

IN THE SUPREME COURT OF ZAMBIA

APPEAL NO. 231/2014

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BETWEEN:

KANIKI PELEKA

APPELLANT

AND

THE PEOPLE

RESPONDENT

Coram: Wanki, Muyovwe and Malila, JJS

On the 2nd December, 2014 and 24th January, 2017

For the Appellant: Col. Paul P. Banda of Messrs Paul Pandala
Banda and Company

For the Respondent: Mrs. M.M. Kawimbe, Deputy Chief State
Advocate

J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court

Cases referred to:

1. Edward Sinyama vs. The People (1993-94) Z.R. 16
2. Nkonde and Another vs. The People (1975) Z.R. 99
3. Benwa and Another vs. The People (1975) Z.R. 1
4. Charles Lukolongo and Others vs. The People (1986) Z.R. 115
5. Kunda vs. The People (1972) Z.R. 196
6. Charles Chiyovu vs. The People (1978) Z.R. 252
7. Mbomena Moola vs. The People SCZ No. 35 of 2000
8. Zambia Revenue Authority vs. Hitech Trading Company
Limited SCZ Judgment No. 40 of 2000
9. Njunga and Others vs. The People (1988-89) Z.R. 1

10. Tomato vs. The People (1972) Z.R. 64 (Reprint)

11. Dickson Sembauke Changwe and Another vs. The People (1988-89) Z.R. 144

When we heard this appeal, we sat with the Hon. Mr. Justice Wanki who has since retired and therefore, this is a majority judgment.

The appellant was convicted by the High Court sitting at Kitwe of the offence of murder contrary to Section 200 of the Penal Code Cap 87 of the Laws of Zambia. It was alleged that between the 13th December, 2012 and 1st January, 2013 at Kitwe jointly and whilst acting together with Harry Banda he murdered Mwansa Kalaliki (hereinafter called "the deceased"). Harry Banda was acquitted by the lower court.

From the outset, we must state that the witnesses from the prosecution and the defence contradicted each other as regards the exact date when the deceased fought with Harry Banda at Kiwala's Bar. According to Ford Kiwala, it was on 14th December, 2012 but from the evidence of Annie the wife to the deceased and Rosemary Chomba the mother to the deceased it appears the fight was on 13th December, 2012. We will return to this issue later in this judgment.

The brief facts of this case are that the appellant, Harry Banda and the deceased were all servicemen at the Zambia National Service (ZNS) Camp in Kitwe. Harry Banda and the deceased were close friends, however, a fight ensued between the two at Ford Kiwala's Bar around 19:00 hours on the 14th December, 2012. Harry Banda assaulted the deceased on the face using fists and kicks and he also kicked him in the ribs. The fight was separated by Ford Kiwala who noticed the deceased bleeding from the nose after the fight. Ford Kiwala only allowed the deceased to leave the Bar after Harry Banda had left in the company of Felix Zulu and advised him not to go to the funeral at Kambolokonya farm that night. There was a contradiction between the evidence of Ford Kiwala and that of Felix Zulu the refractory witness who said the deceased did not bleed from the nose after the fight.

According to the deceased's mother, he called her on the 13th December, 2012 to inform her that he had been badly beaten by Harry Banda and the matter was resolved between them.

Anyway, after the altercation with Harry Banda, the deceased went to the funeral. Apparently Annie, the deceased's wife was inside the funeral house. Since it was raining, the

deceased decided to seek shelter in Felix Chibesa's car as the rain was seeping through the tent. Whilst inside the funeral house, Annie received a call from the deceased informing her that he was outside the funeral house and he had been badly beaten by the appellant. She rushed outside only to find that he was unable to walk properly as he was in pain; his face was swollen; his right eye was blood shot and he was nose bleeding. Annie said the deceased told her that the appellant had hit him with the door of the car as he tried to get into the car to seek shelter from the rains and that the appellant even stepped on him. Again, the appellant phoned his mother to inform her that the appellant had assaulted him.

Meanwhile, as fate would have it, Annie fell ill and got admitted in hospital on the 15th December, 2012. The mother to the deceased visited Annie in the hospital only to be informed that the deceased was unwell and had failed to seek medical attention due to lack of funds. At this time, the deceased complained of headache and pain in the chest. The deceased's mother gave him K300.00 so that he could go to the police and to cover medical expenses. On the 16th December, 2012 the deceased reported to the police the assault involving the

appellant. He was given a medical report form and after attending the clinic he returned the form. The deceased gave a statement to the police which was admitted in evidence.

At the instance of the deceased's mother, who did not take kindly to the fact that the deceased who was disabled, had suffered assault at the hands of the appellant, a meeting was held between the two families to discuss the assault and the appellant invited Pearson Hamwende a serviceman charged with the welfare and discipline of servicemen to attend the meeting. This was before the demise of the deceased. At that meeting, the mother to the deceased demanded a refund of the medical expenses. According to Pearson Hamwende, the appellant later gave him K300.00 which he passed on to the deceased's mother. He told the court that later the deceased was admitted at a local clinic and when he visited him, he was unable to speak and he had a swollen face. The deceased died on 1st January 2013. According to hospital records, the cause of death was severe malaria but after the post-mortem examination on the body of the deceased which was carried out after the body was exhumed, the pathologist found that the cause of death was intracranial haemorrhage with brain damage.

Harry Banda and the appellant were arrested and charged with the offence of murder which both denied.

We see the need to briefly give a summary of Harry Banda's defence before the trial court. According to Harry Banda, it was on the 13th December, 2012 when he and the deceased visited the Kambolokonya funeral house around 18:00 hours. He stated that firstly they decided to go for a drink at Ford Kiwala's Bar where they met Felix Zulu. Harry Banda's version of the story, which was not believed by the learned judge, was that while at Kiwala's Bar the deceased tripped and the deceased and himself fell to the ground and Mr. Kiwala mistakenly thought they were fighting. And so, the deceased was kept behind by Mr. Kiwala while Harry proceeded back to the funeral house with Felix Zulu. Later, the deceased joined them at the funeral house where Justin Kalenga joined them in drinking. Justin Kalenga, a male nurse who was one of the defence witnesses told the court that he attended to the deceased at the clinic and that the deceased complained of body weakness, loss of appetite, headache and tested positive for malaria.

The other witnesses for Harry Banda testified that the deceased was alright on the 14th December, 2012 around 18:00

hours before the Zambia National Service Annual Ball. That even on 25th December, 2012 he was in good health.

In his defence, the appellant testified that on the material day, he slept at the funeral house in Felix Chibesa's vehicle where the deceased found him. That after discovering that Felix Chibesa was not in the vehicle, the deceased left. The appellant denied hitting the deceased with the door of the car and stepping on him as alleged. At the meeting held to discuss this matter, the deceased denied that he had fought with the appellant. The appellant said he had a cordial relationship with the deceased as a workmate before this incident. To his knowledge, the deceased died from a bout of severe malaria.

The appellant's witness Elliot Phiri who also slept in the vehicle outside the funeral house said he did not witness any fight between the deceased and the appellant. In a nutshell, this was the appellant's defence.

After considering the evidence, the learned judge accepted that the deceased was assaulted by the appellant. The learned judge took the view that the statement made by the deceased to Annie that the appellant hit him with a door of the car and

stepped on him was covered by the *res gestae* principle in terms of the case of **Edward Sinyama vs. The People**.¹ In **Edward Sinyama** we gave guidance regarding the application of the *res gestae* principle which is an exception to the hearsay rule.

On the authority of the case of **Nkonde and Another vs. The People**² the learned judge also relied on the deceased's statement to the police. In the interpretation of the learned judge, the case of **Nkonde and Another vs. The People**² held that once the statement of a witness has been admitted, it becomes part of the record and that the trial court may examine it to see the weight to be attached, if any, to the said statement. In the words of the learned judge, the statement made to the police put weight to the evidence of Annie as the two complemented each other. He found that the incident at the Kambolokonya funeral house was more serious than the one between Harry and the deceased. The learned judge found that the assault constituted a *novus actus interveniens*. The learned judge was of the view that the appellant's act of stepping on the deceased's face and kicking him with his boots clearly showed that he had the intention to cause grievous harm which proved malice aforethought. The learned judge concluded that the

injuries sustained by the deceased at the hands of the appellant caused his death. He found that the appellant had acted alone and convicted him of the subject offence. The learned judge acquitted Harry Banda of the offence of murder but found him guilty of the lesser offence of assault contrary to Section 247 of the Penal Code.

The appellant has now come before this court armed with three grounds of appeal couched in the following terms:

- 1. The court below erred in law and fact in convicting the appellant when neither jointly or severally did he participate in the beating of the deceased at the scene of the name Kiwala's Bar on the 13th December, 2012 as the appellant had neither the motive nor the intent to quarrel with or beat the deceased or cause grievous harm or acted with malice aforethought to kill the deceased.**

- 2. The court below erred in law and fact by arriving at its verdict when all evidence available was not tendered before it as no witnesses from the funeral house were called to establish that the appellant had hit the deceased with the car door on the 14th December, 2012 between 22:00 hours and 23:00 hours.**

3. The suppression of evidence by the prosecution available to the defence calls for intervention of the Supreme court by ordering a retrial so that fresh evidence maybe presented by the following witnesses;

- i. Killer Kambolokonya**
- ii. Amon Kaniki, the father of the appellant**
- iii. Nyambu Kaniki and**
- iv. Mrs. Kambolokonya**

Col. Banda, learned Counsel for the appellant relied on his filed heads of argument. In support of ground one, learned Counsel referred us to the case of **Benwa and Another vs. The People³** and he proceeded to argue that the court below did not resolve the conflict of evidence which pointed more to Harry Banda as the causer of the deceased's death. It was submitted that the evidence showed that on the 13th December, 2012, the appellant was not present at Kiwala's bar when the deceased was severely beaten up and kicked by Harry Banda.

Counsel attacked, as pure hearsay, the evidence by Annie (the widow) that the deceased told her that the appellant had assaulted him. Counsel's view is that the fight at Kiwala bar which was the real cause of the deceased's death was swept under the carpet by consent or settlement held at the deceased's

house. That there was a conflict in the evidence of Ford Kiwala and the other prosecution witnesses who included Annie. Counsel argued that the failure by the court below to address the conflict of evidence renders the verdict questionable. We were urged to order a retrial before another judge or acquit the appellant. Further, Counsel argued that the court below erroneously admitted accomplice evidence from Harry Banda and Annie and that the plea for a retrial of this case is the cure to the injustice suffered by the appellant.

In support of ground two, Counsel relied on the case of **R v Grey** cited in **Kenny's Outline of Criminal Law**. We did not consider the authority as we could not lay our hands on the cited works. It was argued by Counsel that the witnesses gave no description of the state of mind and health of the deceased at the time when he was hit with the car door at the funeral. Counsel argued that the deceased was hit by the door of the car by accident and he had no intention to kill or cause grievous bodily harm to the deceased. We must immediately state that this submission flies in the teeth of the evidence by the appellant who vehemently denied hitting the deceased with the door of the car. Getting back to the submissions, Counsel contended that Elliot

Phiri corroborated the appellant's evidence that there was no fight at the funeral house. It was pointed out that the investigation officer admitted that he did not visit the funeral house due to bad weather conditions. He argued that weather conditions should not have prevented investigations and that this failure was a calculated strategy to pass the cause of death to the appellant.

Turning to ground three, Counsel's argument is that the prosecution failed to call certain witnesses and that this court should order a retrial so that fresh evidence can be presented by witnesses named in the ground of appeal, one of the witnesses being the father of the appellant. Relying on the cases of **Charles Lukolongo and Others vs. The People**,⁴ **Kunda vs. The People**;⁵ and **Charles Chiyovu vs. The People**⁶ it was submitted that the prosecution is obliged to present before the trial court all evidence available to it even if the same is favourable to an accused person in the interest of justice. Counsel contended that, on the basis of authorities cited, the judgment of the court below should be quashed and or in the alternative the matter should be sent back to the High Court for retrial before another judge.

In response, Mrs. Kawimbe the learned Counsel for the State, filed heads of argument. She conceded that Ford Kiwala, Harry Banda and Felix Zulu gave conflicting evidence but that the state relied on the weight of the evidence given by the widow Annie and other witnesses which evidence was of high value in proving the guilt of the appellant. Mrs. Kawimbe submitted that Annie attested to the bad condition of the deceased who had sustained a swollen face and a red blood shot right eye. It was contended that Annie's evidence was further corroborated by the mother of the deceased Rosemary Chomba who was also informed by the deceased that he had been badly beaten by the appellant.

Further, that the statement of the deceased to the police corroborated the evidence of the widow Annie and the mother of the deceased. It was submitted that even considering the proximity in time between the occurrence of the event and the making of the statement by the deceased to his wife, there was no possibility for concoction of the description of the appellant's role in the cause of the unfortunate incident. It was argued that the widow Annie and the mother of the deceased should be believed because they had no possibility to concoct, fabricate or distort

the statement that the deceased made to them. Mrs. Kawimbe pointed out that according to the evidence in the court below, the deceased fully recovered from the beatings inflicted on him by Harry Banda and that he never complained of pain from those beatings.

She took the view that the beatings inflicted on the deceased by Harry Banda could not have caused the deceased's death but that it was the intervening act of the appellant's brutal beating of the deceased that caused the deceased's death. She relied on the case of **Mbomena Moola vs. The People**⁷ in which we held that:

"It is not necessary in all cases for medical evidence to be called to support a conviction for causing death. Where there is evidence of assault followed by a death without an opportunity for a *novus actus interveniens*, a Court is entitled to accept such evidence as an indication that the assault caused the death."

Counsel distinguished the case in *casu* from the **Mbomena case**⁷ and submitted that although the deceased was beaten by Harry Banda it is the *novus actus interveniens* of the appellant that led to the death of the deceased.

In response to ground two, Counsel submitted that the prosecution proved its case beyond reasonable doubt. She

argued that the learned judge applied the principle of *res gestae* appropriately and that it was up to the appellant to rebut the prosecution evidence. Mrs. Kawimbe accused the appellant of attempting to raise new issues in this appeal.

In response to ground three, Counsel argued that the appellant failed to present a credible defence before the trial court, hence his conviction which was based on the evidence before court. Counsel relied on the case of **Zambia Revenue Authority vs. Hitech Trading Company Limited**⁸ to support her argument.

Mrs. Kawimbe submitted that it was up to the appellant to call his preferred witnesses who were not called by the prosecution if he was of the view that they would support his case. In conclusion, Mrs. Kawimbe urged us to uphold the appellant's conviction and dismiss the appeal.

We have considered the evidence presented in the court below; the judgment of the trial court and the submissions by Counsel for the parties.

We intend to deal with the three grounds of appeal together. However, before we delve into what we consider to be the main

issue in this appeal we want to address several issues. First of all, we note that the learned judge found that the statement made by the deceased to his wife Annie that the appellant assaulted him fell within the ambit of the principle of *res gestae*. We do not agree. Looking at the facts of this case, this was not an appropriate case to apply the *res gestae* principle. In this case, the deceased was at a funeral, he called for the wife when he got injured; he reported the matter to his mother, brother and to the police where he made a statement; he went to the Clinic and eventually was hospitalised and passed on. The deceased even attended a meeting where it was resolved that the appellant refunds the deceased's mother for medical expenses. The appellant subsequently refunded K300.00 to the deceased's mother for the medical expenses expended on the deceased. There was definitely no need to invoke the *res gestae* principle when there was direct evidence available to the trial court.

The second issue is on the witnesses who were allegedly not called by the prosecution and Counsel for the appellant argued that this disadvantaged the appellant. Col. Banda demanded for a retrial in order to call fresh evidence or alternatively, that the appellant should be acquitted. The State argued that it was up

to the appellant to call the witnesses who were not called by the prosecution.

It is trite law that the prosecution is obliged to present all evidence in its possession during trial. However, we do not find any value in the argument by Counsel for the appellant that the prosecution failed to call the appellant's father and Nyambu Kaniki the elder brother to the appellant. Indeed, an accused person is free to call his own witnesses and in appropriate cases can request the court to assist in issuing a subpoena for the witnesses. The record shows that the appellant, in his defence told the court that he was calling two witnesses but he later dispensed with the witnesses. The appellant cannot turn around to blame the prosecution when he was given an opportunity to call in his defence any witness of his choice. The demand for a retrial is totally uncalled for.

The next argument is that the police did not carry out any investigations at the funeral house due to bad weather conditions. We do not agree with this assertion as there is evidence on record showing that the police visited the funeral house. The challenge, that the police had in this case was that no one was willing to come forward to testify. In a situation

where the police receive no co-operation from members of the public, they cannot be blamed for not bringing witnesses to court. The arguments by Counsel for the appellant on this issue cannot be sustained.

We will now address the main issue in contention, in this appeal, which is whether there was sufficient evidence to prove that the appellant caused the death of the deceased. Counsel for the appellant insisted that it was Harry Banda who killed the deceased as he was seen assaulting the deceased by Ford Kiwala yet no one saw the appellant assaulting the deceased at the funeral house where obviously a lot of people had gathered. In convicting the appellant, the learned judge relied on Annie's evidence that she was told by her deceased husband that the appellant injured him; and the evidence of the mother to the deceased coupled with the statement that the deceased gave to the police confirming the appellant's assault on his person. We have noted, however, that it was not clear whether the fight at Kiwala Bar was on 13th December or 14th December, 2012.

Contrary to Mrs. Kawimbe's submission that the deceased had recovered from the beatings inflicted on him by Harry Banda, the mother to the deceased testified that her son was *badly beaten* by Harry Banda. In fact, Annie did not even tell the police that her husband had been assaulted by Harry Banda, which was odd. She did not even mention whether he had any injuries yet the description given by Ford Kiwala was that Harry Banda badly assaulted the deceased and that after the fight he kept him back as he feared the fight would continue. It would appear to us that Annie was protecting Harry who was a close friend of the deceased. This was confirmed by Marvin Kalaliki the elder brother to the deceased who said-

"Even Harry Banda had been said to have earlier assaulted my young brother. My brother told me he had been kicked with boots by Banda but that they had discussed and settled the matter. We then got some money from our mother and went to report the matter at Luangwa Police. We were given a Medical Report form to take to Luangwa Clinic. I saw that on the Medical Report only Peleka's name appeared and not that of Banda. I asked him why. He said it was because he had settled the issue with Banda."

Further, under cross-examination he said-

"He said Accused 1 used fists and kicks on the body. My brother refused to reveal this to the police. I questioned my brother over the non-disclosure, he said people had told him he and Accused 1 (Harry Banda) would be fired if he disclosed the assault by Accused 1. I was present when my brother made the report to the police....Yes it was wrong to report only one assault."

We take the view, that the learned judge should have addressed his mind to this evidence. If the deceased could not disclose the assault by Harry Banda to the police what more his wife? According to James Kolala, the investigations officer, the deceased reported for work on 14th December, 2012 although he was not feeling well and this was a day after he was assaulted by Harry Banda at Kiwala Bar. Yet Annie's evidence was that she was with the deceased in the afternoon before he proceeded to the funeral and he was alright. The point we are making here is that, it is clear that the deceased was obviously badly injured by Harry Banda and unfortunately for the deceased, he was assaulted again by the appellant and again kicked to the head. The learned judge stated as follows-

“I do accept the submission by Mr. Mulunda that the incident at PW1's place on 13th day of December 2012 was independent of that at the Kambolokonya funeral house. The latter incident was, in my opinion, more serious. The latter assault constituted a "novus actus interveniens" or new intervening act.” (emphasis ours)

Looking at the cause of death, which is head injuries, in simple terms, can it be stated for certain that the latter incident was more serious - especially having regard to the conflicting evidence as to the condition of the deceased after the assault by

Harry Banda. This conflict in evidence should have been and should be resolved in favour of the appellant. It seems to us that there is a doubt as to which assault caused the death of the deceased as the two assaults on the deceased were basically one after another and in our view, the learned judge should have been alert to this fact. The pathologist found that there was haemorrhage in the soft tissue of the face. And both assaults included fists and kicks on the face. The question is: of the two assaults which one caused the head injury that led to the death of the deceased?

In the case of **Njunga and Others vs. The People**⁹ we held that:

"This court has on a number of occasions indicated that it is not necessary in all cases for medical evidence to be called to support a conviction for causing death. Except in borderline cases, laymen are quite capable of giving evidence that a person has died. Where there is evidence of assault followed by a death without the opportunity for a novus actus interveniens, a court is entitled to accept such evidence as an indication that the assault caused the death."

In this case, although the appellant was rightly found by the learned judge to have assaulted the deceased, the death of the deceased could not be heaped on him alone going by the evidence which we have alluded to above. Indeed, we agree that the appellant and Harry Banda did not act jointly but their action of

assaulting the deceased which assault was directed to the head and the cause of death being a fatal injury to the head, the two should have borne the blame. In this case, Harry Banda was found guilty of assault while the appellant was found guilty of murder. Our view is that this was a misdirection. The two culprits should have been found guilty of the same offence.

Looking at the evidence on record, we take the view that malice aforethought was not established by the prosecution who simply threw the evidence at the court. As earlier stated, the two assaults followed each other. In her evidence, Dr. Olga stated as follows:

“The death could have been due to beating. Generally, it could have been a stroke. But not in this case because I found haemorrhage in the soft tissue of the face and head. RTA cannot cause such injuries I did not find any other injuries.”

Haemorrhage in the soft tissue of the face and head, in our view, could have been the result of the assault by both Harry and the appellant. In the case of **Changwe and Another vs. The People**¹¹ we put it simply that:

"As Sections 200 and 204 of the Penal Code show, murder is a crime which requires a specific intent or a specific frame of mind and it is for the prosecution to adduce evidence which will satisfy this requirement."

The description of the two assaults on the deceased show that Harry Banda and the appellant could not have contemplated the grievous harm that resulted in the death of the deceased.

The prosecution failed to establish malice aforethought in this case. We find difficulty in understanding the learned judge's conclusion that the assault by the appellant was more serious than that of Harry Banda - yet the assaults followed each other and were targeted to the head and the deceased bled after each assault. We take the view that the learned judge misdirected himself when he convicted the appellant of the offence of murder. As we stated earlier, since Harry Banda and the appellant obviously assaulted the deceased, the learned judge should have treated both the same. This means that the appellant should also have been found guilty of assault and convicted accordingly.

In the circumstances, we allow the appeal. We therefore quash the conviction for the offence of murder and set aside the death sentence imposed by the lower court. Instead we find the appellant guilty of assault occasioning actual bodily harm contrary to Section 248 of the Penal Code and we sentence him to

twelve (12) months imprisonment with hard labour with effect from the date of arrest which is 15th January, 2013.



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E.N.C. MUYOVWE
SUPREME COURT JUDGE



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M. MALILA, SC
SUPREME COURT JUDGE