accused denied the charge.

PW3 identified the accused and when shown the knife 'ID1', he said it was the one he had retrieved at the scene. He had found it with PW1.

In a nutshell that was the case for the prosecution.

The Defence Counsel informed the court that he was unable to get instructions and he was offering no defence and not giving evidence to the contrary.

The State Advocate submitted that in relation to section 161 (2) paragraph (b) of the Criminal Procedure Code, the evidence on record so far and in the absence of further evidence to the contrary, a conviction on a special finding under section 167 was justifiable. It was his prayer that the accused be detained under the President's pleasure.

Mr. Waluzimba further submitted that from the evidence of PW1 and PW2, the deceased died as a result of an assault by the accused. The Postmortem Report also supported this fact. In addition, that though PW2's testimony indicated that the accused intended to stab him but missed and stabbed the deceased, it was argued that trying to stab someone with a knife shows an intention to cause death or grievous harm to that person.

Hence the accused had the necessary requisite malice aforethought, though a third party is the one who died. That this was a case of

transferred malice per section 204(a) of the Penal Code Chapter 87 of the Laws of Zambia.

It was counsel's submission that there is indisputable evidence that the accused was mentally challenged before and at time of the offence. This was supported by the findings of Dr. Msoni. It was also submitted that the conflicting evidence over the knife does not diminish the prosecution's case that a knife was used as testified by all the prosecution witnesses.

Further the Postmortem Report 'P2' shows that the deceased died as a result of head injury with deep stab wound.

I am indebted to the State Advocate for his submission and I do concur with him that the prosecution has proved the case of murder beyond reasonable doubt.

It is clear from the evidence of the prosecution witnesses including the Postmortem Report 'P2', that the deceased died as a result of being stabbed by the accused.

Going by the provisions of section 161 (2) (b) and as submitted by the State Advocate, I order that the accused be detained during the President's pleasure under section 167 of the Criminal Procedure Code.

I am equally fortified by the Supreme Court decision in **MBAYE VS. THE PEOPLE (1975) ZR 74**, where it was held inter alia that, "**a court has no power to make a special finding that an accused person is not**

**guilty by reason of insanity in cases where there has been a determination that the accused was unfit to plead”.**

Accordingly, the accused to be detained during the President’s pleasure.

Delivered at **Solwezi** this **13<sup>th</sup>** Day of November, 2012

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**Judy Z. Mulongoti**  
**HIGH COURT JUDGE**