IN THE HIGH COURT FOR ZAMBIA **HJ/90/2018**

HOLDEN AT CHIPATA

(*Criminal Jurisdiction*)

BETWEEN:

THE PEOPLE

VS

YOHANE LIBONDE

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

APPEARANCES

FOR THE PEOPLE:	MRS. R.N. KHUZWAYO, CHIEF STATE ADVOCATE, MRS. A.N. SITALI, DEPUTY CHIEF STATE ADVOCATE, MR. M. LIBAKENI AND MR. W. SILWIMBA ALL OF NATIONAL PROSECUTIONS AUTHORITY.
FOR THE ACCUSED	MR. J. PHIRI, SENIOR LEGAL AID COUNSEL WITH MS S.F. BWALYA, 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. JOSEPH MULENGA AND ANOTHER V THE PEOPLE (2008) VOL 2 Z.R 1
2. NYAMBE MUBUKWANU LIYUMBI v THE PEOPLE (1978) Z.R. 25 (S.C.)
3. MAKOMELA V THE PEOPLE (1974) ZR 254
4. PHILLIPS V R (1969) 53 CR. APP. R 13
5. LEE CHUN-CHUEN V R (1963) A.C220
6. WALKER V R (1969) 53 CR AP. R 195

Yohane Libonde hereinafter referred to as the accused stands charged with one count of murder contrary to *Section 200 of the Penal Code Chapter 87 of the Laws of Zambia.* The particulars of the offence allege that the accused on the 27th of November, 2015 at Chipata in the Chipata District of the Eastern Province of the Republic of Zambia did murder **Size Mbewe**. When called upon to plead, the accused denied the charge.

In order to establish the guilt of the accused the prosecution must satisfy me upon each and every ingredient of the offence charged. The elements of the offence of murder are stipulated in *Section 200 of the Penal Code.* The prosecution is therefore required to establish three elements namely that:-

1. The accused person caused the death of the deceased.
2. By an unlawful act.
3. With malice aforethought.

Pursuant to *Section 204 of the Penal Code* malice aforethought is established when it is proved either that the accused had an actual intention to kill or to cause grievous harm to the deceased or that the accused knew that his actions would be likely to cause death or grievous harm to someone.

Grievous harm is interpreted in *Section 4 of the Penal Code* as any harm which endangers life or which amounts to a maim or which seriously or permanently injures health or which is likely to injure health, or which extends to permanent disfigurement, or to any

permanent or serious injury to any external or internal organ, member or sense.

I will now consider the evidence in this case. The prosecution called three witnesses.

The first prosecution witness was **Matalino Ingwe** the Vice headman of Chuni village. PW1 told the Court that on 27th November, 2015 about 22:00 hours he received information from Stanely Libonde that his brother Yohane Libonde had killed their uncle Size Mbewe with an iron bar. The witness testified that he was further informed that prior to the murder the accused and his uncle had engaged in an altercation. PW1 narrated that when he went to the scene he found the deceased lying outside the house belonging to the accused's mother. He went on to state that he instructed the neighbourhood watch to apprehend the accused as he had fled the scene. The witness asserted that the accused was apprehended the following morning. PW1 said when he asked the accused about the incident, the accused stated that he had killed his uncle because he had alleged that he was a thief. The witness further testified that the accused was thereupon handed over to the police.

There were no substantive issues raised in cross examination.

The second prosecution witness (**PW2**) was **Detective Sergeant Felix Mulenga**. His testimony was that on 28th November, 2015 he received a report that the deceased had been murdered by the accused. He said that when he visited the crime scene with

Detective Sergeant Kapolyo, they found the deceased lying in a pool of blood, facing upwards. He stated that the deceased had sustained two deep cuts on his head and multiple cuts on his face. The witness informed the court that there was a shovel and a stick next to the body. According to PW2, a Stanley Libonde, the brother of the accused, said he had also retrieved an iron bar from the accused during the ordeal. PW2 informed the court that he took the body to Chipata Central Hospital where a post-mortem examination was conducted. He said the accused was later apprehended by PW3.

The witness was not cross-examined.

The prosecution's final witness **(PW3)** was **Chief Inspector Christian Kalonde Mutale**, the arresting officer in this matter. He testified that on 28th November, 2015 he recorded a warn and caution statement from the accused in which he denied having murdered the deceased. According to PW3, the explanation by the accused was that the deceased alleged that the accused was a thief and started beating him. The accused only retaliated in self-defence. PW3 went on to state that an iron bar, a stick and a shovel were obtained from the crime scene and he produced them as exhibits **P1, P2** and **P3** respectively. He also produced the post mortem report and it was marked as exhibit **P4**.

During cross-examination, PW3 clarified that the iron bar was handed over to him by the accused's brother. He said a statement was recorded from Stanley who stated that he found the accused standing over the deceased with an iron bar in his hands. PW3

said he was unable to confirm whether exhibits P2 and P3 had been used in the murder.

There was nothing in re-examination.

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 evidence stated that he was arrested on 13th October, 2015 by the police on allegations that he had murdered his uncle Size Mbewe on 27th November, 2015. According to the accused he was not able to tell the Court the cause of his uncle's death and the exact month he died because they lived in different places. All in all the accused refused having murdered the deceased.

Under cross-examination the accused reaffirmed that he was arrested on 13th October, 2015 and that the evidence adduced by the prosecution witnesses was a total fabrication against him. The accused testified that PW1 was the headman at their village but that he did not get along with him because of his tendency of dragging him to Court on unsubstantiated allegations.

In further cross examination the accused confirmed that he was on good terms with his brother Stanley, but that the information he relayed to PW1 regarding the killing of the deceased was false.

At the close of the case submissions were only received from the prosecution and I have taken them into account in arriving at my decision.

I have considered the entire evidence led before me and I find that it is not in dispute that Size Mbewe died in Chuni village at the house belonging to the accused's mother on 27th November, 2015. I also find that prior to his demise, Size Mbewe was involved in a brawl wherein he was badly battered and was found lying dead in a pool of blood. It is also common cause that an iron bar, a stick and shovel (**exhibits P1, P2 and P3**) were retrieved from the scene of murder. According to the post-mortem report which was admitted into evidence as exhibit **'P4'** the cause of Size Mbewe's death was head injury due to fractured temporal bone, fracture of frontal bone and multiple bruises on the face.

I am satisfied that the cause of the deceased's death is consistent with a person who was savagely assaulted. I find that these facts have been proved, what is in contention is whether the accused person was responsible for battering the deceased and his subsequent death.

Both PW1 and PW2 testified that they received reports from Stanley Libonde that the deceased was engaged in a scuffle with the accused on 27th November, 2015 at about 22:00 hours. PW1

said he immediately visited the place where the incident occurred and found the deceased lying dead in an injured state. PW1 also testified that when the accused was apprehended the following day he confessed to killing his uncle as he was falsely accused of stealing. According to PW1 the accused was handed over to the police on 28th November, 2015. PW2 equally confirmed that he visited the scene shortly after the deceased was murdered where he retrieved the instruments (**exhibits P1, P2 and P3**) which were used by the accused to inflict injuries on the deceased. PW3 also confirmed that the accused explained to him under warn and caution that he resorted to batter the deceased on 27th November 2015 after he beat and accused him of stealing from his mother. I find the testimony of the prosecution witnesses to be plausible and true.

I must outrightly indicate that the evidence of the accused was unconvincing from beginning to end. The accused did not bother to listen to his lawyer's guidance during examination in chief but insisted on his fictitious and incredible story of how the police arrested and charged him with the murder of his uncle before his actual death on 27th November, 2015. It is apparent to me that the accused did not attach any seriousness to his defence. In the figment of his imagination he wrongly believed that his conviction would only be anchored on the testimony of his mother and young brother who had been in hiding with the view of frustrating the prosecution of this case. The evidence of PW1 to the effect that the accused was handed over to the police on 28th November, 2015 was not contradicted in cross examination by the defence.

It is trite law that where an accused person fails to challenge the prosecution version in cross examination and advances a version in his own testimony, the trier of the fact would be entitled to treat his version as an afterthought. I am fortified on this position by the case of **Joseph Mulenga and Another v The People**[1] where the Supreme Court held as follows:-

> ***"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."***

Similarly, in the matter before me the assertion by the accused that he was arrested by the police on 13th October, 2015 for no apparent reason is an afterthought aimed at misleading the Court.

I have considered the possibility of the accused person being falsely implicated by PW1 and I am satisfied that it was not the case. The report made by the accused's young brother to PW1 during the night of 27th November, 2015, his immeidate confirmation of the murder and the notification of the police were done so contemporaneously to the attack that there was no opportunity for PW1 to fabricate the story and falsely implicate the accused person.

In fact, there is no evidence of Size Mbewe having been involved in any incident that night which would have caused the injuries that killed him other than the fight between him and the accused

person. This being the case I find the injuries he suffered could only have been inflicted by the accused person during that fight. I find PW1 and PW2 to be truthful and accept their version of what transpired on that night.

I am also satisfied that the accused used an iron bar to inflict the multiple wounds that the deceased sustained on the head. It is clear that upon being confronted by his young brother Stanley and realising that the deceased was lifeless he fled the scene.

In keeping with the provisions of *Section 204 of the Penal Code* there is no doubt in my mind that the nature of the brutal attack leads to the inevitable conclusion that the intention of the accused was to kill the deceased or at least cause him grievous bodily harm.

I will now turn to consider the evidence that the attack in issue occured mainly as a result of the accusation made by the deceased that the accused had stolen his mother's kitchen utensils. I must affirm that this evidence in a way suggests the defence of provocation.

The law on provocation is to be found in *Section 205 of the Penal Code* which provides as follows:

> *(1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion, caused by*

sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only

(2) The provisions of this section shall not apply unless the court is satisfied that the act which causes death bears a reasonable relationship to the provocation.

There is a string of cases which set out the correct approach to the defence of provocation. The cases such as **Nyambe Mubukwanu Liyumbi v The People**[2], **Esther Mwiimbe v The People, Makomela v The People**[3], **Phillips v R**[4]and **Lee Chun-Chuen v R**[5] all establish that provocation in law consists mainly of three inseparable elements, namely the act of provocation, the loss of self-control both actual and reasonable, and the retaliation proportionate to the provocation. All three elements must be present before the defence is available.

In the instance case, I have already found as a fact that there was an altercation between the accused and his deceased uncle. Going by the evidence on record, I am of the view that the argument between the two was trivial. The evidence far from suggesting any provocation or loss of self-control indicates that the accused embarked on a course of action which was dispassionate, deliberate and certainly not in the heat of passion and fled the scene.

The Court in **Walker v R**[6]**,** had this to say:-

> ***"It has never been the law that the man who completely loses his temper on some trivial provocation and reacts with gross and***

savage violence which kills his victim can hope for a jury to find a verdict of manslaughter on grounds of provocation."

In **Makomela v The People** it was stated that:

"***It is important ...not to overlook that the question is not merely whether an accused person was provoked into losing his self-control but also whether a reasonable man would have lost his self-control and, having done so, would have reacted as the accused did.***"

I am of the view that the reaction of the accused over a trivial argument was unwarranted and not proportionate to the actions of the deceased on the material date. It is true that a reasonable man would not have reacted by battering the deceased several times as the evidence led shows. On the test laid down in **Mwiimbe**, the defence of provocation in this regard cannot succeed for the absence of the essential element of proportionality on the facts of this case. The accused's actions, to borrow the words of the Court in **Walker v R** were gross and savage, as such, the offence herein cannot be reduced to manslaughter.

Having established that the accused murdered the deceased herein I have not found any extenuating circumstances pursuant to *Section 201 of the Penal Code* which would reduce the culpability of the accused person.

On the foregoing, there is no doubt on my mind that the accused person unjustifiably caused the death of **Size Mbewe**. I find him

guilty of the offence of murder contrary to *Section 200 of the Penal Code* and I convict him accordingly.

Delivered in open Court at Chipata this 25th day of *April*, 2018.

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M.CHANDA

JUDGE