

**THE PEOPLE v EVERISTO BUNDA, ZEBRON MUMBA AND EVERINE KAMWATA (1990 - 1992) Z.R. 194 (H.C.)**

HIGH COURT  
M. E. MWABA, COMMISSIONER  
27TH JANUARY, 1992  
(H.N./17/91)

**Flynote**

Criminal law and procedure - Murder - Common design - Motive - Proof of malice aforethought - When applicable.

Criminal law and procedure - Sentence - Extenuating circumstances - When available.

**Headnote**

The accused were charged with the murder of a fellow villager in Ndola rural. The basic facts were that a day before the incident, a fight took place between the deceased and one of the accused. As a result the following day the accused in the company of the co-accused went in search of the deceased and, having found him at his home, chased him into the nearby bush uttering threats to inflict fatal injuries. Shortly afterwards the deceased was found dead and the accused attempted to run away and had to be physically apprehended. They denied killing the deceased or acting in pursuance of a common design.

**Held:**

- (i) The facts of the case indicated the existence of motive as proof of malice aforethought of motive and the killing of the deceased as part of a common design, therefore all three accused were guilty of murder.
- (ii) Evidence of the deceased having started a fight may be regarded as extenuating circumstance for purposes of sentencing under s.201(1) of Act 3 of 1990.

**Cases referred to:**

- (1) R. v Ball [1911] A.C. 47.
- (2) Ernest Mwaba and Others v The People (1987) Z.R. 19.
- (3) Mohan and Another v R. [1967] 2 All E.R. 58.

**Legislation referred to:**

Act 3 of 1990, s.201(1).

For the State:	K. Lwali, Assistant. Senior State Advocate.
For first and second accused:	P. Mutale, Legal Aid Counsel.
For the third accused:	J. M. Kapasa, Messrs Kapasa and Co.

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**Judgment**

**MWABA, C.:** delivered the judgment for the court.

The accused persons stand charged with murder contrary to s.200 of the Penal Code, cap. 146 of the Laws of Zambia. The particulars of the offence are that Everisto Bunda, Zebron Mumba and Everine Kamwata, on the 3<sup>rd</sup> day of September, 1990 at Ndola in the Ndola District of the Copperbelt Province of the Republic of Zambia, jointly and whilst acting together did murder Davy Sumaili.

A plea of not guilty was entered in respect of each of the three accused persons. During the trial the prosecution called six witnesses.

PW1 Regina Kampanga, wife of the deceased, informed the Court that

On 2<sup>nd</sup> September, 1990 she was at home and that her late husband told her to go to the bar. This was about 19:00 hours.

Her late husband bought her one beer. She then saw A3 who also bought her one beer. This time her late husband asked her the name of the person who had bought her the beer. She informed him that the beer was bought by her aunt A3. He also asked whether it was the same person who was looking for men for her. She refused the allegation. The deceased then slapped her and she went outside. Then, the deceased picked a quarrel with A3. They both went outside where A3 started insulting the deceased. The deceased beat A3 who sustained a red eye. PW1 went back home, but she did not know where the deceased had gone.

The following morning A3 went to her and asked where her husband had gone and she informed her that she did not know where her husband was. A3 insisted that she should accompany her to look for the deceased at his place of work and that if A3 does not see him there then she would kill her instead. They both left for A3's home. When they reached there A3 said that she was feeling tired because she was beaten up by the deceased and that she wanted to lie down. At this juncture PW1 went back to her friend's house as she was afraid that A3 would go to her house again and start troubling her. When she eventually returned to her house PW1 found her late husband at home. She stayed at home and later A3 approached her again. She accused her of hiding the deceased. A3 entered the house, but she did not see the deceased. A3 then took the deceased's pair of trousers and half pair bed sheets while saying that between her and the deceased one would die. A3 started going back to her home and PW1 followed her so that she could get back what A3 had taken. When they reached A3's home, she started beating PW1 until PW1 managed to free herself. A3 said she would go and call A2 who could run faster so that he could catch the deceased. A3 then picked an axe handle and a hoe saying that if she found the deceased she would chop him. They went to look for him. A1 and a soldier went into the bush. They did not accompany A3. PW1 returned to her home crying. The deceased returned to his home and found his wife crying. She explained that she had been beaten by A3. The deceased then tore his skipper and went outside the house. Shortly afterwards A3 reached the deceased's home and asked PW1 where the deceased was. She said she would chop him once she saw him, failure to that PW1 would die instead. Since she did not see the deceased she started going away. Then the deceased, who was hiding behind the house, entered his house and started eating food. When PW1 left her house to look for soap she saw A2 running towards her house and when the deceased saw him, he ran out of the house without a shirt. A2 started chasing him and A3 followed. PW1 followed behind and climbed an anthill. She saw A1 and a soldier come from the hiding and ran after the deceased. When they all disappeared in the bush, PW1 returned. On her way home she met A2 chanting that as a hunter he has killed and thrown away. PW1 saw A1, A3 and a soldier going back using a bush path at the edge of the village. When she reached her friend's place, PW1 was informed that a person had been killed in the bush. PW1 went to the chairman who admitted that a person had been killed. The Chairman asked whether she was missing somebody; PW1 admitted that she was

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missing her husband. They both went into the bush where they found the deceased lying at the anthill. PW1 informed the chairman of the names of people who were chasing the deceased. After staying for a short while in the village all the accused persons were apprehended and the matter was reported to the police.

In cross-examination PW1 said that she was present when the deceased was being chased by A2 and that she did not know what A2 did to the deceased in the bush. She added that A3 followed the deceased in the bush. She did not return before reaching the bush. PW1 agreed that A3 was expecting, but she was in her early stage and that could not prevent her from running after the deceased. PW1 also said that when she climbed the anthill she saw A1 and a soldier, but she did not see what they did to the deceased.

PW2, Jenny Kafunga, informed the Court that on 3rd September, 1990 she was at her house. At about 15:00 hours she saw accused 1, 2 and 3 chasing her son-in-law (the deceased) into the bush. She knew the three accused persons before. A1 was married to her young sister, A2 is her uncle's son and A3 is her sister. They all live in the same village.

When they chased the deceased, she followed up to a certain distance, but she got tired and returned. She, however, decided to report to the chairman so that he could follow up the matter. Upon her arrival at the chairman's place she was informed that the chairman had gone to the place where his son had found a dead body. She added that only a short time had

passed since she saw them chase the man and received information that the man they were chasing had died. Later on she went to the bush and saw the dead body. At that time the three accused persons had run away. The next time she saw them was at the police station. She informed the Court that the three accused persons were the only ones who were chasing the deceased person.

In cross-examination, PW2 said PW1 is her sister and that when the accused persons were chasing the deceased they passed in the fields near her house. She further informed the Court that she did not see the soldier. She only saw the three accused persons. When she looked at the dead body she observed that only his genitals were swollen.

PW3, Eliam Masha Sumaili, informed the Court that on 3<sup>rd</sup> September, 1990 he identified the body of his late son to the police and to the village headman. He added that he went to the scene where he found the dead body. He observed that the deceased's teeth were loose, he had bruises on the chest, there was blood on the mouth and no other parts were injured; but the head looked swollen. The body was buried on 7th September, 1990 with the permission of police who informed PW3 that there was no doctor to conduct a *postmortem* examination.

PW5, Lewis Chisamba, informed the Court that on 3<sup>rd</sup> September, 1990 he went to collect firewood in the bush. As he was collecting firewood he found a person lying down. This was past 15:00 hours. When he went near he found that the person was dead. He did not recognise the dead person that time. He went home and told his neighbour. Later he heard from PW1 that her husband was chased by people into the bush. Afterwards he discovered that the name of the dead man was Davy Sumaili, a person he had known before. He informed the Court that when he looked

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at the dead body, he did not observe anything peculiar on the body. He did not see any injuries. In cross-examination, he told the Court that there was no sign of a struggle at the place where the dead body was. He also said that he did not see blood in the mouth, but he saw saliva.

PW5, Detective Constable No.21460, Abet Siguyola, informed the Court that on 3<sup>rd</sup> September, 1990, he was on duty at Misundu Police Post at about 17:00 hours. He received a report to the effect that there was a dead body in the bush. He rushed to the scene and found the dead body. He checked the body and found that there was a wound on the mouth and on the chest and blood was oozing from the nose and mouth. Upon inquiring he was informed of the names of the people who were seen chasing him. After 18:00 hours the same day he managed to apprehend all the suspects.

In cross-examination, PW5 informed the Court that at the scene there was no sign that a fight had taken place. He stated that he did not see any rocks around at the scene.

PW6, Detective Constable No.11905, Sililo Kumatongwe, informed the Court that on 4<sup>th</sup> September, 1990 when he reported for work, he found a report that someone was murdered. He went to the scene and found a dead body. He examined it and found that it had some marks. He collected the body and took it to Ndola Central Hospital Mortuary. On 7<sup>th</sup> September, 1990 he jointly arrested the three accused persons and charged them with the subject offence. He warned and cautioned them in Bemba, a language they understood well. They all gave a free and voluntary reply denying the charge.

On 28<sup>th</sup> September, 1990 the deceased's body was exhumed at Kantolomba cemetery after which Dr Graig from UTH Lusaka conducted a *postmortem* examination and the body was reburied. The body was identified to the doctor by Marshall Sumaili, the deceased's father. PW6 received the postmortem report and kept it in his custody. The said report was produced in Court as exh. 'P1'.

In the said postmortem report Dr Graig certified that the examination was conducted on the body of a young man. It was showing early decomposition and mummification. The face, hands and chest were red showing the evidence of bruises. The right upper chest and skull were fractured and that the cause of death was violence due to suspected assault.

In cross-examination PW6 informed the Court that when he observed the dead body, he saw bruises on the chest and on the face. He found dust all over the body. He observed blood coming from the nose and mouth. At the scene there were many foot marks so that one could conclude that there was a fight. He further informed the Court that the dead body was buried in the first instance because the father of the deceased got in touch with a junior police officer at Ndola Central Hospital and obtained disposal forms from him without his knowledge. That is why the body had to be exhumed for the *postmortem* examination.

In pursuance of s.207 of the Criminal Procedure Code, the accused persons were put on their defence. The rights of election were explained to them. The first and second persons chose to give evidence on oath and called no witnesses. The third accused person elected to remain silent. In his sworn statement he informed the Court that on 3<sup>rd</sup> September, 1990 he

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was apprehended and beaten up by police who accused him of having killed somebody. He informed the Court that he knew nothing about the case framed against him. A2 also denied knowledge of this case.

The advocate for A3 submitted that the conduct of the deceased when he was with PW1 and A3 drinking beer at the bar shows that the deceased was the aggressor. He pointed out that it was not true that A3, who was at the time pregnant took part in the chase. He concluded by saying that there is not sufficient evidence to establish a common design on three accused persons and that there is no evidence to show which of the accused persons assaulted the deceased.

On the evidence before this Court, it is not disputed that Davy Sumaili, the deceased in this case, lost his life on 3<sup>rd</sup> September, 1990. The issue which should be resolved is whether the three accused persons are the ones who inflicted fatal injuries on the deceased.

The evidence connecting A1 to the offence is that of PW1 and PW2. PW1 testified that A1 and a soldier went into hiding in the bush and that she saw A1 and the soldier come out hiding and start chasing the deceased until they all disappeared in the bush. PW2 informed the Court that on 3<sup>rd</sup> September, 1990 she saw accused 1, 2 and 3 chase the deceased. They all ran into the bush and PW2 could no longer see them. She informed the Court that she knows the three accused persons very well.

Similarly, the evidence linking A2 and A3 to the offence is again that of PW1 and PW2. PW1 said that at the bar the deceased accused A3 as the one who was looking for men for his wife. Then A3 started insulting the deceased and a fight ensued. The fight resulted in A3 sustaining a red eye. The following date, that is 3rd September, 1990, A3 started looking for the deceased and told PW1 would be killed instead. Later A3 entered the deceased's house and took his trousers and a half pair bed sheets while saying that between her and the deceased one would die and that she would call A2 who could run faster in order to catch the deceased. A3 picked an axe handle and a hoe and said that if the deceased would be found she would chop him. Shortly afterwards, when the deceased saw A2 coming to his house, he ran out of his house without a shirt. Then PW1 saw A2 chase him together with A3 and a soldier until they all disappeared into the bush.

PW1 further testified that when she met A2 coming from the bush she heard him sing a song of praise saying that as a hunter he had killed and thrown away. She added that it took a very short time from the time they were chasing him up to the time the deceased was reported dead.

As already pointed out, PW2 also confirmed that she saw A1, A2 and A3 chase the deceased.

On the evidence on record I find as a fact that:

- (a) A day before the alleged incident took place there was a fight at the bar between A3 and the deceased.
- (b) As a result of the fight A3 sustained a red eye and she therefore wanted to kill the

deceased in order to revenge. Thus on 3<sup>rd</sup> September, 1990 she made the necessary preparation to accomplish her goal. The arrangements she made include hiring A2 to assist her.

(c) The three accused persons chased the deceased into the bush and that

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the deceased died shortly after the three accused persons were seen running after him.

The only question for me to decide is whether the three accused persons killed the deceased. As I have pointed out, the previous acts or words of the third accused person show that she entertained feelings of enmity towards the deceased. The said evidence of motive shows that nobody else apart from A3, A1 and A2 assaulted the deceased person and that the deceased died as a result of the injuries inflicted on him during the fight. The injuries indicated in the *postmortem* report such as fractured chest and skull clearly show that the deceased was unmercifully beaten up.

The advocate for the third accused submitted that there was no common design on the part of the three accused persons and that there is no evidence to show which of the accused persons assaulted the deceased.

I totally disagree with the submissions of the learned advocate for the third accused person because the presence of motive and the preparations which A3 made included the hiring of A2 to assist her to kill the deceased and the declaration of her intentions do show that the three accused persons had common intentions to kill him.

The fact that the deceased died shortly after the three accused persons were seen chasing him inevitably shows that the said accused persons committed the offence in question. They even ran away after the incident.

The question of motive was considered in the case of *R. v Ball* [1] by the House of Lords which had this to say:

"Surely in an ordinary prosecution for murder you can prove previous acts or words of the accused to show he entertained feelings of enmity towards the deceased, and that this evidence not merely of the malicious mind with which he killed the deceased, but of the fact that he killed him. You can give in evidence the enmity of the accused towards the deceased to prove that the accused took the deceased's life. Evidence of motive necessarily goes to prove the fact of homicide by the accused, as well as his "malice aforethought", in as much as it is more probable that men are killed by those who have some motive for killing them than those who have not."

The question whether other people may also have assaulted the deceased and that there is no evidence to show which of the accused persons assaulted the deceased was considered by the Supreme Court for Zambia in the case of *Ernest Mwaba and Others v The People* [2]. The Court said that the fact that other villagers also participated in the assaults would not relieve the appellants of their own liability. As active participants in the joint venture, they would all be principal offenders within the meaning of s.21 of the Penal Code.

In the case of *Mohan and Another v R.* [3] it was held that the appellant was liable even if his own blow would not have been fatal had they not been accompanied by the blows of other people. Thus once more or less equal participation in the unlawful assaults on the same victim was established, it was unnecessary to show who struck the fatal blow; each was fully liable for the manslaughter. Further, the three accused persons are charged with murder, contrary to s.200 of the Penal Code. The question is whether they intended to kill the deceased within the meaning of s.204 of the Penal Code which defines malice aforethought. Considering the declaration Considering the declaration

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of intention to kill by A3, the nature of injuries sustained by the deceased ie. fractured upper chest and skull and the song sung by A2 praising himself for having killed the deceased is a clear testimony that the three accused persons intended to kill the deceased with malice aforethought. The advocate for the third accused person Mr *Kapasa* has submitted that the

accused was the aggressor, but he did not advance the defence of provocation. I have therefore declined to consider this point further. The evidence of PW1 and PW2 was found by this Court to be credible. In light of all these considerations, I find each of the three accused persons guilty of murder under s.200 of the Penal Code and convict each of them accordingly.

*Sentence:*

The Court has considered whether there are extenuating circumstances to persuade this Court to impose any other sentence other than death as required by s.201(1) of Act 3 of 1990.

This Court has established that since the deceased himself started the fight which resulted in A3 sustaining a red eye this aspect is taken as an extenuating circumstance. For this reason, death penalty is not imposed on the three accused persons. Instead A1 and A2 are each sentenced to 16 years' imprisonment with hard labour and A3 is sentenced to eight years' simple imprisonment. The sentences are effective from the date they were remanded in custody.

Accused convicted.