

IN THE HIGH COURT FOR ZAMBIA
AT THE CRIMINAL REGISTRY
HOLDEN AT LUSAKA

(Criminal Jurisdiction)

HP/143/2015



BETWEEN:

THE PEOPLE

VERSUS

EPHRAIM TAPISHA

BEFORE : HON JUDGE G. C. M. CHAWATAMA

For the State : Miss. Mhango - National Prosecutions Authority

For the Defence : Miss. Kabende - Legal Authority Board

JUDGMENT

CASES REFERRED TO:

1. ***The People v Palmer (1972) ZR 139***
2. ***The People v Elisha. M. Tembo (1980) ZR 206***
3. ***The People v Mudewa (1973) ZR 147***

AUTHORITIES REFERRED TO:

1. ***Section 199 of the Penal Code, Cap 87 of the Laws of Zambia.***

The accused **EPHRAIM TAPISHA** was charged on information containing one count of Manslaughter *Contrary to Section 199 of the Penal Code Chapter 87 of the Laws of Zambia.*

The particulars of offence are that **EPHRAIM TAPISHA**, on the 24th day of February, 2015 at Kafue in the Kafue District of the Lusaka Province of the Republic of Zambia did unlawfully cause the death of one **MABVULA TEMBO**.

The prosecution called four witnesses while the accused gave sworn evidence and did not call any witnesses.

PW1 was **Beatrice Tapisha**, a first cousin to the accused person. Her testimony was that on 24th February, 2015 around 23 hours while she was sleeping with her children Tabetha Tapisha and Moses Tembo, she was woken up by Mabvula Tembo, the deceased. He entered her house threatening to kill her and the 3 year old son they had together, Moses Tembo. He ordered her to go outside; as she got up he tore her clothes and pulled her outside. He hit her with a catapult, pushed her to the ground and started strangling her. Her daughter, Tabetha ran to call her brother, the accused herein. When the accused came, he found her on the ground without clothes. Upon seeing the accused, the deceased decided to turn on him. However, the accused hit the deceased. **PW1** did not see clearly the accused hit the deceased because it was at night and after being beaten she was confused.

The same night, the accused went to look for transport to take the deceased to the clinic but was not successful. In the morning **PW1** went to the crime scene and found the deceased on

the ground and next to him was an iron bar. She observed that he had a cut on his forehead. Thereafter, they got transport from Bishop Njase. However, by the time the vehicle was coming Mabvula had died. She was taken to the Police station together with others and the body of the deceased. **PW1** concluded by informing the court that there was no one else who fought with the deceased on the fateful night apart from the accused.

In cross examination, **PW1** told the court that this was not the first time the deceased was beating her. She would on previous occasions report the deceased to the Police but she would later go and withdraw her complaints. She also confirmed that the accused was also being threatened by the deceased because he was trying to protect her from being beaten. She was aware that the accused reported the threats to the Police but did not know about the response of the Police. She further confirmed that on the night in question, Mabvula forced his way into her house.

Furthermore, **PW1** testified that when the deceased was beating her he was on top of her. She described him as huge. He was taller and bigger than the accused. It was her testimony that if the accused had not come to their rescue, the deceased would have killed her and the child. She confirmed that she did not see any injuries on the accused person.

PW2 was **Tabetha Tapisha**, a ten year old daughter of **PW1**. She was sleeping with her mother and her young brother Moses

Tembo on the fateful night, when Mabvula came to their house. Mabvula wanted to kill them starting with their mother. He grabbed the mother, he had an iron bar. He hit the mother with the catapult. From there she went to call her uncle, Ephraim Tapisha. The uncle came, it was between 23 and 24 hours. She did not see them clearly when they were fighting but she recalls that it was in the verandah near a wash line and that the deceased wanted to use the clothes to strangle the mother. She also could not recall what happened when the uncle came but after the fight they went back to sleep.

In the morning she saw Mabvula on the ground. She was scared to look at him properly. The uncle looked as he normally does. **PW2** reiterated that Mabvula came with an iron bar. He was holding it on his side.

In cross examination, she confirmed that she had witnessed the mother being beaten by Mabvula before. She also testified that the other people they lived with whom she identified as the sister and the cousin ran away when Mabvula came on the fateful night. When the uncle came he pushed Mabvula off the mother.

PW3 was **Bishop Committee Njase**. It was his testimony that on 24th February, 2015 at around 23:00 hours, he received a call from Jairo Tapisha requesting for transport to take Mabvula to Kafue Police. The request was made because Mabvula was beating Beatrice Tapisha. He did not respond to that call

because it was late. The next day morning around 06 hours, Jairos Tapisha went to his house to request for transport again. This time he released the vehicle to be driven by his grandson, Twaambo Munkombwe. When Jairos and the grandson got to where Mabvula was, it was discovered that he had died. Jairos, Ephraim and Beatrice went to his house and Jairos told him about Mabvula's death. **PW3** decided to drive the van himself and took the three to the Police Station. He gave a statement at the Police Station and then went back home. Ephraim looked sober like nothing had happened. He did not have any injuries. He did not see the body of the deceased. In cross examination, **PW3** told the court that he handed the accused over to the Police.

PW4 was **Eddison Nkhuwa**, the arresting officer. He testified that he was the one who investigated the murder case of Ephraim Tapisha (the accused). The accused was taken to the Police Station by Bishop Njase and the accused's relatives. The accused led him to the scene of crime where the body of the deceased was. He went in the company of other officers and Beatrice Tapisha. The deceased had multiple injuries in the head; the brain was exposed as the skull was broken. He had other physical injuries on the arms and the body was swollen. The body was found leaning against the wall of the house. Whilst at the scene the accused gave him an iron bar as what he had used to inflict the injuries on the deceased.

The body of the deceased was taken to Kafue Hospital for a postmortem. However, the postmortem was attended by another officer who brought a postmortem report which was kept in **PW4's** custody. The report shows the cause of death as subdural hemorrhage due to skull fracture due to blunt head injury. On the report the internal examination also revealed that there was fracture of the III-V (three to five) right ribs and sternum.

DW1 was the accused **Ephraim Tapisha**. He testified that he was in charge of the family farm where he, Beatrice and other family members lived. He was protective particularly of Beatrice who was certified as mentally ill. He was aware that the deceased was the boyfriend to Beatrice. However, the deceased used to beat Beatrice every so often. **DW2** learnt that at one time the deceased hit Beatrice with a hoe in the head and she fainted. She had reported him to victim support but later withdrew the complaint. He often spoke to the deceased whenever the deceased was sober. It was clear to him that Beatrice loved the deceased, none the less. The deceased often threatened to kill the accused. The accused reported to the Police but was always turned away because according to the police the same were just verbal threats which did not carry any weight.

On the night in question he was woken up by his niece Tabetha (**PW2**), between 23-24 hours who came to report that Mabvula

had come to say he wanted to kill his son together with the mother, Beatrice. When he got to Beatrice's house he found the deceased on top of his naked sister strangling her by the neck. He went there to push the deceased off. When he saw that the deceased was not getting off his sister he got an iron bar which was nearby and hit the hands of the deceased with it. After that the deceased charged at him while hurling insults. He retreated to the verandah, he was afraid that he would be hurt by the deceased so he hit him on the head with the same iron bar. At this time he was in a state of confusion. He saw that the deceased was still charging at him, he further hit him on the legs. The deceased fell down to the ground that is when the accused saw blood coming out of the accused. He could not remember how many times he had hit the deceased. **DW1** described the deceased as bigger and taller than him.

DW1 instructed his nephew to go to the neighborhood watch to ask for assistance. At the same time he was entertaining a thought of administering first aid on the deceased but he could not as he was overcome by fear. Jairos came back without help as the neighborhood watch said it was too dark but that they would come in the morning. Jairos told him that he had also tried to call Bishop Njase to ask for transport but the Bishop also offered to help in the morning.

The next morning, Jairos went back to Bishop Njase and was given a vehicle. Upon seeing that Mabvula had died, he asked Jairos and Beatrice to accompany him to the scene of crime. The Bishop drove them to the Police Station. Upon arrival at the Police Station, he surrendered himself to the Police. He gave a statement to the Police and was charged with murder. When he saw the injuries on the body of the deceased, he realised that he was in a state of confusion when inflicting those injuries. He was overcome by fear for his life as well as the lives of Beatrice and her son. During the fight he was against the wall and had no way of escape, he thought the only way out was to hit the deceased.

In cross examination the deceased maintained that he was in a state of confusion when he hit the deceased inflicting severe injuries on him.

However, in re-examination **DW1** confirmed that the post-mortem report was consistent with his testimony that he hit the deceased once in the head and then his arms and legs. **DW1** further reiterated that at the time he was hitting the deceased he was in a state of confusion as he was put in a situation by the deceased which seemed to him like he had no way out.

It is a fundamental principle of criminal law that the burden of proving that the accused is guilty of the charge placed upon him

is always on the prosecution and the standard expected is one beyond reasonable doubt.

Judge Muwo in the *People v Sitali (1972) ZR 139*¹ had the following to say:

“The standard of proof which the prosecution must attain is such a standard as enables the court to be sure of the guilt of the accused beyond reasonable doubt. If upon the whole of the evidence the court is not satisfied that the guilt of the accused has been proved to that standard then, whatever may be the probabilities of the matter, the accused is entitled to an acquittal”.

The accused herein has been charged with an offence of manslaughter contrary to **Section 199 of the Penal Code, Cap 87 of the Laws of Zambia.**

The said section provides that:

“Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed “man-slaughter”. 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 death or bodily harm.”

The evidence from the prosecution is that the accused was called by his niece to rescue his sister (**PW1**) who was being beaten by the deceased (her boyfriend). There was evidence to the fact that this was not the first time the accused was beating his girlfriend.

The court further heard that on one occasion **PW1** was hit with a hoe by the accused to a point where she fainted. It was further the prosecution's, as well as the accused's evidence that the accused had been threatened a number of times by the deceased that he would kill him. The accused reported these threats to the Police but from his evidence the Police did not take his report seriously. The fact that accused was aware of the physical abuse of his sister may create an impression that the accused was so incensed with the accused that he had planned to one day sort him out and the fateful day might have been that chance. The accused put up a defence of defence of his person and the person of another.

However, I have followed the events of that night carefully. The circumstances were such that the accused went to the rescue of the sister. The undisputed evidence is that the accused attempted to save the sister from a violent man. In addition the deceased has been described as a huge man; bigger and taller than the accused. What is also worth noting is that the accused came armed with an iron bar and a catapult according to the evidence of **PW2**. It was this same iron bar that the accused used on the deceased when he was put in a moment of unexpected anguish.

In the case of *Palmer v R (1971)1 ALL ER 1088*², cited in the case of *The People V Elisha. M. Tembo (1980) ZR 206*³. I must make mention here that it has also been cited by Counsel for the Defendant in

her submissions which I find helpful, the court had the following to say:

“If there is some relatively minor attack, it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger he may have to avert the danger by some instant reaction...All that is needed is a clear exposition, in relation to the particular facts of the case, of the conception of necessary self-defence. If there has been an attack so that defence is reasonably necessary it will be recognized that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action.”

Furthermore, in the case of *The People v Mudewa (1973) ZR 147* the court’s guidance was that the court should apply an objective test of reasonable reaction on the part of the accused. The court further said that:

“The court could not say that a reasonable man, finding himself in “moment of unexpected anguish in the position in which the accused found himself, might not have reacted as the accused did and that therefore it could not be said beyond a reasonable doubt that the defence used was excessive”.

I have considered the circumstances under which this offence was committed. I have no doubt in my mind that the accused was in a moment of anguish. He was pushed against the wall by

a man described as bigger than him, a man who had come to kill. It could not be reasonably expected of him to 'weigh to a nicety the exact measure of his necessary defensive action'.

The application of the objective test also necessitates the examination of events at the point at which an accused person commits the offence, not past actions. It is the circumstances and the actions of the moment.

Section 17 of the Penal Code provides that:

“Subject to any other provisions of this Code or any other law for the time being in force, a person shall not be criminally responsible for the use of force in repelling an unlawful attack upon his person or property, or the person or property of any other person, if the means he uses and the degree of force he employs in doing so are no more than is necessary in the circumstances to repel the unlawful attack.”

I find that this defence is available to the accused. I accordingly acquit him of this charge and order that he be released forthwith.

DELIVERED IN LUSAKA THIS 3RD DAY OF FEBRUARY, 2016


G.C.M. CHAWATAMA
JUDGE