**IN THE SUPREME COURT FOR ZAMBIA Appeal No. 181/2011**

**HOLDEN AT NDOLA**

(Criminal Jurisdiction)

**BETWEEN**

**JOSEPH NJOBVU APPELLANT**

**AND**

**THE PEOPLE RESPONDENT**

***Coram:*  SAKALA CJ, MUYOVWE and MUSONDA, JJS**

**On the 6TH December, 2011 and 6th June, 2012**

For the Appellant: Mr. K. Muzenga, Acting Principal Legal Aid

 Counsel

For the Respondent: Mr. Patrick Mutale, Acting Chief State

 Advocate

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

**MUYOVWE, JS, delivered the Judgment of the Court.**

**Cases referred to:**

1. **R. vs. Shaushi s/o Miya (1951) 18 E.A.C.A 198**
2. **Jackson vs R (1962) R. & N 476**
3. **Libuku vs. The People (1973) Z.R. 345**
4. **Bicton Tembo vs. The People (1972) Z.R. 93**
5. **The People vs. Pelete Banda (1977) Z.R. 363**
6. **Nyambe vs. The People (1973) Z.R. 228**
7. **Abdullah Bin Luendo and Another vs. R. (1953) 20 E.A.C.A. 166**
8. **Benwa and Another vs. The People (1975) Z.R. 1**
9. **Yanyongo vs. The People (1994) Z.R. 149**

**10. Kambarage Kaunda vs. The People (1990-92) Z.R. 215**

**11. Chola Nyampande and Sichula vs. The People (1988-89)**

 **Z.R. 163,**

**12. Simon Malambo Choka vs. The People (1978) Z.R. 246**

When we heard this appeal, Justice Musonda sat with us. But at the time of writing this judgment, he was not available. Therefore, this judgment is of the majority.

The Appellant was convicted by the Chipata High Court of one count of murder contrary to **Section 200 of the Penal Code, Cap 87 of the Laws of Zambia**. The particulars alleged that the Appellant on 12th November, 1998 at Katete in the Katete District of the Eastern Province of the Republic of Zambia did murder one Margaret Tembo.

The Appellant was also convicted of the offence of attempted murder contrary to **Section 215 (a) of the Penal Code.** The particulars alleged that on 13th January, 1998 at Katete in the Katete District of the Eastern Province of the Republic of Zambia jointly and whilst acting together did unlawfully attempt to cause the death of [Matildah](file:///C%3A%5CMatildah) Zulu.

In relation to Count one, the prosecution called five (5) witnesses. PW1 and PW2 were children of the deceased, who was the mother-in-law to the Appellant. PW1 was the brother-in-law to the Appellant; while PW2 was his wife. The facts indicate that at the time of commission of these offences, the Appellant and PW2 were on separation.

 The evidence of PW1 and PW2 was substantially the same. The two witnesses testified that in the morning, on the material day, they were working in the field with their mother. As they were working, the Appellant arrived and demanded to know from the deceased about the problems that he was having with his wife, PW2. The deceased advised him to approach the marriage mediator and that the Appellant left in annoyance after the short discussion.

The Appellant, later, returned to the field in the afternoon and as the deceased was coming out of the shelter where she had been resting after working, he blocked her, tripped her and she fell down and then he struck her on the head with an axe and the axe-head remained embedded in the head of the deceased. She was rushed to the hospital but she died on the way to the hospital.

Both PW1 and PW2 stated that the deceased was not armed with any weapon before the Appellant struck her with the axe. That she did not insult him. That after he struck her with the axe, the Appellant ran away leaving the axe embedded in the deceased’s head after he failed to remove it. He ran off with the axe-handle.

PW3 and PW4 were both in their fields, when they heard people mourning. They rushed to the deceased’s field where they found her unconscious and bleeding profusely on the ground with the axe head embedded in her head. They both did not witness the incident.

The matter was reported to the police by PW5; who also did not witness the incident.

In the 2nd count, the facts are that the complainant (PW6) was returning home alone, from the field in the afternoon. As she proceeded home, she met a young man (the Appellant) clad in a red bomber and they by-passed each other as he was going in the opposite direction. PW6 was carrying a bucket of water on her head. Suddenly, he grabbed her from behind causing the bucket to fall from her head. The Appellant and PW6 started struggling as he kept touching her buttocks and he pushed her to the ground and undressed her as they struggled. He tried to cut her throat with a knife and then squeezed her throat and she lost consciousness. When she regained consciousness, she discovered that she was bleeding heavily from her private part and the Appellant had disappeared. PW6, who was in a lot of pain, discovered that the Appellant had cut off the whole of her private part. She managed to crawl to her brother’s house and she was rushed to St Francis Hospital; where she was hospitalised for a month.

According to her brother (PW7), he visited the scene of crime and he found “the part that had been cut off” from PW6 also and took it to the police.

PW8 and PW9 who were called by PW7 to see what had happened to PW6 also testified.

PW10’s evidence was that in the company of PW11 he apprehended the Appellant on 19th January, 1998 and the Appellant surrendered the axe handle to them. At the time of apprehension, the Appellant was wearing grey trousers with a red bomber and they found a home-made knife in his pocket. PW10 handed the Appellant over to the police at Katete, together with the exhibits found on his person.

PW12, Acting Woman Inspector, Rose Mwila, conducted the identification parade at which PW6 identified the Appellant.

PW13, the Arresting officer in both counts, stated that he visited both scenes of crime. He confirmed that the Appellant was apprehended and brought to the police station on 19th January, 1998. The Appellant was interviewed and later charged with the subject offence. PW13 produced the exhibits in Court including the part that had been cut off from PW6’s private part; the post-mortem examination report relating to the first count and the Medical Report relating to PW6 in the second count.

In his defence, the Appellant stated that, on the material day he went to his field only to find that his hoe was missing. He decided to follow his wife (PW2), who was with the deceased at the field to inquire about his missing hoe. When he reached the field, PW2 advised that she knew nothing about the whereabouts of his hoe. The Appellant then went to work in his field. He knocked off around 1400hours and decided to go and see the marriage mediator to complain about his concerns over his marriage with PW2. From there, he went home, and then he went drinking and later, went back to his field. As he worked, he felt hungry as he had not eaten for two weeks so he proceeded to the deceased’s field to look for food. He had a small hoe in his hands. On reaching the field, he found his wife (PW2), the deceased and others. He asked for food; but he was greeted with insults from the deceased; who emerged from the shelter with an axe which she threw at him. He said the sharp end of the axe struck him on the head and he got injured. He said PW2 was also advancing towards him with a hoe in her hand. And so he picked the axe and advanced towards the deceased and threw the axe and struck her on the head and ran away. The Appellant said he ran away with his bare hands.

 According to the Appellant, he stayed at his father’s farm for two weeks until he decided to go back to his village. As he proceeded, he was surprised to see a mob of people with pangas, machetes and muzzle loaders and when they saw him they said: “Isn’t that the young man who caused an accident at Musimuko village.” On hearing that, the Appellant took to his heels. The people chased him until they apprehended him and he was beaten severely to the extent that he was hospitalised for three days.

On the 2nd Count of Attempted Murder, the Appellant said it was while he was in hospital that the police brought PW6 into the ward where he was admitted. They told her he was the one who had attacked her. He insisted that she managed to identify him at the parade as she had seen him at the hospital before the identification parade was conducted.

In his judgment, with regard to Count 1, the learned trial Judge found as a fact that the Appellant admitted that he killed his mother-in-law by striking her with an axe. He considered the Appellant’s story that the deceased had thrown an axe at him. In considering the defence of self-defence he considered the cases of **R. vs. Shaushi S/O Muya¹** and **Jackson vs R².**  He stated that he believed the evidence of PW1 and PW2 as he was impressed with their demeanour. The trial Judge found that the Appellant’s own evidence was that the axe missed him and that, therefore, the defence of self-defence was not available to him.

In light of the prosecution evidence, the trial Judge also considered the defence of drunkenness. He addressed his mind to the cases of **Libuku vs. The People³** and **Bilton Tembo vs. The People** in which the defence of drunkenness was examined. The trial Judge found that the fact that the Appellant could strike the deceased with an axe and run off after attempting to dislodge the axe from the deceased’s head was evidence of the fact that the defence of intoxication was not available to the Appellant.

The learned Judge also examined the defence of provocation in line with the case of **The People vs. Pelete Banda** and found that the Appellant was not provoked by the deceased. He found that the Appellant was an untruthful witness. And that the prosecution had proved its case beyond reasonable doubt and found the Appellant guilty as charged and convicted the Appellant of the offence of Murder and sentenced him to the mandatory death sentence.

On the 2nd Count, the trial Judge; after reviewing the facts of the case, considered the cases of **Nyambe vs. The People6** and **Abdullah Bin Luendo and Another vs. R,** amongst other cases. He found that there was a possibility, having regard to the circumstances, that the complainant (PW6) could have made an honest mistake in identifying the Appellant. That although the incident happened in the afternoon; PW6 was frightened and traumatised. The trial Judge found that the evidence of identification needed support as it was weak. The supporting evidence was found in the fact that the Appellant was wearing a red bomber at the time of commission of offence and that at the time of apprehension he was wearing a red bomber and a home-made knife was found in his pocket.

 The trial Judge found that an axe handle was also picked from the shelter where the Appellant had been sleeping before he was apprehended. The trial Judge connected the axe handle to the axe used by the Appellant to strike the deceased. According to the trial Judge, these were odd coincidences; which confirmed the complainant’s evidence of identification. He was satisfied that the Appellant was properly identified. He relied on the case of **Benwa and Another vs. The People**. That the injuries sustained by the complainant and his attempt to cut her neck with a knife established an intention on the part of the Appellant to do grievous harm. The trial Judge was satisfied that the prosecution proved its case against the Appellant in the 2nd Count and found him guilty as charged and convicted him accordingly. The Appellant was sentenced to 15 years imprisonment with hard labour.

The Appellant being dissatisfied with his conviction appealed and put forward three grounds of appeal namely:-

1. **The learned trial Court misdirected itself when it accepted the evidence of PW1 and PW2 as representing what transpired in the absence of corroborative evidence.**
2. **The learned trial Court erred in law and in fact when it convicted the Appellant in Count 2 on the basis of flawed identification evidence, knife and bomber**
3. **In the alternative, the learned trial Judge erred in law and in fact when it convicted the Appellant for offence of attempted murder on finding that he intended to do grievous bodily harm.**

At the hearing of the appeal, Mr. Muzenga learned Counsel for the Appellant relied on his filed Heads of Argument.

In support of ground one, it was submitted that PW1 and PW2 were the deceased’s biological children who witnessed the death of their mother, at the hands of the Appellant. He submitted that from their evidence, the Appellant must have been very annoyed but the two witnesses could not explain what infuriated him yet they denied that the deceased provoked and attacked the Appellant. He argued that the trial Judge should have treated the evidence of PW1 and PW2 with caution as they were witnesses with an interest to serve. That failure to do so was a misdirection.

Mr. Muzenga contended that the Appellant gave a more plausible explanation that the deceased insulted him and attacked him with an axe. That although the trial Judge considered the defence of provocation, it failed on account of the uncorroborated evidence of PW1 and PW2, and that this was a misdirection.

Counsel urged this Court to disregard the evidence of PW1 and PW2, and accept the Appellant’s evidence that he was provoked, thereby reducing the offence to manslaughter and impose an appropriate sentence.

Further, Mr Muzenga submitted that if the Court finds that the defence of provocation is not established, it should be considered as an extenuating circumstance so as to impose another sentence other than the mandatory death sentence.

With regard to ground two, Mr. Muzenga submitted that the trial Court conceded that the evidence of identification was weak and that, therefore, the only evidence was the knife and the bomber. It was submitted that there was no evidence that the knife and the bomber had blood stains. That these are common items and in the absence of evidence like blood stains, this evidence is not sufficient to sustain a conviction. That we should allow the appeal on this ground and set the Appellant at liberty.

In support of ground three, Counsel submitted that the trial Judge found intent on the part of the Appellant to do grievous harm and convicted him of Attempted Murder. To buttress his argument, Mr. Muzenga cited **Yanyongo vs. The People9** where it was held that:

**“For a conviction of attempting to cause death it is necessary to prove actual intention to kill and intention to cause grievous harm is not sufficient.”**

It was submitted that the trial Judge erred in law and fact when he convicted the Appellant of the subject offence after finding that he intended to do grievous harm. That on this ground, the Court should allow the appeal, quash the conviction and instead substitute a conviction for the offence of causing grievous harm and impose an appropriate sentence.

On behalf of the State, Mr. Mutale supported the conviction on both counts. He submitted, with regard to ground one, that although PW1 and PW2 were related to the deceased, their testimony as to what happened ought to be accepted. He argued that, notwithstanding, the lack of corroboration, the evidence of PW1 and PW2 was analysed by the Court and found to be credible. Counsel submitted that the argument that the Appellant reacted in the manner he did because he was provoked, has no merit having regard to the testimony of PW1.

On ground two, he argued that the trial Court rightly accepted the identification evidence which pointed to the Appellant. Mr. Mutale submitted that the victim of the attack stated that the Appellant wore a red bomber and used a home-made knife. He pointed out that PW1 confirmed that at the time of apprehension, the Appellant was found with these items. That this evidence supported the weak evidence of identification. He contended that the Appellant was properly identified as the man who brutally mutilated the complainant in the 2nd count.

Turning to ground three, Mr. Mutale submitted that there was clear evidence in the manner that the Appellant attacked the complainant that he had an intention to kill her. He submitted that to do what the Appellant did in this case; to cause the nature of injury reflected an intention to kill.

In response, Mr. Muzenga contended that it is not a question of credibility but rather reliability of evidence given by the witnesses because of the category of the two witnesses. He argued that there is need to look for ‘something more’ in order for their evidence to be believed and for the judgment of the Court below to stand. That there is no indication that the trial judge directed his mind to this and he contended that this was a misdirection.

In response to ground three, Counsel argued that the learned trial Judge made a finding that the conduct of the Appellant showed that he intended to do grievous bodily harm and that this was the basis for the conviction. He argued that this Court has said on a number of occasions that constructive malice or implied malice cannot suffice in a charge of attempted murder. Mr. Muzenga contended that the only offence that can stand in accordance with the findings of the learned trial judge is causing grievous harm and nothing else.

We have perused the Record of Appeal, the judgment of the lower Court and considered carefully the oral submissions by both learned Counsel as well as the authorities cited in the Heads of Argument filed herein by Mr. Muzenga.

With respect to ground one, the gist of Counsel’s argument is that PW1 and PW2 were suspect witnesses and that the trial Judge should not have placed much reliance on their evidence as it lacked support.

First of all, we wish to note that the trial Judge misdirected himself when he made a finding in his judgment that the Appellant admitted to having killed his mother-in-law as this was contrary to the Appellant’s evidence. We have examined the Appellant’s evidence and although he admitted to striking the deceased with an axe, he certainly did not admit that he killed the deceased.

Turning to ground one, there is a plethora of authorities on the issue of witnesses with an interest to serve such as **Kambarage Kaunda vs. The People10; Chola Nyampande and Sichula vs. The People¹¹; Simon Malambo Choka vs. The People¹²** where we have said that in cases involving suspect witnesses, the Court should be cautious and should warn itself of the danger of false implication of the accused and also ensure that the danger is excluded. In this case at Page J4; the trial Judge said:

“**I accept in toto this evidence of these two witnesses as i was impressed by the forthright manner in which they narrated the incidents leading to the death of their mother on that fateful day. I do not for one moment harbour any illusions that they may have tainted their evidence in order to secure a conviction against the accused. Having said that I must reject the accused’s claim or suggestion that it was his mother-in-law who first attacked him before he delivered the fatal blow against her.”**

We hold the view, that although the Judge did not state that he was ‘warning himself of the danger of false implication’, the above statement shows that he was alive to the fact that he had to treat the evidence of PW1 and PW2 with caution. Obviously, the evidence of PW1 and PW2 must be weighed in the light of the whole evidence adduced before the lower Court.

We do not agree with Mr. Muzenga that there was no corroborative evidence in this case. In fact the Appellant’s own evidence provided the necessary corroboration. According to the Appellant, he went to the deceased’s field in the morning and was greeted with hostility. Surprisingly, he went back there in the afternoon to ask for food. The Appellant said the deceased threw an axe at him and it glazed his head and then he picked up the axe and advanced towards the deceased and threw it at her and then he ran away. The trial Judge, in his judgment, referred to the post-mortem examination report which showed the cause of death as severe head injury with brain damage. Of significance were the following injuries noted by the pathologist:-

1. **Laceration gaping 10cm X 5cm on right forehead**
2. **Open fracture right half and frontal bone with nectronic brain tissue.**

The serious injuries sustained by the deceased cannot by any stretch of imagination have been caused by an axe which was merely thrown at the deceased. Taking this into account, we are satisfied that the trial Judge was on firm ground when he rejected the Appellant’s story as being devoid of truth and accepted the evidence of PW1 and PW2.

Further, if the Appellant was injured, as he claimed, he could have sought immediate medical attention, and if he was attacked as he claimed, he could have reported the matter to the police or the headman. Instead, he went into hiding until he was hunted down by the neighbourhood watch. The Appellant’s conduct did not depict the behaviour of an innocent man and can only lead to an inference of guilt in the face of the evidence adduced against him. We hold that the trial Judge did not misdirect himself on this point as there was sufficient evidence to support the evidence of the two witnesses.

With regard to the defence of provocation alluded to by Mr. Muzenga, looking at the circumstances of the case, the trial Judge was on firm ground in rejecting this defence as it was non-existent. There can, therefore, be no question of it being considered as a failed defence in order to reduce the offence to manslaughter.

Having considered the evidence on Count 1, we are of the firm view, that the trial Judge did not misdirect himself and that there was overwhelming evidence which pointed to the guilt of the Appellant. We uphold the conviction of the Appellant for the offence of Murder of Margaret Tembo in the 1st Count. Ground one, therefore, fails.

In relation to ground two, which touches on the evidence of identification, we agree with Mr. Mutale that the Appellant was properly identified. We do not consider the absence of blood stains on the knife and bomber to be an issue. In our view, of importance is that these items were found on the Appellant. The trial Judge found this as a fact. Further, the trial Judge was satisfied that the Appellant was wearing the red bomber during the commission of both offences and was found with a home-made knife in his pocket on apprehension. These items strengthened the weak evidence of identification. We find no merit in ground two.

Turning to ground three, which relates to the 2nd Count, Mr. Muzenga’s argument is that the Appellant should at best have been convicted of causing grievous harm. Mr. Muzenga’s argument is that in cases of attempted murder, it is the intention to kill rather than the intention to cause grievous harm which should be considered. That the trial Judge convicted the Appellant on the basis that he had caused grievous harm to the complainant.

We have considered the argument and authorities cited.

We take note of the fact that the trial Judge did come to the conclusion that the Appellant intended to do grievous bodily harm taking into account the injuries sustained by the complainant and the fact that he also tried to cut her neck with a knife. The Medical Report (exhibit P3) shows that:

1. **Part of the vulva and vagina was cut off (missing)**
2. **Bruising face and neck.**

The record also shows that the Appellant squeezed the complainant’s neck and she lost consciousness. In the words of the complainant, when she regained consciousness, she found “her private part had been literally cut out.” In our view, the nature of the attack clearly shows intention to kill. The complainant’s description of the events, point to the fact that she was left for dead by her attacker. In our view, there was sufficient evidence to support the charge of attempted murder. Indeed, had the trial Judge properly directed himself, he would still have convicted the Appellant on the charge of attempted murder.

We do not find any merit in ground three.

In conclusion, we find that there was sufficient evidence to sustain a conviction on both Counts. We find no extenuating circumstances in respect of Count 1 and the death sentence is hereby confirmed. We also will not disturb the sentence in the 2nd Count. The appeal has no merit and we dismiss it.

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**E.L. SAKALA**

**CHIEF JUSTICE**

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**E.N.C. MUYOVWE P. MUSONDA**

**SUPREME COURT JUDGE SUPREME COURT JUDGE**