

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

HP/43/2017



**THE PEOPLE**  
**V**  
**AUGUSTINE KANIKI**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 24<sup>th</sup> DAY OF  
 APRIL, 2017**

*For the State* : *Mrs P. Lungu, Senior State Advocate, NPA*

*For the accused person* : *Mr C. Siatwinda Legal Aid Counsel, Legal  
 Aid Board*

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

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CASES REFERRED TO:

1. *The People V Njobvu 1968 ZR 132*
2. *David Zulu V The People 1977 ZR 151*
3. *Ilunga Kabala and John Masefu V The People 1981 ZR 102*

LEGISLATION REFERRED TO:

1. *The Penal Code, Chapter 87 of the Laws of Zambia*

The accused person in this matter 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 allege that Augustine Kaniki on dates unknown, but between 11<sup>th</sup> April and 25<sup>th</sup> April 2016 at Lusaka in

the Lusaka District of the Lusaka Province of the Republic of Zambia did murder Samson Mvula.

The accused person denied the charge, and the matter proceeded for trial. The state called five witnesses, while the accused person gave his defence on oath, and called no witnesses. The first witness was Sunday Nyanga a police officer who was based at Ngwerere Police under Kabangwe Police station. It was his evidence that he had received a report from Brave Zimba around 01:30 hours on 11<sup>th</sup> April 2016 that Samson Mvula a taxi driver was followed by suspected criminals in Zani Muone, after he was booked by a person.

PW1 and the said Brave Zimba followed Samson to Zani Muone East but they did not see the vehicle, and PW1 got Samson's phone number from Brave Zimba and when he called the number a male voice answered stating that the owner of the phone had been apprehended, as he had tried to rob him with his friends.

PW1 had asked for directions to the house of the person on the phone and he said that when they reached a place called Mulongoti, they should call him. When they reached the said place and called him, he did not answer and they drove around until they saw the vehicle that was driven by Samson parked at a house. That Brave Zimba had identified the vehicle.

PW1 told the court that he went to that house and a person whom he came to know as Augustine the now accused person opened the door, and he said that he was the person that had answered the phone when PW1 had called. When PW1 went into the house he

found Samson half naked with bruises all over his body and he was unconscious. That the accused person when asked what had happened explained that people had beat up Samson as they thought he was a thief.

However PW1 noted that Samson had burn marks and he did not find a mob at the house. There was just the accused person with his family members. That Samson was bleeding from his nose and mouth, and he had no shirt on and was tied. He had bruises all over the body and there was blood on the floor as well as an iron on. PW1 got Samson and took him to the police station where he issued him a medical report, and he had instructed Brave to take him to Chingwere clinic. That from there they were referred to UTH. He was informed on 25<sup>th</sup> April 2016 that Samson had died at UTH. PW1 told the court that he had taken the iron and handed it over to the Criminal Investigations Officer (CIO).

PW1 had searched for the accused person on learning of Samson's death, and he charged and arrested him with the offence of murder. He also stated that the accused had on the day they found Samson at his house lodged a complaint of aggravated robbery. That after a week the robbers were apprehended, and it was found that Samson was not connected with the robbery. The accused person's attackers were taken to court.

In cross examination PW1 testified that on that day he was in charge of the patrol, and he was patrolling with recruits. That he had followed up the report with Brave Zimba. He maintained that there was no mob at the accused person's house when he reached

there. That there were about six children and the accused person with his wife, and an unknown person in the house when he arrived. It was his testimony that the oldest child was about ten years old, and the youngest a baby who was with his wife.

He stated that he was not aware that the accused person had told the arresting officer that two of his neighbours had gone to the house. That the accused person had told him that the mob had beaten Samson. He further stated that he had found that Samson had already been assaulted by the time he went there, and he maintained that Samson had burn wounds on his back and buttocks, and he was bleeding from the mouth and nose.

PW1 also maintained that he had handed over the iron suspected to have been used, as well as the accused person to the CIO, and he had knocked off, so he did not charge him with assault or grievous bodily harm. He agreed that they initially suspected Samson to have been involved in the robbery, and they had regarded the accused person as the complainant. PW1 also stated that he was aware that Samson gave statement to the police on 13<sup>th</sup> April 2016, on the assault.

Oponi Banda was PW2. He is the father to the late Samson Mvula. His testimony was that on 11<sup>th</sup> April 2016 around 05:00 hours police officers had gone to his house with a taxi driver Zimba and the late Samson who was badly injured and not talking at the time. That Samson had burns on his back and was swollen as he had been beaten. PW2 had taken him to the hospital, as he had been referred to UTH.

That after two days the late Samson's condition had improved and he had explained to PW2 that he was booked by people who had directed him to a house. However on the way they had met a vehicle that had blocked them in front. That the customer had got out and struggled with the people who went away with his bag.

That the customer had then told him that they go to his house which was near so that he gives him the taxi fare as the thieves had stolen his money. However upon reaching there the customer had alleged that the thieves were the late Samson's friends, and that he should reveal who they were. That is how Samson was beaten with sticks, and he was burnt with an iron.

PW2 told the court that the late Samson stayed in hospital for thirteen days before he died on 24<sup>th</sup> April 2016.

In cross examination PW2 stated that the late Samson had narrated the ordeal to him on 11<sup>th</sup> April 2016, the day he took him to the hospital. That his condition stabilized for a week and thereafter it went down and he started declining to eat. That he was talking up to the time he died.

In re-examination he clarified that the late Samson narrated the ordeal two days after he was admitted.

Donald Zulu was PW3. He was the late Samson's grandfather. That he had visited the late on 11<sup>th</sup> April 2016 in the evening and he was not talking. When he had again visited him on 15<sup>th</sup> April 2016 he was talking, and he had narrated the ordeal to him. PW3 gave details of what the late Samson had told him similar to what PW2

had told the court. He added that when the late had gone to the customer's house, the customer had woken up his family and they beat him, and then assaulted him with a hot iron on his chest and buttocks. That he also sustained injuries on his face which were inflicted with a potato peeler. That PW3 had continued visiting him and the wounds on his face started healing. However the late Samson died on 24<sup>th</sup> April 2016, and PW3 had gone to identify the body. That before the assault the late Samson had been well.

When cross examined PW3 testified that the ordeal had shocked the family, and they had discussed what had happened. He denied that what he had told the court was the same as PW2, as he had told the court what the late Samson had told him. He did however state that PW2 had been at the bedside when the late Samson had narrated what had happened to him. That he had not told police what the late Samson had told him, and he had attended the postmortem and was traumatized by it.

Brave Zimba was PW4. His evidence was that on 11<sup>th</sup> April 2016 he had reported at Zagonda rank in Zani Muone where he worked as a taxi driver. That around midnight a customer had approached him and he was carrying a black bag. He asked to be taken to Zani Muone West where he lived and he got into the car as they discussed the price. Then two men went to the car and entered it, and asked to be taken to Devil's street in Emmasdale.

That PW4 had told them that he had already been booked by someone going to Zani Muone West, but the two men insisted that that they wanted to be taken in PW4's car. The first customer had

refused to go with the two men as he did not know them, and he got out of the vehicle, and booked the car next to PW4's, driven by Samson Banda, and they started off.

PW4 had then told the two men that they should start off but they told him that they would tell him when to start off. Then the two men asked him to follow Sam's vehicle but he refused and they went into another taxi across the road and they started off. PW4 was suspicious that the two men were up to something as the vehicle started off in a hurry, and he decided to phone the police, and as he started off he met police who were patrolling the area and he had explained to them what he suspected.

Police said that they should follow the vehicle and they did. He stated that as the first customer had given him directions to where he was going, they had followed those directions. However along the way PW4 ran out of fuel so he gave police the directions, and they proceeded to search the area. That as they were going the police officer had asked for Samson's number, and the officer had called the number and directions were given to the customer's house.

That as he was refueling the police officer had called him and informed him that he had found Samson's vehicle and Samson, and that Samson was in bad shape. PW4 had met the police officer who had driven the car for the late Samson at the police station, and a medical report was issued to the late Samson. PW4 has taken him to Chingwere clinic with another police officer and they were referred to UTH. At the time the late Samson was not talking or

moving and was half naked with burns on his back up to his buttocks. He also had cuts on his face.

PW4 had said that they pick up the late Samson's parents as he knew where he lived, and they picked up his father and he dropped them off at UTH. The next day he travelled to the Copperbelt and returned a few days later, and learnt that Samson had died. He identified the accused person as the customer who had approached him with a view to book his vehicle.

When cross examined PW4 told the court that when he had reported his suspicions to the police, three to four of them had gone with him to search for Samson's vehicle, and they had used PW4's vehicle. When he had ran out of fuel the officers had disembarked and he had left them. At the point they had not found Samson's vehicle, and the officers had proceeded on foot.

It was also his evidence in cross examination that he did not give the officers the registration number of Samson's vehicle, and he was not present when Samson was found. That he was called to go to the police post to identify Samson. He denied having ever gone to the accused person's house, but admitted having passed by his house after being given directions, after Samson had died. He denied having attacked the accused person whilst he was in the taxi driven by Samson. He also denied having stolen the accused person's phone, and the accused person had identified him as the person he had earlier wanted to book.

In re-examination PW4 told the court that he had not given police the registration number of Samson's vehicle as he was not sure of



it, but that he had described it as a Toyota Corolla grey or white in colour. He denied being part of the people that had attacked the accused person, as he was with police at the time, trying to find the deceased.

The last state witness was Lackson Mwiya the arresting officer. PW5 testified that he was assigned a docket of aggravated robbery on 11<sup>th</sup> April 2016 in which the accused person had complained that he was robbed after he had booked the late Samson's taxi. That before he reached his house two men had appeared in front of the vehicle he had booked, and they had attacked him and stole his bag. That the accused person had apprehended the late Samson on suspicion that he had connived with the two men that had attacked him, and took him to his house where he assaulted him with a pressing iron.

PW5 also stated that the late Samson was only rescued by Constable Nyanga and he was taken to Chingwere clinic and was later referred to UTH. That PW5 visited the late Samson on 13<sup>th</sup> April 2016 and recorded a statement from him. That the docket of murder was opened when he died. He stated that he had interviewed accused person and he did not give a satisfactory response. PW5 made up his mind to charge and arrest him for the subject offence. He had given a free and voluntary reply denying the charge.

That efforts to retrieve the pressing iron failed as the accused person's relatives had moved. That when he had taken over the investigations the iron had been handed over to the accused

person's relatives. He also stated that the suspects in the aggravated robbery case were apprehended, and taken to court. However the charge was reduced to theft from person and the accused person Charles Mulenga had pleaded guilty to the charge. He identified the statement recorded from the late Samson Mvula and it was marked 'ID1'.

It was admitted and marked as 'P1' after the court ruled that it was not being admitted as truth of its contents as part of the res gestae rule, but only to show that the statement was made. He also identified the postmortem report, and it was marked 'ID2' and produced as 'P2'.

PW5 in cross examination stated that he had recorded a Warn and Caution statement from the accused person. He denied that the accused person had told him that he had left Samson when he went to his house, but that he went with him. He agreed that the accused person had told him that he had been attacked and he had shouted for help. That he had told him that about 12 people had gone there to his rescue, and they apprehended the late Samson, and had beaten him.

It was also stated that the accused person in his statement said that two neighbours had helped him tie the late Samson. That PW5 had interviewed the neighbours but did not record statements from them, as the neighbours expressed ignorance over the matter. It was stated that the accused person was not charged with assault as PW5 was still investigating the aggravated robbery case. That he did not see the pressing iron, but that PW1 had told him that he

handed it over to the accused person's relatives. It was stated that PW5 did not have proof of the hand over and return of the iron despite such being recorded. He denied that the accused was not charged with assault as the mob beat the late.

The accused person in his defence stated that he had received a funeral message from Kitwe on 6<sup>th</sup> April 2016. That he went to the funeral and returned on Sunday after starting off around 16:00 hours, and he arrived in Lusaka around 01:00 hours. He stated that he went to the taxi rank on arrival and asked a taxi driver to take him to Zani Muone West, and he was charged K30.00. When he opened the car to put his bag inside he saw two men in the back seat, and he told the taxi driver that he could not use a vehicle that already had people, as it was in the night.

Further in his defence the accused person testified that he went to another taxi, and he was charged K25.00 and they started off. After travelling about one kilometer he looked in the side mirrors and saw a speeding vehicle coming. He had alerted the taxi driver and the taxi driver asked how far they were from the accused person's house. Then the lights of the on-coming vehicle were switched off, and he told the driver to lock the car. To his surprise the driver of the taxi stopped the vehicle and unlocked the car doors.

He testified that the driver got out of the vehicle and the two men went to the side where the accused person was sitting, and opened the door and started dragging the accused person out of the vehicle. That the accused person held the steering wheel and screamed and Brave Zimba got his phone from his pocket, while Mulenga got his

bag. That Brave and the taxi driver dragged him out of the vehicle but he was strong. The driver hit him with an unknown object on his shoulder and he let go of the steering wheel, and he ran out the vehicle.

His testimony was that he wanted to book Brave at first and Brave was there at the point of attack. That he knew Mulenga in prison when he pleaded with him to forgive him for stealing his items.

That he had ran to his house and there was no one there. Then after about thirteen minutes he heard a lot of noise at the roadside. When he went outside he saw a person sitting down and a lot of people. Then he saw a vehicle with police officers inside and they asked who the complainant and the thief were. They were taken to the vehicle that was about two hundred metres from his house, and taken to the police station where he gave a statement.

That the person who was sitting down was the taxi driver he had booked. He was released the next day by police who were investigating the matter, and he reported for work. He gave a total value of the stolen items as K5, 220.00. That police called him after two weeks to identify one of his attackers. When he went there he was told that the taxi driver had died, and he was detained. He denied having answered the deceased's phone as alleged by PW1, and that he had told him that he wanted the late Samson to reveal who the thieves were. That PW1 lied when he said that the late Samson was found at his house and that the deceased's vehicle was parked at his house.

His defence was the late Samson was found by the roadside surrounded by people. He denied ever having seen the iron alleged to have been used to assault the late Samson.

When cross examined the accused person testified he booked the late Samson's taxi after he left the first one five metres away. He denied that the taxi driver remained in the taxi during the attack, and he could not say why his lawyer did not cross examine on this. He maintained that Brave was involved in the robbery as he saw him twice.

He admitted that it was dark where he was attacked from, but the car door was opened so there was light from inside the car. His defence was that Brave only informed police of the attack so that he could exculpate himself. That he recognized Brave when he got his phone, and he denied that the people who attacked him were charged and arrested and taken to court and convicted. His testimony was that it was only one person.

That when he heard noise outside, he had gone back to the scene and found the late Samson with people there. He denied having seen the people beat the late. He denied assaulting and burning the late Samson, and he stated that there was no socket at the scene on which an iron could have been plugged. He maintained that his wife and children were not home at the time, though PW1 was not cross examined on this. He admitted that he was agreed that his things had been stolen, and he said that three people attacked him. He further stated that he does not know who told the mob that the deceased was the thief, as he had ran away. He agreed that he

could grab a person alone and burn him. He also agreed that he was a soldier. The accused person denied that the police officers had entered his house or that he had answered the deceased's phone.

I have considered the evidence. It is a fact that PW1 was on the material night informed by PW4 that the late Samson could have been followed by suspected criminals. It is a fact that PW1 and PW4 had gone to Zani Muone West to try and find the late Samson. It is further a fact that PW1 found the late Samson beaten and burnt, and he had taken him to the police, and issued him with a medical report. It is a fact that PW4 and PW2 took the late Samson to UTH where he was admitted and died. It is also a fact that the postmortem conducted on the late Samson reveals that he died as a result of burns.

The question is whether it has been proved beyond all reasonable doubt that the accused person is the person who beat and burnt the deceased to death? Murder is defined in Section 200 of the Penal Code, Chapter 87 of the Laws of Zambia as;

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

Section 204 of the Penal code deems malice aforethought in the following instances;

***“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.***

The evidence in this matter shows that while PW1 alleged that he found the late Samson at the accused person's house while beaten and burnt, the accused person's story is that he had left the late Samson at the car after he was attacked by thieves and his bag stolen. His defence was that it was the mob that beat the late Samson.

When PW1 testified he stated that he did not find the mob when he reached the accused person's house, but that there was only the

accused person, his wife and young children at the house. He had also found the iron that had been used to burn the late Samson on the floor, and that he had taken it to the police and handed it over to the CIO.

Therefore the question in this matter is which story between the prosecution and the defence is more credible? PW1's testimony that after they could not locate the late Samson he had obtained the late Samson's phone number from PW4, and when he had called the number a male voice had answered stating that the late Samson had been apprehended as he was suspected of having been with the thieves who had robbed the accused person. That the male voice had given them directions to his house and that is how they had found the late Samson.

If the accused person did not say what PW1 alleges, then why was PW1 not so cross examined? To allege otherwise in defence in my view was just an afterthought by the accused person. The postmortem report shows that the late Samson died of burns. The state in the submissions while referring to the case of **DAVID ZULU V THE PEOPLE 1977 ZR 151** which held that where there is circumstantial evidence, the court may only convict the accused person if an inference of guilt is the only reasonable inference that can be drawn from the facts of the case.

A careful analysis of the evidence shows that the accused person had been in the taxi driven by the late Samson Mvula when thieves attacked them and stole the accused person's bag which contained a number of items. That the accused person had suspected the late



Samson Mvula to have connived with the thieves. The evidence as led by the state shows that the late Samson was taken to the accused person's house where he was beaten and burnt with an iron.

While the iron was not produced in evidence this is not fatal as there is evidence from PW1, PW2, PW4 as well as the postmortem report to show that the late Samson was burnt. The accused person did not deny that Samson was burnt.

The state in the submissions relied on the case of ***ILUNGA KABALA AND JOHN MASEFU V THE PEOPLE 1981 ZR 102*** where it was held that odd coincidences if unexplained can be supporting evidence, and argued that in this matter it was an odd coincidence that the late Samson was found at the accused person's house injured, after the accused person was aggrieved that he had been robbed.

That if indeed the accused person had left the deceased by the road, how was he burnt with a pressing iron? That additionally if the accused person had left the deceased by the road before the mob arrived, how would the mob have known he was the thief?

The state also argued that the accused person apart from not denying PW1's evidence that he answered the deceased's phone and directed PW1 to his house did not deny that his wife was found at the house when PW1 was cross examined. The state noted that the only discrepancy in the evidence of PW1 and PW4 is that PW1 stated that he went to the accused person's house in the company of PW4, and PW4 stated that he did not reach the accused person's

house as he ran out of fuel. That this discrepancy does not go to the root of the case.

I do agree that the discrepancy does not go to the root of the case but goes to credibility. However none of the two witnesses can be said to be less credible than the other, as PW4 did not give any evidence as to what was alleged to have been found at the accused person's house, while PW1 did. They were both consistent on the injuries found on the late Samson. In fact the accused person does not deny having been booked by the late Samson.

Having found that there is nothing in the evidence that would lead me to conclude that the state witnesses were untruthful in material respects, and taking into account that the story that the accused did not go home with the deceased was only raised in defence, and that it was never put to PW1 when he was cross examined, leads me to infer that it was just afterthought. It is therefore my finding that the accused person was found with the deceased at his at his house when the deceased was burnt and beaten, and it is the accused person who inflicted those injuries as he suspected that the deceased was with the thieves.

Having established that the late Samson was found burnt in the accused person's house, the next question that arises is whether the accused person intended to kill him?

PW1, PW2 and PW4 all testified that the late Samson was found with burns on his chest and buttocks. He was not talking at the time. The state in the submissions referred to Section 204 of the Penal Code which sets out the instances in which malice

aforethought can be deemed. They argued that going by Section 204 (a) which states that malice aforethought can be deemed by an intention to cause death or grievous harm to a person, by inflicting the injuries on the late Samson, the accused person intended to kill him.

The state also relied on the case of **THE PEOPLE V NJOBVU 1968 ZR 132** which made reference to Section 204 of the Penal Code.

By inflicting those burn injuries to the chest and buttocks that led to the deceased's death, the accused person intended to do grievous harm to the deceased. Therefore the malice aforethought has been established, and the offence of murder is complete. The state has proved their case beyond all reasonable doubt and I find the accused person **GUILTY** as **CHARGED** and I convict him accordingly.

**DATED THE 24<sup>th</sup> DAY OF APRIL, 2017**

*S. Kaunda*  
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**S. KAUNDA NEWA**  
**HIGH COURT JUDGE**