

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

HJ/47/2016

B E T W E E N :

THE PEOPLE

VERSUS

YOHANE CHIRWA



Before Honorable Mrs. Justice M. Mapani-Kawimbe

For the People:

Mrs. A.N. Sitali – Deputy Chief State Advocate

Ms. C. Lupili – Senior State Advocate

Mr. M. Libakeni – State Advocate

Mr. W. Silwimba – State Advocate

For the Accused:

Mr. J. Phiri – Senior Legal Aid Counsel.

Mrs. S.C. Lukwesa – Senior Legal Aid Counsel

JUDGMENT

Cases Referred to:

1. Director of Public Prosecutions v. Lukwosha (1966) ZR 14 (CA)

Legislation and other Works Referred to:

1. Penal Code, Chapter 87.
2. Criminal Procedure Code, Chapter 88

Yohane Chirwa the accused stands charged with the offence of murder contrary to **section 200 of the Penal Code**.

The particulars of the offence allege that on 5th day of January, 2016 at Lundazi in the Lundazi District of the Eastern Province of the Republic of Zambia, he murdered **Elemiya Nkhoswe**. A plea of not guilty was entered following a medical doctor's opinion that the accused was not fit to take a plea.

Victoria Phiri testified as **PW1**. Her evidence was that sometime in January, 2016 she left her home to buy maize at Eva Ndolo's house. She was in the company of Yapatula Zimba. Along the way, they heard a noise coming from the road side and immediately saw Elemiya Nkhoswe the deceased walking towards them with blood oozing from the left side of his head. When PW1 and her friend asked the deceased what caused the injury, he told them that Yohane Chirwa the accused had hurt him.

The deceased asked PW1 and her friend for the directions to the accused's father's house. The following morning PW1 heard that the deceased had passed away. PW1 told the Court that she has known the accused for a very long time and she identified him in Court.

PW3 testified that he observed that the deceased's body had a deep cut on the left side of the head where blood was oozing from. The deceased was also bleeding from the nose and mouth.

PW3 told the Court that the deceased's father told him that his son was assaulted on 4th January, 2016 by the accused and later died the next day, as he was being taken to the clinic. PW3 also testified that he deposited the body of the deceased at Lundazi District Mortuary, while he detained the accused at Lundazi Police Station.

PW3 testified that on 7th January, 2016 he attended the post-mortem examination of the deceased at Lundazi District Hospital in the company of Moffat Ngoma. The post-mortem was conducted by Dr. Balungisa of Lundazi District Hospital. According to PW3, the post-mortem report disclosed that the deceased's death was caused by a head injury with intracranial bleeding. PW3 identified the post-mortem report which was marked as ID1 and upon his request, admitted into evidence as P1.

In cross-examination, PW3 told the Court that he received information that the accused suffers from epilepsy. He also told the

Court that the accused told him that he assaulted the deceased because he insulted him. Further, that the deceased was drunk at the time of the assault.

The witness was not re-examined.

After the close of the prosecution's case, the accused remained silent. On behalf of the accused person, Learned Counsel submitted pursuant to section 17(2) of the Criminal Procedure Code, that the medical report concerning the accused, following the Court's Order made under that section, for the accused to undergo medical assessment, be admitted as part of his evidence.

I have given serious consideration to the evidence adduced in this case, as well as the submission of Learned Counsel for the accused.

I find that it is not in dispute, that the accused Yohane Chirwa has been suffering from epilepsy from the time that he was a very young child. He also suffers from intellectual disability associated with poor communication skills and an emotional dyscontrol phenomenon. It is also not in dispute that on 4th January, 2016 the

accused assaulted the deceased thereby wounding him on his head and the attack led to his death.

The offence of murder is set out in section 200 of the Penal Code which provides as follows:

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

Malice aforethought is defined in section 204 of the Penal Code in the following terms:

"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;***
- (d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."***

From the evidence, I find that Elemiya Nkhoswe died on 15th November, 2016 at his home in Holoholo Village, Chief Kapichila in

Lundazi District. I also find that the post-mortem conducted on his body on 7th January, 2016 found that the deceased died from head injuries with intracranial bleeding.

The evidence implicating the accused is direct with PW1 and PW2 both testifying that the deceased told them that the accused wounded him on the left side of his head. Further, that the deceased died the next day on 5th January, 2016.

I am satisfied that by inflicting such injuries the accused person was incapable of understanding that he was likely to cause death or grievous bodily harm to the deceased. I am further satisfied that he had no malice aforethought when he committed the offence. I am fortified by the medical opinion of Dr. P.C. Msoni quoting relevant portions of his report as follows:

"Presentation on admission

Yohane Chirwa was admitted at Chainama East on 30th June 2016 for the purpose of a Medical Report following a charge of Murder contrary to section 200 of the Penal Code Chapter 87 of the Laws of Zambia. He consistently says he hit someone who provoked him in his drunken state. When the matter of the offence was put to him he appeared not to understand the charge and its consequences because of his mental state.

Past medical/Psychiatric history

Yohane Chirwa is not able to give an adequate account about himself because of his mental state. A collateral history from parents/relative who saw him grow up can be of great help.

It however became increasingly clear that Johane has had a longstanding neurological condition either as a result of problems at birth or soon afterwards in infancy. It is not clear whether or not he had been attending a health centre or hospital for his prominent complications which are epilepsy and cerebral palsy, hence the need for history from parents/relatives.

Ward observation

Yohane Chirwa had poor personal hygiene such that initially nursing staff had to bath him regularly and ensure that he was well shaved. The nutritional status had to be enhanced through appropriate feeding.

Mental State Examination

The striking feature in his mental state examination was his compromised intellectual functioning. He was initially mute and difficult to engage. Later on he could be engaged in basic conversations but he was not able to abstract nor give complex answers. He tended to be monosyllabic. He was aware that he was at the hospital following a murder but was indifferent and was unable to grasp the gravity of the offence.

Significantly he denied perceptual disorders and he was not paranoid.

The cognitive functions were grossly impaired: he was poorly oriented, his memory for recent and remote events when he responded was poor and so was his judgment. He had inadequate insight.

Conclusion

On the basis of the above information, observation and findings, Johane Chirwa has Cerebral Palsy with Epilepsy which appear to have been longstanding. Both these neurological conditions can result from some brain damage at birth or soon afterwards. Arrest of intellectual development is a common sequelae.

Yohane has both intellectual disability and epilepsy both of which are associated with poor communication skills and emotional dyscontrol phenomenon respectively. Coupled with provocation, aggressive behaviour can ensue.

In the case of **Director of Public Prosecutions v Lukwosha¹**

Blagden CJ, as he then was, held *inter alia* that:

“The language “incapable of understanding what he is doing” in Section 13 of the Penal Code refers not merely to the accused’s knowledge of what physical act he is performing but also to his knowledge of the probable consequences of that physical act, accordingly, when a disease of the mind renders the accused incapable of foreseeing these probable consequences, he is legally insane within the meaning of Section 13 of the Penal Code.”

The old section 13 of the Penal Code now appears as section 12 of the Penal Code. It sets out thus:

“12. A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is, through any disease affecting his mind, incapable of understanding what he

health condition which has a bearing on his criminal responsibility, the accused did not understand the consequences of his actions. Therefore, arising out of his substantially impaired mental responsibility, I find the accused not guilty of murder by reason of insanity. Section 161 (2) (b) of the Criminal Procedure Code provides that:

"2. At the close of such evidence as is mentioned in subsection (1), if the Court, finds that the evidence as it stands:

(b) Would, in absence of further evidence to the contrary, justify a conviction, or a special fining under section one hundred and sixty – seven shall order the accused to be detained during the President's pleasure."

In accordance with section 161(2) (b) of the Criminal Procedure Code, I order that the accused be detained during the President's pleasure.

Delivered in open Court at Chipata this 16th day of December, 2016.


M. Mapani-Kawimbe
HIGH COURT JUDGE