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IN THE SUPREME COURT OF ZAMBIA **APPEAL NO.12/2023**
HOLDEN AT KABWE
(CRIMINAL JURISDICTION)

BETWEEN:

JACOB MWANSA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Hamaundu, Kabuka and Chisanga, JJS

On 4th April, 2023 and 13th April, 2023

For the appellant: Mr P. Chavula, Principal Legal Aid Counsel

For the State: Mr V. Choongo, State Advocate

JUDGMENT

HAMAUNDU, JS delivered the Judgment of the Court

Cases referred to:

1. **Bwanausi v The People (1976) ZR 103**
2. **Yotam Manda v The People (1988-1989) ZR 129**
3. **Phiri & Others v The People (1973) ZR (Reprint) 63**
4. **The People v Njovu (1968) ZR132**

1.0 INTRODUCTION

1.1 The appellant appeals against his conviction for murder by the High Court. He appeals on two grounds, which read as follows:

> **"Ground one**
>
> **The learned trial judge erred and misdirected himself both in law and fact when he convicted the appellant in absence of conclusive evidence proving that the deceased died as a result of the injuries which were inflicted by the appellant.**
>
> **Ground two**
>
> **In the alternative to ground one, the learned trial judge erred in law and in fact in convicting the appellant of murder in the absence of evidence proving malice aforethought beyond reasonable doubt".**

1.2 In the court below, the appellant stood charged with the offence of murder contrary to **Section 200** of the **Penal Chapter 87** of the **Laws of Zambia**. It was alleged that on 30th September, 2011 in Ndola the appellant murdered Elijah Tembo.

2.0 THE FACTS

2.1 Going by the grounds of appeal that have been advanced

by the appellant, we can safely say that a number of issues that were in contention in the court below are no longer in dispute. Hence, we will sent out the following undisputed facts: In the evening of the 30th Septembers, 2011, at a bar in the Chipulukusu Township of Ndola, the appellant kicked the deceased, Elijah Tembo, in the head with a pair of safety shoes. He also knocked the head of the deceased against the wall of the bar. What brought about this treatment on the deceased was an allegation that he (the deceased) had stolen a bicycle.

2.2 A witness, PW2, who was vending some snacks at the bar, said that, after hitting the deceased's head against the wall, the appellant dragged him to some place within the premises and left him lying there. When the witness came back from selling her snacks at neighbouring bars, she found that the deceased was no longer lying where the appellant had left him, but was now lying in a ditch just within the premises of the bar.

2.3 The following morning, PW2 still found the deceased lying in the ditch. She then alerted some men who lifted the

deceased from the ditch. The deceased was taken to the hospital in an unconscious state. He died, about seventeen days later, without having regained consciousness. The cause of death was diagnosed as head injuries.

3.0 THE HIGH COURT'S DECISION

3.1 We will not set out the defence that the appellant adopted in the High Court because it is no longer in tandem with the position that the appellant has taken in this appeal. Suffice to say that it was on the above facts that the High Court (presided by Siavwapa, J, as he then was) convicted the appellant.

4.0 THE APPEAL AND DECISION OF THE COURT

4.1 In the first ground of appeal, the appellant advances two arguments. The first is a brief one, and is that no evidence was led at the trial to reveal the condition of the deceased's health prior to the assault on him. We take it that, by implication, the appellant is arguing that the possibility that the deceased could have died of causes that already existed prior to the assault could not be ruled out.

4.2 Equally brief is the prosecution's counter-argument that the testimony of the witnesses PW1, PW2 and PW4 (the arresting officer) was that the deceased died due to the injuries inflicted by the appellant. By this submission, we take it that the State's argument is that, according to that testimony, other causes had been ruled out.

4.3 We agree with the prosecution that the possibility that the death of the deceased had been due to causes antecedent to the assault by the appellant had been ruled out. This is because; first, the cause of death, as determined in the post-mortem report, was consistent with the type of assault that the appellant meted out on the deceased. Secondly, the testimony of the witnesses showed that, immediately before the assault, the deceased was conscious and moving, and yet immediately upon the assault the deceased lost consciousness and mobility; and this remained the position until his death, seventeen days later. So, we find no merit in this argument by the appellant.

4.4 However, the appellant's main argument in this ground is that, since the deceased was found lying at a different place from that where he had left him, the possibility that other people may also have assaulted the deceased after the appellant's assault could not be ruled out. Mr Chavula, who argued this appeal on behalf of the appellant, emphasizes that the trial court should have examined alternative inferences, such as the one that the appellant is advancing now instead of arriving at the conclusion that the deceased's death was only from the assault by the appellant. We have been referred to the case of **Bwanausi v The People**[1] for that argument.

4.5 Mr Choongo, for the State, on the other hand, submits that the eye-witness accounts of both PW1 and PW2, who witnessed the appellant assaulting the deceased at different times and positions within the premises, were that on both those occasions it was only the appellant who was assaulting the deceased. Counsel submits that, on that evidence, only one inference could be drawn; and that is that the appellant was the one who caused the death of

the deceased. For that submission, counsel has referred us to the case of **Yotam Manda v The People**[2], where we held that a court can only draw an inference of guilt if that is the only irresistible inference on the facts.

4.6 Our position is this: We could delve into the question whether on the facts of this case there was a possibility that other people may have assaulted the deceased, after the appellant assaulted him; but that would be an exercise in vain in view of the provisions of **Section 207** of the **Penal Code, Chapter 87** of the **Laws of Zambia**. This section in part reads:

> **"207. A person is deemed to have caused the death of another person although his act is not the immediate or sole cause of death in any of the following cases:**
> **(e) If his act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons."**

4.7 According to this provision, therefore, as long as it is not in dispute that the appellant assaulted the deceased, he cannot escape liability for causing the death of the deceased; even if we were to accept his suggestion that other people may have assaulted the deceased subsequent

to the assault he meted out himself. Hence, the only issue for consideration in the circumstances is whether his culpability is for manslaughter or murder. That, of-course, depends on whether the appellant's assault was accompanied by malice aforethought: and that is the issue that the appellant has raised in the second ground of appeal.

4.8 The appellant's argument in the second ground is based on **Section 204 of the Penal Code**, but is anchored on a passage in the case of **Phiri & Others v The People** [3]. **Section 204** reads:

> **"204. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:**
>
> **(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".** (*underlining ours for emphasis*)

4.9 Mr Chavula contends that the appellant did not act with

malice aforethought when he went to apprehend the deceased for being accused of stealing a bicycle. He goes on to submit that the evidence of PW1 did not disclose that the appellant kicked the deceased with safety shoes, and neither did her evidence disclose how many times the appellant kicked the deceased. Mr Chavula also submits that PW2, as well, did not state how many times the appellant knocked the deceased's head against the wall. Counsel goes on to point out that the postmortem evidence did not disclose the severity of the head injuries.

4.10 Mr Chavula has quoted part of the following passage from the case of **Phiri & others v The People**, cited above:

> **"The learned trial judge found malice aforethought to have been proved because the nature of the assault was such that the appellants must have appreciated that it was likely to result at least in grievous harm. The learned judge came to this conclusion, however, on the basis of Phiri's evidence, but on the medical evidence, although it is clear that the deceased in fact died as a result of the blows on the head, it cannot be said that the appellants must have known that these blows were likely to cause grievous harm as defined. Had the medical evidence been clearer as to the severity of the blows and had the learned trial judge made a finding as to malice aforethought after considering only that evidence, an appellate court could**

only have interfered with such finding if it was one which could not reasonably have been entertained. In the present case, however, we are unable to say what could have been the learned trial judge's finding on the question of malice aforethought had he directed himself properly, and for these reasons the conviction in the cases of appellants one and three must be set aside and convictions for manslaughter substituted".

4.11 Relying on this passage, Mr Chavula concludes his submissions by pointing out that, even in this case, there is no finding by the trial Judge on the question of malice aforethought.

4.12 In response, Mr Choongo has referred us to the High Court decision in the case of **The People v Njovu**[4] where Blagden, CJ said that malice aforethought relates to the state of mind of the accused at the time he caused the death of the deceased. It is Mr Choongo's argument that malice aforethought can be inferred from surrounding circumstances of the offence, such as; the nature of the weapon used, the part of the body targeted and the manner in which the weapon is used. Proceeding with this argument, he submits that the appellant in this case targeted the head in assaulting the deceased, and he

therefore ought to have known that death or grievous harm could result from such assault.

4.13 First, we would like to explain the passage quoted from the case of **Phiri and others v The People** in its proper context. The case was one where there was a conflict between an eye-witness account and the medical evidence. Phiri was a witness in the case who claimed to have witnessed the assault. He gave very exaggerated testimony that the appellants beat the deceased with a bicycle chain, a long baton, an axe handle and a spanner, in addition to kicking and stamping him all over the body. The doctor, on the other hand, said that, in his opinion, the injuries he found on the head were probably caused by four or five heavy blows with a blunt instrument. The trial judge relied on the testimony of Phiri in arriving at the conclusion that there was malice aforethought. The Court of Appeal (this court's predecessor), however, found that Phiri, because of his exaggeration and other circumstances, should have been treated as an untruthful witness; and that his testimony should not have been relied on. Having excluded

Phiri's testimony, the Court of Appeal was unable to determine what the trial court's finding would have been had it resolved the issue of malice aforethought only on the evidence of the doctor, hence the reduction of the convictions to manslaughter.

4.14 The appellant's case herein is different. First we must point out that, contrary to the appellant's assertion that PW1 did not say that the appellant kicked the deceased with safety shoes, the witness did actually say that. Secondly, malice aforethought can be inferred from the whole conduct of the appellant. In this case, PW2 testified that, after knocking the deceased's head against the wall, the appellant left the deceased lying on the ground. Surely, it must have become clear at this point to the appellant that the assault on the deceased had had a grievous effect on the latter; and if, at first, the appellant had not appreciated what effect the assault would have on the deceased, the deceased's falling to the ground should have brought the appellant back to his senses, and at that point the appellant should have exhibited conduct which

showed concern about what had happened. But instead, the appellant's conduct was one of indifference: he did not show surprise at what had just happened. It can therefore be inferred that the appellant knew that kicking the deceased in the head and further knocking the deceased's head against the wall would, at least, cause grievous harm to the deceased, but he simply did not care whether that happened or not. Hence, even though the trial Judge did not formally pronounce the finding of malice aforethought, the evidence very clearly showed that it was present. In our view, therefore, the appellant was caught up by **Section 204 (b)** of the **Penal Code;** and we do not hesitate to hold that malice aforethought was proved in this case. We find no merit in this ground of appeal as well.

4.15 All in all, we uphold the learned trial judge's conviction. This appeal is dismissed.

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E. M. Hamaundu
SUPREME COURT JUDGE

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J. K. Kabuka
SUPREME COURT JUDGE

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F. M. Chisanga
SUPREME COURT JUDGE