

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

HP/08/2016

**BETWEEN:**

THE PEOPLE

V

DAVID MONZE



**BEFORE THE HONOURABLE LADY JUSTICE M.CHANDA THIS 17th  
DAY OF FEBRUARY, 2016**

**APPEARANCES**

FOR THE PEOPLE : MS C. LUPILI  
FROM NATIONAL PROSECUTION  
AUTHORITY

FOR THE ACCUSED : MR H.M.MWEEMBA AND MR. K.  
MWEEMBA FROM LEGAL AID  
BOARD

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

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**LEGISLATION REFERRED TO:**

1. THE PENAL CODE CHAPTER 87 OF THE LAWS OF ZAMBIA
2. THE CRIMINAL PROCEDURE CODE CHAPTER 88 OF THE LAWS OF ZAMBIA

**CASES REFERRED TO:**

1. SALUWEMA V THE PEOPLE (1965) ZR 4
2. ESTER MWIIMBE V THE PEOPLE 1986 ZR 15 (SC)
3. ROSALYN ZULU V THE PEOPLE (1980) ZR 341
4. NYAMBE MUBUKWANU LIYUMBI v THE PEOPLE (1978) Z.R. 25 (S.C.)
5. MAKOMELA V THE PEOPLE (1974) ZR 254
6. PHILLIPS V R (1969) 53 CR. APP. R 13
7. LEE CHUN-CHUEN V R (1963) A.C220
8. WALKER V R (1969) 53 CR AP. R 195

9. MWANDEMA V THE PEOPLE (1995-97) ZR 133

10. LIBUKU V THE PEOPLE(1973) ZR 345

**David Monze** hereinafter referred to as the accused stands charged with one count of **murder** contrary to *Section 200 of the Penal Code Chapter 87 of the Laws of Zambia.*

The particulars of the offence being that David Monze on the 2<sup>nd</sup> day of September, 2015 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, did murder **Clifford Hamwata.**

When called upon to plead, the accused denied the charge; the prosecution then called four witnesses.

**Kanyanga Siakalima** was the first prosecution witness (**PW1**). He told the court that on 2<sup>nd</sup> September, 2015 at around 11:30hours he was on his way home when he passed by the accused's shop and heard him arguing with his father-in-law **Clifford Hamwata.** PW1 heard the accused telling Clifford to leave his premises and threatened to kill him if he further resisted. He stated that he saw the accused hit Clifford with an iron rod on the forehead. PW1 averred that he rushed to inform the accused's brother, **Robert Monze (PW3)**, of what had transpired and after which he proceeded to his residence. He told the court that he was later picked up by the Deputy head teacher of



Rufunsa Technical School, Amon Lukandu (PW2) and Robert Monze (PW3) and together they went to the accused's shop where they found Clifford's dead body lying on the floor.

Under cross-examination PW1 confirmed that he saw the accused hit Clifford with an iron rod but that he did not know whether Clifford had hit the accused as well. He stated that he had known the accused and the deceased since 2008 and that he was not aware of any strained relationship between them.

The second prosecution witness was **Amon Lukandu (PW2)** who testified that he was employed as a driver by the accused's father **Philimon Monze**. PW2 went on to testify that on 2<sup>nd</sup> September, 2015 he passed through the accused's shop around 06:00hours and found the accused drinking beer. PW2 stated that he eventually left the accused's shop but before he could reach his place of work, he received a phone call at around 11:30hours from the accused's father Philimon Monze. It was PW2's evidence that Philimon requested him to go back and check on the accused who was fighting with his father-in-law.

PW2 said he then went to the accused's shop where he found some policemen and saw some blood trails outside the shop. He narrated that when the policemen broke down the door to the accused's shop, PW2 saw the deceased lying dead in

the shop. The witness said the deceased's face appeared to have been severely battered.

Under Cross-examination he revealed that he left the accused person drinking beer at 06:00hours in the morning.

**PW3** was **Robert Monze**, the accused's elder brother, who told the court that he was slashing along Mukamba road on the material date. The witness told the court that around 11:30 hours, PW1 went and informed him that his brother, was fighting with his father-in-law Clifford and that the accused had hit Clifford with a metal bar. He said he immediately went to the accused's shop. PW3 narrated that when he arrived there, he saw bloodstains on the sides of the shop and decided to inform the Rufunsa police. He said that he went back to the shop with some police officers who broke down the door and found Clifford dead in the shop with his head having been hit badly.

Under cross-examination, when asked whether there had been any tension between the accused and his father-in-law, PW3 explained that the accused had matrimonial differences with his wife. He also stated that it resulted in the matter being reported to the law enforcement agency and later led to a divorce. Prior to the matrimonial differences, the two related well.



The last prosecution witness was Inspector **Leo Mulenga Chabala (PW4)**. It was PW4's testimony that he received a report of murder and he subsequently visited the murder scene. At the scene, he saw marks on the ground as well as bloodstains, an indication that someone had been dragged. When he entered the shop he found the deceased lying on the floor with deep cuts on his forehead and mouth. He saw an iron bar and an axe with bloodstains on the floor, next to the deceased. The witness then took the body to Chongwe mortuary and it was later transferred to the University Teaching Hospital in Lusaka where a postmortem was conducted. He produced the postmortem as part of his evidence.

During cross-examination PW4 informed the court that when he went to the scene, there were a lot of people. He further said that the blood on the axe was not tested to prove that it was that of the deceased. It was his evidence that the accused was apprehended in Luangwa area and was handed over to Rufunsa Police Post.

After the close of the prosecution's case, I found that the state had established a *prima facie* case against the accused and I found him with a **case to answer**. When put on his defence in compliance with section 291(2) of the *Criminal Procedure Code*, the accused elected to give sworn evidence and did not call any witnesses.

It was the accused's evidence that he married the deceased's daughter **Constrine Hamwata** in March, 2010. During their marriage, the two experienced some marital problems which eventually led to them divorcing in January, 2015. He said that on the 2<sup>nd</sup> of September, 2015 he was drinking some spirits from early morning. Later that day, the deceased went to the accused's shop to collect the money that the accused had allegedly realised from the sale of talk time. The deceased inferred that he had given the accused's wife money to enable her sell talk time in the shop. He told the accused that he was not worthy of the deceased's daughter. The accused narrated that Clifford the deceased then started pushing him repeatedly as he continued demanding for his money. The deceased then picked up an iron rod and hit the accused on his ankle and shoulder. The accused got hold of the same iron rod and used it to hit the deceased on the forehead sending the deceased falling to the ground. He then ran away to Rufunsa Police station where he was in custody for two days. It was during this time that he was told of the deceased's demise.

In cross-examination, the accused denied having dragged the deceased into the shop to chop him. He however revealed that after hitting the deceased, he did not see him alive again. In further cross examination the accused confirmed that his father-in-law was instrumental in the accused's divorce.



At the close of the case, Defence Counsel indicated that they would file in written submissions while the Prosecution intimated that they would merely rely on the evidence on record.

On behalf of the accused person, it was submitted by Mr. H.M Mweemba and Mr. K. Mweemba that on 2<sup>nd</sup> September, 2015 the deceased went to the accused's shop and harassed him in a manner that was provoking to the extent of hitting him. Counsel submitted, citing the case of the **Saluwema v The People**<sup>1</sup> that the accused's story was reasonably possible and the prosecution had failed to establish or prove their case beyond all reasonable doubt.

It was also submitted that the only evidence pointing to a fight which could have been helpful was that of PW1 who seemed to have witnessed part of the fight. Counsel contended that there was no one who actually witnessed the beatings on the deceased as alleged by the post mortem report. He further contended that what could be insinuated herein was that as the deceased fell to the ground the other injuries could have possibly been sustained as a result of the fall.

It was further submitted that there was provocation by the deceased to the accused which resulted in the accused retaliating in self-defence. Counsel referred the Court to *Section 205 (1) of the Penal Code Cap 87 of the Laws of*

*Zambia* and asserted that in the case of the **Esther Mwiimbe v The People**<sup>2</sup> it was stated that

**“There are three inseparable elements to the defence of provocation namely; the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. All these three must be present before the defence is available.”**

It was also canvassed on behalf of the accused that his retaliation under the circumstances was proportionate to the provocation and urged the Court to consider the defence of provocation and to only find the accused guilty of manslaughter.

In the alternative, Legal Aid Counsel submitted that the act by the accused was done only in circumstances of self-defence. Counsel further urged the Court to consider the case of **Rosalyn Zulu v The People**<sup>3</sup> where the issues on self defence were properly articulated. It was submitted that if the defence of self defence was acceptable then the accused be acquitted forthwith and set at liberty.

I have considered the entire evidence led before me and I find that it is not in dispute that Clifford Hamwata died at the accused's shop on 2<sup>nd</sup> September, 2015. It is also not in dispute that prior to his demise, Clifford Hamwata was involved in an altercation with the accused wherein he was badly battered. It is further not in dispute that the



deceased was shortly thereafter found lying dead on the floor of the accused's shop with severe injuries on his head. It is also common cause that an axe (exhibit P2) with blood stains was found next to the deceased's body. It is common ground that the accused was married to the deceased's daughter Constrine sometime in 2010. It is also common ground that in January, 2015 the deceased was instrumental in the divorce process between his daughter and the accused following the matrimonial problems that rocked their marriage.

According to the post-mortem report, which was admitted into evidence as (exhibit P3), the cause of Clifford Hamwata's death was crushing of the brain and multiple chop wounds of the head. I am satisfied that the cause of the deceased's death is consistent with a person who was savagely assaulted with a sharp object. The submission that the deceased could have possibly sustained the injuries when he fell to the ground after being hit once with an iron bar by the accused is far-fetched.

I note that the accused on one hand has not challenged the evidence of PW1 to the effect that he had actually threatened to kill the deceased if he remained on his premises and immediately struck him with an iron rod. On the other hand the accused claims to have acted in self-defence after he was provoked and hit first by the deceased.

I have considered the possibility of the accused person being falsely implicated by PW1 and I am satisfied that it was not the case. The report by PW1 to PW2, who in turn alerted the police, was made so contemporaneous to the attack that there was no opportunity for him to fabricate the story and falsely implicate the accused person. In fact, there is no evidence of any other person being at the said shop at the time of the attack, other than the accused person. There is equally no evidence of Clifford Hamwata having been involved in any incident that morning which would have caused the injuries that killed him other than the fight between him and the accused person.

This being the case I find that the injuries he suffered could only have been inflicted by the accused person during that fight. I do not believe the accused's claim that he only hit him with an iron bar once. Had it been the case, he could not have suffered the multiple chop wounds to the head and the crushing of the brain. I find PW1 and PW2 to be truthful and I accept their version of what transpired on that morning. I am also satisfied that the accused used an axe to inflict the multiple chop wounds that the deceased sustained on his head. It is clear that upon realising that the deceased was lifeless, the accused locked him in his shop and fled to Luangwa area.

The elements of the offence of murder are stipulated in *Section 200 of the Penal Code Chapter 87 of the Laws of*



*Zambia*. The prosecution is therefore required to establish three elements namely that:

1. *The accused person caused the death of the deceased.*
2. *By an unlawful act.*
3. *With malice aforethought.*

Malice aforethought is established when it is proved either that the accused had an actual intention to kill or to cause grievous harm to the deceased or that the accused knew that his actions would be likely to cause death or grievous harm to someone.

In the matter before me I am quite satisfied that the nature of the brutal attack leads to the inevitable conclusion that the intention of the accused was to kill the deceased or at least cause him grievous bodily harm.

I will now turn to consider the defences of provocation and self-defence as advanced by the learned defence Counsel on behalf of the accused person.

The law on provocation is to be found in *Section 205 of the Penal Code* which provides as follows:

- (1) *When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion, caused by sudden provocation as*

*hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only*

*(2) The provisions of this section shall not apply unless the court is satisfied that the act which causes death bears a reasonable relationship to the provocation.*

There is a string of cases which set out the correct approach to the defence of provocation. The cases such as **Nyambe Mubukwanu Liyumbi v The People**<sup>4</sup>, **Esther Mwiimbe v The People, Makomela v The People**<sup>5</sup>, **Phillips v R**<sup>6</sup> and **Lee Chun-Chuen v R**<sup>7</sup> all establish that provocation in law consists mainly of three inseparable elements, namely the act of provocation, the loss of self-control both actual and reasonable, and the retaliation proportionate to the provocation. All three elements must be present before the defence is available.

In the instant case, I have already found as a fact that there was an altercation between the accused and his deceased father-in-law. Going by the evidence of PW1, I am of the view that the argument between the two was trivial. The evidence, far from suggesting any provocation or any loss of self-control, indicates that the accused embarked on a course of action which was dispassionate, deliberate and certainly not in the heat of passion and fled the scene. Even if the accused's evidence, which I have not accepted, was anything to go by the defence of provocation would still not have been available to him. This stems from the fact that



the accused who claims to have been hit first was neither maimed nor sustained any noticeable injuries.

The Court in **Walker v R**<sup>8</sup>, had this to say:-

*"It has never been the law that the man who completely loses his temper on some trivial provocation and reacts with gross and savage violence which kills his victim can hope for a jury to find a verdict of manslaughter on grounds of provocation."*

In **Makomela v The People** it was stated that:

*"It is important ...not to overlook that the question is not merely whether an accused person was provoked into losing his self-control but also whether a reasonable man would have lost his self-control and, having done so, would have reacted as the accused did."*

I am of the view that the reaction of the accused over a trivial argument was unwarranted and not proportionate to the actions of the deceased on the material date. It is true that a reasonable man would not have reacted by battering the deceased several times as the evidence led shows. on the test laid down in **Mwiimbe**, the submission in this regard cannot succeed for the absence of the essential element of proportionality on the facts of this case. The accused's actions, to borrow the words of the Court in **Walker v R** were gross and savage, as such, the offence herein cannot be reduced to manslaughter.

I will now turn to consider the defence of self-defence. The principles governing self defence are provided for in *Section 17 of the Penal Code* and are self-explanatory. The case of **Mwandema v The People**<sup>9</sup>, gives the position of the law clearly. The court observed that the essence of self-defence is that the accused acts quite deliberately to preserve his life or to prevent grave harm to himself.

I have already established that the deceased suffered multiple injuries in the attack while the accused surprisingly had not sustained any wounds after allegedly being struck twice with the same iron rod. This clearly goes to imply that the reaction of the accused was by far greater than that required to prevent harm to himself.

I must also state here that the facts in the case of **Rosalyn Zulu v The People** as submitted by defence Counsel can be distinguished from the *case in casu*. The brief facts in Zulu were that the deceased husband was prone to extreme violence against the accused wife. After a quarrel the deceased went to have a bath. As he was in the bathtub, he called her and threatened to kill her. There was a pistol on the cistern and he made an attempt to seize it. She took it and shot him. The Court found that the immediate attempt by the deceased to seize the gun coupled with the fact that he was so close to her that he could still attack her, despite the fact that she had the gun, made it reasonable for her to believe that she would be assaulted and the gun taken away



from her and used against her if she did not first use the weapon. It is apparent that the finding of self-defence in that case was on its own peculiar facts.

In the matter at hand, going by the testimony of PW1, I hold that the accused's actions were not within the principles of self-defence. It is apparent from the evidence on record that because the accused believed that the deceased was instrumental in his divorce process, he must have ceased the opportunity of the trivial altercation they had to deal with the deceased brutally. I must therefore affirm that the defence of self-defence cannot be sustained.

On the foregoing, I find the accused guilty of the offence of murder and convict him accordingly.

Having established that the accused murdered the deceased herein, I must consider pursuant to *Section 201 of the Penal Code* whether or not any extenuating circumstances exist in this case, which would persuade me to impose any sentence other than death. *Section 201 of the Penal Code* provides that:

- (1) *Any person convicted of murder shall be sentenced-*
  - (a) *to death; or*
  - (b) *where there are extenuating circumstances, to any sentence other than death: Provided that paragraph (b) of this subsection shall not apply to murder committed in the course of aggravated robbery with a firearm under section two hundred and ninety-four.*

- (2) *For the purpose of this section-*
- (a) *an extenuating circumstance is any fact associated with the offence which diminish morally the degree of the convicted person's guilty;*
  - (b) *in deciding whether or not there are extenuating circumstances, the court shall consider the standard of behaviour of an ordinary person of class of the community to which the convicted person belongs.*

There is evidence on record by both PW2 and the accused himself that the accused had been drinking beer from morning on the material date.

I consider that intoxication can be an extenuating circumstance. However, evidence of drinking, even heavy drinking is not sufficient in itself to give rise to a defence of intoxication (SEE **Libuku v The People**<sup>10</sup>).

It is my immediate affirmation that in as much as evidence was led before this Court that the accused had been drinking prior to the salvage attack, there is no evidence on record to signify that the accused was so drunk as to diminish his responsibility on the fateful morning.

The fact of the accused fleeing to Luangwa area after he killed the deceased shows presence of mind and clearly that he was in control of his faculties.



I am satisfied that there are no extenuating circumstances present in this case. This means that the only sentence available here is death.

On the foregoing, I am satisfied that the prosecution has discharged its burden of proof. I find the accused guilty of the offence of murder contrary to *Section 200 of the Penal Code Chapter 87 of the Laws Zambia* and convict him accordingly.

Delivered in open Court at Lusaka this **17<sup>th</sup>** day of **February**, 2016.



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**M. CHANDA**  
**JUDGE**