

IN THE HIGH COURT FOR ZAMBIA
HOLDEN AT CHIPATA
(Criminal Jurisdiction)

HJ/59/2014

BETWEEN:

THE PEOPLE

Versus

JUDITH MWANZA

***Before the Honourable Mrs. Justice J. Z. Mulongoti
in Open Court on the 10th day of December, 2014***

For the State: Mrs. M. P. Lungu, Senior State Advocate & Mrs. S. Kachaka, State Advocate, NPA

For the Accused: Mr. J. Phiri, Senior Legal Aid Counsel, Legal Aid Board

JUDGMENT

Cases referred to:

1. *Mbaye v. The People* (1975) Z.R. 74
2. *The People v. Mwaba* (1973) Z.R. 271

Statutes referred to:

1. *The Penal Code, Chapter 87 of the Laws of Zambia*
2. *The Criminal Procedure Code, Chapter 88 of the Laws of Zambia*

Judith Mwanza, the accused herein was charged with the offence of murder contrary to section 200 of ***the Penal Code***. The particulars of the offence alleged that the accused, on the 9th day of May, 2012 at Katete in the Katete District of the Eastern Province of the Republic of



Zambia, did murder **Sofia Tipezenji Phiri** hereinafter referred to as "the deceased".

The accused first appeared before my brother Sikazwe, J. on 31st August 2012. Before plea could be taken, it was brought to the Court's attention that the accused was, by reason of unsoundness of mind, incapable of taking plea or making a proper defence. The Court then ordered that the accused be medically examined in order to ascertain her mental condition at the time of the alleged offence and also to establish whether she had the capacity to stand trial.

A psychiatrist's report was accordingly rendered on the 9th day of July, 2013. In his report, **Dr. Francis Simenda** of Chainama Hills College Hospital found that the accused "*has a longstanding schizophrenic illness with mainly negative symptoms which have been resistant to treatment so far*". He went on to opine that the accused was labouring under this illness at the time of the alleged offence and that she was not fit to stand trial, take plea or follow court proceedings.

The accused appeared before me on 1st December, 2014 and on the basis of the psychiatrist's report, that the accused was incapable of taking plea or follow court proceedings, I entered a plea of "*not guilty*", proceeded to set a trial date to hear evidence from the prosecution in accordance with section 161 of ***the Criminal Procedure Code***.

At the trial held on 3rd December 2014, four witnesses were called by the prosecution to support the charge.

PW1 was **Evelyn Mwanza**, 58, the accused's first cousin of Chinkumba Village in Petauke District. Her testimony was that on the 9th day of May, 2012, she was working at her field when she heard people crying at the village. She then left the field for the village. When she got there, she asked why people were crying. The response was that they were crying because the accused had killed the deceased.

According to PW1, she found the deceased lying on the floor in her house whilst bleeding. At that time, the

accused was tied up behind the house. When PW1 asked the accused why she had killed the deceased, her response was that she had done so because the deceased whipped her following a dispute between the two over a reed-mat. She also told PW1 that when she was whipped, she reacted by hacking the deceased using a hoe (exhibit "P1").

PW1 identified the accused in Court.

In cross-examination, PW1 informed the Court that she knew the accused not to be a normal person for many years. According to her, the accused used to pick up papers and eat things which are not edible. PW1 also confirmed that she did not see the accused hack the deceased but was only told about the incident.

PW2 was **Alibesi Phiri**, 53, the deceased's sister-in-law and niece to the accused of Nyamuzepo Village in Petauke District. Her account as to the events of the 9th day of May, 2012 was in tandem with that of PW1. She told the Court that she went to the deceased's house around 14:00 hours when she heard people crying. On arrival, she found the deceased lying dead in her house. She observed that the

deceased had been bleeding but at that time, the blood had dried up. When she asked what had happened, the accused explained that she had hacked the deceased using "P1" because the deceased whipped her and wanted to grab a reed-mat from her.

It was PW2's further testimony that she also saw the accused cooking nshima. According to her, the accused got the pot she was using to cook nshima, went with it inside the house and started jumping over the deceased's body. When PW2 asked why she was behaving like that, the accused did not answer. Instead she continued to jumping over the deceased's body repeatedly.

PW2 then got hold of the accused, tied her and took her outside the house. She remained tied until the police later picked her up together with the deceased's body.

The witness further informed the Court that the accused was the only person who used to live with the deceased.

When cross-examined, PW2 confirmed that the accused was mentally disturbed. It was her testimony that the accused used to undress in public. At times she used to threaten to drown her own children.

PW3 was **Richard Mwanza**, 27, the accused's biological son and deceased's grandson of Chikwendo Village in Petauke District. His testimony was that around 13:00 hours on the 9th day of May, 2012, he passed through the deceased's house to see her. He found the door slightly open. Upon entering the house, he saw the deceased lying on the floor. He observed that the deceased had been hacked and had been bleeding although, at that time, the blood had dried up. The deceased never answered when PW3 attempted to speak to her. It was then that PW3 realized that the deceased was dead.

This prompted PW3 to go outside the house to ask the accused, who used to live with the deceased, about what had transpired. The accused explained that she had hacked the deceased using "P1" because she felt pain when

the deceased whipped her following an argument over a reed-mat. PW3 then informed other villagers about the incident and later reported the matter to the police. He also told the Court that he saw "P1" with blood stains on the blade.

PW3 identified "P1" and the accused in Court.

The fourth and last prosecution witness, **PW4**, was Detective Chief Inspector **Davies Zulu**, 49, of Sinda Police Post. His testimony was that on the 9th day of May, 2012, at about 16:30 hours, he received a report from PW3 of the deceased's alleged murder. According to him, PW3 reported that the accused had murdered the deceased. PW4 then went to the deceased's house where he found the deceased lying in a pool of blood. When PW4 checked the deceased's body, he observed multiple injuries in her head.

PW4 further informed the Court that he found the accused tied with a fibre rope outside the house as she was suspected to be the one who had inflicted the injuries on the deceased. According to him, he was shown "P1" as the

weapon which was used to inflict the injuries. PW4 also saw that "P1" had blood stains.

When leaving the scene, PW4 picked up the accused and the deceased's body. The accused was detained in police custody while the deceased's body was taken to St. Francis Hospital where a post-mortem examination was later conducted. The report of the examination was produced in Court as exhibit "P2".

According to PW4, his investigations revealed that the deceased used to live with the accused prior to her demise.

PW4 identified and produced "P1" and "P2". He also identified the accused.

At the close of the evidence for the prosecution, the accused was found with a case to answer and accorded an opportunity to make a defence to the charge as per section 161 of ***the Criminal Procedure Code***. However, defence counsel indicated to the Court that the defence elected not to proffer any evidence.

In a case of this nature, where the accused's mental condition is in issue, the procedure to be followed is set out under sections 160 to 167 of **the Criminal Procedure Code** (CPC). The Supreme Court summarized the procedure in the case of **Mbaye v. The People (1)**. In delivering the judgment of the Court, Baron, ACJ as he then was put it this way:

"To recapitulate, the steps to be followed in cases where an accused person's mental condition at the time of the trial is in issue are as follows:

(1) The court must immediately inquire into the question and, after hearing the psychiatrist's report and any other evidence it may deem relevant, must make a positive determination of the question of the accused's fitness to plead.

(2) If the determination is that the accused is fit to plead then the trial proceeds in the ordinary way and one of the options open to the defence is to plead insanity at the time of the offence and to ask the court to make a special finding.

(3) If the determination is that the accused is unfit to plead the trial must still proceed immediately. If at the

conclusion of the evidence for the prosecution and, if any, of the evidence for the defence that evidence does not justify either a conviction or a special finding under section 167 the accused must be acquitted and discharged; but if the evidence would justify either a conviction or a special finding no conviction or special finding may be entered but the accused must be detained during the President's pleasure.

(4) Thereafter if the President, on the advice of a medical officer' considers that the question of the accused's capacity to make a proper defence should be re-examined he proceeds under section 165 of the Criminal Procedure Code; in other words the President directs that the accused person be brought back before the court for a further inquiry into, and determination of, the question of the accused's fitness to plead, and if as a result of that further inquiry the accused is then found fit to plead he is called upon to plead to the charge or information and the trial then commences de novo.

As earlier alluded to, the Court already inquired into and determined the question of the accused's capability to make a proper defence. It was medically determined that the accused is incapable of making a proper defence by reason of unsoundness of mind hence the entering of a

plea of "not guilty" and the hearing of the evidence as aforementioned.

It is settled law that in such circumstances, as was noted in the case of ***The People v. Mwaba (2)***, the Court must make findings of fact and determine whether it believes the prosecution witnesses. The Court must also determine whether the evidence, as it stands, would justify either a conviction or a special finding under section 167 of the CPC. Only an affirmative determination to either effect would warrant the accused's detention during the President's pleasure otherwise, she would be entitled to be acquitted and discharged under section 161 (2) (a) of the CPC. It is in light of the foregoing that I will proceed to determine the matter.

It is indisputable that the deceased is dead. The fact of her death was confirmed by the 3 PWs who were corroborated by the postmortem report 'P2' that the cause of death was severe head injuries due to trauma. The three testified that they saw the deceased lying on the floor lifeless with a deep cut on the head and covered in blood which was almost dry.

I also note that the said evidence was not challenged by the defence either by way of cross-examination or otherwise. As such, there is no reason for me to doubt the evidence adduced by the prosecution witnesses. The accused also confessed to PW1, 2 and 3. I am of the considered view that although the three, being related to both accused and deceased are witnesses with a possible interest of their aim to serve, It is safe for me to rely on their testimonies and to convict on it since it was corroborated. I find that they had no motive to falsely implicate accused especially being a mother of PW3.

It is clear that the deceased was hacked using "P1" and died as a result of the injuries sustained from such hacking. PW3 and PW4 who testified that the deceased sustained head injuries and that "P1", which was at the scene, had blood stains and accused confesses to hacking deceased with it after they quarreled over a reed mat. The behaviour of the deceased, who did not bother to report to anyone and how she carried on with her wife as usual, cooking nshima with a dead body in the house clearly proves she is of unsound mind.

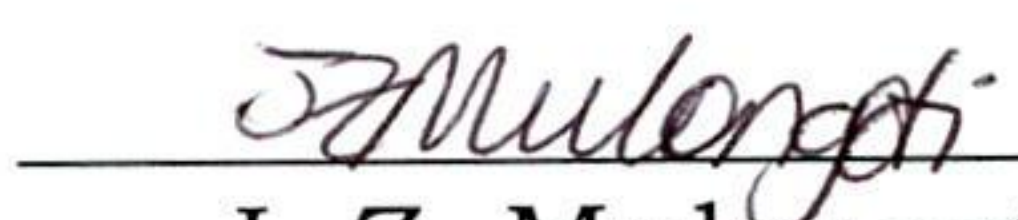
I concur with the doctor's finding that she is and was a *schizophrenic* at the time of the commission of the alleged offence as stated in his report. This finding is also supported by the testimonies of PW1, PW2 and PW3 as to the accused's state of mind and behaviour at the time the deceased was hacked and before.

Accordingly, I find that the prosecution has proved the offence of murder against the accused as created by section 200 of ***the Penal Code*** but for the accused's unsoundness of mind at the time of the commission of the offence, I am, satisfied that the evidence, as it stands, would justify a special finding in respect of the accused under section 167 and not a conviction. Accordingly, **I HEREBY ORDER that the accused be detained during the President's pleasure in terms of section 161 (2) (b) of the CPC.**

I must emphasize, however, that this order is neither a conviction nor a special finding to the effect that the accused is not guilty by reason of insanity as elucidated in **Mbaye v. The People**. If, at any point, the periodic reports submitted to the President pursuant to section 163 (3) of

the CPC will disclose that the accused is fit to plead, that question will be re-examined and determined as provided for in section 165 (1) of the CPC. In the event that the accused is found to be fit to plead, the matter will proceed in accordance with section 165 (2) of the CPC.

Delivered at Chipata this 10th day of December, 2014.


J. Z. Mulongoti
HIGH COURT JUDGE

