

**IN THE HIGH COURT FOR ZAMBIA
HOLDEN AT MONGU**

HT/29/2015

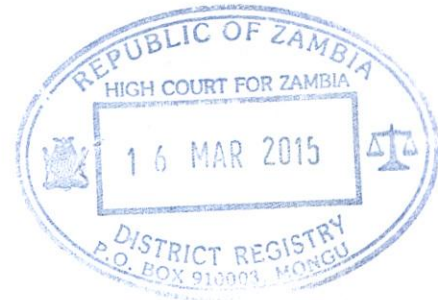
(Criminal Jurisdiction)

BETWEEN

THE PEOPLE

Vs.

KAYOMBO STEVEN



Before: Hon. Judge B.M.M. Mung'omba on this 16th day of March, 2015.

For the Prosecution: Mr.B. Mpalo, Senior State Advocate & Mrs. P. Nyangu, State Advocate – NPA

For the Defence: Mr. I. Yambwa, Legal Aid Counsel – Legal Aid Board

JUDGMENT

Cases Referred To:

- 1. *Mwewa Muroso vs The People (2004) ZR. 207.***
- 2. *Ernest Mwaba & Others vs The People (1987) ZR. 19***
- 3. *Mohan & Another vs Regina (1967) 2 ALL ER***

Legislation Referred To:

- 1. *The Road Traffic Act, 2002; s. 161(1).***

The accused in this case, **Lubinda Lubasi (A1)** and **Kayombo Steven (A2)**, are charged with the offence of Causing Death by Dangerous Driving contrary to **Section 161(1) of the Road Traffic Act No. 11 Of 2002** Cap 464 of the Laws of Zambia. It is alleged that the two accused persons herein on

4thOctober, 2013, at Kaoma in the Kaoma District of the Western Province of the Republic of Zambia, jointly and whilst acting together, did cause the death of **Ketata Joseph Pelekelo** by driving a motor vehicle namely Toyota Corolla registration number ALE 2691 and Toyota Corolla registration number ABM 2772, respectively, on a public road namely Freedom Way Road in a manner which was dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be, expected to be, on the said road.

When called upon to plead, the first accused admitted the charge and the Court entered a plea of guilty. Having taken into account the mitigation, I imposed a sentence of a fine of K2, 000.00 in default three months imprisonment with hard labour.

As regards the second accused, he denied the charge and the matter proceeded to trial.

From the onset I remind myself that the onus rests on the prosecution to prove the charge against the accused beyond any reasonable doubt. If I am to entertain any doubt I am required to resolve that doubt in favour of the accused and to acquit him. The case of **Mwenwa Muroso vs The People (2004) ZR 207** is instructive.

Section 161(1) of the Road Traffic Act No.11 of 2002 under which the accused is charged provides:

*“161. (1) Any **person who causes the death of another person by the driving of a motor vehicle** on the road recklessly, or at a speed, or manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road*

commits an offence and shall be liable, upon conviction, to a fine not exceeding thirty thousand penalty units or to imprisonment for a period not exceeding five years, or to both". (Emphasis mine)

The prosecution, therefore, have to satisfy each and every ingredient of the offence if I am to convict the accused for the subject offence. The prosecution called two witnesses who both gave evidence on oath.

The following is a summary of the evidence I received from the two prosecution witnesses.

Musaka Clifford Hamulondo (PW1) testified that on 4th October, 2013, at around 19: 00 hours he was in motor vehicle registration number ABM 2772 being driven by Steven Kayombo, the second accused. The motor vehicle was moving along Freedom Way Road in Kaoma when suddenly he saw what looked like a carton box lying on the road which turned out to be a person, now the deceased. He had been hit by a motor vehicle registration number ALE 2961 driven by the first accused, Lubinda Lubasi. The said vehicle was parked by the road side near the scene of accident.

He informed Court that due to the short distance at which they saw the deceased's body, A1 drove putting the body in between the wheels of his vehicle. The motor vehicle dragged the body for about 10 meters and it stopped. They removed the body from underneath the motor vehicle. The person was gasping.

Later an ambulance from Mayukwayukwa arrived at the scene. The person was examined and according to PW1, it was said that the person was dead. The body was then taken to the hospital.

PW2 was **No. 36976 Sergeant Kalaluka** based at Kaoma Police, traffic section. He was the arresting officer in this case. He testified that on 4th October, 2013, while on duty, he received a report of causing death by

dangerous driving involving male Lubinda Lubasi (A1) who was driving a Toyota corolla registration number ALE 2691 and male Kayombo Steven who was driving a Toyota corolla registration number ABM 2772.

The accident happened when both drivers were driving along Freedom way road in Kaoma in the direction of north to south. A1 hit a pedestrian who was trying to cross the road from the direction of west to east whose name is Joseph Ketata. When the victim was hit he fell on the road and A2, who was coming from behind, dragged the victim between the wheels of his motor vehicle for a distance of about 12 meters and went to stop by the right side of the road.

According to PW2, later the victim was taken to the hospital where he died upon arrival at Kaoma District Hospital. He was taken there gasping. Acting on the report, PW2 interviewed both suspects and made up his mind to charge and arrest them for the offence of causing death by Dangerous driving.

He also told Court that the height from the ground, the space between the vehicle and the ground, could be approximately 5 centimeters in height. PW2 visited the scene and drew up a sketch plan which was not drawn to scale produced and marked P1. On 8th October, 2013 he attended a postmortem conducted on the body of the deceased. The postmortem report was produced and marked P2.

PW2 testified that he decided to charge A2 jointly with accused A1 because when the deceased person arrived at the hospital he was still gasping. According to him, this condition meant the time both A1 and A2 ran over the deceased, he was still alive. However, it was his evidence that it became very difficult to know who actually caused the death of the deceased because both A1 and A2 ran over him. He expressed the view that there was a possibility of the deceased surviving after the first person ran over him.

PW2 also testified that the motor vehicle for the 2nd accused was not examined due to the fact that it had no visible dents. He however described the damage that was suffered by the first vehicle as a depressed bonnet and a shattered wind screen.

At the close of the prosecution case I found a prima facie case had been made out against the accused and I put him on his defence.

The accused gave evidence on oath and called no other witness. He testified that around 19 to 0 hours on 4th October, 2013, he was driving along Freedom Way road in Kaoma. Then he saw another motor vehicle parked along the said road. It had its lights and hazards on. This was near Ministry of Education offices.

According to the accused, he slowed down and saw something that looked like a carton box. He said the lights to his motor vehicle were not so bright. Then he realized that it was actually a person lying on the road. He applied the brakes and stopped.

Then he saw another motor vehicle following him behind. He informed me that there was no other way he could have gone and to avoid hitting the person he decided to put him in between the wheels and drive through.

Under the wheels, that person was unfortunately hooked on his jacket and dragged for about four (4) meters. When the motor vehicle had stopped, the accused and PW1 came out and removed the person from underneath the vehicle.

They checked this person and discovered that he had been severely injured. Lubinda Lubasi, (A1) also came at the scene but later left. Then an ambulance coming from Mayukwayukwa arrived at the scene. According to

the accused, the nurses examined the body and stated that the person was dead. The body was later taken to Kaoma Hospital morgue.

The matter was then reported to Kaoma Police Station where he was jointly charged with A1, Lubinda Lubasi.

In cross-examination, the accused testified that he does not hold a drivers licence although at the time of the accident he had a provisional drivers licence. He confirmed seeing a motor vehicle parked along Freedom way road with its lights and hazards on. According to the accused, he thought the parked motor vehicle had run out of fuel or had a mechanical fault; meaning that it had a problem.

The accused narrated that he could not stop at this point because there was another motor vehicle following him behind. He avoided causing another accident had he stopped. He informed the Court that he had been driving since the year 2007.

He confirmed putting the person who was laying on the road in between the wheels of the motor vehicle he was driving. However, he stated that he did not know whether the actions could have occasioned injuries to the person underneath the vehicle.

Finally, the accused told me that he was driving at about 60 Kilometers per hour at the time of the accident. He however maintained that he did not ignore the lights and hazards from the parked vehicle.

This was the evidence by the defence and they closed their case.

As stated earlier I warn myself from the outset that the onus rests on the prosecution to prove the charge against the accused beyond all reasonable doubt. I carefully considered all the evidence that is before me. It is not in dispute that A1 was involved in an accident and had ran over the deceased. Whilst the deceased was lying on the road, A2 failed to avoid the deceased and

he was dragged underneath the car of the accused for a short distance. When the deceased was removed from underneath the car he was gasping.

Taking into account the fact, that Lubinda Lubasi had hit him into the deceased first and then A2, followed the question that arises is, can the resultant death be attributable to both of them? To assist me resolve this vexing question, I have turned to the case of **Ernest Mwaba vs The People (1987) ZR. 19** which was an assault case and a number of people were involved in assaulting the deceased. The victim subsequently died and the Supreme Court in addressing the issue as to who could the resultant death be attributed to held as follows:

“(i) where joint adventurers attack the same person, then unless one of them suddenly does something which is out of line with the common scheme and to which he alone the resulting death is attributable, they will all be liable.

*(ii) where the evidence shows that each person actually participated in an assault then they are all **Crimes Participes**. The fact that other persons may have also assaulted the deceased at the 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 & Another vs Regina (1967) 2 ALL ER**, which was referred to in the **Ernest Mwaba case**, it was held that:

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

The wisdom to be gleaned from the above two cases in my view is that in the case of assault for example if one or more people participated in the assault and the victim dies, that death is attributable to all those involved because there was more or less equal participation in the assault. The cumulative effect

is that they killed a person. They are all liable as it is not necessary to show who struck the fatal blow.

Turning to the case at hand Lubinda Lubasi had hit into the deceased and thereafter the accused. These facts are not in dispute. Applying the reasoning in the ***Ernest Mwaba and Mohan*** aforecited it is immaterial which person among the two actually caused the death of the deceased. They are both equally responsible and equally liable.

I find that the accused was driving in a manner in which he was not foreseeing actual or potential danger. He failed to keep a proper look out on the road.

For reasons advanced in the preceding paragraphs I am satisfied that the prosecution have proved all the essential ingredients of the offence beyond any reasonable doubt. The accused is liable for causing the death of the deceased by driving dangerously.

I therefore find the accused guilty as charged and convict him accordingly.

DELEVERED AT LUSAKA THIS 16TH DAY OF MARCH, 2015



Judge Betty Majula Mung'omba
HIGH COURT