

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

HP/257/2017

BETWEEN:

THE PEOPLE
v
PATRICK CHILONGOSH



**BEFORE THE HONOURABLE LADY JUSTICE M.CHANDA THIS 29TH DAY OF
MARCH, 2018**

APPEARANCES

FOR THE PEOPLE : O. MUHWENDE
FROM NATIONAL PROSECUTION AUTHORITY

FOR THE ACCUSED : G.M. IMBWAE
FROM DOVE CHAMBERS

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

OTHER WORKS REFERRED TO:

1. OXFORD DICTIONARY OF LAW (2002) 5TH EDITION, LONDON: OXFORD UNIVERSITY PRESS
2. **THE BLACK'S LAW DICTIONARY (2004) 8TH EDITION USA: THOMSON WEST**
3. AN INTRODUCTION TO EVIDENCE, G.D NOKES (1952) 2ND EDITION, LONDON: SWEET & MAXWELL

Patrick Chilogoshi 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 4th February, 2017 at Lusaka in the Lusaka district in the Lusaka Province of the Republic of Zambia did murder **Richard Kabwelile**. 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 that either 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 four witnesses in aid of their case.

Luponga Kanyembo was the first prosecution witness (**PW1**). His evidence was that he saw the deceased on the evening of 4th February, 2017 at the accused's bar. PW1 told the court that the accused's bar was located next to his bar and that he was watching a football match there when the accused went in to buy some alcohol. He testified that the deceased also bought some alcohol for the accused and the two sat down to drink together. PW1 stated that he left the accused in the bar with the accused when he headed home at around 21:30hours. He said the next time he heard about the deceased was around 04:00hours the following day when the accused and his wife went to his home to inform him that the deceased was lying unconscious on the floor of the bar. PW1 said he then accompanied them back to the bar and when they went inside he saw the deceased lying on the floor. He informed the court that he checked the deceased's body and did not observe any injuries. He narrated that they took the body to Levy Mwanawasa hospital and thereafter he and the accused were placed in police custody.

In cross-examination the witness informed the court that the accused had a habit of exhibiting violence towards patrons at his bar. When asked if any of them had filed a complaint with the

police, the witness responded that he was not aware if they had. He told the court that at the time he was leaving the bar, the deceased remained there. He said the deceased was in good health and was chatting with the accused.

There was no re-examination.

The second prosecution witness was **Muwela Malimba (PW2)**, the accused's landlord. PW2's testimony was that at about midnight on the fateful day, the accused and his wife went to his house to inform him that Richard had passed out on the floor of the bar. According to the witness, the accused narrated that he had dozed-off at the counter in the bar and when he woke up he noticed that Richard was lying down on the floor. The accused also told him that he assumed Richard was sleeping and tried to wake him up but realised that he was unconscious. The witness said he escorted the accused and his wife back to the bar and when they opened the door he saw Richard sleeping on the floor facing upwards. PW2 explained that his head was near the counter and his legs were close to the doorway and that there was some water-like liquid dripping from his mouth. He said that upon seeing the situation, he advised the accused to report the matter to the police station. He said they proceeded to Kalikiliki police station and returned to the bar with the police. They then proceeded to take the body to Mwanawasa hospital where he was pronounced dead.

In cross-examination, the witness told the court that when he advised the accused to report the incident to the police, the accused did not hesitate but went there willingly. He said he did not see any blood on the body of the deceased.

There was no re-examination.

The third prosecution witness (**PW3**) was **Constable Sidney Mukuka Chiti**. He said after receiving the report from the accused at Kalikiliki police station, he visited the crime scene and found the body of the deceased on the floor of the accused's bar. He said after examining the body, he noticed that some saliva was coming out of the mouth but that there were no injuries on the body. He asserted that they rushed to Levy Mwanawasa hospital where the deceased was pronounced dead. He said during his investigations, he discovered that the deceased was last seen with PW1 and the accused. He said it was on this basis that he detained the two.

There was no cross-examination.

Detective Muwela Akafumba was the fourth prosecution witness (**PW4**). He told the court that on 5th February, 2017, he was assigned to investigate the murder of Richard Kabwelile. He stated that when he perused the docket he discovered that the accused and PW1 had been detained in connection with the offence. He said when he interviewed them he learnt that PW1 was at the accused's bar that night but when he headed home,

he left the accused with deceased and two other customers. When PW4 interrogated the accused his explanation was that he dozed-off at the counter and when he woke up he found the deceased lying on the floor. The accused relayed how he informed his landlord and later the police as well as how they took Richard's body to the hospital where he was pronounced dead.

PW4 said that a postmortem examination was conducted on 9th February, 2017 which revealed that the deceased died of brain hemorrhage due to blunt fatal head and abdominal injuries. He produced the postmortem report and it was marked as exhibit "P1".

In cross-examination the witness stated that he was aware that the accused had been drinking alcohol. He also said that he was not sure if a blunt injury could be caused by a person falling.

There was no 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 person elected to give sworn evidence and called two witnesses.

The first defence witness was the accused himself whose testimony was that around 21:00hours on the material date, he was at his bar conducting a stock-take when the deceased went

in to buy some alcohol from him. He explained that after paying for the alcohol, the deceased sat on a bench near the door. He said later, the deceased was joined by three other customers who went in the bar. The accused testified that PW1 was also in the bar watching a football match. He narrated that when PW1 and the other customers left the bar, he remained with the deceased. The accused stated that he continued with the stock taking while the deceased consumed his alcohol.

The accused testified that he must have dozed-off because the next thing he recalled was waking-up to see the deceased lying on the floor of the bar. He said he assumed that the deceased had similarly dozed-off hence he went to wake him up but noticed that he was non-responsive. He recalled that the deceased's eyes were open and one of his legs was folded while the other one was straight. He said he went outside to look for help but realised that there was nobody in sight. He rushed to his landlord's house which was located near the bar to inform him of the ordeal and they went back to the bar together. The witness stated that when his landlord examined the deceased, he advised that they report the matter to the police.

The witness stated that when the police asked him whether he knew who could be called to identify the deceased's body, he advised that PW1, the proprietor of the bar next to his, would be the right person as the deceased was his care-taker. He said that when they went to PW1's house, he was wearing a blood stained shirt. When the police inquired about it, his response was that

the shirt got stained during the fight he had with his wife. They returned to the bar with him and he identified the deceased as his caretaker. He testified that the body of the deceased was taken to Levy Mwanawasa Teaching Hospital and afterwards they were detained at Kalikiliki police station.

It was the accused's testimony that he had an ailment of dozing-off which he had contracted when he was employed at Kafue National Park. He said at one point he even fell in the brazier while his wife was cooking nshima and was admitted at the University Teaching Hospital for treatment. He added that the sleeping sickness had disrupted his life to the point of making him reduce on church programmes which he was previously actively involved in.

In cross examination, the accused ` stated that he spoke with the deceased before he went and sat alone near the door. He denied sitting with the deceased at the counter.

When asked if he was alone with the deceased when the others left, the witness answered in the affirmative. He denied the allegation that he fought with his customers. He agreed that he did not have evidence to show that he was still suffering from the dozing ailment.

There was nothing of relevance in re-examination.

The second defence witness (**DW2**) was the accused's friend, **Esau Lungu**. He told the court that he had known the accused for a long time. He said the accused had previously been an active member of the church choir and was the youth coordinator at Mtendere Parish. He explained that when the accused contracted the sleeping ailment, he had to relinquish these responsibilities since the illness made it difficult for him to perform his duties. He also said that in 2013, the accused's ailment was so serious that he dozed-off and fell in a pot of porridge. He stated that the accused sustained serious burns and was admitted to the University Teaching Hospital.

In cross examination the witness said that he was not with the accused on 4th February, 2017 and therefore could not testify on what happened that night. He however said that he was certain that the accused had not been cured of the sleeping sickness.

In re-examination DW2 stated that the accused had continued dozing-off even after receiving medication from the hospital.

The third defence witness (**DW3**) was the accused's wife **Beatrice Nampungwe**. She explained that her husband did not work at the bar because of his sleeping sickness and that he went there that night to help with stock-taking. DW3 said that she left him at the bar when she went home round 21:00hours. She narrated that an hour after she went home, her husband also arrived and informed her that there was a man who was unconscious at the bar. She escorted him to the landlord's house to ask for help in

handling the situation. After discussing with the landlord, they all hurried to the bar then to the police station to report the matter. She told the court that her husband had been experiencing sleepiness from the time they got married in 2012. She informed the court that in 2013 as she was preparing nshima, he dozed-off and fell in the pot of porridge and sustained burns on his face. She said that the problem persisted even after receiving treatment from the University Teaching Hospital.

In cross examination, DW3 reiterated that her husband did not sell at the bar due to his sleeping problem; he went there to help her order some beers. She said she could confirm that despite her husband receiving treatment at the hospital, the problem had still persisted.

In re-examination she said that her husband was a bricklayer and only used to help her with stock-taking at the bar. This was the evidence I received in this matter.

I have considered the evidence before me and I find that it is not in dispute that Richard Kabwelile died on 4th February, 2017. According to the post mortem report which was admitted into evidence as exhibit 'P1' the cause of Richard's death was a hemorrhage due to blunt fatal head and abdominal injuries. It is clear that on the fateful night, the deceased had been consuming alcohol at the accused's bar. It is also not in dispute that the accused was with the deceased prior to his demise. What is in

contention is whether it was the accused that caused the death of the deceased.

From the foregoing, the evidence linking the accused to the death of the deceased is circumstantial as there was no eye witness to the alleged commission of the offence. The definition of circumstantial evidence can be derived from the Oxford's Dictionary of Law which defines it in the following terms:

“Circumstantial evidence (indirect evidence); evidence from which the judge or jury may, infer the existence of a fact in issue but which does not prove the existence of the fact directly. Case law has described circumstantial evidence as evidence that is relevant (and, therefore, admissible) but that has little probative value.”

Circumstantial evidence is also defined in **the Black's Law Dictionary** as:

“Evidence based on inference and not on personal knowledge or observation.”

Further, Professor Nokes in his book entitled **“An Introduction to Evidence”** aptly puts it at page 467 that:

“The possible defects in circumstantial evidence may....include not only those which occur in direct evidence such as falsehood, bias or mistake on the part of witnesses, but also the effect of erroneous inference.”

I must emphasise that the court has a duty to be cautious against drawing wrong inferences from the circumstantial evidence at its disposal before it can safely proceed to record a conviction.

In the case before me, the evidence linking the accused to the death of Richard is that he was the last person to be seen with the deceased. Careful scrutiny of the post mortem report shows that the deceased's death was due to head and abdominal injuries but it is by no means easy for me to say that these injuries were caused by a physical attack. In the absence of any evidence to suggest that the deceased was subjected to any physical attack, it is difficult to deduce that he was murdered. There is a possibility that the blunt head injury could have been sustained by the impact from the collision of his head with the floor when he fell.

A further analysis of the post mortem report reveals that it does not indicate whether the abdominal injury was either caused by a physical attack or the rupture of an internal membrane. It is apparent from the evidence on record that the outer body of the deceased was intact with no signs of any external force having been inflicted to the abdomen. I find it hard to imagine a situation where the deceased could have been attacked on the abdomen without exhibiting any physical signs such as abrasions or bruising of the external abdomen. In light of this, it

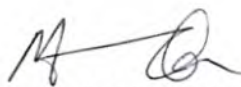
is arduous to ascertain whether the death in question was as a result of natural causes or a physical attack.

I am also cognizant that the accused in his defence told the court that while he was in the bar with the deceased, he fell asleep at the counter as he suffered from a sleeping ailment. It is my affirmation that the accused's explanation is plausible because there is medical evidence from the hospital which was produced as exhibit 'D1' to confirm that he suffered from a sleeping illness from 2013.

It is my finding therefore that the prosecution has not rebutted the explanation that at the time the deceased met his fate, the accused was asleep.

On the totality of the available circumstantial evidence before me, I am not satisfied that it has taken this case out of the realm of conjecture which can permit an inference of guilt. The accused's explanation was a reasonable one. Consequently, I find that the prosecution has failed to discharge its burden of proof and I acquit the accused forthwith.

Delivered in open court at Lusaka this 29th day of March, 2018



.....
M.CHANDA
JUDGE