

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

**HP/268/2014**

**BETWEEN**

**THE PEOPLE**

**Versus**

**SEBASTIAN MICHELO**



**Before the Hon. Mrs. Justice A.M. Sitali in open court on the 4<sup>th</sup> day of June, 2015**

***For the State*** : ***Mrs. M. M. Bah-Matandala,***  
***Senior State Advocate***

***For the Accused*** : ***Mr. C. Siatwinda,***  
***Legal Aid Counsel***

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

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**Cases referred to:**

1. Woolmington v. DPP (1935) A.C 462
2. Moonga v. The People (1969) ZR 63
3. Mwewa Muroso v. The People (2004) Z.R. 207
4. The People v. Inonge Anayana & Lubinde Sinjambi (2010) Z.R 263
5. George Musongo v. The People (1978) Z.R. 266
6. Kambarange Kaunda v. The People (1990) ZR 215



**Legislation referred to:**

- 1. The Penal Code Chapter 87 of the Laws of Zambia, sections 200 and 204 (a).**

Sebastian Michelo, the accused, stands charged with the offence of murder contrary to Section 200 of the Penal Code Cap, 87 of the Laws of Zambia. The particulars of the offence are that Sebastian Michelo on dates unknown but between the 26<sup>th</sup> and 27<sup>th</sup> day of February, 2014 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, did murder Gerald Mweemba.

The accused pleaded not guilty.

The prosecution called five witnesses. PW1 was Ephraim Mweemba; who testified that on 27<sup>th</sup> February 2014 in the morning, he left his home to go to his father's house. As he approached his father's house he saw a bicycle near a hammer mill approximately 60 meters away. He also found sneakers on the handles of the bicycle and a person lying on the ground. As it was a bit dark, he lit the torch on his phone and when he moved closer he noticed that it was his younger brother Gerald Mweemba who was lying on his back with his neck tilted to the side. PW1 said he noticed that he had a deep wound on the forehead into which one could fit a hand.

PW1 said he went to wake up his father Jeremiah Mweemba and together they went to where the body was. PW1 testified that he reported the matter to the police at Shibuyungi police station. The police visited the scene and took pictures of the body and of the scene. PW1 testified that



he last saw the accused alive on the day before he found his body lying on the ground and he was in good health.

PW1 testified that the police picked up the body and took it to the University Teaching Hospital (UTH) mortuary where they were told to go back on 28<sup>th</sup> of February 2014, for a post mortem examination. On 28<sup>th</sup> February 2014, he identified the body of the deceased in the presence of Mr. Muhau, a police officer. A postmortem was conducted by a doctor at UTH. PW1 identified the photographs as those of the deceased, his young brother in court.

PW2 was Dailes Tembo, who testified that on 26<sup>th</sup> February 2014 around 23:00 hours she was sleeping in the house with her husband Michael Tembo, when Sebastian Michelo came and said that he had come from Jeremiah Mweemba's house and had beaten Gerald Mweemba and left him lying on the ground. PW2 went on to testify that Sebastian Michelo then pushed the door open and slept in the house. In the morning her sister in law came and informed her that there was a funeral at Jeremiah Mweemba's house and that Gerald Mweemba had died. When Sebastian heard this, he jumped up and went to the bedroom. PW2 testified that she left to fetch water and when she returned she found that Sebastian Michelo had gone. PW2 further testified that she and her husband decided to inform her grandparents, Mr. and Mrs. Mapalamungu of what Sebastian had told them.

PW2 testified that she had last seen Gerald Mweemba a week before he died and that he appeared to be in good health. She testified that Gerald's father and her father were brothers. PW2 also testified that the



accused is her husband's grandfather and that she has known him since 2007. PW2 identified the accused in court.

In cross examination, PW2 testified that she remembers well what transpired on 26<sup>th</sup> February, 2014 and has not left out or added anything. PW2 also testified that she gave a statement to the police dated 2<sup>nd</sup> March 2014. She identified the statement in court.

In further cross examination, PW2 testified that the accused appeared drunk on the night when he went to her house and that she had met the accused at a tavern earlier in the day. She also testified that the accused was still in the house when her sister in law Carol came to inform them that Gerald Mweemba had died.

PW3 was Michael Moya, he testified that in February, 2014, around 23:00 hours, Sebastian Michelo went to his home from Jeremiah's place. PW3 said at the time, he was sick and his wife asked who had pushed the door. Sebastian answered that it was him. He then informed them that he had beaten up Gerald Mweemba and left him lying on the road. The door was about 2 to 3 meters from where he had slept. After pushing the door, Sebastian entered and slept in the house. PW3 testified that they permitted him to sleep in the house because he is his grandfather and he had known him for about three (3) years.

PW3 testified that he knew Gerald Mweemba for almost five years because he had been his neighbor. He also testified that he had last seen Gerald four days prior to the incident and he had appeared fine to



him. PW3 also testified that he never saw Gerald again as he died. PW3 identified the accused in court as Sebastian Michelo.

PW3 further testified that the following morning around 06:00 hours when his wife, PW2 was about to go outside, his elder sister came and informed them that Gerald Mweemba had died. At the time, Sebastian Michelo was still in the house and he left after that.

In cross examination, PW3 stated that when the accused went to their house in the night he was drunk. He reiterated that the accused told them that he had come from Jeremiah's house and that he had beaten Gerald Mweemba and left him lying on the road.

PW4 was Muhau Siwisha who testified that on 27<sup>th</sup> February, 2014 he was based at Shibuyungi police station when he received a report from Ephraim Mweemba of Shibuyunji village in Shibuyungi district that his brother Gerald Mweemba was found dead within his father's premises. As scenes of crime officer he went to the scene with Detective Inspector Kuonga and they found the body lying on the ground covered in a pink duvet. He took photographs of the scene. He then removed the duvet from the body and checked it physically. He saw that the body was facing upwards with his head facing to the right side. The body had a deep cut on the left side of the head.

PW4 testified that he took a photograph of the cut before they picked up the body and took it to UTH Mortuary. PW4 went on to testify that on 28<sup>th</sup> February 2014, he was present when a post mortem examination was conducted on the body of the deceased by the pathologist Dr Victor



Telendy. Later, the body was taken back to Shimakumpa village for burial. PW4 identified in court the photo album containing the pictures taken of the deceased.

PW4 testified further that on 2<sup>nd</sup> March, 2014, they received information that led to the apprehension of the suspect. Inspector Katampi and he went to Shameno village where they found the suspect hiding in a thicket. He was apprehended and taken to Shibuyungi police station. PW4 interviewed the suspect whom he came to know as Sebastian Michelo, and who said he was also called Zebron. On 3<sup>rd</sup> March, 2014, the suspect led him to the scene of the crime. He was not warned and cautioned. PW4 identified the postmortem report which was prepared by the pathologist.

In cross examination, PW4 testified that he did not notice any signs of struggling at the scene where the body was found and that the body was found about 10 meters away from an abandoned house and 30 meters away from his father's house. He also found a bicycle at the scene which belonged to the deceased. PW4 testified that there was only one wound on the head of the deceased.

PW5 was Maswabi Kuonga the arresting officer who testified that on 27<sup>th</sup> February 2014, he was on duty at Shibuyungi police station when he received a report that a male person, Gerald Mweemba aged 32 years old of Shimakumpa village was found dead in the village. Acting on the report, Lusaka Division command was informed through the Chief Investigations Officer rural. PW5 testified that he rushed to the scene in the company of Inspector Muhau and other officers. Upon arrival, they



found the body of the deceased lying on the ground in the premises of Mr. Jeremiah Mweemba in Shimakampa village. They examined the body and observed that it had a deep cut on the head. There was a bicycle with sneakers on it about 5 meters away from the body. They were identified as belonging to the deceased. The body was taken to UTH mortuary where a postmortem examination was conducted on the body of the deceased in the presence of Detective Inspector Muhau.

PW5 further testified that investigations were conducted and one suspect was apprehended and taken to the police station. The suspect whom he came to know as Sebastian Michelo also nicknamed Zebron was warned and cautioned in the Tonga language which he appeared to understand well. Sebastian Michelo then freely took them to the scene of the crime. Photographs were taken of the suspect demonstrating how the crime was committed. PW5 identified the photographic album containing the photographs which were taken during the visit to the scene of the crime with the accused. PW5 also identified the accused in court as Sebastian Michelo as well as the postmortem report prepared by the pathologist.

In cross examination, PW5 testified that the accused was apprehended in March 2014. The next day he was taken to the scene of the crime so that he could explain what happened. PW5 denied that he set up the deceased so that the relatives of the deceased could give him cattle or that he deprived the accused of food and sleep or pestered him to admit that he committed the offence. He denied that he threatened to shoot him dead if he did not admit the charge. PW5 testified that he personally warned and cautioned the accused in Tonga. He was cautioned before



going to the scene of the crime and he was also warned and cautioned at the time he was charged and arrested for the offence of murder.

That was the prosecution's case.

At the close of the prosecution case, I found the accused person with a case to answer and put him on his defence. The accused elected to testify on oath but did not call any witnesses.

In his defence, Sebastian Michelo the accused testified that on 26<sup>th</sup> February 2014 he was at home around 15: 00 hours when he went to fetch medicine from his maize field. In the process, the people from the neighborhood watch in the presence of Mr. Kuonga a police officer came and asked when he was last at his wife, Elina Jeremiah's place. The accused said that he had divorced Elina Jeremiah some time back and that she lived at Jeremiah's place. The police officer forced him to accompany him to Shibuyungi Police Station. The accused further said that at the police station he found four police officers and that one of them pointed a gun at him and forced him to admit that Elina Jeremiah was still his wife.

The accused said that on 27<sup>th</sup> February, 2014 he went with the police officers in their motor vehicle to Shameno village in Mumbwa district. He went on to testify that in Shameno village, the police officers continued asking him about his former wife but he insisted that he had divorced her a long time ago. From Shameno village, he was taken to Jeremiah Mweemba's place and then to his house which was searched.



After that they went back to Shibuyungi police station where he was informed that he had murdered Gerald Mweemba. He said he told the police that that he knew nothing about the murder of the deceased and that he last saw Gerald Mweemba in 2013 as he (the accused) was sick the whole of 2014. He said that the police officers one of whom he knew as Mr Muhau gave him a piece of paper to write his name on and also made him to sign on a blank page in a book so that Jeremiah Mweemba could give them cattle.

The accused said he denied that he went to Dailesi's house on 26<sup>th</sup> February, 2014 and said that he only passed through her house two weeks before the murder of Gerald Mweemba in February. He said this was after he had drank some beer. He went on to state that he could not have fought with Gerald Mweemba because he did not have any difference with him. He further stated that the photographs of him at the scene of the crime were taken without his knowledge.

In cross examination, the accused testified that he knew Gerald Mweemba who was PW2's cousin and that they lived in the same area. The accused also said that he had met Gerald Mweemba only once when he was dating Elina Jeremiah. He said Gerald Mweemba had done nothing wrong to him. The accused admitted that PW3 is his grandson and that he has a good relationship with him. He testified that PW2 and PW3 lied when they said that he confessed to them that he had beaten Gerald Mweemba because of the money they owed him.

That was the case for the defence.



At the end of the trial neither counsel for the prosecution nor defence counsel made any submissions. I have carefully considered the evidence adduced by the prosecution witnesses and by the accused.

The accused is charged with the offence of murder contrary to section 200 of the Penal Code chapter 87 of the Laws of Zambia. The burden to prove the charge of murder against the accused lies with the prosecution who must establish the guilt of the accused beyond all reasonable doubt: see Woolmington v. DPP (1), Moonga v. The People (2) and Mwewa Murolo v. The People (3). Any doubt raised in my mind regarding the guilt of the accused will be resolved in his favour.

Section 200 of the Penal Code, Chapter 87 of the Laws of Zambia, under which the accused is charged provides that:

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

Section 204 of the Penal Code, Cap. 87, defines what constitutes malice aforethought.

In order for the prosecution to succeed and secure the conviction of the accused on a charge of murder under section 200 of the Penal Code, Cap. 87 in the present case, I must be satisfied beyond reasonable doubt that it was the accused person who caused the death of the deceased; that it was with malice aforethought that he caused the death of the deceased; and that it was as a result of an unlawful act or omission of the accused that the deceased died.



In the present case, there is no dispute that Gerald Mweemba died as a result of the wound that was inflicted to his temple when he was assaulted as revealed by the postmortem report. What is disputed is the person who inflicted the fatal injury on his body. Thus the question I have to determine is whether or not it was the accused person who murdered the deceased.

A careful scrutiny of the evidence before me reveals that the prosecution case against the accused centers mainly on the testimony of PW2 Dailes Tembo who told the Court that on 26<sup>th</sup> February, 2014 around 23:00 hours the accused went to her house and said he had come from Jeremiah Mweemba's house and that he had beaten Gerald Mweemba the deceased and left him lying on the ground. The accused spent a night at the house of PW2. The next day early in the morning PW2 was informed by her sister in law that Gerald Mweemba had died. PW2 then reported the matter to her grandparents.

PW2's testimony is confirmed by PW3 her husband who said on the night of 26<sup>th</sup> February, 2014, he was sleeping in his house when he heard someone push open the door to his house. His wife PW2 asked who was at the door and the accused identified himself to her. PW3 said he heard the accused tell PW2 that he had come from Jeremiah Mweemba's place and that he had beaten Gerald Mweemba and left him lying on the road. PW3 said they permitted the accused to sleep in their house because he is his grandfather. PW3 further said the next morning his elder sister informed them that Gerald Mweemba had died and that the accused was still in the house at the time. The testimony of PW2 and PW3 was not discredited.



The prosecution case therefore rests on the confession made by the accused to PW2 in the hearing of PW3. It is trite law that the court may convict on the basis of a confession statement provided that it is proved by the prosecution beyond reasonable doubt that the statement was made freely and voluntarily and that it was not induced by any promise, favour or any menace or under fear to confess. In the case of The People v. Inonge Anayana & Lubinde Sinjambi (4) the court held, inter alia, that the rule governing admissibility of extrajudicial statements by the accused persons may be stated shortly as being that such statement is not admissible in evidence against the maker upon his trial on a criminal charge, unless it is proved beyond reasonable doubt to the presiding Judge that the statement was made without any inducement by a person in authority whereby the accused was led to believe that it would be his duty or to his temporal advantage to make a statement or it would be to his temporal disadvantage not to make a statement when the opportunity became available to him. Thus voluntariness is a condition precedent.

In George Musongo v. The People (5) the confession in question was made to an auditor and it was alleged by defence counsel that he ought to be regarded as a person in authority who like any other person in authority must have administered a warn and caution statement to the appellant before questioning him. The court held that whereas failure on the part of a police officer to administer a caution constitutes an impropriety in respect of which a trial court may exercise its discretion in favor of the accused, similar failure on the part of any other person in authority (or indeed anybody else) does not necessarily amount to an impropriety as it cannot reasonably be expected that a person, other than a police officer,



should of necessity appreciate the niceties of what should, and should not, be done in such circumstances. In all cases however, the issue must always be whether the accused was so unfairly or improperly treated in all the circumstances that the evidence ought to be rejected.

In the present case the accused made an unsolicited admission to PW2 in the hearing of PW3 that he had beaten the deceased and left him lying on the ground in circumstances where he was not compelled to do so. The accused made the statement to PW2 and PW3 without a process of arrest in mind. Further PW2 and PW3 are not persons in authority and are related to the accused person and so there is no question that the admission he made was induced by any promise of favour or out of fear. If anything from the testimony of PW2 and PW3 the confession was made quite spontaneously almost as soon as he entered the house of PW2 and PW3.

The accused person's assertion that PW2 and PW3 lied against him because they owed him money was first raised by the accused in cross examination and no questions to that effect were put to the two prosecution witnesses. Having observed the demeanor of PW2 and PW3, I found both of them to have been forthright in the manner they testified. They did not prevaricate in answering the questions put to them in cross examination. Their testimony was not discredited in any way. On the other hand, having observed the accused as he testified, I found that he was not forthright in his testimony and prevaricated in answering questions in cross examination. I, therefore, accept the testimony of PW2 and PW3 that the accused informed them that he had beaten



Gerald Mweemba, the deceased, at Jeremiah Mweemba's place and left him lying on the ground.

The deceased was found lying dead on the ground in a pool of blood in his father Jeremiah Mweemba's yard in the early hours of 27<sup>th</sup> February, 2014 by PW1 his brother. This situation was consistent with the accused person's confession to PW2 and PW3 that he had beaten the deceased and left him lying on the ground unconscious. Further, PW4 the arresting officer told the court that the accused was apprehended on 2<sup>nd</sup> March, 2014 from Shameno Village a neighbouring village from Shimakampa Village where the deceased lived. According to PW4 the accused was found hiding in a thicket. Further, PW4 and PW5 said that the accused subsequently led them to scene of the crime and demonstrated to them how the crime was committed.

Based on the prosecution evidence I am satisfied and find as a fact that it was the accused person Sebastian Michelo who assaulted the deceased on his head and thereby caused him a serious injury from which the deceased person died almost instantly on 26<sup>th</sup> February, 2014, according to the evidence on record. I further find that the nature of the injury from which the accused died is confirmed by the post mortem report which reveals that the cause of the death of the deceased was crushing of the brain due to a chop wound of the head. The post mortem report shows that the deceased had a chop wound on his left temporal bone and that his brain was crushed. It is clear to me from the evidence that it was the accused person who delivered the fatal blow to the head of the deceased and that it was that blow which killed the deceased Gerald Mweemba.



Having found as a fact that the accused, Sebastian Michelo inflicted a fatal injury to the deceased's head, I find that malice aforethought has been proved by the prosecution in terms of section 204 (a) of the Penal Code, Chapter 87 of the Laws of Zambia which provides that:

*"204. Malice aforethought shall be deemed to have been established by evidence proving any one of the following circumstances:*

- (a) an intention to cause the death of or grievous harm to any person whether such person is the person actually killed or not;."*

This is because when the accused struck the deceased on the head, he must have intended to cause the death of the deceased or to do grievous harm to the deceased.

At this stage, I wish to address the issue of possible false implication of the accused which must be ruled out before a conviction can stand. In doing so, I considered the Supreme Court's guidance in the case of Kambarage Kaunda v. The People (6) where the court observed that:

*"Prosecution witnesses who are friends or relatives of the prosecutrix may have a possible interest of their own to serve and should be treated as suspect witnesses. The court should, therefore, warn itself against the danger of false implication of the accused and go further to ensure that danger has been excluded."*



In this case I am mindful of the danger of false implication of the accused by PW2 Dailes Tembo who was a cousin of the deceased. However, I note from the evidence on record that PW2 has not shown any possible motive to falsely implicate the accused in the commission of the crime he did not commit. In any case PW3 who supported the evidence of PW2 is a grandchild of the accused Sebastian Michelo. From the evidence on record I am satisfied that the danger of false implication of the accused by PW2 and PW3 has been eliminated.

From the evidence before me I am satisfied that the prosecution have proved beyond reasonable doubt the charge of murder against the accused, Sebastian Michelo. I, therefore, find him guilty of the offence of murder contrary to section 200 of the Penal Code, chapter 87 of the Laws of Zambia, and I convict him accordingly.

Delivered in open court this 4<sup>th</sup> day of June, 2015.



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**A. M. SITALI**  
**JUDGE**