IN THE HIGH COURT FOR ZAMBIA **HP/126/2017**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

THE PEOPLE

VS

JACQUELINE MWIINDWA

Before the Honourable Mr. Justice C. Chanda in Open Court on the 31st day of August, 2017.

For the People:	Mrs C. M. Hambayi & Mrs M. M. Matangala, Deputy Chief State Advocates with Mr G. Zimba, Principal State Advocate, NPA
For the Accused:	Mr A. J. Shonga Jr. SC. assisted by Mr N. Ngandu, Messrs Shamwana & Co.

RULING

Cases referred to:

1. *Mwewa Murono Vs The People (2004) ZR 207*
2. *The People Vs Njovu (1968) ZR 132*
3. *Dickson Sembauke Vs The People (1988-89) ZR 144*
4. *The People Vs Japau (1967) ZR 95*

5. *The People Vs Winter Makowela & Robby Tayabunga (1979) ZR 290*

6. *David Zulu Vs The People (1977) ZR 151*

Legislature 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*

JACQUENLINE MWIINDWA, stands accused of murdering **KOFI MILUMBE** on 28th day of October 2016 at Lusaka contrary to Section 200 of the Penal Code, Chapter 87 of the Laws of Zambia which allegation she denied.

In order to prove the commission of the alleged offence, the prosecution adduced evidence from eleven (11) witnesses. At the close of the prosecution's case, I am enjoined by the mandatory provisions of Sections 206 and 291 (1) of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia to determine whether or not a *prima facie* case has been established to require the accused make her defence.

Section 206 of the Criminal Procedure Code, provides that:-

> ***"If at the close of the evidence in support of the charge, it appears to the Court that a case is not made out against the accused person sufficiently to require him to make a***

defence, the Court shall dismiss the case, and shall forthwith acquit him."

Although the said Section 206 relates to criminal trials before the Subordinate Courts, is it now settled that it must be read together with Section 291 (1) dealing with trials in the High Court which enacts as follows:-

"When the evidence of the witnesses for the prosecution has been concluded and the statement or evidence (if any) of the accused person before the committing Court has been given in evidence, the Court if it considers that there is no evidence that the accused or any one of several accused committed the offence, shall, after hearing if necessary any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding."

The above provisions speak clearly that the determination I must now make is not depended on the defence making a submission of no case to answer. This position was amplified by the Supreme Court in the case of **MWEWA MURONO VS THE PEOPLE**[1] when it held as follows:-

"The application of Section 206 and 291 of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia does not depend on the defence, making a no case to answer submission. The Court has of its own motion to consider whether a prima facie case has been made out."

Despite the clear exposition of my duty at this stage as reproduced above, I nonetheless extended an invitation to the defence to make their submission which they did. The prosecution was equally granted liberty to file its submissions in response if any on or before noon of 30th August 2017 but none were filed by that time and as such I thus proceeded to render this ruling without them.

Mr A. J. Shonga Jr, the Learned State Counsel submitted that the evidence of the prosecution adduced so far did not make out a *prima facie* case of murder and prayed for the acquittal of the Accused. Although the Learned State Counsel was magnanimous and conceded that the prosecution had established the fact of the death of the deceased, he however contended that such death was not as a result of any culpable act or omission of the accused. My attention was drawn to the evidence of PW11 the Pathologist and his opinion as to the cause of death as contained in the Postmortem examination report exhibit marked P6. According to PW11, the deceased died of traumatic shock which simply meant multiple organ failure as a result of multiple blunt force injuries of his chest and head. PW11 explained that the injury the deceased sustained to his skull was of such a nature akin to those caused or found in road traffic accident victims as a result of a big external force of a fast moving motor vehicle. It was therefore contended that the injuries highlighted in the postmortem examination report exhibit P6 could not have resulted from the deceased holding on to the motor vehicle for the accused. In addition it was submitted that there was no evidence connecting the death of the deceased to the

said motor vehicle exhibit marked P1 especially that PW6 and PW7, the occupants of the said motor vehicle at the time testified that the Accused did not hit the deceased. It was further highlighted that the motor vehicle for the accused had no damage to its bonnet or the windscreen or any damage whatsoever on the front grill suggestive of it having been involved in an accident with a pedestrian.

It was finally submitted on the authorities of **THE PEOPLE VS NJOVU**[2] and that of **DICKSON SEMBAUKE VS THE PEOPLE**[3] that the accused had no motive or purpose to cause death or grievous bodily harm to the deceased. It was contended that the accused intention of visiting the deceased's house was to check on the children and became perturbed when she found that their four young children were being looked after by DELPHINE MUFWABI (PW1) who was barely 16 years of age at the time. Even in those circumstances, I was urged to consider the conduct and manner the Accused drove her motor vehicle whereby she navigated her motor vehicle to the side even when the deceased had blocked the way. Similarly, that even when the deceased had held on to the said motor vehicle, she never drove in any manner that was careless or reckless as to endanger his life but that she drove at a reasonable speed until such a time that the deceased had to let go off her car. This was confirmed by the evidence of PW2 who managed to talk to the deceased on phone and also by the evidence of PW4, PW5, PW6 and PW7.

It was therefore the Learned State Counsel's prayer that I find the accused with no case to answer on the authorities of **THE PEOPLE VS JAPAU**[4] and that of **THE PEOPLE VS WINTER MAKOWELA & ROBBY TAYABUNGA**[5].

I have considered the evidence before me and I have taken into account State Counsel's submissions and arguments. The uniqueness of this case is that I did not only just hear the witnesses testify before me but I also moved to the scene and was therefore able to see and follow how the events of that fateful night unfolded as relived by the witnesses.

Has the prosecution thus far established a *prima facie* case of murder against the accused person? My predecessors, who sat in these same Courts and whose robes of justice I have inherited, long settled and established when a submission of no case to answer may be properly made and upheld. In the case of **THE PEOPLE VS JAPAU**, Evans J, as he then was, held as follows:-

> ***"There is a case to answer if the prosecution's evidence is such that a reasonable tribunal might convict upon it if no explanation were offered by the defence. A submission of no case to answer may properly be upheld if an essential element of the alleged offence has not been proved or when the prosecution evidence has been so discredited by cross examination or is so manifestly unreliable, that no reasonable tribunal can safely convict on it."***

Similarly, Muwo J, as he then was, in the case of **THE PEOPLE VS WINTER MAKOWELA & ROBBY TAYABUNGA** came to the same conclusion when he held as follows:-

> ***"A submission of no case to answer may properly be upheld if an essential element of the alleged offence has not been proved or when the prosecution evidence has been so discredited by cross examination or is so manifestly unreliable, that no reasonable tribunal can safely convict on it."***

The Supreme Court of our land put a stamp of authority on that position of the law when it reiterated in the case of **MWEWA MURONO VS THE PEOPLE** as follows:-

> ***"In criminal cases, the rule is that the legal burden of proving every element of the offence charged and consequently the guilt of the Accused lies from beginning to end on the prosecution. The standard of proof is high, its proof beyond reasonable doubt... A submission of no case to answer may properly be made and upheld when there has been no evidence to prove the essential element of the alleged offence and when the evidence adduced by the prosecution has been so discredited that no reasonable tribunal could safely convict on it.If at the close of the evidence in support of the charge, it appears to the Court that a case is not made out against the Accused person sufficiently to require him to make a***

defence, the Court shall dismiss the case, and shall forthwith acquit him."

Being bound by the heavy shackles of the doctrine of judicial precedence and *stare decisis* of which I cannot extricate myself from, I am properly guided by the above cited authorities. It is therefore my considered view that a *prima facie* case is made out whenever the prosecution adduces evidence establishing an essential ingredient or essential ingredients of the offence charged. The said evidence must be of such a nature that it tends to implicate the accused one way or the other in such a manner that a reasonable tribunal might convict upon it even where the Accused offers nothing in defence. For how else might a reasonable tribunal convict, unless the evidence implicates. Thus the converse is true that where the evidence adduced by the prosecution does not implicate the accused person one way or the other, then in that instance a *prima facie* case has not been made out.

The Accused person is facing a charge of murder enacted under the provisions of Section 200 of the Penal Code in the following terms:-

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

On the totality of the evidence so far adduced, I find that all the prosecution witnesses have **exonerated** rather than **implicate** the Accused in the commission of this alleged offence. As rightly pointed out by the Learned State Counsel in his written

submissions, there was no shred of evidence adduced alleging any culpable act or omission of the Accused in relation to the death of the deceased.

Given the nature of the injuries the deceased sustained and the opinion of PW11 the Pathologist, I have no slightest hesitation in finding that the deceased died as a result of a road traffic accident. My finding is based on the view expressed by PW11 to account for the fracture on the skull being consistent with those usually found in road traffic accident victims involving a big force. In addition, the fracture of the shin, even if not fatal, could only have been sustained as a result of a road traffic accident as it was of such a nature that the deceased could not have walked on his own as opined by PW11.

When the testimonies of CHRISPIN MILUMBE (PW2), WINFORD SOKO (PW4), KAMWI MUFANA (PW5), LEONARD NYIRONGO (PW6) and SANDRA MALASHA MWINDWA (PW7) who were material witnesses in this case are considered, these witnesses discounted the supposition that the deceased may have been run over by the accused. All these witnesses confirmed that at some point the deceased had let go off the said motor vehicle and had walked freely. Meaning that at that point he sustained no such shin fracture of the nature PW11 had found during post mortem examination the deceased had sustained. As for CHRISPIN MILUMBE (PW2), he confirmed in his evidence that when he spoke with the deceased, who was his younger brother, on phone at exactly 19:26 hours, the deceased informed him that he had let go

off the said motor vehicle and was following it on foot. It was PW2's testimony that he then advised the deceased to stop following the said motor vehicle as it was dangerous to do so. As for WINFORD SOKO (PW4) and KAMWI MUFANA (PW5), they testified that they saw the deceased walk past their place of work on Bayuni Road. Their testimonies tallied with that of PW2 on that score.

I once again refer to the Pathologist's opinion that all the injuries the deceased sustained were inflicted at the same time as they were all fresh wounds and that was the reason he was unable to tell where the first impact was. This finding strongly suggests that the deceased never sustained any fatal injury or injuries whilst he held on to the said motor vehicle before letting go of it otherwise given the distance that the car had been driven, one would have reasonably expected a trail of blood spots to have been found along the road. In this case however, the blood spots were found concentrated in one area very close to where the body of the deceased was found lying as depicted by pages 6 and 7 of the photographic album exhibit P2.

Even PW9, D/Sgt. KAZHIMOTO 36198 the scenes of crime expert who did a scene reconstruction of the accident were unable to make any conclusion and neither did he suggest that the motor vehicle for the accused had hit the deceased. PW9 also confirmed that he never found any blood on the bumper of the said motor vehicle. I must mention here that I saw the motor vehicle for the accused exhibit P1 which was impounded the very night of the alleged accident both physically and via the photographic album exhibit P2

and it showed no signs of having been involved in any accident which could have caused the nature of the injuries which resulted in the death of the deceased.

With regard to the testimonies of LEONARD NYIRONGO (PW6) and SANDRA MALASHA MWINDWA (PW7) who were both occupants of the said motor vehicle at the material time, they denied that the Accused run over the deceased. It was therefore incumbent upon PW10 D/Insp. CHAFILWA 28576 the arresting officer to tell the Court the basis upon which he arrested and charged the Accused with the subject offence. According to PW10, he arrested and charged the accused on the basis of the alleged statement made by PW7 that she heard the deceased complain that he was hurt by the Accused and also on the basis of the postmortem examination report exhibit P6. In other words, the arresting officer merely drew an inference from that alleged statement and exhibit P6 to the effect that the injuries that caused the death of the deceased may have been caused by the Accused without investigating the matter further.

Such an inference was a dangerous one to make and the wisdom of the Supreme Court in the case of **DAVID ZULU VS THE PEOPLE**[6] becomes apparent when it held that:-

> ***"It is incumbent on a trial Judge that he should guard against drawing wrong inferences from the circumstantial evidence at his disposal before he can feel safe to convict. The Judge must be satisfied that the***

circumstantial evidence has taken the case out of the realm of conjecture so that it attains such a degree of cogency which can permit only an inference of guilt."

I am alarmed that the arresting officer relied only on an alleged statement of one witness instead of him conducting effective and thorough investigations. One even wonders at what point the deceased could have reasonably complained of having been hurt when he sustained fatal injuries to his head and chest. The evidence before me showed that the deceased could not have survived those injuries for him to live to tell the story thereafter.

On the totality of the evidence before me, I find that this case against the Accused is stuck deeply in the realm of speculation. The prosecution has therefore failed to make out a case of murder against the Accused person sufficiently to require her to make a defence. It behoves me therefore to dismiss this case and **JACQUELINE MWIINDWA** you are hereby acquitted and set free forthwith.

Dated at Lusaka this 31st day of August 2017

REPUBLIC OF ZAMBIA
HIGH COURT OF ZAMBIA
31 AUG 2017
CRIMINAL REGISTRY
P.O. BOX 5

.....
C. CHANDA
JUDGE