

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

HK/04/2014

BETWEEN:

THE PEOPLE

VS

CLINT MWILA

Before the Honourable Madam Justice C.K. Makungu

For the State: Mr. K.I. Waluzimba - Senior State Advocate

For the Accused: Mr. N. Simwanza of Kitwe Chambers

J U D G M E N T

Cases referred to:

1. *Mwewa Murogo vs The People* (2004) ZR. 207
2. *David Zulu v The people* (1977) Z.R. 151
3. *People v John Nguni* (1977) Z.R. 376
4. *The People v Christopher Banda* (2012) Z.R. 362
5. *Kambarange Mpundu Kaunda v The People* (1992) SJ1

Legislations referred to:

1. *Penal Code Cap. 87 of the Laws of Zambia Sections 200,204(a)&(b)*

THE CHARGE

The accused stands charged with the offence of murder contrary to section 200 of the Penal Code.

PLEA

He pleaded not guilty

STANDARD OF PROOF 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 Murono v The people* (1).

ESSENTIAL ELEMENTS OF THE OFFENCE

The essential elements of the offence of murder are that:

1. The accused had an intention to kill or malice aforethought as defined under section 204 of the Penal Code.
2. That the accused caused the death of the person named in the indictment by an unlawful act or omission.

SUMMARY OF EVIDENCE

PW1 Martin Mwansa's testimony was that on 2nd May, 2013 he was at the mortuary at Kitwe Central hospital where a postmortem examination was conducted on the body of his late nephew by the name of Pepino Mumbati by a pathologist. He said he was the one who identified the body to the Doctor and the police officer. He said he observed a very deep wound on the left side of the chest.

PW2 Coasta Mumbati testified that on 28th April, 2013 between 19.00 and 20.00 hours his mother Beatrice Musenge phoned him from her farm within Kitwe district that his young brother Pepino Mumbati had been stabbed with

a knife. Between 22.00 and 23.00 hours, he was informed that Pepino had passed away. The following day, his family reported the matter to Kitwe Central Police. Thereafter, they went to the farm where they found the deceased in a hut with a wound on the chest which was dressed. When the dressing was taken off he saw a deep wound. Later, the body was taken to the hospital mortuary.

Under cross-examination, he said that there were a few huts in the area where the deceased was found.

PW 3 Beatrice Musenge Kalenga testified that on 27th April, 2013 around 19.00 hours she was seated outside her hut at a farm in Mfubu Ranch in Kitwe, with the deceased who was her son and Katolo who was their neighbour. Later the accused who was her next door neighbour and a friend to the deceased arrived at his hut and started quarrelling with his wife. Their huts were just about 8 metres apart. She said the deceased advised the accused's wife to go and resolve their issues inside the house. Then the accused answered the deceased that he was talking nonsense and that he would beat him. The deceased then shouted at him saying he was not talking to him. Thereafter they both rose, met half way and continued quarrelling. She went and removed the deceased from there and he went into their hut. She said she gave the deceased food and he went outside again. Then the accused started insulting him while she was inside the house. All the while the deceased had been saying that he did not want to fight the accused as he considered him as his elder brother.

She further stated that she heard the accused's wife requesting him to go to bed and she sensed that they were moving. Then she heard the wife say "what have you used to stab him?" Thereafter, the deceased went back home and she met him outside. The deceased was holding his chest. When he removed his hand, she saw blood oozing from the wound on the chest

and he collapsed. She used a battery powered light to see it. Then the accused fled as his wife came to check on the victim. Later, she phoned her older son PW2 and requested him to go and pick up the deceased as he was wounded. The deceased passed away the same night. The following morning, the police went and collected the body. She identified the accused in Court saying she had known him for two weeks before that incident.

Under cross-examination, she said she used to sell opaque beer called shake shake at home and that her son never took alcoholic beverages. She further stated that she could not tell whether the accused had been drinking.

She heard the accused and his wife arguing about money that his wife and child allegedly stole from him when he was drunk. She further stated that the deceased did not reprimand the accused's wife for what she had allegedly done and he did not call her ugly.

PW4 Shine Jilanda Katolo testified that on 28th April, 2013 around 19.00 hours, she was at the farm in Mfubu Ranch with the deceased, the deceased's sister and mother (PW3) seated outside PW3's hut. The accused and his children were also seated nearby outside the hut. He was drinking shake shake which he bought somewhere else. Then the deceased started talking to the accused's wife saying that he would go and eat her food. By then the accused was coming from behind and having over heard the deceased, he got annoyed and started asking the deceased why he was talking to his wife and he started shouting insults at his wife. He accused her of being unfaithful for talking to the deceased. He said he and PW3 advised him to just go to bed but he refused.

Later on as PW3 was inside the house, he remained sitting with the deceased and the deceased's young sister. The accused left his wife and went to shout insults at the deceased relating to his mother as the accused's wife was persuading him to enter the house. He suddenly heard her asking the

husband what he stabbed his friend with. Then the deceased approached his hut saying he had been stabbed while holding his stomach. When the mother got out of the house the deceased collapsed as he was bleeding profusely. By then the accused had fled the scene. He further stated that he tied a cloth around the wound hoping to stop the bleeding but his efforts were futile. Then PW3 went away to make a call to his son so that he could pick up the victim. PW3 later returned with some crime prevention officers.

He said while he was inside the house the deceased's sister called him and told him there was something coming from the river side nearby covered with a white cloth and that it had entered the accused's hut. So he went to check on the white thing at the accused's house. When he peeped through the sack which was partially blocking the door way he saw the accused inside the hut. As soon as their eyes met, the accused ran away using another way out.

He said the deceased passed away after 22.00 hours that night. The following morning the police came and collected the body. He later went to Kitwe Central police and gave his statement. He said he used to get along well with the accused whom he had lived with for a few weeks. He identified the accused in Court.

Under cross-examination, he said that the deceased did not drink beer that night and that he observed that the accused was drunk. He denied having told the police that the accused and the deceased had quarreled before but admitted that his deposition said so. He said he did not see the deceased getting stabbed. The accused and the deceased were both his friends.

PW5 John Nyirenda testified that he is a Detective Constable in the Zambia Police service stationed at Kitwe District Police Headquarters. On 29th April, 2013 around 10.00 hours whilst on duty he was assigned this case to

investigate. According to the report on the docket, the deceased's body was still at the farm. He later went and collected the body which he took to Kitwe Central Hospital mortuary. He said he examined the body and found a deep cut on the left side of the chest. He later interviewed Katolo (PW4) who was an eye witness and he informed him that the deceased was stabbed by the accused who had run away.

PW5 further stated that on 2nd May, 2013 he attended a postmortem examination of the body of the deceased conducted by Doctor Olga whose preliminary findings were that the deceased died of a deep cut which had pierced the heart and lung. Later on he found the accused at Wusakile police station whom he picked up and took to Kitwe Central police where he interviewed him on the alleged murder of Pepino Mumbati. He further stated the accused explained to him that he had quarrelled with the deceased because the deceased had insulted his wife. A fight ensued and after he was kicked on the ribs by the deceased, he produced a knife with which he stabbed him. Thereafter, he ran into the nearby bush fearing that he could be arrested.

Under warn and caution the accused admitted having stabbed the deceased with a knife. On 6th May, 2013, he went to the crime scene with the accused who demonstrated how he stabbed the deceased and showed him the direction in which he ran.

PW5 further stated that he searched around the crime scene and found a blood stained knife which he kept as he presumed that it was the one used by the accused in that incident. He produced in evidence a 15cm long sharp knife without a handle and the Postmortem Report.

Under cross-examination, he said that he had come across a man called Edwin Mwape during his investigations and he was the one who actually

found the knife during the search and the accused confirmed that it was the one he used to stab the deceased with. He further stated that Shine Katolo informed him that the deceased and accused had struggled.

The accused gave evidence on oath and called no witness. He stated that on 28th April, 2013 before 09.30 hours he drunk some illicit beer with the deceased at the farm in Mfubu area. Thereafter, he left the deceased and went and drunk some more beer with his uncle. He got drunk and fell asleep at a certain drinking place. When he woke up, his uncle reported to him that his wife and child had connived to steal some money from his pocket while he was sleeping and they had taken some money out of his pocket. Thereafter he drunk some more beer before he decided to go back home around 20.00 hours.

He said when he arrived home he went and sat outside his hut with his wife and 12 year old son. He found the deceased seated with his mother and Katolo outside the deceased's hut next door. He said he started arguing with his wife about the money that she allegedly stole from him while he was asleep. Then the deceased's mother approached them and advised him to stop troubling his wife. She went back home and a short while later, the deceased went and stood behind his wife and advised him that instead of bothering his wife in his drunken state, he should go to bed. He said he and his wife told the deceased to stay out of their business but he stayed there and started insulting his wife that she was stupid for refusing to be protected and he called her ugly.

He said they continued arguing and the deceased threatened to beat him up. Thereafter he went and pushed him. He fell down and when he got up the deceased kicked him in the ribs. Then, they both went to the deceased's house and started insulting each other. A short while later, his wife grabbed his hand as she wanted to go with him to see his uncle. He said they walked for about 7 metres before the deceased followed them. By then the

deceased had taken off his shirt. The deceased went in between them and then his wife pushed both of them down. When they got up they started struggling. Thereafter, the deceased ran back home promising to return. He said he remained standing there and heard some strange voices from the deceased's house saying they wanted to burn him (the accused). Those people came and chased him into the bush. He walked all night and reached Maposa area in the morning around 06.00 hours. While in Maposa at the bus station, he got into a bus driven by his cousin which was going to Ndola. He went to see his sister in Senior compound, Ndola and explained to her how he had moved. His sister called his aunt who told her that the person he had argued with meaning Pepino Mumbati had died. He said he was puzzled to hear of the death of the Pepino and requested his sister to escort him to the nearest police station. That is how he was arrested and taken to Kitwe Central police.

Under cross-examination, he said that he was not injured at the material time because they did not fight. He did not know what was on the ground where they had fallen as it was dark. He was not in possession of a knife at that time.

SUBMISSIONS

Defence counsel did not make any submissions. The learned state advocate submitted that it is not in dispute that the deceased died of a stab wound which had injured the right lung and heart as stated in the Report on Postmortem Examination exhibited herein as P1.

There is strong circumstantial evidence which can only lead to one inference that the accused was the one who stabbed the deceased with a knife (Exhibit P2) although none of the witnesses saw the actual stabbing. He argued that the accused's explanation is unreasonable. The deceased was stabbed by the accused at the time when the deceased followed him and told him to

stop insulting his mother (PW3). There is no evidence on record even from the accused himself that the deceased might have fallen on something sharp or pointed which might have pierced his lung and heart. The accused must have in the circumstances, picked up a knife from where his wife was cooking and stabbed the deceased with it in the chest.

In support of his arguments, he cited the case of *David Zulu v The people (2)* where the Supreme Court held *inter alia* that:

“It is incumbent on a trial Judge that he should guard against drawing wrong inferences from the circumstantial evidence at his disposal before he can feel safe to convict. The Judge must be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such a degree of cogency which can permit only an inference of guilt.”

In the light of this case he submitted that the circumstantial evidence in this case, has taken the case out of the realm of conjecture such that it has attained a degree of cogency which can only permit an inference of guilt.

Mr. Waluzimba went on to submit on the Latin expression *res gestae*. He said that the statements which were made by the deceased that “I have been stabbed” and the accused’s wife that, “What have you stabbed him with?” fall within the *res gestae* principle which was applied by the High Court in the case of the *People v John Nguni (3)*. In that case it was held that:

“Evidence of a statement made by a person who is not called as a witness may be admitted as part of the *res gestae* and can be treated as

an exception to the hearsay rule provided it is made in such conditions of involvement or pressure as to exclude the possibility of concoction or distortion to the advantage of the maker or to the disadvantage of the accused.”

He also referred to the case of *The People v Christopher Banda* (4) where it was held *inter alia* that:

“11) Thus the so called *res gestae* principle is a single principle and for evidence to come within that exception to the hearsay rule, it must pass the test that the trial Judge is satisfied that there is no possibility of concoction or distortion.

12) The test to be applied in deciding whether a hearsay statement (*res gestae*) made by a bystander or victim indicating the identity of the attacker is admissible can be put as follows: was the identification relevant; was it spontaneous; was there opportunity for concoction; and what risk was there of error?”

He argued that in the present case, there was very little time that elapsed between the deceased following the accused and the making of the statements by the accused’s wife and the deceased himself. Therefore there was no possibility of fabrication and the statements should be admitted as *res gestae*.

He went on to submit on issues of false implication that in the circumstances of the case PW3 and PW4 had no motive to give false evidence against the accused. He said although PW3 the mother of the deceased might have her own interests to serve, her evidence has to a large extent been collaborated by PW4 who was a friend to both the accused and the deceased. PW4 lived with the accused in the same house for some time and his evidence actually places the accused at the scene. The accused's own testimony actually collaborates the prosecution evidence in many respects. Therefore the danger of false implication of the accused has been excluded.

Mr. Waluzimba further submitted that the accused ran away from the scene of crime not because people wanted to burn him but because he had stabbed the deceased. In any case people would not have wanted to burn him if he had not injured the deceased. Running away from the scene meant that he had the guilty knowledge of what he had done to the deceased.

He further submitted that stabbing a person with a knife is unlawful unless it appears that the stabbing is justifiable for example the right of self defence. There is no evidence on record to suggest that the deceased was the aggressor. PW4 in cross-examination denied that the deceased fought with the accused. Therefore, the stabbing was unwarranted and accused had malice aforethought as defined under section 204(a) and (b) of the Penal Code (1) as he had an actual intention to kill or to cause grievous harm to the deceased or he knew that what he was doing would possibly cause death or grievous harm to the deceased.

In conclusion, Mr. Waluzimba submitted that on the totality of the evidence on record, the prosecution has proved beyond reasonable doubt that the accused murdered the deceased.

FINDINGS OF FACT AND APPLICATION OF THE LAW TO THE FACTS

It is not in dispute that on 28th April, 2013 between 19.00 hours and 20.00 hours the accused, the accused's wife and child, the deceased, PW3 and PW4 were all at the farm in Mfubu Ranch in Kitwe. The deceased was PW3's son and PW4's friend. He was also the accused's friend. PW4 was a friend of the accused with whom he had lived in the same hut for about two weeks.

I warn myself that it might not be safe to rely on the evidence of PW3 and PW4 unless it is corroborated, because they both fall in the category of suspect witnesses. Being a friend and mother to the deceased respectively, they might have a motive to tell lies against the accused in order to serve their own interests. [See *Kambarange Mpundu Kaunda v The People (5)*]. If their evidence is uncorroborated, there should be some evidence that would compel any reasonable tribunal to convict the accused before I can rely on that evidence to convict.

It is undisputed that the accused was seated with his family outside his hut, which was opposite PW3's hut where the rest of them were also seated. The huts were about 8 metres apart. It is also not in dispute that the accused arrived home just after 19.00 hours and started quarreling with his wife who was busy cooking. The accused was drunk at that time and the deceased intervened in the argument between the accused and his wife. Then the accused turned against the deceased whom he started insulting. The accused quarreled with the deceased who was angry that the accused had insulted his mother. They were very close to each other as they were arguing. The accused was aggressive and threatened to beat up the deceased. The deceased responded that he did not want to fight. At that time PW3 was inside her hut while PW4 was outside. PW3 and PW4 did not see the deceased getting assaulted but it seems as though the accused's wife saw the deceased being stabbed by the accused. I am satisfied that the accused was the one who stabbed him using the knife that has been

produced herein. The circumstances which bring the case out of the realm of conjecture are as follows:

- The accused's wife had asked her husband what he had used to stab him, meaning that she wanted to know what the accused had used to stab the deceased.
- This qualifies as *res gestae* because the question was asked immediately after the incident.
- There was no time and no reason for the accused's wife to ask an inappropriate question in the heat of the moment.
- Although the accused's wife was not called as a witness, I am of the view that PW3 and PW4 did not fabricate the story of her having asked that question because their evidence is supported by the facts that the accused was the only one at the scene who was angry with the deceased and about to fight him. Further, the deceased himself told his mother that he had been stabbed under circumstances which permit the application of *res gestae*.
- The accused ran away immediately after the incident and made a great effort to go as far as Ndola.
- The accused's explanation of what transpired does not make sense because if he had not harmed the deceased, he would have stayed to check on him.

Under the circumstances, I do not accept the accused's story that the deceased fell on something that pierced his chest. Considering section 204 of the Penal Code (1), I find that the accused had malice aforethought because he knew that stabbing the deceased with a knife in the chest would cause grievous harm to him or his death. The act of stabbing was definitely unlawful. Since the State has discharged its burden of proof I hereby find the accused guilty as charged and convict him accordingly.

Dated at Kitwe this 26th day of February, 2014.

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C.K. Makungu
JUDGE