

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

HP/255/2019

BETWEEN:

THE PEOPLE

VERSES

BENNY ESSAU ZULU

BEFORE: THE HON. MR. JUSTICE W.G.K. MUMA IN OPEN
COURT THIS 17TH DAY OF MAY, 2022.

For the State: *Mr. S. Mainza from National Prosecution
Authority*

For the Accused: *Mr. R.M. Simeza (S.C.) from Simeza Sangwa
and Associates*

JUDGMENT

Legislation referred to:

1. Section 200 of the Penal Code Chapter 87 of the Laws of Zambia
2. Section 204 of the Penal Code Chapter 87 of the Laws of Zambia
3. Black's Law Dictionary 10th Edition

Cases referred to:

1. *The People V. Njovu* (1968) Z.R. 132
2. *David Zulu V. The People* (1977) Z.R. 151 (S.C.)
3. *John Mwansa and Samuel Mwansa Vs The People* SCZ/APP/No. 170/171/2014
4. *Machipisha Kombe V The People* (2009) ZR 282

5. *Simutenda V The People* (1975) ZR 294

The accused person stands charged with Murder contrary to **section 200 of the Penal Code Chapter 87 of the Laws of Zambia**. The particulars of the offence allege that Benny Essau Zulu on 9th day of July, 2019 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, did murder Natasha Mkandawire.

I warn myself that in criminal cases the burden of proving the guilt of an accused person lies from beginning to end on the prosecution; there is no onus cast upon the accused to prove as to his innocence. If after considering the evidence in this matter, there remains any doubt in my mind as to the guilty of the accused, then the accused must be given the benefit of doubt and be acquitted forthwith.

Turning to **Section 200 of the Penal Code Chapter 87 of the Laws of Zambia** the offence of Murder is defined as;

“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 under **Section 204 of the Penal Code Chapter 87 of the Laws of Zambia** as:

“Malice aforethought is deemed to be established by evidence proving anyone or more of the following circumstances:

(a) An intention to cause the death of or to do grievous harm to any person, whether such a person is 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 an act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”.

The case of **THE PEOPLE V. NJOVU (1968) Z.R. 132¹** qualifies the above in saying:

“To establish “malice aforethought” the prosecution must prove either that the accused had 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 the death or grievous harm to someone”.

The prosecution must prove that the accused persons unlawfully, knowingly, with malice aforethought took the life of Natasha Mkandawire.

I will now consider the evidence in this matter.

The prosecution called ten witnesses. The first prosecution witness was Mulipa Besa a 38 year old teacher from Ngwererere who will hereinafter be referred to as PW1. PW1 testified that she was the mother to the deceased Natasha Mkandawire. PW1 recalled that on the 9th of July, 2019 she was at home in her living room when at about 20:00 hours Natasha received a phone call. PW1 heard Natasha request for one of her siblings to escort her outside claiming that she would return soon. After a few minutes, Natasha's sibling returned home without Natasha. PW1 tried to inquire as to where Natasha was and Natasha's sibling informed her that she would return. After 5 minutes PW1 sent a text message to Natasha to find out where she was but the text did not go through. PW1 waited for 30 minutes and later tried to phone Natasha, however the line did not go through. PW1 started to call her relatives in search of Natasha but to no avail. Natasha did not return home on the material night.

All attempts to reach Natasha the following day proved futile. PW1 went

to report the matter at Ngwererere Police Station at 15:30. At the Police PW1 gave a description of the clothes that Natasha was wearing on the material night being, white leggings, a black top, a bush green head sock and purple slippers. On the 11th of July, 2019 PW1 received a phone call from Ngwererere Police informing her that there was a body that was picked on the 10th July, 2019. PW1 went to University Teaching Hospital (UTH) with Jackson Besa. Jackson Besa and PW1's mother identified the body and confirmed that it was Natasha's body.

PW1 disclosed that Natasha had a boyfriend, Ignatius Chikolomo who she came to know because Natasha spoke about him every day. PW1 revealed that she knew the accused person facially as he was a Ngwererere resident.

The second prosecution witness was Jackson Besa a 44 year old Service Man from Zambia National Service who will hereinafter be referred to as PW2. It was his testimony that on 11th July, 2019 he was called by PW1 to identify Natasha Mkandawire's body at UTH mortuary. PW2 went to the mortuary and identified the body of Natasha. PW2 disclosed that the postmortem was conducted on 16th July, 2019. PW2 identified the body to the doctor who conducted the postmortem. There were two police officers left in the room while the postmortem was conducted. PW2 denied knowing the accused person.

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The third prosecution witness was George Tembo a 45 year old Police Officer from Kabangwe Police Post who will hereinafter be referred to as PW3. It was PW3's testimony that he was in the CID section scenes of crime. PW3 recollected that on 10th July, 2019 he was at Kabangwe Police Post when he received a report of suspected murder from a member of the public. A body was discovered in Panika village in Chief Mungule. Inspector Sitali received the call. Inspector Sitali called PW3 to accompany her to the scene of the crime. The body was found at plot No. 12869 about 2.9km from Great North Road. Immediately PW3 arrived at the scene of the crime he took photos of the position of the body which was facing downwards. On physical inspection of the body, he observed a cut on the right side of the forehead. The deceased was wearing a black top, a maroon and grey sweat shirt and white leggings that were coated with blood. About 3 meters away from the body was half a pair of purple slippers and a bush green head sock. The body was female.

According to PW3's assessment the deceased could have been killed somewhere else and dumped at the scene as there were no signs of a struggle. The body was taken to UTH for identification.

PW3 made a photo album of the photos he took on his canon camera that was the property of Zambia Police. PW3 disclosed that he was the only

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person that had access to the camera. PW3 developed the photos in the presence of Inspector Sitali. PW3 positively identified the photo album of the photos taken. PW3 identified the accused person as Zulu who was his neighbor in Ngwererere.

The fourth prosecution witness was Sabina Jato a Chief Inspector from Lusaka Police Station who will hereinafter be referred to as PW4. PW4 narrated that she worked under the Homicide section at Lusaka Police and investigated murder cases. PW4 recalled that on 16th July, 2019 she was assigned to attend the postmortem of a body already at UTH mortuary. The body was of Natasha Mkandawire. The postmortem was conducted by the Doctor in the presence of Mulenga Mulugwisha and Kennedy Mwansa. During the postmortem PW4 noticed a cut on the right side of the deceased's neck and a cut on the right side of the forehead. The deceased further had multiple cuts on the skull. PW4 confirmed knowing the accused who she came to know when he was being cautioned at the police.

The fifth prosecution witness was Stephen Zulu Mvula a Police officer from Force Headquarters, who will hereinafter be referred to as PW5. PW5 disclosed that he was a deputy in charge of forensics. PW5 narrated that on 17th July, 2019 he was in receipt of a pistol serial number NY5634 and

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a motor vehicle Mitsubishi Parejo license plate number ABL 8531 which was allegedly shot at. There were also two fragments of a bullet and one bullet core. PW5 explained that the Pistol was a Makarov, Russian made, and 9mm caliber and had a capacity chamber of 9mm. The trigger and safety catch worked very effectively thereby preventing accidental firing. The pistol worked well though the metal jacket was deformed indicating that the bullet went through the barrel. PW5 fired the pistol to compare it with the marks that were present at the scene of crime. PW5 checked the barrel to see which direction the grooves were going. The groove marks were the same. The same type of pistol was used and four shots were fired. PW5 could not determine the distance where the shots were fired from. PW5 revealed that there were four grooves on the pistol. The metal jacket also had four grooves. This meant that there was one type of firearm that discharged that type of ammunition.

In regards to the motor vehicle there was a request to determine whether the holes that were found inside the motor vehicle were gunshots. PW5 examined the holes in the motor vehicle which bore traces of gun shots. The shots were slightly near the headrest on the driver's seat. The others were on the panel of the back seat. There were also traces of the gun shot on the driver's seat.

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The following day a scene reconstruction was conducted after being led by the suspect. They started at the point where the deceased person was picked up by the accused Mr. Zulu. They went to Ngwererere road. The motor vehicle was parked facing westward according to information obtained from the accused. An examination was conducted and that the bullet perforated the chair and had an entry and exit which also hit the panel that separated the two doors, the passenger's seat and the drives seat. There was also a gunshot hole that was under the cover. PW5 removed the cover where he found the bullet core and metal jacket. PW5 checked the entry point of the bullet core and measured the diameter of both bullet holes. The bullet hole that perforated the seat measured 9.6mm and the one that hit the panel measured 10mm. PW5 concluded that the type of gun used could have been of three types, the 9mm Luger Pal labellum, and a series of 9mm pistols Makarov. PW5 could not determine the type of series of the firearm.

PW5 took photographs of the motor vehicle and bullet holes with a digital canon camera. The camera is the property of the Zambia Police. He printed the photographs and made a photo album of nine pictures. PW5 generated a report of his findings, which was tendered into evidence and marked P7.

Under cross examination, PW5 verified that he was only given one bullet jacket and that his report was accurate. There was only an error with the report saying there were 2 jackets when there was actually one. PW5 explained that he wanted to determine whether the pistol was working and wanted to determine whether the holes were made by gun shots. PW5 however did not determine when the gun was last fired. PW5 clarified that he formed an opinion after laboratory tests were conducted. PW5 confirmed that he examined the marks using his eyes. The deformed bullets had four grooves which passed through the barrel. PW5 verified that the holes on the car were caused by a gun shot. He further stated that the motor vehicle had blood stains. PW5 could not determine the type of firearm used but confirmed that the bullet moved from the passenger side to the driver's side. The bullet moved at a 30 degree angle.

The sixth prosecution witness was Rogers Kanungo a Police Inspector from Lusaka Central Police Station that will hereinafter be referred to as PW6. PW6 recalled that on 13th July, 2019 whilst on duty his supervisor introduced him to the accused who was facing the charge of murder. PW6 found Inspector Shamapango and Inspector Sikazwe. PW6 was asked to record a short warn and caution statement and to establish if the accused was willing to demonstrate what had transpired on the material day. PW6 authorized the caution statement which was tendered into evidence and

marked P8.

Under cross examination, PW6 denied having asked the accused if he was willing to participate in the process and did not tell the accused that he had the right to refuse. PW6 however did inform the accused that whatever he said could be used against him in the court of law. PW6 reemphasized that the warn and caution was a short one. PW6 refuted knowing that the accused had a lawyer. PW6 revealed that he made the accused sign the warn and caution at the end of the same.

The seventh prosecution witness was Stephen Nkowani a District Criminal investigations officer that will hereinafter be referred to as PW7. PW7 recalled that on the 13th July, 2019 he was on duty as team leader to the investigations of a murder case of the deceased Natasha Mkandawire. PW7 conducted interviews of the accused in the presence of PW6 and Inspector Sikazwe.

PW8 was Dr. Muchelenganga Adam Luchenga a state forensic pathologist. He recalled that on 16th July, 2019 he received an order for Postmortem examination to examine a 19 year old woman who had been found along a roadside with a wound on her forehead. The body was identified by a relative and PW8 proceeded to examine the body and obtain photographs.

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During the process of external examination PW8 removed the clothes on the body and obtained photographs of the clothing using a Canon Police Camera. PW8 thereafter collected swab which was inserted in the vagina. PW8 inspected the naked body of the deceased and noted that there was an open wound on the forehead which he photographed. PW8 turned the body and examined the back where he observed another wound on the back of the neck and took a photograph of the wound. The wound was consistent with the entry of a gunshot wound. PW8 further observed that there was some blackening or soot which was washable. PW8 took a photo of the soot.

PW8 did an internal examination of the body, chest and all the organs in the chest and abdomen. He did not find any disease. The uterus did not contain any fetus. PW8 examined the neck where there was a wound. The path taken by the bullet entered the neck and broke the bones in the neck and entered the skull passed through the brains and fractured the skull before exiting. PW8 found a fragment of metal that was copper coloured on the forehead skin but he did not recover the bullet.

PW8 concluded that the death was caused by a gunshot from the findings of the wound that was a loose contact. PW8 explained that in Pathology there is a contact wound, a near wound and a distant wound. The contact

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has two (2) types of wounds, Hard contact where the gun makes an imprint on the skin or wound. This means that you could see the barrel of the gun imprinted on the skin. Loose contact in which the barrel of the gun is 2 to 5 centimeters away from the skin and it is away because when the gun is fired it pulls back and allows the smoke to settle on the skin. It is the smoke that PW8 referred to as the blackening or soot. This indicated loose contact gunshot wound. PW8 prepared the postmortem report and stored the photographs on the computers at the office of the State Forensic Pathologist.

Under cross examination PW8 explained that the bullet entered from the left hand side of the deceased to the right hand side of the deceased. PW8 explained that any firearm could have been used revolver, pistol or rifle.

PW9, Harry Mulungisha a Police Officer from Lusaka Headquarter and the Officer in Charge of Homicide effected the arrest of the now accused. PW9 recalled that on 12th July, 2019 he reported for work and was assigned to investigate a case of murder of Natasha Mkandawire aged 19 who was murdered by unknown persons. PW9 was informed by the DCIO that there was a person detained in connection with the same. PW9 got the accused and took him to his office for interviews. The accused name was Essau Zulu.

Mr. Tembo the DCIO ordered that the accused's house be searched. The house was searched and a pistol was recovered from the accused's bedroom. The accused's motor vehicle was taken to the police and it was observed that there were blood stains on the passenger's seat.

On 12th July, 2019, PW9 handed all these items that were in turn handed over to forensic for examination. The accused was handed to the police headquarters.

PW9 revealed that he saw the bullet marks on the motor vehicle.

Under cross examination PW9 denied having knowledge that that there was coverage of the case in the Newspaper on 14th July, 2019 and denied investigating the stories that came out of the newspaper. PW9 additionally denied knowing whether the deceased had a boyfriend. PW9 disclosed that the accused claimed that the man who shot the deceased could have been a police officer and that was why he asked him to produce an identification card. PW9 stated that when he interviewed the accused he did not have legal representation present.

Bronson Sakala former Officer in Charge of Ngwererere Police Post recalled that on 8th July, 2019 he was in charge of all administrative issues at the

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station. During the day shift he had one officer on duty in addition to himself. The officer was Constable Akabondo. There was an occurrence book that showed their movements and operations. The occurrence book had entries which had the taking over and the handover notes.

On 7th July, 2019 at the Inquires office Sergeant Munthali handed over the office to Sergeant Chikoloma. The items taken over was an AK47 rifle with 7 rounds of ammunition and one riot gun with 4 shells. On 8th July, 2019 Sergeant Chikoloma was with Constable Muyunda in the night shift. In the morning Constable Muyunda handed over to Constable Akabondo. The property handed over to Constable Akabondo was 1AK47 rifle with 7 rounds of ammunition as well as 1 riot gun with 4 shells. At 17.40 hours Constable Akabondo handed over to Constable Kashimba 1 AK47 rifle with 7 rounds of ammunition and a riot gun with 4 shells. On 9th July, 2019 Constable Kashimba who was on duty at 07.50 hours handed over to Constable Akabondo one AK47 with 7 rounds of ammunition and one riot gun with 4 shells and other items. These items were handed over to Constable Kashimba at 18.00 hours. At 07.45 hours Constable Kashimba handed over one AK47 with 7 rounds of ammunition and one riot gun with 4 shells to Constable Akabondo.

Between the 7th July, 2019 and 10th July, 2019 no ammunition was

expended.

Under cross examination PW10 clarified that there were records of the firearms at the station (The Armory Register Book). PW10 further clarified that the occurrence book does not keep a record of firearms at the station. PW10 disclosed that the full names of Sergeant Chikoloma was Cornelius Chikoloma.

This marked the closure of the prosecution case.

When put on defence, Counsel for the accused indicated to the Court that the accused would remain silent and say nothing at all and that he would call no witnesses at all.

The accused is perfectly entitled to do so. I therefore have to make a determination based upon the evidence adduced by the prosecution and this does not absolve me from testing the evidence to satisfy myself as to its truth or falsity nor does it affect the onus placed upon the prosecution to satisfy me beyond all reasonable doubt as the guilty of the accused person.

I did receive the submissions from both Counsel and I am indebted to them for their spirited arguments and the plethora of authorities their in. I have

also carefully taken a full note of their arguments and the law.

I now wish to state my findings of fact.

I hasten to say that there is no direct evidence adduced against the accused. The facts surrounding the case anchors solely on circumstantial evidence.

Circumstantial evidence has been defined in *Black's Law Dictionary 10th Edition* as;

Evidence based on inference and not on personal knowledge or observation”.

This definition has been fortified in the case of **DAVID ZULU V. THE PEOPLE (1977) Z.R. 151 (S.C.)²** wherein the Supreme Court held interalia;

It is therefore incumbent on the 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 in our view must, in order to feel safe to convict, be satisfied that the circumstantial evidence has

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

It is therefore prudent that in making my findings of fact I must mirror myself against this background. I should further severely caution myself against the danger of permitting or allowing the confession statements to cloud my mind as the same were expunged from record in my Ruling following the trial within trial.

Nonetheless in this case the evidence leading to the discovery of the body of the deceased exclusively builds up from the disclosure made by the accused person himself which subsequently resulted in the accused leading the police to the scene where the body was found. This evidence filtered through in the mainstream by the testimony of PW 5 Stephen Zulu a forensic Ballistic expert. He informed the Court that he extended a thought of doing scene reconstruction. That he made a request for the presence of the suspect because no one was at the scene at the time. Further that the subjective knowledge was based on the same suspect.

He further informed the court that the suspect led them to the scene. They started at the point where the deceased was picked by the suspect Mr. Zulu. Now the accused.

This piece of evidence reflects in P7 which is a report consolidated by PW5.

This piece of evidence was not challenged in anyway at all.

I must underscore this position that without the accused having led the police to the scene, no one else could have known where the body of deceased was disposed of at that time.

I want to arise and bring forth the evidence of leading the police to the scene by the now accused as it forms the crux of this matter.

I am fortified by the holding in the case of ; **JOHN MWANSA AND SAMUEL MWANSA VS THE PEOPLE SCZ/APP/No. 170/171/2014³** Wherein at page 25 of the Judgment, the Supreme Court guided as follows;

“It is a well-established principle that where the leading of the police to the scene or elsewhere by an accused, whether voluntarily or not, has resulted in the discovery of real evidence, or the discovery of anything else not already known to the police, the evidence of leading is always admissible.”

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There is further evidence on record led by PW7 and PW9 that it was the accused who led them to the scene where the body of Natasha was found. I must also mention that no one knew who had picked the deceased from her residence.

The evidence of PW1 the mother of the deceased narrated that on the 9th July, 2019 at about 20:00 hours the deceased received a call from unknown person and asked her siblings to escort her outside. The siblings came back on their own and that was the last day Natasha was seen. The mother reported to Ngwerere Police over the missing of her daughter Natasha from home.

On the 11th July she received a call from Ngwerere Police Station that a body matching the description she had given the police had been found.

I have earlier stated herein that had the accused not have led the police to the scene, the body of the deceased could not have been found at that time.

How then could the accused have known where the body of Natasha was disposed of?

The answer invariably leads me to a firm position that it was the accused who picked Natasha from the home on that fateful day.

There is evidence on record led by PW8 a State Forensic Pathologist to the effect that the cause of death of the deceased was as a result of gunshot wounds to the neck and head. That there were no other competing causes of death, natural or violent before she sustained the gun shot. This position is confirmed by the evidence led by PW3, Tembo George who is scenes of crime police officer. According to his assessment, the deceased could have been killed elsewhere and just dumped at the scene. He observed that there were no signs of any struggle at the scene.

There is further evidence led by PW9 that when they searched the accused house, a Pistol serial number NY 5634 was retrieved from the accused bedroom and that his motor vehicle was also taken to the police station. That the motor vehicle had blood stains on the passenger seat in front and that there were bullet marks on the Motor vehicle. The evidence of PW5 a forensic Ballistic Expert alluded to the fact that the motor vehicle which was retrieved from the accused's house had a hole which was a trace of a gunshot.

That the impact was massive hence making the metal copper jacket peel off and the bullet core extensively deformed, and that is to say, the shot was discharged at short range.

This evidence corroborates the evidence of the pathologist. In his summary and opinion, he indicated that the firearm was a rifled weapon (revolver, pistol or rifle) That the pathological range of fire was a loose contact as evidenced by the soot that was washable. That in loose contact wounds, the muzzle is against the skin, but for a short time following discharge of the weapon, a gap opens up between the muzzle and skin so that a ring of soot is deposited around the entrance hole. Further that the direction of fire was from downwards, upwards from left to right. That the decedent may have survived only a few seconds and was incapable of voluntary action. That the mechanism of death was a physical disruption of the brain and brain stem structure.

All these circumstances put together leaves me in a very difficult position to separate the bullet wounds found on the body of the deceased from the bullet holes found on the motor vehicle belonging to the accused which had blood stains on the seat. This same motor vehicle was retrieved from the house of the accused upon search. This could have occurred at the same time indicating that the deceased was shot at when she was in the motor vehicle belonging to the accused.

Therefore, I do not doubt in any way that the accused led the police to the scene where the body was found.

In the case of **MACHIPISHA KOMBE V THE PEOPLE (2009) ZR 282⁴**, the court held ;

‘Odd coincidence constitute evidence of something more. They represent an additional piece of evidence of which the court is entitled to take into consideration.’

I have already drawn an irrevocable position from the circumstantial evidence pointing to the fact that the accused was with the deceased at the time of her death. Thus, the accused was the last person to have been with the deceased.

The deceased died from bullet wounds. There were also bullet holes found on the motor vehicle of the accused. The range of fire was loose contact (muzzle against the skin). This is indicative that the accused has peculiar information of what transpired on that fateful day.

The accused elected to remain silent and called no witnesses at all.

He is rightly entitled to do so and equally State Counsel Simeza representing the accused properly cited the case of **SIMUTENDA V THE PEOPLE (1975) ZR 294⁵** wherein it was held:

'The only person who could have given the court direct evidence as to his state of mind at the critical time chose not to give evidence. There is no obligation on an accused person to give evidence, nor must we be taken to suggest that in the present case there was any onus on the appellant; but where an accused person does not give evidence the court will not speculate as to the possible explanations for the event in question; the court's duty is to draw the proper inference from the evidence it has before it.'

In this matter at hand the evidence highlighted is so strong against the accused that it leaves no room for speculation.

If in any event the accused was simply attacked when he was with the deceased, why did he neglect to report to police immediately the incident occurred?

All this demonstrates a guilty mind on the part of the accused.

The cocktail of events I have adumbrated herein leads me to draw only one inference and that is to say that it was the accused who shot the deceased and went to dump the body to the place where he subsequently led the police.

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Having said so I am therefore satisfied that the prosecution has proved their case against the accused person beyond all reasonable doubt at all and I find the accused guilty of murder and I convict him accordingly.

DELIVERED IN OPEN COURT THIS 17th DAY OF MAY 2022.

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HONOURABLE JUSTICE MR. W.G.K. MUMA
HIGH COURT JUDGE