

IN THE HIGH COURT FOR ZAMBIA
AT THE SOLWEZI DISTRICT REGISTRY
HOLDEN AT SOLWEZI

HKS/41/2013

(CRIMINAL JURISDICTION)

BETWEEN:

THE PEOPLE
VS
FRANK MUSONDA

Before the Hon. Mr. Justice I.C.T. Chali in Open Court on the 22nd day of August, 2013.

For the State: Ms. N.T. Mumba - Senior State Advocate

For the Accused: Ms. S.M. Kundachola – Senior Legal Aid Counsel

JUDGMENT

Cases referred to:

1. *Mwewa Muroso v. The People (2004) ZR. 207*
2. *The People v. Pelete Banda (1977) ZR. 363*

Legislation referred to:

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

The Accused was charged with one count of murder contrary to section 200 of the Penal Code Chapter 87 of the Laws of Zambia.

The particulars of the offence were that the Accused, on the 28th day of October, 2012 at Solwezi in the Solwezi District of the North-Western Province of the Republic of Zambia, did murder one SEMU CHIFUNGE.

The Accused denied the charge.

Throughout the trial and indeed at the time of writing this judgment, I have reminded myself that the burden of proving every element of the offence charged lies on the prosecution, and that they must prove the charge against the Accused beyond reasonable doubt. Should I at the end of the day entertain any doubt as to the

Accused's guilt, I am required by law to resolve that doubt in favour of the Accused and to acquit him. There is no burden on the Accused whatsoever to prove his innocence. These are the standards set by our Courts in such decisions as the case of MWEWA MURONO v. THE PEOPLE (2004) ZR. 207.

Side by side with the above principles, I have also borne in mind the provisions of the Penal Code relating to murder, particularly sections 200 and 204. These state as follows;

"200. Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder."

"Malice aforethought" is also defined as follows under section 204;

"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances;

- (a). an intention to cause the death of 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.....***
- (c). an intent to commit a felony....."***

An intention or intent or knowledge may be expressed verbally by, or inferred from the conduct of, an accused person depending on the circumstances of each case.

The following is a summary of the evidence adduced by the prosecution in support of the case against the Accused.

PW1 was GEORGE CHALI MUSEMA the deceased's paternal uncle. He said he used to live with the deceased at PW1's home in Mushitala West area of Solwezi. His house was some 300m from the Solwezi River, north of the Solwezi River Bridge on Independence Road. He said that he also knew the Accused as a very good

friend of the deceased and who even used to spend nights at PW1's home during the weekends when PW1 would be away visiting his family.

PW1 said on the material day he had seen his nephew around 08:00 hours before the nephew left. He said his nephew was in good health at the time. PW1 described the clothes that his nephew was wearing as he left home.

He was at home between 15:00 hours and 16:00 hours when PW1 started seeing a lot of people passing through the yard of his house going towards the Solwezi River, saying someone had drowned in the river. He decided to follow those people in the direction of the river. When PW1 got to the river, where a large crowd had by then gathered, some of the people recognized him and said to each other that he was the uncle of the young man who had drowned. He drew near to where the body was lying and indeed recognized the body on the bank of the river as that of his nephew, SEMU CHIFUNGE. The body was only clad in an under pant. PW1 observed a deep cut on his nephew's upper lip. Two young men who were standing by the river bank told PW1 that they had been the ones who had retrieved the body from the river. Thereafter PW1 called the police who arranged to move the body to Solwezi General Hospital where his nephew was pronounced dead. The body was deposited in the mortuary awaiting post mortem examination, which took place on 31st October, 2012 after PW1 had identified the body to the Medical Doctor and the Police. The boy was thereafter released to the family for burial. At the trial PW1 identified the clothes the deceased had been wearing which were later recovered.

Under cross examination, PW1 said from the point at which he found the body the nearest pedestrian crossing point was about 500 to 600m away. He said the place was sandy and muddy but not rocky. He said he was not present when the body was retrieved from the river, and that he found a lot of people had already gathered at the scene. He said at the scene a small girl had told him that she had seen someone who had ran away with the deceased's clothes.

PW2 was PHILLIP KATALAYI who was a friend of the deceased. He said that on the afternoon of Sunday 28th October, 2012, he found the deceased drinking chibuku opaque beer at JAH NIGHT BAR. PW2 sat with the deceased but did not partake of the beer. After the deceased had finished the beer, the two left together and went to Chililabombwe Bar in the same area called ma Grade where they started drinking

chibuku together. That was around 13:00 hours. And that was where the Accused found and joined them. PW2 knew the Accused as the deceased's workmate. After some time, PW2 left Chililabombwe Bar, leaving the deceased in the company of the Accused. PW2 returned to JAH NIGHT BAR and joined other friends who were drinking beer. After a short while a girl entered the Bar and informed the people that someone had drowned in the Solwezi River. PW2 and his friends ran to the River where he learnt that the person who had drowned, and whose body had by then been retrieved, was SEMU CHIFUNGE, the deceased in this case. PW2 said that at the time he left the deceased and Accused at Chililabombwe Bar the two had not quarreled over anything.

PW3 was MATHEWS MALISENI, another paternal uncle of the deceased. He said he got the news of his nephew's drowning from PW1 on 28th October, 2012. He eventually linked up with the relatives and Police at Solwezi General Hospital where the deceased's body had been taken. He said that as the body was being moved on a stretcher to the Out Patient Department after being certified dead by the Medical Doctor and while waiting for the mortuary attendant, he observed some blood coming out of the deceased's mouth. When they opened the deceased's mouth, PW3 observed a big cut on the inside of the deceased's cheek. PW3 began to wonder if indeed his nephew had simply drowned. And when the mortuary attendant arrived, he pressed on the deceased's stomach, and chibuku beer came out of the deceased's mouth. That raised more suspicion.

On 29th day of October, 2013 PW3 went to SILONDWA ENGINEERING where the deceased used to work with the Accused. Among other things, PW3 wanted to speak to the Accused to find out what exactly had happened since the Accused was said to be the last person in whose company the deceased had been seen alive. The Accused was accordingly called to the Manager, Mr. MWANSA's office. When the question was posed to him, the Accused admitted that he had been with the deceased at a drinking place and that when the beer they had was finished they decided to leave for their homes together. Accused told PW3 that the route they took crossed Solwezi River. When they reached the river and wanted to cross, they took off their clothes and only remained in under shorts. Because SEMU was very drunk, the Accused carried both their clothes. They started crossing, with the Accused in front with the clothes. After the Accused was at the other bank and looked back, he did not see his friend. He told PW3 that he did not realize SEMU had dropped into

the river. PW3 did not believe that story and told the Accused to just tell the truth so that the matter could be settled quickly.

The Accused then changed the story and narrated the following story to PW3.

Before 28th day of October, 2012 he and the deceased had contributed K25,000 each which they agreed would be used to buy beer on that day as they watched an English Premier League football game between two of the top teams on television. When the day arrived, the Accused went to where SEMU lived so that they could go to drink beer and watch the soccer game as earlier planned. He did not find his friend where he used to live at PW1's home. The Accused finally traced SEMU to some drinking place in Kayebela area, but found that SEMU had alone used the K50,000 they had put together. Accused only found a little beer which got finished quickly and the two decided to go to their homes. On the way, the two started quarrelling over the K50,000. In the process the Accused punched SEMU with a fist to the head, who fell to the ground and hit his head on a rock and failed to get up. Accused dragged SEMU to the river to try to resuscitate his friend by pouring water on him. But his friend did not regain consciousness. He then removed SEMU's clothes and immersed him in the river, but there was no reaction from his friend. By then people had started gathering at the scene. That is how the Accused decided to run away with his friend's clothes.

After the said narration PW3 told the Accused that he was going to discuss the matter with SEMU's other relatives before he communicated their decision to the Accused.

On 30th October, 2012 PW3 went to the Accused's work place where, in front of the owner of the company, Mr. SILONDWA, and the Manager, Mr. Mwansa, as well as PW3's brother in law a Mr. LUNDA, the Accused repeated the story in which he had punched SEMU. PW3 and family then decided to take Accused to the Police and reported their suspicions.

Under cross examination PW3 said his suspicions as to what led to his nephew's death was also aroused by the person who claimed to have retrieved the body from the river. That person had gone to the Hospital in the company of the Police as they went to deliver the body they had collected. PW3 did not recall that person's name at

the trial, but revealed that the man had told them of having witnessed a fight between the deceased and his friend near the river. He said he was present when the Accused narrated the story of his fight with the deceased to the Police Officers. According to the story Accused told the Police, they were only two of them when the deceased dropped into the river. PW3 said he was present when the Accused told that story to the Police. PW3 said the Accused had told the story freely and that he was not induced into doing so. He said no one troubled the Accused before he told the story to the Police. Accused looked alright at the time and was not frightened.

Detective Constable Mathews Chunda of Solwezi Central Police Station (PW4) was the officer on call on 28th day of October, 2012. Around 15:00 hours he received a report of drowning at Solwezi River from PW1. PW4 left with Detective Chief Inspector MKANDAWIRE the C.I.O. of the same formation for the scene. They found that the body had already been retrieved from the river and was lying on the bank. PW1 identified the body to the Police Officers as that of his nephew SEMU CHIFUNGE. PW4 inspected the body at the scene and only observed a small cut on the upper lip. The Officers removed the body from the scene and left it with the relatives at Solwezi General Hospital awaiting to be deposited in the mortuary.

On 30th October, 2012 PW3 went to the Police Station with the Accused where he explained his observations on the body of the deceased after the relatives had remained with it at the Hospital, which had aroused PW3's suspicions as to how SEMU had died. PW3 told the Police that after the suspicions were raised he had traced the Accused and asked the Police to hear the story from the Accused.

PW4 interviewed the Accused who explained how the two had been good friends; that they had quarreled over the K50,000 SEMU had used alone; that the deceased had told him to do whatever he wanted or to go to hell; that Accused had then punched his friend with a fist to the head; his friend had collapsed and Accused had failed to revive him even after immersing him in water; that Accused had taken off SEMU's clothes and hidden them in a bush on the other side of the river and gone home. PW4 said the Accused led the Police to the place where the fight had taken place, and across the river to the bush where the Accused showed PW4 where he had hidden deceased clothes. These were recovered that day by the Police from the spot Accused had hidden them. Photographs were taken and produced in which the Accused was showing the place in the bush where he had hidden the clothes.

PW4 said he also attended a post mortem examination on the body of the deceased which was identified to the Doctor by PW1. PW4 said that during post mortem the Doctor had taken a piece of the deceased's lung and placed it in water. He said the piece of lung had floated in the water from which the Doctor had concluded that the deceased had not drowned but had been put in the water after he had already died. PW4 produced in evidence the Post Mortem Report.

At the end of the prosecution's case, when the Accused was found with a case to answer and was put on his defence, he at first elected to remain silent and to call one witness in his defence. However, after a short adjournment to allow Defence Counsel to interview her client's witness, the Accused decided to give evidence on oath.

In his evidence on oath the Accused said that on Sunday 28th day October, 2012 he went to see SEMU at his home but did not find him. He finally traced him at a bar in the area where he found the deceased with two other friends drinking chibuku opaque beer. Accused joined them in the drink. When the beer was about to run out the other two friends of theirs left. After the remaining beer was finished, SEMU told the Accused he was going home. Accused asked his friend to accompany him to Accused's sister's home to collect some relish, but the deceased refused. That is when the Accused decided to accompany the deceased before he could leave for his sister's home to get the food he wanted. They chose a route that passed across the Solwezi River. When they reached the foot bridge on the river they found that it was gone. In order to cross the river, the two decided to take off their clothes. The Accused offered to cross first with the clothes for both of them ahead of his friend. The Accused then started wading through the river, which was only waist deep, up to the other bank. When he was on firm ground, the Accused turned to see where SEMU was, but the friend was nowhere to be seen. He asked one of the boys who was nearby and was told that his friend had dived into the water and had not come up. The people who had been washing clothes and bathing in the river then got out and started waiting. Even after some 30 minutes his friend did not come up. Accused said he got disturbed in his mind, especially that he had been drinking beer. He then put his friend's clothes in the plastic bag he had and went to put the bag under a tree some 100m from the river. Thereafter he went home, where he explained to his house mate what had happened. Thereafter Accused went to sleep.

On 29th day of October, 2012 after he had reported for work, he was called to the Manager, Mr. MWANSA's Office where he found PW3. Accused was asked to explain what had happened leading to his friend's death the previous day. He said he explained five times the way he told the court in his defence. However, PW3 did not buy his story. PW3 told the Accused he was the uncle to the deceased and that Accused should just tell him the truth. PW3 promised he would not take the Accused to the Police to be beaten or to Court to be hanged. Accused said he got scared and concocted a story of what never happened. That was the story involving the K50,000 which he had found squandered by SEMU; of how he had punched his friend who had fallen to the ground unconscious; of how Accused had tried to revive him; and of finally running away and hiding his friend's clothes in the bush.

Accused said that by giving PW3 that story the matter would end there and then. However, the following day he was taken to the Police by the very PW3. He said he told the Police the made up story of punching his friend, but he denied having beaten his friend.

Under cross examination the Accused admitted that PW3 had been kind and gentle to him and that he trusted the man. He said he did not want to be taken to the Police even though he knew he was innocent. He said PW3 did not beat him to induce him to tell the story. He said that PW3 did not lie to the court when he said that the Accused had told him the story about the fight freely. He also said he told PW4 the same story because he was scared of being beaten to death. Accused said he did not inform either the police or the deceased's family about his friend's disappearance at the river. He said he was drunk, disturbed and confused by his friend's disappearance. He said he had ran away with the deceased's clothes because he feared the people who had started gathering at the scene would steal them. Then he went to hide them away.

The Accused's witness was a 13 year old boy who claimed to have been at the river when he heard that a person had drowned near to where the boy and his friend's had been swimming. When he reached the scene of the drowing the boy found the body had been retrieved from the river and was lying on the bank clad only in under shorts. The boy said he had not seen how the drowned man had gotten into the water or with whom he had been before he got into the water. However, he said he had seen the person who had retrieved the body whose name he said was

CHISAMBO. He said he did not see the Accused at the river that day. Lastly the boy said that later the deceased's father arrived at the scene after the body had already been retrieved from the river.

I have considered the evidence on the record which I have summarized above from which the following facts have been proved by the prosecution beyond reasonable doubt.

1. SEMU CHIFUNGE did not die of natural causes. The Report on Post Mortem Examination which was produced as Exhibit P2 at the trial shows that he died from head injuries. The Medical Examiner who conducted the post mortem examination recorded, inter alia, that the deceased had suffered sub-dural haemorrhage. He found that the mouth of the deceased was full of blood. When he conducted the lung test in the water, the Doctor found the lungs were floating, an indication that the deceased had not drowned, even though the evidence before me was that the body had been retrieved from the water. In other words, he was thrown in the water after he had already stopped breathing, or had died.
2. The last person with whom the deceased had been seen alive was the Accused. This was as per the evidence of PW2 PHILLIP KATALAYI and the Accused himself. He left with the deceased from the last bar with a view to going home.

After the two conclusions above the case is open to only one conclusion in my view, namely, that the Accused caused the injuries which led to the deceased's death. I have chosen this conclusion, out of the two stories given by the Accused, because it makes more sense to me. In view of the findings of the Post Mortem Examination, the Accused's story that the deceased had drowned is excluded because the floating test on the lungs was positive. In other words the story of the deceased having dived into the water, untouched by a human blow or other external factor, is excluded.

The Accused's second story to PW3 was of him having punched the deceased to the head which threw the deceased to the ground and he never recovered after that. The post mortem report disclosed head injuries and sub-dural haemorrhage. PW3 had spoken of an injury he had observed on the inside of the deceased's mouth and blood spouting therefrom as the family members were transporting the body at the

hospital. The blow or punch to the head must have triggered the injuries directly to the head or they could have been sustained by falling to the ground, which in my view is very proximate to and a direct result of that punch. In other words, the punch cannot be divorced from the fall and the resulting injuries to the head, hence the death.

I have earlier indicated that the story of the Accused having punched the deceased makes more sense to me. Firstly, it was made freely and voluntarily to PW3 on 29th October, 2012 and was repeated the following day to PW3 and his relatives. There was no objection from Counsel for the Accused when PW3 narrated Accused's story of the fight at the trial. There was only a feeble attempt at objecting to the Investigating Officer, PW4's narration of the same story. Of course, I overruled the objection because I found no valid grounds for the objection. It is my finding that the Accused had repeated the story of his punching the deceased freely on at least three occasions before he was charged and arrested for the subject offence.

The Accused then attempted to cover the death as one from drowning and ran away to go and hide the friend's clothes in a bush. He did not report the "drowning" either to the Police or to his best friend's relatives, particularly to PW1 whom he knew very well, but instead just went to sleep. I do not accept that he did not report because he was drunk, confused or disturbed by his friend's disappearance," but out of a further desire to cover up the fact thereby exposing a guilty mind. Because, even when he had sobered up the following day and had gone to work, he did not report the incident to any one whom it concerned until he was confronted by PW3 at the work place.

For the foregoing reasons I am satisfied that the Accused had caused the death of SEMU CHIFUNGE by an unlawful act, namely, by punching the deceased with a fist to the deceased's head from which the deceased sustained the injuries to the head which caused his death. I am satisfied that the Accused intended, at the very least, to cause grievous harm to SEMU CHIFUNGE when he punched him on the head. In other words, the Accused knew or ought to have known that punching his friend on the head would or was likely to cause grievous harm to his friend.

Had the provisions of sections 200 and 204 of the Penal Code stood alone, I would at this stage pronounce that the Accused was guilty of murder. However, I must consider other matters provided for by law.

The story of the fight is supported by a background of the K50,000 the two had put together for drinking while watching a football game on television. The Accused got upset because he discovered that the deceased had used it all alone or with other people other than the Accused who had contributed to the fund. When the Accused confronted his friend over the matter, the deceased challenged the Accused to do whatever the Accused wanted, or to even go to hell. Although the defence of provocation was not canvassed during the trial, either during the cross examination of the prosecution witnesses or during the evidence of the Accused himself, who instead opted to simply deny having laid even a finger on his friend, I propose to deal with that defence at this stage.

With regard to provocation as a defence to a charge of murder, section 205 of the Penal Code provides;

“205(1). When a person unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion, caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only.

(2). The provisions of this section shall not apply unless the court is satisfied that the act which causes death bears a reasonable relationship to the provocation”.

The Penal Code defines “provocation” as follows under section 206 thereof;

“206(1). The term “provocation” means and includes.....any wrongful act or insult of such a nature as to be likely, when done or offered to an ordinary person,.....to deprive him of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered. For the purposes of this section, “an ordinary person” shall mean an ordinary person of the community to which the accused belongs”.

The Hon. DESAI, J. in the case of THE PEOPLE V. THE PELETE BANDA (1977) ZR. 363 (HC) broke down this defence when he held as follows;

1. That provocation consists of three elements;

- *the act of provocation;*
- *the loss of self control, both actual and reasonable;*
- *the retaliation proportionate to the provocation.*

These elements are not detached.

2. That the question is not merely whether the accused was provoked into losing self control but also whether a reasonable man would have lost his self control and, having done so, would have acted as the accused did.

3. The actions of the accused must bear a reasonable relationship to the provocation offered. Reasonableness must be tested with regard to an ordinary person of the community of the accused, and the whole of the provocation given and the whole of the accused's reaction to it must be considered."

I have considered the Accused as a very ordinary person in a rural or peri-urban setting. To such a person who gave his occupation as a bricklayer, the sum of K25,000 at the time was a lot of money. In my view for the Accused to be rebuffed over his own money, to be deprived thereof and to be challenged to do whatever he wished, and to even be told to go to hell, was provocation. I consider the Accused, in the words of DESAI, J, to be a person of simple rural stock and accustomed to small money and a ration of simple chibuku beer when he can save for it, as he hoped he had done. He was therefore grossly provoked and his passions were aroused when he was told to do whatever he wanted or to go to hell. I find that there was no time for that passion to cool and he could not desist from punching the deceased. In the heat of passion, he could not be expected to choose the part of the deceased's body to hit, or indeed to desist hitting the deceased at all.

In the circumstances, I find that the defence of provocation is available to the Accused. I accordingly find the Accused guilty of the lesser offence of manslaughter contrary to section 199 of the Penal Code, Chapter 87 of the Laws of Zambia, and I convict him of the said offence.

Delivered at Solwezi in Open Court this 22nd day of August, 2013

I.C.T. Chali
JUDGE