

**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA  
(Criminal Jurisdiction)**

**HP/42/2015**



**BETWEEN:**

**THE PEOPLE**

**Versus**

**NASSON KASONKOMONA  
HAGGAI BANDA**

**CORAM: HONORABLE JUSTICE MR. MWILA CHITABO, SC**

**For the State: Mrs. A.K. Mwanza & Mrs. E. Mulele – State  
Advocate**

**For the Accused: Mr. M. Sinyangwe of Messrs Douglas &  
Partners**

---

**R U L I N G**

---

**Legislation referred to:**

- 1. Section 200 of the Penal Code chapter 87 of the Laws of Zambia*
- 2. Section 291 (2) of the Criminal Procedure Code Chapter 88 of the Laws of Zambia*

**Cases referred to:**

- (1) The People vs Japau (1967) ZR 95*

The accused stand charged of the charge of Murder contrary to section 200 of the Penal Code<sup>1</sup>. The particulars of the offence state that on unknown dates but between the 13<sup>th</sup> and 22<sup>nd</sup> day of September, 2014 in Lusaka District and Province of the Republic of Zambia, jointly and whilst acting together did murder one **DUKE MTONGA**.

The Accused pleaded not guilty.

The prosecution called 10 witnesses.

**DW1** – was **Edson Banda**; 50 years of Block IC Mukango Barracks, Deputy Headmaster at Kenneth David Kaunda Primary School. The essence of his evidence is that on 13<sup>th</sup> September, 2014 between 6 – 7 hours he discovered a break in at the school in respect of his office. It was discovered that a desk computer was missing.

A report was made at Palabana police post. Two police officers were assigned to investigate the break in and theft, namely Inspector Mtonga and Constable Kahare. The officers picked one firearm from the armory. They then proceeded to Mukango Barracks.

At the gate Lance Corporal Kasonkomona a sentry allowed them to proceed. In the course of their investigations in the barracks, they met 3 soldiers one of them inquired if they had declared the weapon at the gate. They then proceeded to the office of the Duty Officer Mr. Liboma to whom the police officers explained their mission. The army officer Mr. Liboma authorised them to proceed with their investigations.

On their way out, Corporal Kasonkomona ordered them to stop at the barrier and ordered them to come out of the vehicle. He demanded to know why they (the police) had not declared the weapon when entering the barracks. The police officers were ordered to lie down facing up and fire arm confiscated.

The witness was also instructed to lie down. Kasonkomona (A1) then instructed Lance Corporal Banda (A2) to kick the police officers. Banda started kicking the police officers and water was poured on them from a hose pipe.

At that time the Regiment Commander was driving out. He identified the witness and inquired as to what was happening. He explained that other 2 people were non uniformed officers on duty. He regretted the incidence and asked them to stand up.

The firearm was handed back to the police and they were rescued. Later Constable Kahare recorded a statement from him in respect of the office breaking at school. He later on another day informed Lt Liboma about the beatings of the officers at the Barracks.

On 25<sup>th</sup> September, 2014 he attended an identification parade at Lusaka Central police where he identified A1 and A2. The witness then proceeded to identify A1 and A2 in the dock.

**Cross examined by Mr. Mutofwe** – the witness testified that he was able to see what was happening to the 2 police officers when they were ordered to lie down. He did not observe any injuries on Constable Kahare, Inspector Mtonga had a swollen face.

**PW2** was Lt. Ignatius Liboma, 36 years; Mukango Barracks Lusaka a Government Officer. He testified that on 13<sup>th</sup> September, 2014 he was on duty. He received a report to the effect that there had been a break in at Mukango Basic School and also at the market. A computer was stolen from the school and some groceries had been stolen from the market.

Around mid-day to 14 hours, he received a telephone call to the effect that 2 civilians armed with an AK47 were found at the market and later taken to the main gate of the barracks. He went to the main gate; he found the 2 men who identified themselves as police officers from Palabana Police. He verified that they did not appear to know about the proceedings to follow before entering a military institution if one had a firearm. He educated them about the procedure explaining that if one entered into a sensitive military institution like the barracks whilst armed that person might be mistaken to be a hostile force.

They updated him on the progress of their criminal investigations and he ordered their release.

The following day about 10 to 11 hours he met Mr. Banda PW1 who narrated that they had been harassed. He then identified A1 and A2 as the persons or sentries who had been on duty on the material day.

**Cross examined by Mr. Mutofwe**, witness said PW1 Mr. Banda did not explain in detail the harassment.

**PW3 was Lt. Col. Mwape Chembe Nsofu;** 46 years, a military officer of Mukango Barracks. He testified that on 13<sup>th</sup> September 2014 between 6 – 7 hours he received a call from one of the teachers from Kenneth Kaunda David Basic School that there had been a break in at school.

Later in the day as he was about to leave barracks he noticed someone kneeling down; he identified him as Mr. Banda, Deputy Head Master (PW1). He also noticed 2 men lying down. He made inquiries and he was briefed that the men lying down were police officers who were conducting investigations in the barracks without declaring the weapon (or following proper procedure).

He ordered their release. He noticed that the police officers were wet and suggested that they go back to their station, but the most senior said they were on duty and they would proceed with their investigations. He did not establish the names of the officers. The sentries who were on duty were Kasonkomona (A1) and Banda (A2). He proceeded to identify them from the dock.

**Cross examined by Mr. Mutofwe** – the witness said the most senior officer said they would proceed with investigations. The officers had no complaint.

**PW4 was Chrispin Mwamba;** 38 years, No. 9371 Detective Inspector, Chalimbana Police. He recalled that on 25<sup>th</sup> September, he was detailed to attend a post mortem on the body of the late James Duke Mtonga at University Teaching Hospital by Dr. Victor Tellendly.

Body was identified by Mr. Wellington Mtonga the brother to deceased. Doctor said the deceased died of respiratory failure. He was not the investigating officer.

**PW5** was **Anne Zulu**; 45 years, unemployed of Palabana Institute, Lusaka. She recalled that on 13<sup>th</sup> September, 2014 about 10 hours she saw her husband Mr. Mtonga (since deceased). He was bleeding from the mouth and nose. He said he was following a case and he was beaten by soldiers at Mukango Barracks. His clothes were wet. (Witness later on stated that she saw husband at 13 hours).

He told her he had been given medication. He got sick the same day complaining of headache, back ache and chest pains. She observed some bruises on both the left and right ribs. Before that day, he was in good health.

On 22<sup>nd</sup> September, he was having difficult to speak and she took him to the clinic where he shortly thereafter died. He started work in 1987. Before he died he was taking medication.

**Cross examined by Mr. Mutofwe** – she said she saw her husband between 10 – 11 hours around midday or afternoon. The husband was bleeding profusely and the clothes were drenched in blood. She did not have the shirt she had mentioned; it was at home.

Deceased never used to suffer from any illness during 20 years of marriage. At one time he used to drink, but he stopped completely 10 years previously.

She was not aware of cause of death. The husband did not tell her he was suffering from pneumonia. Sickness was getting worse from 13<sup>th</sup> to 22<sup>nd</sup> September, 2014. He went to clinic on 13<sup>th</sup> September, 2014.

**Reexamined by Mr. Akapelwa** – witness stated that deceased was having sleepless nights. She saw husband about lunch hour on 13<sup>th</sup> September, 2014.

**PW6 was Constable Kahare Mwala** – 40 years, No. 30561 Palabana Police. He recalled that on the 13<sup>th</sup> September, 2014 he received report that Kenneth David Kaunda Primary School had been broken into from Mr. Banda (PW1) and his colleague he could not remember.

He launched investigations. They went to the school in the company of the two teachers (PW1) and another Chief Inspector Mtonga. Later he received information that another break in had occurred at the market.

At the market they were confronted by some soldiers who wanted to find out why they were armed in a military barracks. They were led to the Duty Officer Lt Liboma (PW2). They were allowed to proceed with their investigation.

When they reached the gate, 2 soldiers disarmed them and started kicking and beating them whilst Mr. Banda was made to squat. Later a senior man went there and ordered their release. They proceeded to Palabana Police and statements were recorded.

From the date of the incidence, Chief Inspector Mtonga was complaining of chest pains, headache and general body pains.

On 25<sup>th</sup> September, 2014 he was called at Lusaka where he identified two soldiers A1 and A2 at an identification parade. The two soldiers were the sentries who beat them and poured water on them from a hose pipe and they were made to roll on the ground. His colleague was bleeding from the nose and clothes were wet.

He met deceased following day on 14<sup>th</sup> September, 2014 who told him he was not feeling well. They bypassed each other; he was going to the clinic. Witness was also not feeling well, he had swollen forehead and felt body pains. He was issued with medical report ID1. He was able to identify assailants as he had opportunity to observe them. He came to know their names as Kansokomona (A1) and Haggai Banda (A2). A1 was the one kicking them on instructions from A2.

**Cross examined by Mr. Mutofwe** – the witness said he received the medical report on 14<sup>th</sup> September, 2014. He had known Inspector Mtonga for 2 years. He used to drink.

**Cross examined by Mr. Sinyangwe** – witness said he has been an officer for 18 years. They made a mistake not to have declared the firearm when entering the barracks. It was not right to be beaten and soaked. He was aware about the cause of death of deceased.

There was no reason why he reported case on 14<sup>th</sup> September, 2014 and not 13<sup>th</sup> September, 2014. They were still confused.



**Re – examined by Mr. Akapelwa** – the witness stated that they were not mistaken for thieves. PW1 was well known to the soldiers as Deputy Headmaster of the school.

**PW7 was Det. Chief Inspector Fanwell Chipepo**; 50 years number 6637 Lusaka Division / Rural Zambia Police

On 23<sup>rd</sup> September, 2014 he was detailed to go and apprehend suspects in a murder case from Mukango Barracks who were on duty as sentries on 13<sup>th</sup> September, 2014. He was handed 2 suspects he came to know as Kansokomona and Banda. He then conveyed them to Lusaka Central Police. They were being investigated for assault and murder.

He handed the suspects to the Criminal investigations officer Mr. Timba (A1 Kasonkomona was mistakenly referred to as Banda and (A2) Banda was mistakenly referred to and identified as A1. It was his first time to see the Accused. (The witness later realised he had swapped the names).

**PW8 was State Forensic Pathologist Dr. V. Tellendly**; 47 years Police Pathologist. He is a medical Doctor, a degree holder (Ukraine) He has been practicing since 2001. He conducted post mortem on deceased body. He had submitted report of his findings ID2 dated 25<sup>th</sup> September, 2014 and it was admitted as exhibit P2.

His findings were that there were no external injuries on the body. Deceased had a chronic disease of the liver generally due to chronic alcohol abuse. That condition however was not dangerous to life.

The cause of death was due to pneumonia i.e inflammation of the lungs. He did not find any other reason for cause of death. Pneumonia develops due to many reasons:

- (1) Weak immune system
- (2) Cold weather may lead to fever and development of pneumonia (children and old people easily suffer from pneumonia)
- (3) A chronic disease may cause pneumonia e.g liver problem.
- (4) It can also be infectious

There are a lot of things that can induce pneumonia as illustrated above. It can be trauma. Witness did not find any evidence of trauma. He was not in a position to state what caused pneumonia in this particular death.

The defence did not cross examine

**PW9 was Det. Inspector Aaron Banda**; 42 years, No. 9343 Lusaka District, (C.I.D). He recalled that on 25<sup>th</sup> September, 2014 he was detailed to conduct an identification parade in a murder case. He was given 2 suspects. The 2 Accused persons were picked by Edson Banda PW1 Const. Kahale Mwala (PW7) – there was no complaint from any of the Accused and the parade was dismissed. A1 and A2 were identified from the dock as the suspects who were picked and identified by PW1 and PW7.

**PW10 was Senior Superintendant Mudenda Timba**; 47 years, No. 1747 police officer, 2<sup>nd</sup> DC10, Lusaka. He testified that on 13<sup>th</sup> September, 2014 he received a report of 2 police officers being

assaulted namely Constable Mwala Kahale and Inspector Dube Mtonga. He guided officer in charge to issue to police officer with medical reports so that they could get medical attention.

He received updates that Inspector Mtonga was not feeling well up to date. He died on 22<sup>nd</sup> September, 2014. His body was conveyed to the University Teaching Hospital and 2 suspects A1 and A2 were subsequently apprehended, charged and arrested of murder contrary to section 200 of the Penal Code.

He made up his mind to arrest the 2 after the outcome of the identification parade. Both Accused denied the charge. The medical report for Constable Kahale was admitted as exhibit P1.

**Cross examined by Mr. Mutofwe** – the witness stated that medical reports were issued on 13<sup>th</sup> September, 2014. Inspector Mtonga might have passed through the office after 13<sup>th</sup> September, 2014. He was unwell from time of assault up to his death.

He made up his mind to charge and arrest the Accused after considering

- (1) Constable Kahale's testimony to the assault
- (2) Commanding officers evidence that he found officers lying prostrate
- (3) The evidence of the Deputy Headmaster to the fact of assault (so medical report was not the only evidence to establish assault)

The officers were assaulted while on duty. The doctor explained to him his findings and he was satisfied the offence of murder had been established because the deceased died within a year and a day after he was assaulted.

The word assault does not appear in the post mortem report.

**Re-examined by Mr. Akapelwa** – witness testified that there were 2 eye witnesses to the assault.

The State rested its case.

At the close of the prosecution case Defence Counsel made written submissions. The main thrust of the submission was that the State has failed to prove all the ingredients of murder beyond all reasonable doubt. They referred to the case of ***The People v Japau<sup>1</sup> (1967) ZR 95*** where it was held that a submission of no case to answer may be properly upheld if an essential element of the alleged offence has not been proved, or when the prosecutions' evidence has been so discredited by cross examination or so manifestly unreliable that no reasonable triable could safely convict.

They pointed out that the evidence of the Forensic Pathologist did not attribute the cause of death to assault. The cause of death was due to respiratory arrest due to pneumonia. It was on this basis that they urged the court to acquit the Accused at this stage.

I am indebted to both counsel in the manner they executed their respective roles of prosecution and defence.

I am further indebted on the submissions of the defence. I am sure the prosecution could have filed their submission but to the indisposition of the Learned Mr. Akapelwa. For a case for no case to answer to be sustained the following ingredients have to be proved:

- (1) That the Accused caused the death of a human being;*
- (2) The death was caused with the intention to kill or cause grievous bodily harm;*
- (3) The death has to occur within 1 year and a day from the date of the occurrence of the event causing the death.*

I warn myself at the outset that the burden of proof at all times rests on the prosecution to prove its case and all ingredients of the offence beyond all reasonable doubt. There is no duty on the part of the Accused to prove his innocence.

I further address my mind to the requirement that any doubt raised in the evidence must be resolved in favour of the Accused.

I will now look at the ingredients of the offence.

**(1) Causing the death of human being**

There is evidence from PW5 Anne Zulu the wife to the deceased that she rushed the husband to the clinic on 22<sup>nd</sup> of September, 2014 where he shortly thereafter died.

PW4 Detective Inspector Mwamba attended the autopsy on the body of the deceased when State Forensic Pathologist Victor Telendiy conducted the post mortem; his findings were that Accused died of

respiratory arrest due to pneumonia. The body of the deceased was identified by the brother of the deceased W. Mtonga as reflected in the post mortem report exhibit P2.

I therefore find as a fact that a human being **Inspector Duke Mtonga** was killed. This ingredient has been proved.

**(2) Caused death with intention to kill or cause grievous bodily harm (i.e malice aforethought)**

The evidence of alleged assault came from PW1 **Edson Banda** to the effect that he saw deceased and Constable Kahale PW7 being kicked by A1 on instructions from A2. PW7 also confirmed being assaulted by Accused. The wife of the deceased stated that she saw the husband about lunch hour. He was bleeding profusely and his shirt was drenched in blood. She said she observed injuries on both left and right ribs and in the face.

The post mortem report does not show such injuries. Even giving allowance that time had passed from date of alleged assault on 13<sup>th</sup> September, 2014 up to the date the autopsy was conducted on 25<sup>th</sup> September, 2014, the evidence of PW7 Constable Kahale was that he observed no physical injuries on the deceased.

Even PW1 did not observe any injuries on the deceased.

In respect to the evidence of PW1 and PW7 on the allegation of the danger of relying on the evidence of the said 2 witnesses; these witnesses were victims of the harassment and alleged assault and I therefore place them in the category of suspect witnesses with an

interest to serve since they were both victims of the alleged assault and harassment. There must be something more or corroborative or put simply some independent evidence that may tend to confirm the evidence of the said witnesses.

The evidence of PW1 and PW5 cannot corroborate each other for the reason I have just given. The evidence of PW7 the deceased's wife is also evidence which is to be received and treated with caution, being a spouse to the deceased she has an interest in the matter and her evidence must be treated with caution as she falls in the category of suspect witnesses.

**PW2 Lt. Ignatius Liboma** – who had occasion to talk to both deceased and Inspector Kahale PW7 and PW1 did not observe any injuries on deceased nor did he receive any complaint. There was equally no evidence from Lt. Colonel Mwape Chembe Nsofu PW3 to the effect that the deceased had suffered any physical injuries.

His evidence was to the effect that when he noticed the clothes of PW1 and PW7 were wet he suggested that the officers go back to the station which deceased declined and said they would proceed with investigations.

On the totality of the evidence on the aspect of assault I find nothing more to establish the allegation of assault. I am further fortified in my view from the absence of any such evidence in the post mortem report nor indeed from PW8 the Pathologist that the pneumonia was caused by trauma.

The ingredient of accused having assaulted the deceased has not been proved. In short there is no credible or cogent independent evidence to conclusively establish and conclude that the Accused person assaulted the deceased with intention to kill or cause grievous bodily harm.

There was evidence from PW1 and PW7 that the deceased and PW7 were soaked with water, this was confirmed by PW3. The evidence of the State Forensic Pathologist was to the effect that the deceased was suffering from liver chronic disease due to chronic alcohol abuse. It was his evidence that pneumonia could be prompted by various factors including

- (1) Weak immune system
- (2) Cold weather
- (3) A chronic disease (like diseased liver due to chronic alcohol abuse
- (4) Trauma

It was his very clear testimony that he could not determine what caused the pneumonia. Even if it has been established that the deceased with PW7 were soaked with water, there is no evidence that that was the act that prompted the pneumonia. This doubt has to be resolved in favour of the Accused.

Having so resolved, I am satisfied that on the authority of **Japau v The People**<sup>1</sup> an essential ingredient in the charge of murder has not been established. It would not be necessary to examine the



issue whether the deceased died within one year and a day following an unlawful act on the part of the Accused.

In the circumstances I find that the prosecution has failed to establish a prima facie case against the Accused. Submission of no case to answer is upheld.

This is in line with the provisions of section 201 (1) of the Criminal Procedure Code chapter 88 of the Laws of Zambia.

I accordingly acquit both Accused persons of the charges of murder contrary to section 200 of cap 87 of the Laws of Zambia and I order that the Accused be set free forthwith and I set them at their liberty.

Delivered this *20th* .....day of April, 2015



---

**Mwila Chitabo, SC**

**Judge**