

**IN THE HIGH COURT OF ZAMBIA**  
**AT THE PRINCIPAL REGISTRY**  
**HOLDEN AT LUSAKA**  
*(Criminal Jurisdiction)*

**HP/44/2013**

**BETWEEN:**

**THE PEOPLE**

**Versus**

**ZESCO ZULU  
OBVIOUS MULALIKA**

***Before the Hon. Mr. Justice Justin Chashi in Open Court on  
the 25<sup>th</sup> day of April, 2013.***

*For the State:*

*P Mukuka, Senior State Advocate*

*For the 1<sup>st</sup> and 2<sup>nd</sup> Accused Persons:*

*L M Chikuta, Messrs Milner Katolo &  
Associates.*

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

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**Cases referred to:**

- 1. Mbomena Moola v The People (2000) ZR 148*
- 2. Jack Chanda and Kennedy Chanda v The People (2002) ZR 124*

**Legislation referred to:**

- 3. The Penal Code, Chapter 87 of the Laws of Zambia*
- 4. The Criminal Procedure Code, Chapter 88 of The Laws of Zambia.*

The 1<sup>st</sup> and 2<sup>nd</sup> Accused persons namely Zesco Zulu and Obvious Mulalika respectively are charged with the **offence of Murder** Contrary to Section 200 of **The Penal Code**<sup>3</sup>.

The **particulars of the offence allege** that the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons on the 4<sup>th</sup> day of March 2012 at Chongwe in the Chongwe District of the Lusaka Province of the Republic of Zambia did murder Elias Petros Lwembe.

The State in pursuit of its case called seven (7) prosecution witnesses.

**PW1 Lefasi Phiri of Nswana Village in Chongwe** testified that on the 4<sup>th</sup> day of March 2012, he was drinking at Mwachilela turnoff. Around 23:00 hours he left for a Shabeen at Chifwanye. On his way back around 01:00 hours, he heard some noise and noticed that a person was being beaten. That he did not know the person who was being beaten though he looked insane and was an elderly man. That there were two young men beating the man using sticks and kicking him.

According to PW1 he knew the two young men from way back as they stay together. That although it was dark, he noticed the two young men because he got closer and held them and asked them why they were beating the man, to which they responded that he is a witch as he dropped from the skies.

It was PW1's further evidence that he tried to stop the two young men, but they could not listen to him and the beating went on for

about ten minutes. PW1 identified the two young men in Court as the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons. PW1 then phoned PW2 who is the 2<sup>nd</sup> Accused's elder sister who came with PW3 so that they could come and help PW1 to stop the Accused persons. That after the 1<sup>st</sup> Accused persisted in beating the man, PW1 decided to leave.

Further, according to PW1, the following morning around 08:00 hours he passed through the same place and found the same man lying at the tavern. When he went near he noticed that the man looked beaten and sick as he could not even speak. At the time, the 1<sup>st</sup> Accused was in the Tavern. The 1<sup>st</sup> Accused bought Maheu for the man, but he was not able to drink. That later the 1<sup>st</sup> Accused asked another person to lift the man around 17:00 hours and take him to the other side of the tarmac.

It was PW1's further testimony that he later heard that the man was taken to Chongwe Police and three weeks later he was informed by the Police that the man had died.

In cross-examination, PW1 asserted that on the day in issue, he started drinking around 11:00 hours up to around 01:00 hours the following morning

According to PW1, both the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons drink beer although he did not see them drink on that day. That he heard

that the 1<sup>st</sup> Accused believed the Deceased was a witch. Further that the 2<sup>nd</sup> Accused is a relative to the Headman, PW4.

**PW2, Margaret Mulalika also of Nswana Village** testified that on the 4<sup>th</sup> day of March 2012 she was asleep when she received a phone call around 23:00 hours from PW1 who asked her to go to the roadside and informed her that the 1<sup>st</sup> and 2<sup>nd</sup> Accused were beating up the Deceased whose name he did not know and that he had failed to stop them. That she went to the road side where she found the 1<sup>st</sup> and 2<sup>nd</sup> Accused and PW1. That at the time she found the 1<sup>st</sup> Accused beating the Deceased and PW1 and the 1<sup>st</sup> Accused were standing by. That the 1<sup>st</sup> Accused had a long stick, which she managed to get away from him. That when she asked the 1<sup>st</sup> Accused why there were beating the Deceased, he said he was a witch.

According to PW2, she with the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons got the Deceased and went home with him where she prepared a fire in the kitchen and after that went to wake up her father, PW4 who did not manage to wake up. She then went to sleep. According to PW2, the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons slept with the Deceased in the kitchen. That in the morning PW4 asked the 1<sup>st</sup> Accused what had happened and thereafter told the 1<sup>st</sup> and 2<sup>nd</sup> Accused to take the Deceased to the roadside who was after some days taken to the clinic.

According to PW2, she then left for Lusaka where she stayed for about two weeks. That her mother then called her to find out if

the 2<sup>nd</sup> Accused was also in Lusaka, as the 1<sup>st</sup> Accused after being apprehended had mentioned that he was with the 2<sup>nd</sup> Accused. PW2 further testified that the 2<sup>nd</sup> Accused was her young brother.

**PW3, Grace Chimwanda of Zingalume compound in Lusaka,** after conducting a **voire dire** testified that on the 4<sup>th</sup> day of March 2012 whilst she was sleeping in PW4's house, her grandfather, she heard PW2 calling for her and she mentioned that she had received a phone call that someone had caught a witch. That together they went to the roadside at Mwachilela turn off and found the 1<sup>st</sup> and 2<sup>nd</sup> Accused beating the Deceased. That the 1<sup>st</sup> Accused had a stick and that both the 1<sup>st</sup> and 2<sup>nd</sup> Accused were beating the Deceased on the ribs. That when the Deceased called out for water, PW2 went and got some in a beer bottle and the Deceased drunk a bit. That PW2 then suggested that they should take the Deceased home. At home PW2 prepared a fire at the kitchen and called out for PW4.

According to PW3 she then left and went back to sleep. The following morning, the Deceased was given the 2<sup>nd</sup> Accused's clothes and was then taken to the road side. That at the road side the Deceased was just lying down. That she was later informed of the demise of the Deceased.

PW3 identified the 1<sup>st</sup> and 2<sup>nd</sup> Accused in court.

In cross-examination, PW3 asserted that at the scene, the Deceased kept saying he had run out of fuel. That both the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons drunk beer and they had started drinking in the morning on the material day.

**PW4, Samson Chumbwe Muyuya**, who is Headman Nswana testified that on the 4<sup>th</sup> day of March 2013, in the night she heard PW3 calling PW2, her granddaughter who was sleeping in PW4's house. PW2 and PW3, then left and only came back after some time and PW3 went back to sleep. That at the time PW4 had malaria. The following morning PW4 saw the 1<sup>st</sup> Accused in the Insaka with somebody else he did not know. That the other person, the Deceased was naked and looked beaten and physically weak. PW4 then told the 1<sup>st</sup> Accused to take the Deceased to the Police and they left. That the following morning the 2<sup>nd</sup> Accused and PW2 left for Lusaka.

PW4 further testified that after about three days, he heard that the deceased was still by the road side near the bar. That he went to the road side and found the Deceased seated but in a weak state. That the following morning PW4 organized money and asked PW5 to take the deceased to Chinyunyu Police Post, which he did.

According to PW4 he later heard from the Police of the Deceased's demise.

**PW5, Kenneth Bwalingo of Rufunsa** testified that on the 6<sup>th</sup> day of March 2013 he went to Church in Nswana Village. Around 13:00 hours, he saw the deceased sleeping on the road at four stars pub, the bar he rents. That when he went back around 16:00 hours he heard people saying someone is going to die. They were saying a person had been beaten the previous night and he was at PW5's bar. PW5 went to the bar and found the Deceased lying down with flies in the nose and ears. That he was an elderly man.

According to PW4, PW5 organised transport money and he got the Deceased and took him to Chinyunyu Police Post using public transport, where he was given a Police Medical Report and thereafter took the Deceased to Chinyunyu clinic, where he was admitted. It was PW5's further testimony that when he went to the clinic the following morning he found the Deceased had been transferred to Chongwe District Hospital.

Further according to PW5, on inquiry, he was told that the Deceased had been beaten by the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons. PW5 identified the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons in Court. PW5 later learnt about the demise of the Deceased.

**PW6 John Lweembe of Kamwala township** in Lusaka testified that he received a message on 15<sup>th</sup> day of March 2012 that the Deceased, his elder brother had been killed. That he went to the University Teaching Hospital (UTH) mortuary and identified the body of the Deceased.

According to PW6, the Deceased's head was badly injured and he had cuts on the back. When asked by the Court, PW6 asserted that the Deceased used to stay at House No. 36 Chipungwe Road, Lusaka.

**PW7, Detective Sergeant Doreen Sumbule** based at Chongwe Police Station testified that on the 6<sup>th</sup> day of March 2012 he received a report of assault case from PW5. At the time PW7 was operating from Chinyunyu Police Post. That PW5 reported on behalf of the Deceased who was in a serious condition. That she issued a Medical Report and referred the Deceased to Chinyunyu Clinic.

PW7 further testified that the following day she inquired from the clinic and was informed that the Deceased had been referred to Chongwe District Hospital.

According to PW7 the Deceased was alleged to have been beaten by the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons. On the 9<sup>th</sup> day of March 2013, PW7 received information of the death of the Deceased. That investigations were later instituted which led to the arrest of the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons.

PW7 produced the Report on Post Mortem Examination in Court which was marked P1 and also identified the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons. At the end of the Prosecution's case, both the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons were put on their defence pursuant to Section 207 (1) of **The Criminal Procedure Code**<sup>3</sup>.



Both Accused persons elected to give unsworn evidence and did not call any witnesses.

The 1<sup>st</sup> Accused testified that on the 4<sup>th</sup> day of March 2012 around 22:30 hours he was with the 2<sup>nd</sup> Accused. That they were coming from a drinking spree. That when they parted, the 2<sup>nd</sup> Accused went to his home and the 1<sup>st</sup> Accused also proceeded to his.

According to the 1<sup>st</sup> Accused, he met a naked man (the Deceased) near the grave side, who started following him. That this made the 1<sup>st</sup> Accused go back to the junction where he had parted with the 2<sup>nd</sup> Accused. That he did not know who this person was. That he called out to the 2<sup>nd</sup> Accused, who came and asked the Deceased who he was, but he was not responding.

The 1<sup>st</sup> Accused further testified that when the Deceased started looking for stones to stone them, they got hold of him. That upon asking the Deceased where he had come from, he responded that he had run out of fuel and the wife had left him. That it is then that they thought he was a witch.

The 1<sup>st</sup> Accused further testified that they then decided to take the Deceased to PW4 and on the way he sat and refused to move. According to the 1<sup>st</sup> accused, that's when he, the 1<sup>st</sup> Accused got a stick from a tree and started beating the Deceased. That later PW1 came.

It was the 1<sup>st</sup> Accused's further evidence that PW2 and PW3 also later came and they then proceeded to PW4's place with the

Deceased and sat in the Insaka. That PW2, then informed PW4' who said he would see them in the morning as he was unwell.

The following morning PW4 asked the Deceased where he came from, but he did not respond. The 1<sup>st</sup> Accused further testified that on PW4's advise he took the Deceased to the road side where he bought him fritters and maheu. That he later gave the Deceased K9,000 for transport and then went home.

It was the 1<sup>st</sup> Accused's further testimony that he fell sick and was only able to go back to the road side on the 9<sup>th</sup> day of March 2012 and met PW5. That he later went home and around 02:00 hours he heard a knock on the door. It was the Police and they arrested him on the allegation of having killed the Deceased. That the 2<sup>nd</sup> Accused was also later arrested and they were jointly charged.

The 2<sup>nd</sup> Accused testified that on the 4<sup>th</sup> day of March 2012, he was coming from a drinking spree with the 1<sup>st</sup> Accused. After parting, he went his own way, but before he could reach home he heard the 1<sup>st</sup> Accused calling, saying he had found a naked person on the road, who was now chasing him. That he saw the 1<sup>st</sup> Accused, who came running and the Deceased, who was naked was following him. That when the Deceased wanted to pick stones, they got hold of him, so that they could take him to PW4. On the way, the Deceased sat and refused to walk.

It was the 2<sup>nd</sup> Accused's testimony that, that's when PW1 came. That the 1<sup>st</sup> Accused then picked a whip.

According to the 2<sup>nd</sup> Accused, PW1 then went and informed PW2 and PW3 who later came and they then walked the Deceased to PW4's place and sat in the Insaka.

That PW2, went to wake up PW4, but he could not as he was sick. The following morning, PW4 after inquiring asked the 1<sup>st</sup> Accused to go with the Deceased to the road side and assist him get on a vehicle. That he then gave the Deceased clothes to wear and they left.

That on the 6<sup>th</sup> day of March 2012 the 2<sup>nd</sup> Accused went to Lusaka and started work. That after three weeks, he received a call from PW2 that the Police from Chongwe were looking for him.

It was the testimony of the 2<sup>nd</sup> Accused that he then went to Le Soleil Police Post and was later picked by the Police from Chongwe.

After the close of the case both Counsel indicated that they would file their respective written submissions on or before the 28<sup>th</sup> day of March 2013.

However, at the time of writing this Judgement, none of them had done so.

I have carefully taken into consideration and analysed the evidence of all the Prosecution witnesses and the evidence of both the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons.

As earlier alluded to, the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons have been charged with the offence of Murder **Contrary to Section 200 of The Penal Code** which states as follows:

***“Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of Murder.”***

The ingredients of the offence are contained in the aforestated Section.

It is not in dispute that the Deceased met his death and that the death arose from an unlawful act in form of an assault, which resulted in the injuries which eventually led to the death of the Deceased. As evidenced by P1, the Report on Post Mortem Examination, the examination of the **brain meninges** revealed **subdural haemorrhage** and the report went on to state the cause of death as **subdural haemorrhage due to blunt head injury**.

What then remains for determination is who caused the death and whether, it was caused with malice aforethought. Section 204 of **The Penal Code** states that malice aforethought shall be established by evidence proving any one of the following circumstances:

- (a) *An intention to cause death or to do grievous harm to any person whether such person is the person actually killed or not,*

(b) *Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person whether such person is the person actually killed or not although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not by the wish that it may be caused,*

(c) *An intent to commit a felony*

(d) *.....(not relevant)*

From the Prosecution's evidence as well as that of both Accused persons it is not in dispute that both Accused persons were at the scene of the crime on the material day. There was also evidence from PW1 and PW3, that they both saw the 1<sup>st</sup> and 2<sup>nd</sup> Accused beating the Deceased.

And further, both witnesses confirmed that the 1<sup>st</sup> Accused was using a stick which he had. PW2 also confirmed finding the 1<sup>st</sup> Accused with a stick which he grabbed from him. In any case, the 1<sup>st</sup> Accused does not dispute, if anything, he admits having a stick and using it to whip the Deceased in order to make him move as he was refusing to do so.

Although, the 2<sup>nd</sup> Accused does not in his defence mention beating the Deceased, and also his sister PW2 does not also mention seeing the 2<sup>nd</sup> Accused beating the Deceased, it would seem PW2 was shielding the 2<sup>nd</sup> Accused, being his relative. There was however overwhelming evidence from PW1 and PW3

that the 2<sup>nd</sup> Accused also participated in the beating of the Deceased, which according to the evidence of PW1, went on for sometime.

Given the fact that the Deceased was an elderly man, who was defenceless and that the beating went on for sometime, the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons possessed knowledge that their actions would probably cause grievous harm to the Deceased. The intent to cause grievous harm was evident and therefore there was malice aforethought on the part of the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons as in the meaning assigned under **Section 204 of The Penal Code**<sup>3</sup>.

The incident in issue happened on the 4<sup>th</sup> day of March 2012 and the Deceased died four days later on the 8<sup>th</sup> day of March 2013. I however note that in the case in **CASU**, there was overwhelming evidence of assault of the Deceased by the Accused persons followed by a death without the opportunity for a **novus actus interveniens** and I am therefore satisfied that the assault was the proximate cause of the Deceased's death. The essential nexus was not broken.

On the strength of the overwhelming evidence, the State has proved the guilty of the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons and discharged its legal burden and I accordingly convict both the 1<sup>st</sup> and 2<sup>nd</sup> Accused of the **Offence of Murder**.

It will be noted that throughout the trial the Accused persons did not seem to raise a credible defence. Their stance, it would seem was to highlight that there were extenuating circumstances in that the Accused persons on the material day had been coming from a drinking spree and were therefore drunk and also believed that the Deceased was a witch as he was naked and was found near a grave side and that he kept saying he had run out of fuel and his wife had left him.

There are a plethora of authorities on the issue of extenuating circumstances, amongst them being the case of **Mbomena Moola v The People**<sup>1</sup> where the Supreme Court held inter alia that:

***“Belief in witchcraft by many communities in Zambia is very prevalent and is held to be an extenuating circumstance.”***

Also in the case of **Jack Chanda and Kennedy Chanda v The People**<sup>2</sup> they held that:

***“Failed defence of provocation, evidence of witchcraft accusation and evidence of drinking can amount to extenuating circumstances.”***

There is evidence in this case which is acceptable, from most of the witnesses that the Accused persons on the material day had gone through a drinking spree and also that they believed the Deceased to be a witch from the manner of his appearance,

where he was found and the words he was uttering. I indeed accept that there are extenuating circumstances. The **Offence of Murder** attracts the mandatory death sentence.

However, where there are extenuating circumstances, it allows the Court not to pass the mandatory death sentence. Extenuating circumstances are provided for under Section 201 of **The Penal Code**<sup>3</sup> which states as follows:

*“201(1) Any person convicted of Murder shall be sentenced;*

*(a) to death or*

*(b) Where there are extenuating circumstances to any sentence other than death provided that paragraph (b) of this Section shall not apply to Murder committed in the cause of aggravated robbery with a firearm under Section two hundred and ninety four,*

**(2) For the purpose of this Section,**

*(a) An extenuating circumstance is any fact associated with the offence which would diminish morally the degree of the convicted persons guilty.*

*(b) In deciding whether or not there are extenuating circumstances the Court shall consider the standard of behavior of an Ordinary person of a class of the community to which the convicted person belongs.”*



I had to reproduce **Section 201 of The Penal Code**<sup>3</sup> to show and emphasize that an extenuation circumstance is not a defence. Further that, it is not a consideration for the Court before convicting the Accused. Therefore, it can only be considered after convicting the Accused persons.

Furthermore, for the purposes of sentencing an extenuating circumstance does not reduce the **offence of Murder to Manslaughter**, but it will not carry the mandatory death sentence but a sentence more severe than manslaughter.

In my view, the only sentence which lies between a mandatory death sentence and a sentence more severe than manslaughter is life sentence.

Having convicted the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons of the Offence of Murder Contrary to Section 200 of the Penal Code and there being extenuating circumstances, I will proceed to sentence the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons to life Imprisonment with hard labour with effect from their respective dates of arrest.

**Delivered at Lusaka this 15<sup>th</sup> day of April, 2013.**

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Justin Chashi  
**HIGH COURT JUDGE**

