

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

**HKS/40/2013**

**BETWEEN:**

**THE PEOPLE**  
**VS**  
**JOHN TAPULA**

**Before the Hon. Mr. Justice I.C.T. Chali in Open Court on the 26<sup>th</sup> 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**

---

**Case referred to:**

1. *Mwewa Murono v. The People (2004) Z.R. 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 stands 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 are that the Accused, on the 28<sup>th</sup> December, 2012 at Solwezi in the Solwezi District of the North Western Province of the Republic of Zambia, did murder one DOUGLAS KALUWAZHI.

The Accused pleaded not guilty to the said charge.

At the trial, the prosecution called six witnesses in support of the charge.

I have borne in mind that the burden of proving the offence charged lies on the prosecution from beginning to end. And the standard of proof required is one which is beyond reasonable doubt. The law dictates that there is no onus whatsoever on an accused person to prove his innocence. The law further requires that should I harbor any doubt as to the Accused's guilt, I should resolve that doubt in his favour by acquitting him. These are some of the basic legal principles on which our criminal justice system are founded as expounded in various decisions of our Supreme Court including in the case of MWEWA MURONO v. THE PEOPLE (2004) ZR. 207.

I have also borne in mind the provisions of the law applicable to a charge of murder. Firstly, section 200 of the Penal Code under which the Accused was charged reads;

***“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 defined under section 204 of the Penal Code in the following terms;

***“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 taking into account all the evidence before court.

The following is a summary of the evidence of the prosecution in support of the charge.

OBEDA KAJOBA (PW2) had been married to the Accused from the year 2000 up to the year 2008 when they divorced. She attributed the divorce due to the fact that the Accused was of very bad behavior and used to beat her frequently. At the time they divorced, they had three children together who remained in PW2's custody. After the divorce the Accused went to live alone in the same village and never visited or provided for the children's welfare or herself.

On 28<sup>th</sup> day of December, 2012, PW2 was at home with her children late in the evening and was preparing to go to sleep when she heard a knock at the window. She heard that it was the Accused who had arrived. He proceeded, apparently without invitation from his former wife, to push the door open and to enter the house. When asked by PW2 as to what he had gone to do there that late in the night, and when he never used to visit, the Accused said he had gone there to make a budget for the children's needs. PW2 was apparently not amused and told the Accused to leave. At hearing this the Accused got upset and threatened that he would kill her. As they were quarreling inside the house she heard a knock at the door and went to open the door. She found that it was DOUGLAS KALUWAZHI, the deceased, now, who had arrived to deliver her phone which she had asked him to charge during the day. Since PW2 was still engaged in an altercation with the Accused at the time, she felt and advised the deceased to go back with the phone and to bring it back the following day. That is how the deceased started going away.

Shortly thereafter the Accused followed the deceased and apparently caught up with him very near from PW2's house. PW2 was able to hear what sounded like an attack by the Accused on the deceased, because PW2 said she heard the deceased say;

***“Brother, what have I done for you to attack me. Let me go. I had only brought the phone to my sister-in-law because tomorrow I will be going for work.”***

She then heard the Accused answer back;

***“You are saying phone, phone, I am going to beat you.”***

PW2 concluded that a fight had broken out between the Accused and the deceased. She rushed to GODFREY KAUTINGU (PW1)'s house to ask him to go and stop the fight. PW1 rushed to the scene where PW2 had said the fight was taking place. As PW1 was approaching, he heard the Accused saying;

***“DOUGLAS if you are man enough get up from where you are lying and go and inform the people in your village to come because you are too small for me. Other people should come and fight with me because I have defeated you.”***

PW1 got nearer and saw the Accused draw back from where the deceased lay, then charge and step on the deceased's face. The Accused did that two times. As he was preparing to launch a third attack on the deceased where the deceased lay, PW1 went and pushed the Accused who fell to the ground. The Accused was furious that he had been disturbed in his act and asked who it was that had done so. When PW1 identified himself, the Accused retorted;

***“Oh, so it is you the relative to DOUGLAS. I know you have not come alone. You must be many. Now that there are many of you let me go pick a stick so that I can injure one or two of you before you injure me.”***

The Accused got up from where he had fallen and started going away. Meanwhile PW1 went over to where deceased lay and lit the torch on his cell phone to see DOUGLAS's condition. PW1 shook DOUGLAS three times but the deceased did not respond either physically or verbally. PW1 observed that DOUGLAS's face was swollen and that he was bleeding from the nose and mouth. PW1 saw the Accused approaching him and he asked the Accused why the Accused had done that to DOUGLAS.

The Accused was still approaching with a stick in his hands and threatening PW1. PW1 had nothing in his hands and decided to run away. But as he ran away he tripped and fell into a ditch. The Accused was on his heels and went to fall in the same ditch. Their phones fell to the ground. As they grappled for their phones PW1 managed to get hold of the Accused and subdued him. As PW1 was trying to take the Accused to the nearby house of VICTOR SHIMO (PW4), MOSES SHUMO (PW3) arrived at the scene. PW1 narrated to PW3 what had transpired. PW3 got so annoyed when he saw the condition of DOUGLAS that he went and attacked the Accused.

However, PW1 stopped PW3 from inflicting more punishment on the Accused and instructed PW3 to go and wake up his father (PW4) to go to the scene. PW3 did so and when PW3 and PW4 returned to where PW3 had left PW1 with the Accused PW3 launched another attack on the Accused who fell to the ground and pretended to have fainted. That was when PW1, PW3 and PW4 went over to where DOUGLAS lay to check him. As the three paid their attention to DOUGLAS, the Accused took to his heels and disappeared.

PW1 said that the incident between him and the Accused took about two hours before the Accused finally escaped. Arrangements were then made to report the matter to the Police who went to the scene and took the body of DOUGLAS, who was presumed dead, to the Hospital. All the prosecution witnesses who saw DOUGLAS where he lay had observed the swollen face, and the injuries mostly to his head and that he had been bleeding from his nose and mouth.

PATRICK KANGWANDA (PW5), who was an uncle to the deceased, led the young men who went to look for and finally apprehended the Accused far away from Solwezi. He said they found the Accused at his brother's field in the bush and that when he saw PW5's team he bolted. But the youngmen pursued and apprehended him and finally took him to Solwezi Police Station where Detective Chief Inspector JEREMIAH MKANDAWIRE (PW6) handled the case. During the interview, the Accused told PW6 that he had fought with the deceased because the Accused had suspected the deceased of having had carnal knowledge of his wife OBEDA KAJOBA (PW2).

During the cross examination of the prosecution witnesses, the following matters also emerged.

PW2 admitted that she was happy when she and the Accused were divorced. She also admitted that she did not love the Accused anymore. She said that in 2012 her brother, JACKSON KAJOBA, had died and PW2's family had suspected the Accused of having played a part in JACKSON's death. She also said that when she returned home that night from PW1's home, she had found that her beddings were missing. She suspected that the Accused had taken them while she had been away at PW1's home where she had gone to inform him of the fight that had erupted between the Accused and the deceased. She later got those beddings from the Police who said they had been recovered near the scene of the fight. Lastly, she said that on the night the deceased had gone to

her home to deliver PW2's cell phone, the deceased had not entered her house.

PW1 in cross examination had said he had heard of the death of JACKSON KAJOBA. However, PW1 said that his family, the Kauitingu family, did not suspect the Accused of being responsible for that death. PW1 said he and his family were not KAJOBA's. He admitted that it was dark at the time at the scene and he had to light a torch on his cell phone to see the injuries and blood on the deceased's face.

Lastly, under cross examination PW6 said that the Accused had not told him that he had spent the night in question at his sister's home, in Kyawama Compound.

At the close of the case for the prosecution, I found that the prosecution has adduced sufficient evidence in support of the charge to require the Accused to make a defence. I therefore found him with a case to answer and I put him on his defence. The Accused elected to give evidence on oath and to call one witness, JENIPHER TAPULA.

At the start of the Accused's defence, Ms. Kundachola, Counsel for the Accused indicated that her client was dispensing with the witness he had earlier proposed to call because that witness could not be found. Accordingly, I only heard the testimony of the Accused, on oath, in his defence.

The Accused started by stating that he did not know anything about the case alleged against him. He said that on 28<sup>th</sup> day of December, 2012 he had left his home in Zangamenu in the afternoon to go and see his sister, JENNIPHER TAPULA, in Kyawama Township within Solwezi to collect some money he had entrusted to her to keep for him. He found his sister at her home and told her what he had gone for. She told the Accused the person to whom she had entrusted the money in turn to keep for her was not at his home in the same Township and she asked the Accused to wait until that person had returned from

work. At about 18:30 hours JENNIPHER went to check at that person's home but found that he had not yet returned. After the second trip to the man's home around 19:30 hours, JENNIPHER returned and informed the Accused that the man had told her he had used the money and that the man would only be able to replace it the following day in the evening after he got paid. Around that time that evening it had started raining and the Accused decided to spend the night at his sister's home in Kyawama Township. He said he only left JENNIPHER's home the following morning around 06:00 hours to go to Zangamenu and to the sand pits on the outskirts of the Township where he used to work.

The Accused said that it was whilst he was at the sand pits working in the company of his elder brother, ERNEST TAPULA, when he saw a lot of people arrive there and told him that they were looking for him. This was around 14:00hours that the people informed him that they had been informed by OBEDA KAJOBA and GODFREY KAUTINGU that the Accused had killed someone the previous night. Among the people who had gone to the sand pits to tell the Accused of the allegations against him, and to apprehend the Accused, was PATRICK KANGWANDA (PW5). He was eventually taken to Solwezi Central Police Station where he was later detained in custody.

When the Accused was reminded of what the prosecution witnesses had alleged he had done in Zangamenu Township on the night he claimed he had slept at his sister's place in Kyawama, the Accused said that all those witnesses had just lied against him. He denied that he had beaten DOUGLAS KALUWAZHI as alleged and that what he told the court about the night of 28<sup>th</sup> December, 2012 was the truth.

In his evidence under cross examination, the Accused admitted that he and OBEDA KAJOBA had divorced in 2008 and that he did not care if she had sexual relationships with other men. He said he was not jealous anymore because even himself was free to have relationships with other women after the divorce. He



also admitted that it would be wrong for him to beat any of OBED KAJOBA's lovers after the divorce.

When the Accused was reminded that the arresting officer, Mr. MKANDAWIRE (PW6), had told the court that he had told him that he had beaten DOUGLAS KALUWAZHI because the Accused had suspected the deceased of having slept with OBEDA, the Accused denied that he had told PW6 that story. He said PW6 lied when he told the Court that the Accused had told the officer of having beaten the deceased over his former wife, OBEDA.

About his sister JENNIPHER TAPULA, the Accused said that she lived in Kyawama in a rented house. However, he could not provide the house number where she lived because the houses were not numbered. He said that he had even informed the police where he had spent the night of 28<sup>th</sup> day of December, 2012, but the Police were rejecting his story. He said he did not know the name of his sister's landlord in Kyawama and he admitted having failed to inform the Police and the Court where JENNIPHER could be found.

The Accused took the position that everyone lied against him in court. However, he admitted that, except for the arresting officer (PW6), all the other witnesses knew him very well and he knew them well also. But he said he did not know why everyone lied against him. He also said that PATRICK KANGWANDA had lied that the Accused had run away when they went to apprehend the Accused. He said all the witnesses from Zangamenu hated him, and that this was not the first case in which they had lied against him. He said that although he did not tell the people of Zangamenu that he was going to Kyawama, they knew he had spent the night away.

Lastly, the Accused said that it was walking distance of about two hours between Zangamenu and Kyawama Township.

The foregoing is a summary of the evidence from both the prosecution as well as the defence all of which I have carefully considered before arriving at my decision. In that process, and as already indicated, I have borne in mind the main elements in the offence of murder. There are as follows;

1. There must be death of a person;
2. The death must be caused by an unlawful act or omission;
3. The act or omission causing death must be shown to have been done by the accused;
4. The accused must have deliberately caused the death or injury, or omitted to do something which was his duty to do which omission led to the death;
5. There was no lawful reason or justification for the act or omission which caused the death.

All the above ingredients of the offence must be proved by the prosecution beyond reasonable doubt before a conviction can be sustained.

On the evidence before me I am satisfied that DOUGLAS KALUWAZHI died on the night of 28<sup>th</sup> day of December, 2012 at Solwezi. During the night in question GODFREY KAUTINGU (PW3), MOSES MBUYU SHIMO (PW1), and Detective Chief Inspector MKANDAWIRE (PW6) had visited the scene and had seen the motionless body of DOUGLAS on whom they observed visible injuries on his body, particularly to the head. The body was certified dead when it was taken to Solwezi General Hospital. On 2<sup>nd</sup> January, 2013 a post mortem examination was conducted on the deceased's body after which the cause of death was established to be due to head injury. The Post Mortem Report (Exhibit P1) which was tendered in evidence by the prosecution recorded the following significant or abnormal findings;

1. Raccoon eyes with Intradural Haemorrhage;
2. Broken left upper jaw;

3. Compressing fracture of left occiput;
4. Multiple skull lacerations and Bruises.

In the circumstances I am satisfied beyond reasonable doubt that the first element of the offence I listed was proved by the prosecution.

That then takes me to the elements of the offence numbered 2,3 and 4, namely, the unlawful act or omission; the connection to the Accused; and intention to cause the death of or grievous harm to the deceased.

The Accused had denied any involvement in the events that led to the deceased's death; he said he did not know anything about the case when he testified in his defence. He gave what sounded like an alibi. He said on the night when the deceased met his death, the Accused was at his sister's home from late afternoon throughout the night, and up to early morning the following day when he left Kyawama to go to work at the sand pits. He had proposed to call his sister to support that alibi when he was put on his defence. However, JENNIPHER was never found. It will also be recalled that he admitted to the court that he had not informed the Police of that alibi when he was interviewed in connection with the offence. At the close of the prosecution's case the Accused was found with a case to answer and was put on his defence. When he was asked if he had any witness to call in his defence, he indicated he would call his sister, JENNIPHER. However, he failed to provide the residential address of his sister. Even the prosecution witnesses who were in court at the time who were expected to know JENNIPHER said they did not know her. The Accused, however, insisted that his sister JENNIPHER existed, even though he did not even know her landlord's name. At the end of the day I had to determine the matters at hand only from the evidence of the prosecution witnesses against that of the Accused.

PW2 spoke of the visit by the Accused to her home that night between 22:00 hours and 23:00 hours to discuss the budget for the children's needs. She did not welcome the Accused to her home. Shortly thereafter the deceased arrived with PW2's phone which he had been charging. According to PW2 the Accused followed the deceased as the deceased was going away and she heard what she thought to be a quarrel between the two men followed by a fight a short distance away.

PW2 was gripped with fear for the deceased and she went to wake up PW1 to ask him to go and stop the fight.

When PW1 finally got to the scene he found the deceased being assaulted by the Accused. The deceased was by then lying on the ground while the Accused was pounding him on the head with his feet. PW1 engaged the Accused both verbally and physically to try to stop the fight. PW1 and the Accused grappled with each other for quite some time, and PW1 said he was able to recognize that it was the Accused who was beating the deceased.

Then PW3, MOSES MBUYU SHEMU, arrived at the scene and witnessed Pw1 grappling with the deceased. PW3 also heard from PW1 of what the Accused had done to the deceased who was lying injured and unconscious nearby.

In my calculation, at least three people (PW1, PW2 and PW3) said they saw or heard the Accused beating the deceased, whereby the deceased sustained injuries to the head from which he later died.

The question is whether PW1, PW2 and PW3 could have been lying as to what they saw or heard the Accused did to the deceased.

I have found as a fact that all the three witnesses knew the Accused very well, as the Accused had himself admitted. They had lived in the same village for a long

time with him, even after the Accused had divorced PW2. The light might have been rather poor at the place the Accused attacked the deceased, but the fight had taken place for a long time and was observed by the three prosecution witnesses at close quarters. In fact PW1 and PW3 had physically grappled with the Accused to stop him inflicting further injury on the deceased. There were verbal exchanges even in the dark between the Accused and PW1 and PW3 whereby the two witnesses were able to recognize the voice of the Accused.

The Accused had said that the prosecution witnesses had lied against him over the death of DOUGLAS KALUWAZHI, but the Accused could not suggest why those witnessed had lied. For my part I do not find any motive for the prosecution witnesses to have lied. I am alive to the evidence of PW2 who said that some time in 2012 her brother, JACKSON KAJOBA, had died and that the Accused had been suspected by PW2's family to have had a hand in that death. However, PW2 said she was not bitter against the Accused on account of JACKSON's death, but she was bitter because of what the Accused had done to DOUGLAS. For that admission I found PW2 to have been honest about her feelings to the point whereby I could not attribute any ill motive to her implicating the Accused in the subject offence.

How about PW1 and PW3? These two witnesses, as PW1 had pointed out, were not from the KAJOBA family and they did not have any cause to be bitter against the Accused over JACKSON KAJOBA's death. I find that neither PW1 nor PW3 had any motive for lying against the Accused.

And then there was the evidence of PW6 the arresting officer who testified that the Accused, on being interviewed responded that he had attacked DOUGLAS because the Accused had suspected the deceased to have had carnal knowledge of Accused's former wife, PW2. This confession was said by PW6 to have come freely from the Accused. That piece of evidence was not challenged by the defence when it was offered by PW6. It suggested the Accused's

presence in the village when the deceased's died as well as the deceased's involvement in the fight with the deceased. I found no motive on the part of PW6 to say the things the Accused had revealed.

In the light of the evidence of PW1, PW2, PW3 and PW6 regarding the presence of the Accused in Zangamenu on the night in question which, I find to be credible and which I accept, I find that the evidence of the Accused's alibi not to be credible and I dismiss it. In other words, it is only the evidence of the prosecution's witness which I accept and which tends to prove beyond reasonable doubt that it was the Accused who had assaulted the deceased and caused him the injuries from which the deceased died.

When DOUGLAS had left PW2 OBEDA's home that night he was followed by the Accused in the same direction.

Shortly, thereafter PW2 heard what was the start of a fight between the two men. PW2 heard DOUGLAS saying to the Accused;

***“Brother, what have I done for you to be beating me? Let me go.....I had only brought the phone to my sister in law because tomorrow I will be going for work.”***

Then PW2 heard the following response from the Accused;

***“You are saying phone, phone I am going to beat you up.”***

The beating of the deceased by the Accused was in my view without any good reason. However, I propose to revisit the point later in this judgment, suffice to say that at the time PW1 was approaching the scene where the Accused was pounding the deceased's head with his feet, the Accused was challenging the deceased as follows;

***“DOUGLAS, if you are man enough, get up from where you are lying and go and inform the people in your village to come because you are too small for me.”***

PW1 heard that the Accused was challenging the deceased that other people should come and fight the Accused because DOUGLAS had been defeated.

According to PW1, the Accused was uncontrollable and bent to beat DOUGLAS or anyone else to death.

On the evidence before me, I am satisfied that the prosecution have proved beyond reasonable doubt that the Accused had been identified as the person who unlawfully assaulted the deceased with the intention of killing, or causing grievous harm to, the deceased. That is to say, that the second, third and fourth ingredients of the offence were also proved.

The last question I posed was whether the Accused had any lawful reason or justification for doing what he did to the deceased which caused the deceased's death. Once it is proved there was such lawful excuse for the Accused's actions then the Accused cannot be convicted of the offence of murder.

The Accused had told PW6 that he had beat up the deceased because he suspected that the deceased had been having sex with OBEDA KAJOBA (PW2) his former wife. Even though the Accused had denied that he had told PW6 that story, I accepted that he had done so. I have therefore considered whether the defence of provocation could be available to him.

Section 205 of the Penal Code makes provocation a defence to a charge of murder when it provides as follows;

***“(1). When a person who unlawfully kills another under circumstances which .....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.”*

And section 206 (1) defines provocation as follows;

*“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, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial, or fraternal relation or in the relation of master and servant, 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 High Court case of THE PEOPLE v. PELETE BANDA (1977) ZR. 363 simplified the above definition when he held;

- “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 could 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."***

The question therefore arises in the instant case whether the Accused can fit in the provisions for the defence of provocation. For him to benefit from the said provisions I must be satisfied that he stood "in a conjugal, parental, filial, or fraternal relation" with OBEDA KAJOBA (PW2). I find that the Accused was not in any such relation. PW2 said that the two had been divorced some four years before the incident the subject of this case. The Accused admitted as much under cross examination and added that he did not care if his former wife engaged in sexual relationships with other men. He said it would be wrong for him to beat his former wife's lovers after he had divorced her.

On the evidence, therefore, the defence of provocation cannot be availed to the Accused in this case.

I have looked elsewhere in the law and the evidence to see if I can draw any justification or excuse for his actions. However, I have found none. Therefore, I find that the fifth element I outlined has been established by the prosecution beyond reasonable doubt.

On the totality of the evidence before me, I find that the prosecution have proved the case on a charge of murder against the Accused beyond reasonable doubt. I therefore find the Accused guilty of the murder of DOUGLAS KALUWAZHI and I convict him accordingly.

Delivered at Solwezi in Open Court this 26<sup>th</sup> day of August, 2013

-----  
I.C.T. Chali  
**JUDGE**

