

IN THE HIGH COURT FOR ZAMBIA
HOLDEN AT CHIPATA
(*Criminal Jurisdiction*)

HJ/29/2018

BETWEEN:

THE PEOPLE

VS

TEMBO LUNGU



BEFORE THE HONOURABLE LADY JUSTICE M. CHANDA THIS 25TH DAY OF APRIL, 2018.

APPEARANCES

FOR THE PEOPLE: MRS. A.N. SITALI, DEPUTY CHIEF STATE ADVOCATE APPEARING WITH MR. M. LIBAKENI ACTING SENIOR STATE ADVOCATE OF NATIONAL PROSECUTIONS AUTHORITY.

FOR THE ACCUSED MR. J. PHIRI, SENIOR LEGAL AID COUNSEL OF LEGAL AID BOARD.

J U D G M E N T

LEGISLATION REFERRED TO:

1. THE PENAL CODE, CHAPTER 87 OF THE LAWS OF ZAMBIA
2. THE CRIMINAL PROCEDURE CODE CHAPTER 88 OF THE LAWS OF ZAMBIA

CASES REFERRED TO

1. R V EXALL (1866) 176 ER 850
2. MWANAUTE V THE PEOPLE APPEAL NO.200(2011)
3. MBINGA NYAMBE V THE PEOPLE (2011) Z.R 246
4. JOSEPH MULENGA AND ANOTHER V THE PEOPLE (2008) VOL 2 Z.R 1
5. ILUNGA KABALA AND JOHN MASEFU V THE PEOPLE

Tembo Lungu the accused person, stands charged with the offence of Murder contrary to *Section 200 of the Penal Code Chapter 87 of the Laws of Zambia*. The particulars of offence alleged that on 29th July, 2016, at Mpandwe village in the Nyimba District of the Eastern Province of the Republic of Zambia, the accused murdered **Peter Phiri**. He denied the charge and the matter proceeded to trial. The prosecution called 7 witnesses in aid of their case.

The first prosecution witness (**PW1**) was **Frank Sangu Mwanza**. His evidence was essentially that on 28th July, 2016 at around 20:00hours, six men namely; White Mumba, Anderson Lungu, Bry Phiri, Kanunji, Jeko and the accused went to his house to play a game of cards. The witness testified that he retired to bed and left the others gambling as he did not have money to participate in the game. He recalled that on the night in question, the accused was wearing black and red football boots and asserted that he was able to see the boots as the place was well lit. PW1 told the court that when he woke up the following morning, the men had already left. He stated that he only learnt of the deceased's death later that day.

In cross-examination, the witness stated that he did not describe the boots that the accused was wearing to the police but that the police saw them during the apprehension of the accused. He further stated that he easily recalled the shoes worn by the accused that night as they were soccer boots and not any ordinary type of shoes.

There was no re-examination.

The second prosecution witness (**PW2**) was **Oscar Mumba**. PW2's version of events was that on 28th July, 2016 he was engaged in a game of gambling with PW3, Anderson Mwanza, Victor, the accused and the deceased at PW1's house. The witness also confirmed that the accused had been wearing black football boots with studs on the outsole on the material night. PW2 went on to state that when he left PW1's house at around 20:00hours, the other men were still deeply engaged in the game. He said he learnt of the death of the deceased the following day upon his return from the garden.

Under cross-examination, the witness stated that during the recording of his statement at the police station, he informed the police that the accused had been wearing football boots on the material night. When asked if he described the boots to the police, he answered in the negative. He affirmed that there were indeed a lot of people who owned soccer boots in Shola village.

The witness was not re-examined.

White Mumba was the prosecution's third witness (**PW3**) who also affirmed that he had been gambling with the accused and the deceased among others. PW3 narrated that PW1, PW2 and Anderson were the first to leave. He stated that he remained with Victor, the accused and the deceased. The witness stated that

Victor, the accused and the deceased continued gambling when he left PW1's place at 03:00hours. PW3 said the next day, he received information that the deceased had been found lying dead at Mutause village. He testified that later, the police recorded a statement from him.

In cross-examination, the witness confirmed that he had been detained at Nyimba police station for seven (7) days as one of the suspects in this matter.

There was no re-examination.

Aaron Phiri, the headman of Mutause village and younger brother of the deceased, was the fourth prosecution witness (**PW4**). His evidence was that on 29th July, 2016 at around 07:00hours, he received a report that his brother had been murdered on the road near Mpundwe stream. He asserted that he rushed to the crime scene and when he inspected the deceased's body, he noticed that there was blood on the head and that it appeared as though he had been battered. It was PW4's testimony that he also noticed prints of football boots surrounding the corpse. He said he further observed some bicycle tracks near the boot prints. The witness went on to inform the court that he followed the trail of boot prints and bicycle tracks but when he reached Shola village, they disappeared. According to the witness, PW1 confirmed that the deceased had been gambling at his house the previous night. PW5 said the matter

was then reported to the police who visited the scene and collected the body.

During cross-examination, PW4 stated that he did not visit the police station and that his statement was recorded whilst he was at the mortuary. When referred to his statement, PW4 backtracked on his earlier evidence and stated that the boot prints disappeared into a maize field and not into Shola village.

The fifth prosecution witness (**PW5**) was **Bernard Tembo**. His evidence was substantially similar to that of PW4 and it will therefore not be reproduced. The witness added that he visited the scene later than PW4. He stated that on 28th July, 2016 he had seen the deceased in good health.

In cross examination, PW5 affirmed that there were a lot of people who played football in both Shola and Mutaase villages.

The prosecution's sixth witness (**PW6**) was **Derrick Mawere**. He basically confirmed that the deceased who was their employee was on 25th July, 2016 paid an incentive of K1,376 upon delivering some cotton at the weigh bridge.

There were no issues raised in cross examination.

PW7, Detective Inspector Kyembe testified that after receiving a report from PW5 on 29th July, 2016 he visited the scene where Peter Phiri was found dead. The witness narrated that he found

a stick about a one meter from the body of the deceased and some football boots foot prints on the scene. PW7 informed the Court that upon inquiring from PW1, PW2 and PW3 he was told that the accused who had been wearing soccer boots was one of the people playing cards with the deceased on the night he met his death. The witness testified further that after the accused was apprehended on 1st August, 2016 he denied the charge under warn and caution. PW7 also stated that he obtained the soccer boots in question from the accused and produced them before Court as exhibit "**P1**". He also produced the post-mortem report as part of his evidence and it was marked as exhibit "**P2**".

Under cross-examination PW7 informed the Court that he never conducted any search at the house of the accused.

The witness also indicated that he did not take pictures of the soccer boot prints at the scene of crime. PW7 equally informed the Court that he did not obtain a report from an expert with regard to the size of the soccer boots which made the prints on the scene of crime. In further cross examination he conceded that there was no connection between exhibit "**P1**" and the prints that were found on the scene.

PW7 further explained that as per the statement he recorded from PW4 the soccer boots prints found on the scene ended in a maize field in Mutausi village. The witness also confirmed that there were many people at the scene, and as such the possibility

that some of them were wearing football boots could not be ruled out.

In re-examination the witness clarified that the first person who saw the deceased's body was not wearing soccer boots. PW7 further clarified that the onlookers stood for did not go near the body but stood at a distance. He stated that to the best of his recollection he could not remember anyone who was wearing football boot amongst the spectators. The witness told the Court that he confiscated the soccer boots from the accused because he was wearing them at the time of his arrest.

After the close of the prosecution's case I found that the state had established a *prima facie* case against the accused person and I found him with a case to answer. When put on his defence in compliance with *Section 291(2) of the Criminal Procedure Code*, the accused elected to give sworn evidence and did not call any witnesses.

The accused in his testimony basically informed the Court that the evidence led by PW1, PW2 and PW3 with regard to him having been present on the 28th July, 2016 at PW1's house where they had allegedly engaged in gambling was a total fabrication. The accused narrated that when the murder of the deceased came up he was taken aback when his uncle took him to Nyimba Police Station. The accused stated that PW3 was equally detained in connection with the murder of the deceased but was later released from custody upon agreeing to pay a bribe of

K2,000 as demanded by the arresting officer. He went on to state that he was only charged with the subject offence because he failed to raise the required bribe of K2,000. The accused further confirmed that he was wearing soccer boots when he was taken to the police by his uncle but he disowned the boots that were produced before Court as exhibit "**P1**".

In cross examination the accused confirmed that he was before Court because he did not manage to bribe the arresting officer. When asked why PW4 and the arresting officer were not questioned about the bribe when they gave their testimony in Court, the accused was at a loss.

In further cross examination, the accused confirmed knowing PW1, PW2 and PW3, and the deceased prior to the 29th July, 2016 because they were his fellow gamblers.

The accused conceded that PW1, PW2 and PW3 had no reason to lie and implicate him in the murder of the deceased because he had a cordial relationship with them.

The accused further stated that he handed himself to the police upon learning of the demise of the deceased because he was apprehensive of the threats issued to the effect that all the gamblers would be killed. The accused confirmed that of all the people who were engaged in gambling he was the only one concerned about the said death threats. The accused testified that prior to the death of the deceased he only remembered

engaging in gambling with Victor, PW1 and PW4 at Chabala village.

After the close of the case, counsel for the prosecution filed written submissions for which I am greatly indebted.

On behalf of the prosecution it was submitted that although the evidence on record was circumstantial, it was nonetheless convincing. Counsel referred the Court to the case of **R v Exall**¹ wherein the Court stated that there may be a combination of circumstances which, if each is considered on its own, may not raise a reasonable conviction or amount to more than a mere suspicion but which if considered in together may create a strong conviction of guilt. Counsel contended that there was evidence that the accused and Victor were the last people to be seen with the deceased. He submitted that the totality of that evidence had taken the cause out of the realm of conjecture.

Counsel also submitted that the combination of facts in this matter created a strong conclusion of guilty. He drew the court's attention to the case of **Mwanaute v The People**² to support his argument.

I have considered the evidence before me and I find that it is not in dispute that Peter Phiri was found dead near Mpundwe stream on 29th July, 2016. It is also not in dispute that when the deceased's body was found it was in an injured state. According to the post-mortem report which was admitted into evidence as

exhibit “**P2**”, the cause of Peter Phiri’s death was severe head injury and a depressed skull. I find that prior to his demise, the deceased had been gambling with others at PW1’s house. I find that following the death of the deceased, the accused was apprehended on 1st August, 2016.

All the above have been established. However, there was no eye witness to the killing of the deceased and therefore I affirm the submission of the prosecution that a conviction in this case rests entirely on circumstantial evidence. What is in contention therefore is whether the circumstantial evidence herein is sufficient to connect the accused to the deceased’s injuries and his subsequent death.

The definition of circumstantial evidence by the learned authors of *Phipson on Evidence, Thirteenth Edition, London: Sweet & Maxwell 1982 at page 2* is couched in the following terms:

“indirect evidence which proves a fact from which the existence of a given fact may be logically inferred.”

Further the Supreme Court in the case of **Mbinga Nyambe v The People**³ observed that a trial judge must be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such a degree of cogency which can permit only an inference of guilt.

The accused in his evidence denied gambling with the witnesses on the material date. I must state however, that the evidence of

PW1, PW2 and PW3 with regard to the accused's presence at PW1's house on the night in question was not challenged in cross-examination by the accused.

It is trite law that where an accused person fails to challenge the prosecution version of events in cross-examination and advances a version in his own testimony, the trier of fact would be entitled to treat this version as an afterthought. I am fortified on this position by the holding of the Supreme Court in the case of **Joseph Mulenga and another v The People**⁴ where their Lordships stated that:

“During trial, parties have the opportunity to challenge evidence by cross examining witnesses. Cross examination must be done on every material particular of the case. When prosecution witnesses are narrating actual occurrences the accused persons must challenge those facts which are disputed.”

In the instant case, I find the accused's evidence that he was not present at PW1's house and therefore did not engage in gambling with the witnesses to be a clear afterthought and I have disregarded it.

Further, the accused confirmed that he knew PW1, PW2, and PW3 and that he had a cordial relationship with them. As such, there is nothing to suggest that their evidence was falsely rehearsed to implicate him.

Coupled with that, I find PW1, PW2 and PW3 to be truthful witnesses and I accept their version of what transpired on that night. There is no doubt in my mind that the accused had engaged in gambling with the witnesses and the deceased during the night of 28th July, 2016. It is also apparent from the evidence led that the accused was wearing soccer boots when they were gambling. It is also clear that the accused was left playing cards with Victor and the deceased when the other players left.

I am satisfied that the combination of the following facts creates a strong case against the accused: that the accused was last seen with the accused and Victor Mwanza at around 01:00hours in the morning; that the deceased was found dead between 06:00 hours and 07:00 hours the same day; that the accused was wearing football boots and that there were prints at the scene of crime which suggest that they were made by a person wearing soccer boots.

I also find it an odd coincidence that the accused was wearing soccer boots on the material night and that football boot prints were found at the crime scene. I draw guidance from the case of **Ilunga Kabala and John Masefu v The People**⁵ wherein the court stated that unexplained odd coincidences maybe supporting evidence where no reasonable explanation has been given for the coincidences.

The totality of this evidence which is that the accused was the last person to be seen with the deceased before the deceased

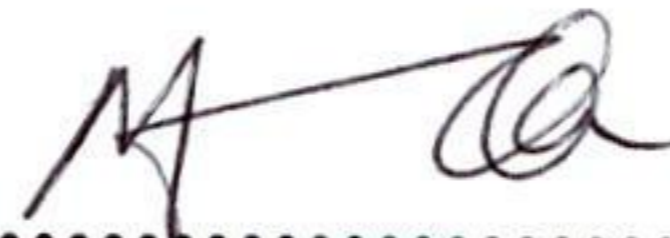
wound up dead near Mpundwe stream takes this case out of the realm of conjecture to permit only an inference of guilt.

The question is whether the accused intended to kill the deceased within the meaning of *Section 204* which defines malice aforethought. Considering the severe head injuries sustained by the deceased it is clear evidence that the accused had knowledge that his actions would be likely to cause death or grievous harm to the deceased.

Thus, the prosecution has discharged its burden and I have not found any reasonable explanation that can exonerate the accused. I have considered pursuant to *Section 201 of the Penal Code* whether there are extenuating circumstances present in this case, but I find that there are none.

In the circumstances, I find the accused guilty of murder contrary to *Section 200 of the Penal Code* and I convict him accordingly.

Delivered in open court this 25th day of April, 2018



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M. CHANDA
JUDGE