

**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA  
(CRIMINAL JURISDICTION)**

**HP/194/2014**



**BETWEEN:**

**THE PEOPLE**

**VS**

**DECENT KABUBI**

**BEFORE Honourable Mrs. Justice J. Z. Mulongoti  
on the 29<sup>th</sup> day of July, 2014.**

**For the People : MS. C. SOKO STATE ADVOCATE - OF NATIONAL  
PROSECUTION AUTHORITY**

**For the Accused : MS. W.S. MUNDIA, LEGAL AID COUNSEL**

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**JUDGMENT**

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**Cases Referred:**

1. EMMANUEL PHIRI & OTHERS V. THE PEOPLE (1978) ZR 79 (SC)
2. KAMBARAGE KAUNDA V. THE PEOPLE (1990 -92) ZR 215 (SC)
3. MWANDAMA V. THE PEOPLE SCZ JUDGMENT No. 5 OF 1996 (SC)

The accused, **Decent Kabubi**, is indicted on one count of *Murder contrary to section 200 of the Penal Code Chapter 87 of the Laws of Zambia*.

The particulars allege that on the 19<sup>th</sup> day of February 2014, at Lusaka in the Lusaka Province of the Republic of Zambia, the accused murdered **FESTUS BANDA**, hereinafter referred to as the deceased.

At trial, the accused pleaded not guilty. To prove its case, the prosecution called five witnesses (**PW**).

**PW1, Tilele Banda, 30**, testified that on 8<sup>th</sup> February 2014, she was at home with her parents when they heard stones being thrown on their roof top. They all rushed outside and found two boys who were throwing the stones. The boys even started hurling insults at them.

It was **PW1's** testimony that later the accused appeared and he joined the two boys. The accused then started beating up the deceased. He even got a plank and hit the deceased on the head. The deceased fell to the ground and lost consciousness. The accused bolted. The deceased was rushed to Los Angeles Police where the assault was reported and he was taken to the University Teaching Hospital (UTH). He was admitted in the Intensive Care Unit (ICU) where he stayed until his death on or about the 19<sup>th</sup> of February 2014.

It was **PW1's** testimony that she was able to see the accused that night because there was candle light in the house and there was a bit of moonlight. The accused was also known to her prior to the incident. She identified the accused in court.

Under cross examination **PW1** testified that the two people who were throwing stones were Junior Mwila and Chris, whom she knew prior to the incident. **PW1** denied the assertion that the deceased had beat up Junior on the night in question.

**PW2, Regina Tindwa, 32**, testified that on the material day she had just finished having a bath. It was around 20:00hrs. She went outside to pour the water she used to bath, when she saw a young man emerge from the flower bed with a plank. He went to where the deceased was and hit him on the head. The deceased fell and the young man continued hitting him. Later he threw the plank and walked off.

According to **PW2**, the accused was the young man who hit the deceased. That she was about 10 metres away when she saw him hit the deceased with the plank 'P1'. She said her flat was in the same yard as the deceased's house and that the deceased was her landlord.

She disclosed that the plank was about a metre long and that one end was bigger than the other. When shown the plank, 'P1', **PW2** identified it as the one she had seen the accused assault the deceased with.

Under cross examination, **PW2** testified that her house did not share the same roof as the deceased's. She said she knew Junior although he was no longer seen in the neighbourhood. She said she could see everything that night because there was moonlight. And that she never saw the deceased beat or fight with Junior.

**PW3, Lale Eric Soko, 25**, testified that on the 8<sup>th</sup> February 2014, he received a phone call from his cousin Duncan Banda who told him that his uncle, the deceased was admitted at UTH after being beaten by the accused, who was on the run.

**PW3** promised his cousin that he would trace the accused since he knew him well as they had worked together as bus driver and conductor, respectively.

After a few days, **PW3** met with the accused and they sat and chatted as mates. Later he asked the accused to accompany him to Los Angeles Police without telling him why. When they got to the Police Post, he went inside and reported that the person who had assaulted the deceased was outside.

That was how the accused was arrested. Under cross examination, **PW3** testified that the accused never attempted to run away when they met and that he did not know his relation with the deceased.

**PW4, Inspector Raymond Silwamba, 39**, testified that on 21<sup>st</sup> February 2014, he was assigned to attend to a postmortem for the deceased herein. The body was identified by Adamson Banda, the brother to the deceased. The postmortem was conducted by the State Pathologist Dr. Musakhanov.

The Court heard that the body of the deceased had injuries on the head and that after the skull was opened there were blood clots on the brain. **PW4** identified the postmortem report 'P2' as the one issued by the Pathologist.

**PW5, Detective Sergeant George Kampamba, 39**, testified that in February 2014, he received a docket of Assault Occasioning Actual Bodily Harm (A.O.A.B.H) to investigate.

He summoned **PW1** who reported that her father (the deceased) had been assaulted using a plank and was admitted at UTH. The plank was also handed to him.

**PW5** went to UTH to check on the deceased. He found him in the ICU, with a deep cut on the head. He was also unable to talk. On 9<sup>th</sup> February 2014 he

found the suspect in custody. He had been brought by the deceased's relatives. He interviewed him and detained him when he gave no satisfactory answer. On 19<sup>th</sup> February 2014, **PW5** learnt of the deceased's death and he proceeded to charge the suspect with murder. He denied the charge. PW5 identified the accused as the suspect he referred to. He also identified the plank 'P1' and the postmortem report 'P2' which were tendered as part of his evidence.

Under cross examination, **PW5** testified that the accused told him that he found Junior had been beaten up. **PW5** further testified that when he made a follow up on this, he was told that nothing of the sort had happened. **PW5** also conceded that the accused had told him that he was hit on the forehead with a shovel by the deceased and that he did not believe this. He also admitted that the accused had a scar on the forehead but stated that it was an old wound. When re-examined he said he knew the wound was old because he knew the accused prior to the incident, and had arrested him several times in relation to other cases of assault.

That was the evidence on behalf of the prosecution. I found the accused with a case to answer. When called upon to defend himself, he opted to give evidence on oath and to call one witness.

The accused (hereafter also **DW1**) testified that on 3<sup>rd</sup> February 2014, around 20:00hours, he was at Maglass bar, taking some beers with his friends Bwalya and Lolo.

Later they parted company and as he was approaching home, he saw a crowd of people, watching a youngman who was lying down.

He inquired from a young girl as to what was going on but the girl did not respond and ran away from him. Then he asked a young boy who told him that the young man had been beaten by the person who stayed at the deceased's house. According to **DW1**, the boy pointed at the deceased's house as he said this.

He further testified that he recognized the young man as Junior and he said there was torch light which people had. And that Junior was unable to breathe. He carried Junior on his shoulder as and as he did so he was suddenly hit with a spade by the deceased. He was hit on the forehead. He fell to the ground and dropped Junior. Then the deceased and his daughters started beating him with planks. They said he had insulted them. The Court heard that he grabbed a plank from one of them and threw it away. He then ran home. He denied beating the deceased nor insulting him.

In cross examination, he testified that he saw the deceased beating Junior as he lay on the ground. When asked why he was changing his testimony since in chief he said he inquired from a young boy, **DW1** responded that he asked the boy deliberately because he knew it was the deceased who had beaten Junior and was avoiding commotion. When further cross examined as to why he said the boy had pointed at the deceased's house, if the deceased was present, he said it was because the deceased was about to enter his house and the boy pointed at him. And that the scene was about 8 metres from the deceased's house. He denied the assertion that he was at the deceased's house that night and insisted that he was by the roadside.

He said he sustained a cut on his forehead after being hit with the spade and that he reported to the Police after he was apprehended but they refused to give him a medical report.

He conceded that he did not go to the clinic the following morning, stating that he was busy and that he did manage to report for work. He reiterated that he did not assault the deceased and did not know how he got injured.

In re-examination, he testified that he found Junior had been beaten by **PW1** and that the deceased had just left the scene.



That was the evidence for the defence. The accused dispensed with his witness.

After analysis of the evidence before me, I make the following findings of fact:

- (1) On or about 8<sup>th</sup> February 2014 around 20hours there was noises at the deceased's home (in Kanyama) which he shared with his wife and children among them **PW1**. **PW2** was a tenant of the deceased and lived in the same yard as the family.
- (2) The noises were from stones being thrown on their roof top. And when the family went to check who was doing so they found it was two young men from the neighbourhood.
- (3) As they tried to stop the boys, the accused also appeared on the scene and joined in the fracas.
- (4) The deceased was later assaulted and rushed to hospital. He was admitted in ICU until his death on 19<sup>th</sup> February 2014.

The issue for determination is whether the accused, before me caused the death of the deceased.

*Section 200 of the Penal Code*, which provides for murder envisages the following ingredients to prove it:

- (1) That there was death
- (2) The cause of such death was unlawful
- (3) The death was caused with malice aforethought
- (4) The accused is responsible directly or indirectly, in causing the death of the deceased

It is encumbered upon the prosecution to prove all the ingredients beyond reasonable doubt.

With regard to the first ingredient, it is indisputable that, the deceased is dead. All the prosecution witnesses testified to this fact. The postmortem report 'P2' also confirmed the death of the deceased.

The evidence revealed that the deceased was hit with a plank 'P1' on the head. He died a few weeks later. The postmortem report revealed the cause of death as "*cardio respiratory arrest due to fracture of skull with brain hemorrhage and due to traumatic head injury.*"

**PW1** and **PW2** testified how the deceased was hit with the plank 'P1' on the head. There was no other evidence to suggest the death was accidental. Thus, the cause of death was unlawful. Whoever hit him on the head caused his death unlawfully. **PW1** and **PW2** corroborated each other and the postmortem report confirmed their testimony. I accept **PW1's** testimony although she is related to the deceased since she was corroborated by **PW2** and the postmortem report I am fortified by **EMMANUEL PHIRI & OTHERS V. THE PEOPLE [1] AND KAMBARAGE KAUNDA V. THE PEOPLE (2)**. The first and second ingredients are therefore, proved beyond reasonable doubt.

The next one is that of malice aforethought as provided in *Section 204 of the Penal Code*. To establish it, the prosecution must prove either, that the accused had the actual intention to kill or to cause grievous harm or that the accused knew that his actions would be likely to cause death or grievous harm to someone. It is well established that malice aforethought being a mental element is difficult to prove. However, it can be inferred from the surrounding circumstances of the case such as the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.

As already determined the accused died of head injuries. The testimony of the prosecution witnesses was that he was hit on the head with the plank 'P1' which was exhibited in court and I am of the considered view that whoever hit the deceased on the head with it had malice aforethought. It was a big plank capable of causing grievous bodily harm resulting in death. The head, a delicate part of the body was targeted showing the attacker had malice aforethought. He ought to have known or foreseen that hitting the deceased in that manner would cause grievous bodily harm and result in death.

Accordingly, malice aforethought has been proved beyond reasonable doubt.

The last ingredient which is the most critical is whether the accused before me, caused the death of the deceased. **PW1** and **PW2** linked the accused to the offence. Both testified that they saw the accused hit the deceased on the head with the plank 'P1'. The accused in his defence, placed himself at the scene and also testified to handling a plank, on the night in question. He said he grabbed the plank from the deceased's family which had attacked him. That they had accused him of insulting them. I note also the many contradictions in his testimony. He was seriously discredited during cross examination and he contradicted himself such that his defence was clearly exposed as an afterthought and mere fabrication. For instance he insisted that the deceased attacked and beat Junior in cross examination but when he was re-examined he said it was **PW1**.


I, therefore, accept the testimony of **PW1** and **PW2** that they saw the accused beat the deceased with the plank 'P1' on his head. I find no reason why they would falsely implicate him. I, therefore, find that the prosecution has proved beyond reasonable doubt that the accused caused the death of the deceased by inflicting head injuries which led to his death. They knew him prior to the incident and he placed himself at the scene.

I am alive to the accused's testimony that he was drinking beer that night and was coming from the bar. I am of the considered view that drunkenness is not

available as a defence to the accused. There was nothing in the evidence to suggest that his capacity was affected. However, it established circumstances which amounted to extenuation. It is trite law that evidence of drinking can amount to an extenuating circumstance for murder as was elucidated in the case of **MWANDAMA V. THE PEOPLE [2]**.

Accordingly, I find him guilty of murder with extenuating circumstances and I convict him accordingly.

Delivered in Open Court this 3<sup>rd</sup> day of October..... 2014.

  
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**J. Z. MULONGOTI**  
**HIGH COURT JUDGE**