

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

**HKS/18/2014**

**BETWEEN:**

**THE PEOPLE**

**VS**

**JOHN NKONDE - A1**  
**PATRICK NKONDE - A2**

Before the Honourable Madam Justice C.K. Makungu

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

For accused persons: 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. George Misupi v The People (1979) Z.R. 271
2. Peter Mullan v The People (1971) Z.R. 110
3. Ernest Mwaka and four others v The People (1987) Z.R. 19
4. Mohan and Another v Regina (1967) 2 ALL E.R
5. Haonga and Others v The People (1976) Z.R. 200

**Legislation referred to:**

1. Penal Code Cap. 87 of the Laws of Zambia - Sections 21(1)b, c & 22, 199, 200, 204 & 393
2. Criminal Procedure Code Cap. 88 of the Laws of Zambia - Section 181(1)(2)

The accused persons stand charged with the offence of murder contrary to section 200 of the Penal Code Cap. 87 of the Laws of Zambia. Particulars of offence are that on an unknown date but between 5<sup>th</sup> and 6<sup>th</sup> December, 2013 and 6<sup>th</sup> December, 2013 at Solwezi in the Solwezi District of the North Western Province of the Republic of Zambia, John Nkonde and Patrick Nkonde jointly and whilst acting together did murder on **Bodwin Kalenga Eze**. They both pleaded not guilty.

The essential elements of the offence of murder contrary to Section 200 of the Penal Code are that:

1. The accused through an unlawful act caused the death of the deceased named in the indictment.
2. At the time of committing the offence both accused had the intention to kill or malice aforethought as defined under section 204 of the Penal Code Cap. 87 of the Laws of Zambia

A summary of the evidence on record is as follows:

PW1 Edna Mpanga testified that she is a Congolese National, resident in Cementi area at the boundary between Zambia and Congo. The house is in Congo. On 5<sup>th</sup> December, 2013 the son of Mukonka Nkonde A.K.A. Leza had passed away. Then the family of the deceased decided to put some charms in the coffin where the deceased was put. Those charms are believed to be able to mysteriously move a coffin to hit the wizard who bewitched and killed the dead person lying in it. This is traditionally known as kikondo. That day, she went close to the funeral house around 17.00 hours and confirmed that there was commotion in relation to the Kikondo and accused 1 and his relative James were there. The Nkondes had taken her husband Bodwin Kalenga Eze from home to the funeral house. She said she went and spent that night at home.

The following morning, around 06.00 hours, she was on her way to the same funeral house when she met accused 1 with his relative James Nkonde who said they were going to her house to get a goat, a pig and 10 tins of maize for the mourners to consume because her husband was accused of having bewitched the deceased. So she took them to her house and gave them the said items.

Thereafter, she went to the funeral house and found her husband with blood oozing from his face and he was unable to walk, he

was just crawling on the ground. She offered the deceased's family K300.00 so that they could stop harassing him and release him but they refused and Mukonka Nkonde whom she tried to give the money to, said that her husband should just die. Thereafter, Peter Kisamina started kicking him and John Nkonde (A1), Lupopa, Kisumi and Kyakukaisha hit him with the coffin. She said they hit him from 06.00 hours to 11.00 hours. During that time, Lupupa and Accused 1 would keep him seated up against the wall as the others carried the coffin and hit him in the chest. Leza the one who had lost his son was just watching. Before he passed away, Peter Kisamina kicked him with a boot on his cheek and she heard his jaw break and saw blood oozing from his mouth and nose. A short while later, after he died, she went back home. Later, the Police went and picked up only Accused 1 and Accused 2 from the funeral house because the other culprits ran away. She identified both accused in court saying she had known them as her neighbours for many years.

Under cross-examination, she said that she had seen James Nkonde tie the deceased and put a coffin on his lap with bricks on top. Peter Kisaina kicked the deceased just before he died. She said she saw Accused 1, Lupopa, Peter Kisaina, Kisumi, Kyakusaisha and James all beating up the deceased. Accused 2 only participated in carrying the coffin.

In re-examination, she said Accused 2 carried the coffin for a short while and then started throwing some mealie meal on top of the coffin while the others were carrying it.

PW2 Samuel Njamba, testified that he was present at the crime scene on the material date and saw Accused 1, James Nkonde, Kyakukaisha, Elike Malona and Kafenkenene carrying the coffin. Accused 2 had mealie meal which he was throwing on the coffin. There were other people who carried the coffin, namely Kisumi, Peter Kisaina and James who ran away when the police came. The people who carried the coffin hit the deceased in the chest, ribs and legs.

PW3 James Kayebeta's evidence was that he is related to the Nkondes meaning the accused persons and their parents and that the late son of Mukonka Nkonde Eze by the name of Moses was his nephew. Upon the death of Moses on 5<sup>th</sup> December, 2013 there was a kikondo that was performed. He saw the coffin where the dead child was put, being carried by some poll bearers when it hit Bodwin Kalenga Eze his brother several times on the shoulders and ribs. That occurred from 15.30 hours until 18.00 hours when he left.

He said he went back to the funeral house the following morning and found the said Bodwin very weak without his shoes and belt. Bodwin was smeared with mealie meal all over his body. His

adversaries made him stand up and dance while holding a walking stick. Thereafter, Accused 2 and James were sent to go and call Bodwin Kalenga Eze's wife (PW1). They returned with her about 20 minutes later. PW1 then offered the Nkonde's K300.00 for the release of her husband but they refused saying they just wanted him dead. At that time, the deceased was seated and Accused 1 and James put a coffin on his lap with bricks on top of it. After removing the coffin and bricks, Floribe and David carried the coffin and hit the deceased with it in the ribs many times. When he fell down, Peter came and kicked him with a boot and he rolled three times, then blood started oozing from his nose and mouth.

He said he then concluded that his brother was dying and went and reported the matter to the chief. Later, he learnt that Sam and Kombe had earlier reported the matter to the Police who showed up at the scene. Upon seeing the Police, some people started running away from the scene. The Police chased them but only managed to apprehend the father to Prudence by the name of Charles. He said he accompanied the police to Kyawama police station on 6<sup>th</sup> December, 2013 where they took both accused with Charles.

He further stated that he witnessed the postmortem examination on the body of the late Eze and was the one who identified the

body to the doctor. Accused 1 is his nephew and Accused 2 is his grandson and he identified both of them in Court.

Under cross-examination, he confirmed what he had said about the individuals who participated in harassing the deceased, hitting him with a coffin and kicking him. He said Accused 2 only got some mealie meal on a plate and as the coffin was being carried around, he was throwing the mealie meal on top of it and ululating. He said accused 2 did not beat the deceased at all. He further stated that he did not know what the mealie meal spreading meant.

He said both accused persons had fallen out of school sometime back and had since not been en-rolled in any other school. He was there when they were apprehended and so was Mr. Nkonde, Bala Kenneth Luili and Bessy's father. Others who had participated in assaulting the deceased had run away. Both accused had not attempted to run away.

PW4 Davies Mwansa's evidence was that he is a police officer in the Zambia police service based at Kyawama police station criminal investigations section. On 6<sup>th</sup> December, 2013 around 11.00 hours whilst on duty, he received a report by telephone from a member of the public to the effect that a certain man had been killed in Leza Village by some people using a coffin. Acting on that report, he mobilised fellow police officers and went to that

village where they found a coffin with a corpse in it and the body of a person he came to know as Bodwin Kalenga Eze lying next to it. Eze was bleeding from the mouth and nose. Some mourners had gathered around so he started making inquiries from them and then James Kayebeta (PW3) a relative to the late Eze gave him some names of people who were involved in assaulting the deceased. He even pointed out Accused 1 and Accused 2 to him and he apprehended them.

Thereafter, he took the late Eze to Solwezi general hospital mortuary where he was certified dead. Later a postmortem was performed on the body of Eze. He produced in evidence a postmortem report. He said he later recorded warn and caution statements from both accused in relation to the murder of Eze and charged them with the offence of murder which they both denied. Thereafter, he charged and detained them in lawful custody. He identified both accused in Court.

Under cross-examination, he said that the Police arrived at the funeral house by 12.30 hours and some of the people who were there ran away upon seeing them. Accused 1 and Accused 2 did not run away. He further stated that he was not informed by anybody that both accused were pupils at a certain school.

Both accused gave evidence on oath. The first accused's testimony was to the effect that he is from Leza Village. Before the incident in question, he was in grade 7 at Mulenga school as a

weekly boarder because the school is quite far from home. The second accused is also a weekly boarder at the same school. On 6<sup>th</sup> December, 2013, he and the second accused arrived back home from school around 17.00 hours and found a funeral which they did not know about earlier. Their father, Mr. Leza told them that there was a kikondo as a consequence of which Bodwin Kalenga was killed. As they were seated in a hut with their father, some Police officers arrived, asked for the bereaved family and arrested him and Accused 2 and took them to the police station in Solwezi.

He further stated that PW1 gave a false testimony against them and that she could not have known them because she is Congolese. He denied having carried a coffin and having been to her house to demand for a goat, a pig and some maize. He said he did not even know her residential address.

Under cross-examination, he said that the second accused is his cousin. He identified Leza the one whose child had died and was placed in the coffin that hit the deceased as Accused 2's grandfather. He further stated that he was in grade 7 when he was apprehended and by November they had already written their final examinations. However, their teacher made the entire grade sevens stay at school to tend a vegetable garden for the school. He further stated that his father knew PW1 and her

husband well. He said they were apprehended just because they were the youngest people at the scene at that time.

Accused 2's evidence was that he was from Cementi area, Village Leza in Solwezi District and he told the same story as accused 1.

Both advocates made no submissions at the end of the trial.

In the case of ***George Misupi v The People*** (1) it was held *inter alia* that:

**“Once in the circumstances of the case it is reasonably possible that the witness has a motive to give false evidence, the danger of false implication is present and must be excluded before a conviction can be held to be safe,”**

I warn myself that PW1 and PW3 who are respectively wife and brother of the late Bodwin Kalenga Eze might have their own interests to serve or motives to give false evidence against the accused, therefore, I will cautiously consider their evidence and ensure that the dangers of relying on it are removed before I could rely on it.

I find that PW1's evidence has been corroborated by PW2 and the Postmortem Report produced herein. To a limited extent both accused have supported PW1, PW2 and PW3's evidence that there was a kikondo at the material time and Bodwin Kalenga

died due to injuries sustained when he was hit with the coffin. I further find that PW1, PW2 and PW3 had no motive to tell lies against both accused in this serious matter because both accused are youths who were amongst many people including some who were older than them and they had not differed with these prosecution witnesses before. There is no evidence that the said witnesses connived to tell the same story.

Furthermore, I am of the view that PW1 would not just come from Congo and decide to point at only the two young men for nothing. If she wanted to falsely implicate the Nkonde family, she could have simply said Nkonde Eze also assaulted the deceased because he must have been the most aggrieved, but she said he did not participate in assaulting the deceased. PW3 is related to both the Nkondes and the deceased and there is no evidence indicating that he had an ill will to implicate both accused. His evidence was corroborated by PW2 and the Postmortem Report. I therefore find it safe to rely on the evidence of PW1 and PW3 as the dangers of false implication have been removed.

It is not in dispute that on 5<sup>th</sup> or 6<sup>th</sup> December, 2013 at Solwezi Cementi area in Leza Village, Mr. Mukonka Nkonde Leza's son Moses had passed away and the Nkonde family suspected the deceased of having killed him through witchcraft. The first accused is the said Leza's grandson. The 2<sup>nd</sup> accused is also related to him.

It is also not in dispute that the Nkonde family put some charms traditionally known in that part of the country as “Kikondo” in the coffin where the body of the late Moses lay. The said charms are believed to supernaturally move the coffin whilst in the hands of poll bearers, which coffin would hit the one who bewitched the deceased inside it. It is also not in dispute that the Nkonde family went and picked up Bodwin Kalenga Eze who is now dead from his home in Congo near the Congo/Zambia border in an area called Cementi, whom they suspected to be the one who bewitched the late Moses and brought him to the said Leza’s house on the Zambian side at Village Leza in Cementi area on 5<sup>th</sup> December, 2013. PW1 was not around when her husband Bodwin Kalenga Eze was picked up. Around 17.00 hours on 5<sup>th</sup> December, she returned home from the farm and learnt from her children that there was a kikondo taking place at Leza Village and that her husband had been taken there by some people who were mourning the late Moses.

I further find that, PW1 went near the funeral house that evening and confirmed that there was a kikondo taking place and she returned home and spent a night there. Although it is disputed that on 6<sup>th</sup> December, 2013 Accused 2 and James went and demanded for a goat, a pig and 10 tins of maize from PW1 so that mourners at Leza village could consume it just because PW1’s husband was believed to be a witch, I find that PW1 told the truth

and that she gave them the said items and went back to the funeral house which was about 400 metres away from her house because she had no reason to lie about that and her evidence has been corroborated by PW3. She found her husband with blood oozing from his face and unable to walk as he was just crawling on the ground. It is not in dispute that PW1 offered Leza the sum of K300.00 for the release of her husband but he and other members of his family refused to take it saying that they just wanted her husband to die.

I further find that at the material time, Accused 2 had some mealie meal which he was sprinkling on the coffin as he was ululating. My interpretation of Accused 2's actions is that he was happy to be involved in that procession and he was encouraging others to go ahead and do what they had agreed to do and that is to assault and kill the suspected witch Bodwin Kalenga Eze. I further find that Accused 1 Lupopa, Kisumi, Kyakuaisha, Elike Malona, Kafenkenene and James Nkonde were exchanging as poll bearers and they hit the deceased with the coffin. They harassed and assaulted him all day on 5<sup>th</sup> December. On 6<sup>th</sup> December, 2013, they assaulted him with the coffin from about 06.00 hours to 11.00 hours which was a period of about 5 hours. Accused one and another at one point put the coffin on the deceased's lap with bricks on top of the coffin. Later, they humiliated the deceased by making him dance whilst injured and exhausted and smeared with mealie meal. Then Peter Kisaina who was wearing safety

boots, kicked him in the jaw which broke and blood started oozing from his mouth and nose, then he died of severe head injuries as stated in exhibit P1- the Postmortem Report.

A short while later, the police arrived at the village and found the coffin with the late Moses in it, on the ground and the body of Bodwin Kalenga Eze lying next to it. Some of the people who were involved in assaulting the late Bodwin Kalenga Eze ran away as soon as they saw the police. Both accused persons remained at the funeral house with some elderly persons including Leza. The Police then apprehended both accused because PW3 told them that they were involved in assaulting Bodwin Kalenga Eze. I am of the view that both accused did not run away because they were young and naïve. The fact that they did not run away does not mean that they did nothing wrong under the circumstances.

Both accused's evidence that there were at school and not at Leza Village when the incident took place is unconvincing because there is overwhelming evidence that from the time the Kikondo started taking place, up to the time that Leza passed away and thereafter, they were both there. I am satisfied with the identification evidence from PW1 and PW3 because they knew both accused very well before the incident.

In the case of ***Peter Mullan v The People*** (2) it was established that where an accused person has given an explanation which

might reasonably be true, the Court needs to look at the reasonableness of the explanation and acquit him. In the present case, I find the explanation given by Accused 1 and Accused 2 unreasonable and unacceptable.

Section 200 of the Penal Code provides that:

**“Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”**

And Section 204 of the same Act provides:

**“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, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**
- (c) An intent to commit a felony; etc”**

In the case of ***Ernest Mwaka and Four others v The People*** (3), it was held that:

**“1. Where joint adventures attack the same person, then unless one of them suddenly does something which is out of line with the common scheme and to which the resulting death is attributable, they will be liable.**

**2. Where the evidence shows that each person actually participated in an assault, then they were all *crimines participes*.**

**The fact that other persons may have also assaulted the deceased at one stage can make no difference where the nature of the assaults was such that their cumulative effect overcame the deceased.”**

In the murder case of ***Mohan and Another v Regina*** (4) referred to in the Ernest Mwaka case, it was held that;

**“Once more or less equal participation in the unlawful assaults on the same victim was established, it was unnecessary to show who struck the fatal blow and each was fully liable for manslaughter.”**

In the case of *Haonga and others v The People* (5) it was held that:

**“When two or more people are known to have been present at the scene of an offence and one of them must have committed it, but it is not known which one, they must all be acquitted of the offence unless it is proved that they acted with a common design.”**

In the light of the foregoing authorities, I find that the first accused with joint adventures named herein, participated in the unlawful assaults on the same victim and he is fully liable for manslaughter and not murder because the nature of the assault was such that the cumulative effect over came the deceased. Section 199 of the Penal Code in relation to manslaughter provides that:

**“Any person who by an unlawful act or omission causes the death of another person is guilty of a felony termed “manslaughter”. An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause the death or bodily harm.”**

Section 181(1) and (2) of the Criminal Procedure code (2) provides:

**“(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.**

**(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.”**

Therefore, pursuant to section 181 of the Criminal Procedure Code, I reduce the charge from murder to the minor offence of manslaughter contrary to section 199 of the Penal Code which has been proved to the required standard. Both accused had an ample opportunity to defend themselves against the offence of manslaughter, so no injustice is being done against them.

I find the first accused guilty of manslaughter contrary to section 199 of the Penal Code and convict him accordingly.

Section 21(1) b and c of the Penal Code provides that:

**“21(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence, and may be charged with actually committing it, that is to say;**

**(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;**

**(c) every person who aids and abets another person in committing the offence.”**

Section 22 of the Penal code provides:

**“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”**

Applying the foregoing statutory provisions, to this case, I reiterate that the second accused's actions were intended to encourage the others who were involved in carrying the coffin and assaulting the deceased, so he aided and abetted them in committing the offence. The second accused also did nothing to stop the others from committing the offence. It is abundantly clear that all the persons involved had formed a common intention to prosecute the unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence was committed of such a nature that its commission was certainly a consequence of the prosecution of such purpose. Therefore, I

deem the second accused to have also committed the offence of manslaughter and find him guilty.

I order that a Social Welfare report be rendered to me by the Social Welfare Department of the Republic of Zambia before I sentence the juvenile offender. I set aside 24<sup>th</sup> July, 2014 at 09.00 hours for sentencing.

I am concerned that Mr. Mukonka Nkonde Leza the grandfather and guardian of both convicts was not charged with any offence by the Police. I wish to bring to the attention of the Police Section 393 of the Penal Code (1) which provides that:

**“Every person who, knowing that a person decides to commit or is committing a felony, fails to use all reasonable means to prevent the commission or completion thereof, is guilty of a misdemeanour.”**

I therefore urge the Police to forthwith apprehend and bring to book Mr. Nkonde and anyone else who may be suspected of having committed the offence envisaged by Section 393 of the Penal Code or Sections 21 and 22 of the same Act. I have put this in the Judgment because such offences have been prevalent in North Western Province for many years and generally, the residents of this part of the country do not seem to be deterred from committing such offences by the stiff penalties that the Courts have been passing. I am therefore of the view that it is in

the public interest that all individuals who will in future be suspected of having allowed or aided and abetted such barbaric acts, or conspired to commit murder or manslaughter be brought to book. Therefore, I take this opportunity to urge the Police to do just that.

Dated at Sowlezi this 18<sup>th</sup> day of July, 2014.

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