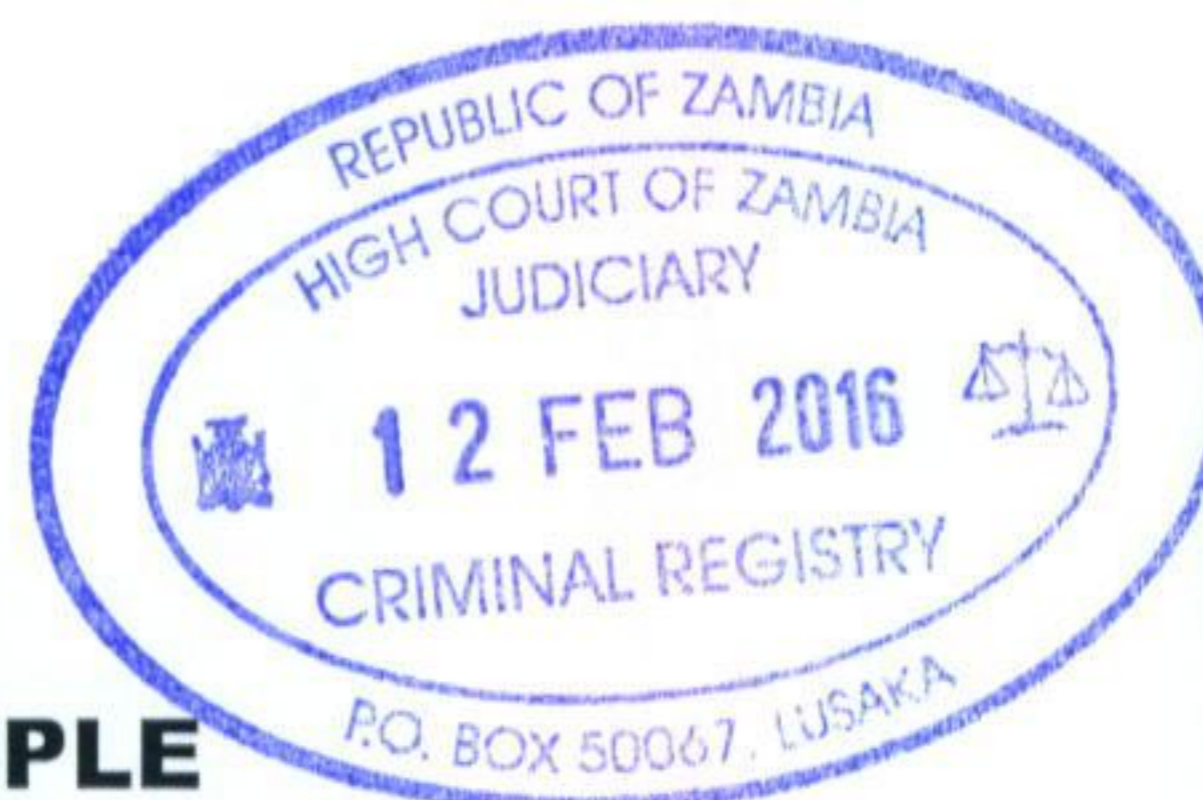


**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CRIMINAL JURISDICTION)**

HP/203/2015

BETWEEN:



THE PEOPLE

VS

**DEBORA CHOMBA
SUSAN MUTEBA MWABHANA**

**ACCUSED 1
ACCUSED 2**

Before Hon. Mrs. Justice M.S. Mulenga on the 12th day of February, 2016

FOR THE PEOPLE : MRS A. MWANZA, STATE ADVOCATE-
NATIONAL PROSECUTIONS AUTHORITY

FOR THE ACCUSED PERSONS : MRS MUNDIA, LEGAL AID COUNSEL –
LEGAL AID BOARD

J U D G M E N T

Cases cited:

1. **Zulu and Others v The People (1978) ZR 227 (SC)**
2. **Nyambe v The People (1973) ZR 228 (CA)**
3. **Mhango and Others v The People (1975) ZR 275 (SC)**
4. **Choka v The People (1987) ZR 243 (SC)**
5. **Nzala v The People (1976) ZR 221 (SC)**
6. **Katebe v The People (1975) ZR 13**

Debora Chomba, Accused 1, and Susan Muteba Mwabhana, Accused 2, stand jointly charged with one account of murder contrary to section 200 of the Penal Code chapter 87 of the laws of Zambia. The particulars of the offence are that A1 and A2 on unknown date but between 23rd April 2015 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia,

jointly and whilst acting together with other persons unknown did murder one Lawrence Chewe (deceased).

The accused persons pleaded not guilty and the prosecution called four (4) witnesses in support of its case. PW1 Mwamba Chewe, the son to the deceased, testified that on 23rd April, 2015 at around 20:00 to 21:00 hours at Mwaona shop in Kanyama compound, Paul, a neighbour, approached him and demanded for the K10.00 PW1 owed him. PW1 told him that he would return the money the following day but Paul insisted and started beating him whilst in the shop. PW1 managed to run away to his home that was 200 meters away from the shop. Paul followed and at home, PW1's brother Chisanga (PW2) came out and Paul started punching him as well. Paul's relatives being Dada Mwabhana (A2's mother), A1, A2 and others joined in the fight and started throwing around flower pots and cups which were by the door. PW1's mother came out at one point and then went back inside and PW1's father, the deceased, came out. At one point PW1 was held by A1 and A2 who were punching him. Then Paul, Dada Mwabhana, A1 and A2 and others started beating the deceased and said they would kill him. PW1 saw the deceased fall backwards. The assailants then dispersed. There were security lights outside which enabled him to see. PW2 went to get a taxi while PW1's mother went to get the deceased's shirt as he had come out of the house without a shirt. The deceased was later pronounced dead at the hospital. PW1 identified A1 and A2.

Under cross examination PW1 said Paul and Dada were not before court as they ran away after the incident. That he

mentioned to the police that they threatened to kill the deceased although his police statement did not state so. He maintained that A1 and A2 were part of the people who were fighting.

PW2 Chisanga Chewa testified that on 23rd April, 2015 at around 21:00 hours as he was about to retire to bed, he went outside and found a fight between PW1 and Paul. He tried to stop the fight but Paul turned on him and started fighting him. PW2's father, the deceased, then went outside to stop the fight and the fight shifted to him and some were throwing things around. Paul's mother and sisters joined in beating the deceased. When the deceased fell down the assailants all ran away. There was light outside and coming from the house. When he noticed that the deceased was not moving or talking, he ran to book a taxi and later took him to University Teaching hospital (UTH) where he was pronounced dead. PW2 identified A1 and A2 as being part of the people who were fighting the deceased. That the accused person's family had continued to throw stones at their house and even broke some windows.

Under cross-examination PW2 stated that A1 and A2 joined the fight and started hitting the deceased when the deceased tried to separate the fight. A1 and A2 came to the scene when Paul was beating PW2 as PW2 was not participating in the fight. He did not see the one who punched the deceased just before he fell down.

PW3, Ireen Ngoza Zulu, the deceased's widow, narrated that on 23rd April, 2015 at around 21:00 hours as she was about to come out of the house to pick plates, she heard PW2 ask Paul why he

was beating PW1 and then Paul started beating PW2 and grabbed him by the throat. She went back in the house and asked the deceased to go and stop the fight. When she went outside with the deceased, she saw a group comprising A1, A2, Dada and others who started throwing items around and also started beating the deceased until he fell down. The ones beating the deceased were A1, A2, Dada and Paul. When the deceased fell, he did not make any movements or speak and she went and got his shirt and they took him to Kanyama Clinic where they told her that the deceased was dead and referred them to UTH. At the police she mentioned the four people she saw beat the deceased and stated that she was able to identify them. She identified A1 and A2 as being among the people who beat the deceased. The others ran away and are at large. That she lives in fear as the accused persons' relatives have been insulting her and threatening that they would kill her and also ran away to Congo.

In cross examination PW3 stated that when she saw Paul squeezing PW2's throat A1 and A2 were not present but were present when she came out with the deceased. She only saw the four people she mentioned beating the deceased.

PW4 Detective Constable Tobias Malama testified that he was assigned to attend the post-mortem of the deceased, Lawrence Chewe, at UTH conducted by Dr. Telendy. The cause of death was found to be head injury and the post-mortem report (P1) was tendered in evidence. He then interviewed PW3 who mentioned four people including A1 and A2 as the ones who had beaten the deceased prior to his death. He also interviewed A1 who was

already in custody and A1 denied the allegation. After further investigations, A2 was also apprehended and she also denied the allegation. They were then charged and arrested for the subject offence. The others mentioned were not apprehended and are on the run.

Under cross examination, PW4 said according to his investigations all the four mentioned persons punched the deceased leading to his fall. The four were A1, A2, Paul and Dada and all punched him at the same time. A1 mentioned that she was not present at the fight as she had gone for prayers along Kabwe Road but his investigations revealed that she did not spend the night at the prayers but went back home. A2 said she had gone to Garden for a holiday but the people around revealed that A2 had not gone to Garden but was within Kanyama during the period.

The accused persons were placed on their defence and they elected to give evidence on oath and called witnesses in support.

Accused 1 (DW1) testified that on the particular Thursday, she left home around 18:00 hours for prayer and fasting at the pastress or Pastor's wife's house. She could not remember her name. She spent the night at the prayers and returned at 06:00 hours the following day. She did not find her sister Bernadette (whom they used to call Dada) at home and thought she had gone to sell at the market. Dada did not return that night and A1 slept. At around 04:00 hours the police came and asked for Dada and Paul, who was A1's nephew, and she told the police that she did not know their whereabouts. The police then

apprehended her together with Mutale, a person who was renting from them, to reveal where Dada was. That PW1 pointed at her at the police as taking part in the fight. That the police would have specifically asked about her if indeed her name was mentioned. That she has not seen Dada and Paul from that time to date and she was aware that they were involved in the fight.

In cross examination, DW1 said she had known PW1, PW2 and PW3 for a long time and they could not mistake her for someone else. She insisted that she spent the whole night at the prayers and did not return home at 20:00 hours as stated by PW4. She could not remember the name of the Pastor's wife where she went for prayers. Her sister Dada used to brew kachasu for sale. She did not pay much attention to the absence of Dada and Paul as her sister sometimes used to leave very early to go and sell.

DW3 Bibian Mwale was the witness for A1. She testified that she is a chief intercessor in the Kanyama branch of Power of God Ministries. She is not the Pastor's wife but some people refer to her as the Pastor's wife. On 23rd April, 2015 they had prayer sessions from 06:00 to 07:00 hours, 16:00 to 17:00 hours and 19:00 hours till morning at her house. During the night prayers they were with A1 until morning. She was surprised when she heard on 25th April that A1 was involved in the fight and she went to the police after two weeks and explained that she was with A1. The officer told her that A1 would be released when the ones involved in the incident were apprehended.

In cross examination she stated that she was close to A1 and had known A1 and her family for four (4) years. That the pastor of

the Kanyama Church was undergoing a course in South Africa and does not stay in Kanyama. Her house, where the prayers were being held, was about 15 minutes walk from A1's place. They were over twenty of them at the prayers where they were praying for young man. That A1 went to relieve herself for a short time during prayers. That she did not focus on A1 during the night of the prayers. She could not recall the officer to whom she gave her statement. A1 was in the group of intercessors and also ushers on Sundays. That the Pastor was not present during the prayers and could not say the A1 was not around.

DW2 (Accused 2) testified that on the material day she was in Garden for School holidays from 19th April to 3rd May, 2015 and was staying with her uncle Kennedy and elder sister, Precious. That she does not recall telling PW3 that they would finish her. She got back to Kanyama on 3rd May as they did not normally learn on the first day of school. Whilst sitted near a shop with her friends, the police asked if anyone knew A1 and after she stated that she did, the police asked her to go and give a statement on whether A1 was involved. She refused that she did not know anything about the fight. That she was at Garden with Precious (DW4) when DW4 received a phone call from someone she did not know to the effect that Paul had committed an offence and was fighting. Paul is her cousin and Dada is her biological mother. They did not do anything after they heard and she does not know where Paul and Dada are to date.

Under cross examination DW2 said she knew PW1 and PW3 but not PW2. There is no reason why PW1 and PW3 could implicate

her family when there were other families in the neighbourhood. She did not know that Paul and Dada fled to Congo. On 3rd May, A1 was already in custody and she did not know that the police were looking for her and did not think the issue had died down. She was arrested the very day she returned home. That it was Dada and Paul who were involved in the fight. She maintained that she did not flee.

DW4 Precious Chomba, (witness for A2) testified that she stays in Garden Park with her husband. A2 was in Garden for a holiday for two weeks from 19th April to 3rd May. On 24th April around 21:00 hours and whilst with A2, she received a phone call that A1 had been apprehended because Paul was involved in a fight. When A2 went back on 3rd May, she received a call on 4th May that A2 had also been apprehended and were surprised as A2 was in Garden at the material time. They were told that they should take Paul to the Police in order for them to release A1.

In cross examination DW4 said she heard about the fight through her sister, Mary Mwewa, who called that A1 had been arrested. That it is not true that she did not know who called her. Mary was staying at the same place in Kanyama together with her children. She knew PW1 as a friend to Paul and PW1 knows A1 and A2 very well. A1 and A2 were pointed at because the fight was with one of their family members. That it was surprising that A2 was apprehended immediately she went back but it was not true that the police were looking for her or that she left Kanyama on 23rd April.

DW5 Gabriel Chanshali (witness for A2) who is the husband to DW4 testified that A2 went to visit them on a holiday on Sunday 19th April and left on 3rd May. He used to go to work on shifts and A2 would remain with DW4. On 4th May whilst going for the night shift, he heard that A2 had been apprehended and DW4 told him that it was due to the scandal which Paul did. On 5th May he went to the Police to find out why A2 was apprehended and they told him they were investigating the whereabouts of Paul and A2's mother and that A2 would be released. He did not know where Paul and Dada were.

Under cross examination DW5 said the night shifts were from 17:00 hours to 07:30 hours the following day. He would not know that would happen to A2 when he was on night shifts. That on 23rd and 24th April, he was on night shift and on 25th April, he came to learn that A1 was apprehended from DW4 and he went to see her at the police station. On the night of 24th April, he was at work and thus not present when DW4 received a call that A1 was apprehended. That he was saddened that A2 was in prison.

This marked the close of the trial. The parties were given opportunity to file submissions but did not do so. The burden of proof is on the prosecution to prove that the accused persons caused the death of the deceased with malice aforethought.

I find as facts that the deceased was beaten on 23rd April, 2015 at around 20:00 hours to 21:00 hours outside his house. This happened when he tried to stop the fight involving one Paul and PW2. In the process of being beaten by Paul and relatives, the deceased fell and became unconscious and was shortly after

pronounced dead at both the clinic and UTH. The cause of death as outlined in the post-mortem report is brain haemorrhage due to blunt force injury.

The eyewitness evidence of PW1, PW2 and PW3 is that the deceased was being beaten by Paul, Dada (mother to A2), A1 and A2 and some other of their relatives. The prosecution case is therefore based on identification evidence. Where a party relies on identification evidence the court must be satisfied that the possibility of honest mistake is ruled out. In the case of **Zulu and Others v The People (1978) ZR 227 (SC)** it was held that:

“Although recognition of a person one knows is less likely to be mistaken than identification of a stranger, even in cases of recognition the danger of mistake is present and must be considered.”

The Supreme Court further held that where the opportunity for reliable identification is poor, the court should consider whether there is other evidence or circumstances to support the identification. Further, in the case of **Nyambe v The People (1973) ZR 228 (CA)** it was held that in cases of both first time identification and recognition of a person previously known, the question is always that of reliability and not necessarily credibility of a witness.

In the instant case, PW1, PW2 and PW3 all stated that the place where the incident took place, that is, outside their house, was well lit by the security light and light from the house. That the fight also took some considerable time because Paul first fought with PW1 and when PW2 went to stop the fight, Paul started beating PW2 instead and it was at this time that A1, A2 and other relatives arrived at the scene and joined in beating PW1

and PW2 and started throwing things around. That when the deceased was later called by PW3 to stop the fight, the said Paul and his relatives including A1 and A2 then all started beating the deceased. Thus the lighting and period of time the incident took show that the opportunity for reliable identification was good or sufficient. Further, Paul, A1, A2 and their other relatives were neighbours who were well known to PW1 and PW3. Therefore the possibility of honest mistake in the identification is ruled out and the identification evidence is reliable.

I have also considered that PW1, PW2 and PW3 are related being mother and sons and their evidence fall under the category of suspect witnesses or witnesses with a possible interest to serve and therefore require corroboration. In the case of **Mhango and Others v The People (1975) ZR 275 (SC)** it was held that:

“When the evidence is purely that of accomplices it should not be relied upon in the absence of corroboration save for special and compelling reasons.”

The issue of corroboration was considered in **Choka v The People (1987) ZR 243 (SC)** wherein it was held that:

“There must be “something more” to satisfy the court that the danger of falsely implicating the accused has been excluded and that it is safe to rely on the evidence of suspect witnesses. Something more than the witness’s demeanor and plausibility of his evidence.”

I find that their evidence is sufficiently corroborated by the evidence of A2, DW4 and DW5 that there was a fight involving Paul and Dada and their further evidence and that of PW4 that the said Paul and Dada are on the run from the date of the incident up to this time. The eye witness evidence of PW1, PW2 and PW3 is that apart from the said Paul and Dada, A1 and A2

were also present. PW1 stated that at some point A1 and A2 held him and beat him and also took part in throwing items such as flower pots around. PW2 stated that A1 and A2 in particular came to the scene when Paul turned on him after he attempted to stop the fight or beating of PW1 by Paul. This fact is also attested to by PW3 who said when she came out the first time, she saw Paul, Dada, A1 and A2 beating PW2 and that is when she went to call the deceased to try and intervene.

Further both the accused persons and the eye witness prosecution witnesses stated that there was no previous animosity between the two families prior to the incident of 23rd April. PW1 and PW2 further stated that other relatives of Paul from the same house to some extent participated in the fight although they did not specifically identify them. This shows that they only mentioned the people they positively saw and were not actuated by malice. DW4 also confirmed that there were other relatives who were living at the same house with Dada and the accused persons and these were not mentioned by the prosecution witnesses or arrested by the police.

Considering all that has been stated above, I find that A1 and A2 were positively identified as being among the assailants. Both A1 and A2 have raised the defence of alibi. In the case of **Nzala v The People (1976) ZR 221 (SC)** it was held that:

“Where an accused person on apprehension or arrest puts forward an alibi and gives the police detailed information as to the witnesses who could support that alibi, it is the duty of the police to investigate it.”

It is thus incumbent on the accused person who wished to rely on an alibi to give the police reasonable details to enable them investigate it. In **Katebe v The People (1975) ZR 13** it was stated that:

“Where a defence of alibi is set up and there is some evidence of such an alibi it is for the prosecution to negative it, that there is no onus on the accused person to establish his alibi. Further that it is dereliction of duty for an investigating officer not to make proper investigation of an alleged alibi.”

In the case of A1, PW4 stated that she told him that on the material night she was at an overnight prayer meeting along Kabwe road. She did not give him particulars of the people she was with who could confirm the alibi and in her evidence in court, she could still not remember the name of the pastor's wife she said she was with. Her witness, DW3, on the other hand stated that the prayers were within Kanyama compound at her house which was about 15 minutes walk from A1's house. The contradiction in terms of the location where the said overnight prayers show that the alibi was an afterthought. Further, the fact that the place where the prayers were allegedly held was a short distance to A1's place shows that she had the opportunity to get to the scene and take part in the beating of the deceased. The alibi is thus negated especially in light of the overwhelming evidence of identification. The said defence fails.

With respect to A2 her alibi is that she was not present but was in Garden for a holiday with her uncle Kennedy and her elder sister Precious. The said uncle was not called but her sister Precious, DW4, and her husband DW5. DW5 was not around in the evening or night on the material date stating that he was working in the night shift during that period. PW4 stated that he

investigated the alibi and found out that A2 was in Kanyama on the material night. In this case also, the overwhelming evidence of identification negates the said defence. Further, it is odd that A2 would be arrested the same day she returned to Kanyama after schools had opened if indeed she was not mentioned by the prosecution eye witnesses who even stated the role she played. As earlier stated, there were other people living at A2's place but who were not mentioned by the witnesses and there was no reason why she could have been implicated when she was not present. This defence of alibi also fails.

I accordingly find that A1 and A2 took part in the beating of the deceased prior to him falling and sustaining the fatal head injury. This shows that A1 and A2 had a common purpose or aided or abetted Paul and Dada in the assault of the deceased as provided in sections 21 and 22 of the Penal Code. They thus caused the death of the deceased.

What I also have to determine is whether they had the requisite malice aforethought as defined in section 204 of the Penal Code. Malice aforethought is defined as the intention to cause death or grievous harm or knowledge that the act will probably cause death or grievous harm although the knowledge is accompanied by indifference of the consequences or a wish that death would not occur. It is always a question of fact whether grievous harm and probable consequence can be foreseen to satisfy section 204. In this case I have taken into account that the two accused persons joined Paul and A2's mother in beating the deceased. On the facts of this case I am not sufficiently satisfied that A1 and

A2 had the requisite malice aforethought to cause death or grievous harm given that the apparent main aggressors were Paul and Dada.

I accordingly find A1 guilty and convict her of manslaughter of the deceased, Lawrence Chewe, contrary to section 199 of the Penal Code. I also make a finding of guilty in respect of A2 for the offence of manslaughter contrary to section 199 of the Penal Code.

IRA

Dated this 12th day of February, 2016



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M.S. MULENGA
HIGH COURT JUDGE