

**IN THE HIGH COURT FOR ZAMBIA**  
**AT THE KITWE DISTRICT REGISTRY**  
**HOLDEN AT KITWE**  
**(Criminal Jurisdiction)**

**HKS/17/2014**

**BETWEEN:**

**THE PEOPLE**

**VS**

**JOSPHAT KAPAIFI**

Before the Honourable Madam Justice C.K. Makungu

For the State: Ms. F. Nyirenda - State Advocate

For all Accused person: Mr. E. Mazyopa - Legal Aid Counsel

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

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**Cases referred to:**

1. Mwewa Murono v The people (2004) ZR. 207

**Legislation referred to:**

1. Penal Code Cap. 87 of the Laws of Zambia - Section 204
2. Criminal Procedure Code Cap. 87 of the Laws of Zambia - Sections 160, 161(2)(b)

**The Charge**

The accused stands charged with the offence of murder contrary to Section 200 of the Penal Code Chapter 87 of the Laws of Zambia. Particulars of the offence are that Josphat Kapaifi, on the

24<sup>th</sup> day of October, 2013 at Kabompo in the Kabompo District of the North Western Province of the Republic of Zambia, did murder one Rodwell Kalulu.

### **PLEA**

Pursuant to Section 160 of the Criminal Procedure Code (1) the accused was found incapable of making a proper defence due to the fact that he is deaf and dumb and unable to communicate using conventional sign language. Therefore, a plea of not guilty was entered.

### **STANDARD AND BURDEN OF PROOF**

It is trite law that in criminal cases, the legal burden of proving every element of the offence charged and consequently the guilt of the accused lies from beginning to end on the prosecution. The standard of proof is beyond any reasonable doubt. (See the case of *Mwewa Muroso v The people* (1).

### **SUMMARY OF EVIDENCE**

PW1 Dickson Chitungilo testified that on 24<sup>th</sup> October, 2013 he was at home when his cousin the accused person threatened to whip Moffat who had taken his plastic carrier bag to school without the accused's permission. At that time the, said Moffat was not at home and the accused got two bamboo sticks which he indicated he would beat him with when he returned. The deceased then grabbed the sticks from him and threw them away. Thereafter, the accused went inside the house to get

Moffat's school shirt with an intention of tearing it. The deceased followed him and after a short while came out of the house with his hands up shouting that he had been stabbed by the accused with a knife. PW1 said he then saw that the deceased had an injury in the abdomen. The knife used by the accused was later found in the house by the accused's mother. He identified exhibit P1 as the same knife.

He further stated that the deceased was eventually taken to Mainga Hospital where he died the following day. PW1 further stated that the accused is able to stammer some words in Lunda language and to make unconventional signs to communicate with only close family members. However, he usually believes that people are back biting him and he is short tempered.

PW2 Moffat Loloji testified that the late Rodwell Kalulu was his biological son with whom he lived in his village called Kalulu Village. On the material date, in the afternoon, he heard the accused complaining that Moffat had taken away his plastic carrier bag. At that time, the said Moffat was at school. He said the accused started saying that he would beat Moffat up as soon as he returned from school and he got two bamboo sticks to beat him with. PW2 said he grabbed the sticks from the accused and threw them away. Then the deceased and himself reprimanded the accused not to execute the illegal plans. PW2 said he then went to sleep in his hut and the deceased went back to his house

which was nearby. When it got dark, he was awakened by some people quarrelling loudly outside Moffat's house. When he got out of his hut, he found the deceased coming out of Moffat's house with his arms up, shouting that he had been stabbed by the accused. Later, the deceased was taken to Mainga Hospital where he died. The accused ran away just after stabbing the deceased.

Under cross-examination, he said that on the material date, the accused had shouted once just three words "my plastic bag!" The accused has been deaf and dumb since birth and can hardly say certain words. He said while he was in his hut, he heard the deceased saying "Do not destroy your nephew's uniform."

PW3 Hudson Tangojisakai testified that he is the chairman of the Crime Prevention Unit in the area where the incident in question occurred. On the material date, around 17.30 hours PW1 reported to him that his uncle Rodwell Kalulu had been stabbed by the accused person and that he was at Kayombo Health Centre. He went to the said Health Centre with two of his colleagues from the crime prevention unit and found the deceased with a stab wound in the abdomen. The deceased was referred to Kabompo General Hospital where they later took him and he died the following day. PW3 said they returned to Kayombo Village where they found that the accused was on the run. They went looking for him and apprehended him in the bush where he had been hiding. Then he sent a written note to Kabompo police to the effect that the

accused had been apprehended. Police from Kabompo went and picked the accused up the following day.

PW4 Detective Sergeant James Kalembembele said that he is based at Kabompo police station. On 26<sup>th</sup> December, 2013 he picked up the accused at Kalulu's Village and collected the home made knife that was allegedly used to stab the deceased. He later obtained a Post Mortem Report from Loloma Mission Hospital in Manyinga, Kabompo. He produced in evidence the knife and Post Mortem Report which were then marked by the Court as P1 and P2 respectively.

He further stated that he only visited the village where the incident occurred two days after the occurrence and did not find any clues as to what transpired as he did not find out the exact location of the crime scene. He further stated that he was able to interview the accused using the accused's sister as an interpreter and the accused denied the charge and denied ownership of the knife.

Under cross-examination, he said that neither PW1 nor PW2 told him that the stabbing happened in the house. He said nobody told him that the accused had gone around the village shouting that he wanted his plastic bag back. He said PW1 told him that he was the one who picked up the knife when the accused dropped it at the scene. He did not find the young man Moffat Kalulu who was

said to have taken the accused's plastic bag. At the end of the prosecution's case, the accused was found with a case to answer but his advocate was unable to get instructions from him for defence, so no evidence was offered in defence.

**FINDINGS OF FACT AND APPLICATION OF THE LAW TO THE FACTS**

I find that on 24<sup>th</sup> October, 2013 in the afternoon the accused, PW1, PW2 and the deceased were all at Kalulu Village in Kabompo District. PW2 was the head man of that village. The deceased was PW2's son. The accused is PW2's grandson. PW1 and the accused are cousins. Moffat is also a relative of all the persons mentioned. I further find that the accused has been deaf and dumb since birth. However, his relatives are able to communicate with him using their own unconventional sign language and he is able to make certain sounds that they understand. The accused is illiterate and unable to understand conventional sign language. Therefore, the police were able to get a statement from him using his own sister as an interpreter and he understood the charge and denied it.

It is note worthy that there was no independent person available in Court to explain the proceedings to the accused. Therefore, he was in my view incapable of understanding the proceedings. I could not allow a relative of his to interpret the proceedings to the

accused because I would not know if they are interpreting correctly.

On the material date, the accused was annoyed that PW1's young brother, Moffat had taken his plastic carrier bag without his permission. He communicated this to members of his family including PW1 and PW2. In his anger and rage, the accused decided to get two bamboo sticks which he indicated to all persons present that he would use to beat up Moffat when he returned. There is a contradiction between PW1 and PW2's evidence as to who grabbed the said sticks from him and discarded them between the deceased and PW2. Since PW2 is elderly and frail and gave testimony as the father of the deceased, he probably lied that he was the one who grabbed the sticks from the accused because in my view he was incapable of doing so. Most likely, the deceased who was younger and able bodied did so. I therefore find that it was the deceased who grabbed the sticks from the accused and threw them away. PW2 went into his hut to sleep just after the sticks were thrown away. Thereafter, the accused went into Moffat's house to get Moffat's uniform which he communicated to the people around that he would tear up.

I further find that the deceased followed him in the house and a moment later, came out injured on the abdomen saying that he had been stabbed by the accused. PW1 and PW2 were outside at

that time and they both saw the deceased and heard him say what he said. I further find that the accused then walked away from the scene and did not return, only to go into hiding in the bush near the main road where he was apprehended from by PW3 and other members of the crime prevention unit of that area on 25<sup>th</sup> October, 2013. When he was apprehended, he resisted arrest.

I further find that the home made knife which the accused used to stab the deceased was found lying in Moffat's house where the accused had thrown it. I take what the deceased said as part of **res gestae** because the deceased was deeply, physically and emotionally involved in the event and he said it immediately after he was stabbed, so there was no time for him to concoct the story. Furthermore, the accused would not have run away if he was innocent.

I cannot tell what transpired between the accused and the deceased just before the stabbing took place. It is clear from the Post Mortem Report that the deceased died of intra abdominal hemorrhage due to a penetrating stab wound which I understand to mean internal bleeding in the abdomen due to a stab wound.

I further find that the accused had malice aforethought as defined under Section 204 of the Penal Code (1) because he knew or



ought to have known that the natural consequences of his action would be grievous harm to the deceased or death.

From the foregoing, my conclusion is that the prosecution has discharged its burden of proof. I finally find that the evidence as it stands would justify a conviction. Pursuant to section 161(2)(b) of the Criminal Procedure Code (2), I order the accused to be detained during the president's pleasure. I direct his advocate to use one of his relatives to help him explain this judgment to his client.

Dated this 21<sup>st</sup> day of May, 2014.

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**C.K. Makungu**  
**JUDGE**