

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

**HJ/37/2016**

**B E T W E E N :**

**THE PEOPLE**

**VERSUS**

**HOFIN TEMBO**



**Before Honorable Mrs. Justice M. Mapani-Kawimbe**

***For the People:***

*Mrs. A. N. Sitali – Deputy Chief State Advocate*  
*Ms. C. Lupili – Senior State Advocate*  
*Mr. M. Libakeni – State Advocate*  
*Mr. W. Silwimba – State Advocate*

***For the Accused:***

*Mr. J. Phiri – Senior Legal Aid Counsel.*  
*Mrs. S.C. Lukwesa – Senior Legal Aid Counsel*

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**JUDGMENT**

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**Cases Referred to:**

- 1. Joseph Mutaba Tobo v the People (1991) S.J (S.C.)*
- 2. Director of Public Prosecutions v Lukwosha (1966) ZR 14 (CA)*

**Legislation and Other Works Referred to:**

- 1. Penal Code Chapter 87*
- 2. Criminal Procedure Code, Chapter 88*
- 3. Oxford Advanced Learner's Dictionary of Current English, 8<sup>th</sup> Edition Oxford Press, 2010*

**Hofin Tembo**, the accused person, stands charged with the offence of murder contrary to **section 200 of the Penal Code**. The particulars of the offence allege that on 15<sup>th</sup> November, 2015 at Lundazi in the Lundazi District of the Eastern Province of the Republic of Zambia, he murdered **Kenson Tembo**. A plea of not guilty was entered following a medical doctor's opinion that the accused person was able to take a plea.

**Edson Tembo** testified as **PW1**. His evidence was that on 15<sup>th</sup> November, 2015, while at the family home at Kapepeya Village, between 22:00 – 23:00 hrs, his younger brother the accused Hofin Tembo asked to go out of the house. He testified that the accused tended to go out of the house wherever he had an epileptic attack. He told the Court that if the accused was not allowed to leave the house, then he would become violent.

It was evidence that the accused went outside the house to the kitchen, where he picked up grass, and threw it on to a fire. Upon hearing the noise the accused's parents who were sleeping in the house came out. The accused's father Kenson Tembo, the deceased, tried to restrain the accused, as Margaret Mtonga the accused's mother and PW1 watched on. Unknown to them, the accused picked

up a log which he struck the deceased with on his neck. Upon being struck the deceased screeched "*my son has killed me*". PW1 also testified that the deceased thereafter staggered but he managed to hold him as he was about to fall. Afterwards the deceased did not respond. PW1 noticed that the deceased had a deep cut on his neck where blood was oozing from.

In Court, PW1 described the log that the accused attacked the deceased with, stating that it was about 2.5 meters long, of medium size and had a sharp end with blood stains. After the identification, the Court marked it ID1. PW1 further told the Court that before the attack, the deceased was in good health. He also testified that he went with others to report the deceased's death at Emusa Police Post and later to Lundazi Police Station. It was PW1's evidence that the deceased's remains were collected by police officers from Lundazi Police Station and deposited at Lundazi District Mortuary. At the same time the accused was picked up and taken to Lundazi Police Station. PW1 also stated that a post-mortem was conducted on the deceased's body.

PW1 testified that the accused was his younger biological brother and suffers from epilepsy from the time he was a young child. He has been on medication for a while, but still suffers from frequent epileptic episodes, occurring weekly or bi-weekly, which make him violent. PW1 also told the Court that when the accused became too violent, the deceased would normally restrain him until he calmed down.

In cross-examination, PW1 testified that on the fateful day, the accused had an epileptic episode and was sick.

The witness was not re-examined.

**PW2** was **Margaret Mtonga** the accused's mother and wife of the deceased. It was her evidence that on 15<sup>th</sup> November, 2015, she and deceased had been sleeping for a little while when they were awoken by the accused's noise at about 22:00 hours. She told the Court that the accused has been suffering from epilepsy from the age of five. When PW2 and the deceased got out of the house, they saw the accused running around the yard and throwing logs on to a fire.

PW2 testified that the deceased tried to restrain the accused, who hit him with a log on his neck. PW2 told the Court that after

being struck the deceased fell down. She later observed that he had a wound on his neck where blood was oozing from. It was PW2's evidence that the deceased died instantly. She described the log that the accused hit the deceased with and identified exhibit ID1. She also testified that after the deceased died, the accused continued wandering around the family home.

She repeated PW1's evidence on how the deceased's death was reported to the Police and how the accused has always been a violent person. Further, that the accused frequently suffers from epileptic attacks.

The witness was not cross-examined.

**Constable M. Magellan**, Service No. 41180 of Lundazi Police Station testified as **PW3**. It was his evidence that on 15<sup>th</sup> November, 2015, whilst at Lundazi Police Station, Mr. Nelson Mzumara reported on behalf of the State, that the deceased, his cousin, Kenson Tembo, aged sixty, of Kapepeya village, Chief Magodi, Lundazi District had been murdered by his biological son, the accused who is a mental patient. Mr. Mzumara told PW3 that the incident happened between 22:00 – 23:00 hours.

PW3 testified that he and other officers went to Kapepeya Village where they found the body of the deceased. He told the Court that he observed that the deceased's body had a deep cut on the neck. At the scene, PW3 saw the stick that the accused used to attack the deceased as well as some blood stains, which were on the ground. PW3 told the Court that he deposited the deceased's body at Lundazi District Mortuary and detained the accused at Lundazi Police Station.

PW3 also told the Court that on 17<sup>th</sup> November, 2015 he attended the post-mortem of the deceased at Lundazi District Hospital in the company of Mr. Nelson Mzumara and other family members. The post-mortem was conducted by Dr. Balungisa of Lundazi District Hospital. According to PW3, the post-mortem results disclosed that the deceased died from internal bleeding and shock. He also identified ID1 in Court and the post-mortem report which was marked ID2. At the request of PW3, the exhibits were admitted into evidence as P1 and P2.

The witness was not cross-examined.

After the close of the prosecution's case, the accused elected to remain silent. On behalf of the accused person, Learned Counsel prayed pursuant to section 17(2) of the Criminal Procedure Code, that the report of Doctor Lekani Banda Venevivi, prepared after this Court's order, that the accused be referred to a government medical institution, for the purpose of being examined, so as to determine his mental status, during the commission of the offence and his fitness to stand trial, be admitted as part of his evidence.

I have given serious consideration to the evidence adduced in this case, as well as the submission of Learned Counsel for the accused.

I find that it is not in dispute, that the accused Hofin Tembo suffers from epilepsy from the time that he was five years old. He is a violent person due to his condition. It is also not in dispute that on 15<sup>th</sup> November, 2015 the accused killed the deceased using a sharp edged log.

The offence of murder is set out in section 200 of the Penal Code which provides as follows:

***“200. Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”***

Malice aforethought is defined in section 204 of the Penal Code in the following terms:

***“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:***

- (a) An intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;***
- (b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;***
- (c) An intent to commit a felony;***
- (d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”***

From the evidence, I find that Kenson Tembo died on 15<sup>th</sup> November, 2016 at his home in Kapapeya Village, Chief Magodi in Lundazi District. I also find that the post-mortem conducted on his body on 17<sup>th</sup> November, 2015 disclosed that the deceased died from *“internal bleeding due to a deep wound on the right side of the neck with communication up to the right lung.”*



The evidence implicating the accused is direct with PW1 and PW2 both testifying that they saw the accused striking the deceased on his neck. Further, that the deceased instantly died from the attack. I am satisfied that by inflicting such injuries the accused person was incapable of understanding that he was likely to cause death or grievous bodily harm to the deceased. I am therefore satisfied that he had no malice aforethought when he committed the offence. I am fortified by the medical opinion of Dr. Lekani Banda Venevivi quoting relevant portions of his report as follows:

**“Psychiatric history**

*Hoffin Tembo is being attended to at Chainama for the first time. He was admitted on 30<sup>th</sup> June, 2016. His present complaint was that of having fits since childhood. He explained he had accessed treatment from the clinic but his fits did not stop at all. He also gave a history of inconsistent drug supply and frequent switches in his medicines which could contribute to poor seizure control. His seizures are characterized by a postictal period in which the patient is confused and wanders about with occasional episodes of violent behavior. In the periods in between the fits, Hoffin is of normal activity and is of normal intellect.*

**Ward observation**

*During his stay, Hoffin had a seizure on 25<sup>th</sup> July 2016 and thereafter he was described as being confused, ran about in the cell and was screaming. He had to be sedated to be controlled and woke up well the following day.*

*On the seizure-free days, he was very cooperative and helped with ward chores.*

### **Diagnosis**

*Hoffin Tembo suffers from Generalized tonic-clonic seizures that are followed by a postictal confusional state in which the patient is confused for some hours.*

### **Conclusion**

*I am of the opinion that Hoffin Tembo was in a state of postictal confusion when he carried out the act. He is fit to take plea in court."*

According to the Oxford Advanced Learner's Dictionary 8<sup>th</sup> Edition, postictal means "*a period following a seizure or convulsion.*" In a postictal state a person experiences an altered state of consciousness.

In the case of **Joseph Mutaba Tobo v The People**<sup>1</sup> the appellant called a psychiatrist to prove his defence of insanity. Quoting the case of **Mushanga v. the People**, the Supreme Court held that:

***"On an issue of mental disability the medical evidence presented to the trial Court may or may not be conclusive. However the Court is bound to consider the medical evidence together with all other relevant evidence. Its quality and weight will be assessed in light of all the other facts and circumstances of the case. But as the cases which we have already mentioned indicate, medical evidence will usually be considered to be more reliable than the assertions by or on behalf of an accused. In this regard we are satisfied that the***

*submissions, to the effect, that the doctor's opinion in this case should be over turned hold no attraction for us."*

In the case of **Director of Public Prosecutions v Lukwosha**<sup>2</sup> Blagden CJ, as he then was, held *inter alia* that:

*"The language "incapable of understanding what he is doing" in Section 13 of the Penal Code refers not merely to the accused's knowledge of what physical act he is performing but also to his knowledge of the probable consequences of that physical act, accordingly, when a disease of the mind renders the accused incapable of foreseeing these probable consequences, he is legally insane within the meaning of Section 13 of the Penal Code."*

The old section 13 of the Penal Code now appears as section 12 of the Penal Code. It sets out thus:

*"12. A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is, through any disease affecting his mind, incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission. But a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission.*

*12 A. (1) where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrest or retarded development of mind or any inherent causes or is induced by disease or injury) which has substantially impaired his mental*

***responsibility for his acts or omissions in doing or being part to the killing.”***

In *casu*, the evidence of PW1 and PW2 is that the accused who is a biological brother and son respectively, has had a long history of epilepsy from childhood, which is associated with violence. I have no reason to disbelieve their testimonies. The medical report of the accused and in particular at ward observation shows that when the accused suffered an epileptic episode on 25<sup>th</sup> July, 2016, he was confused, ran about in the cell and was screaming.

On the date that the accused killed the deceased, the evidence laid suggested that he was totally ambivalent to the crime that he had committed. As a consequence, I find that the accused's long term health condition has a bearing on his criminal responsibility. Therefore, arising out of his substantially impaired mental responsibility, I find the accused not guilty of murder by reason of insanity. Section 161 (2) (b) of the Criminal Procedure Code provides that:

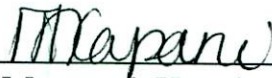
***“2. At the close of such evidence as is mentioned in subsection (1), the Court, if it finds that the evidence as it stands:***

***(b) Would, in the absence of further evidence to the contrary, justify a conviction, or a special fining under section one hundred and sixty***

*- seven shall order the accused to be detained during the President's pleasure."*

In accordance with section 161(2) (b) of the Criminal Procedure Code, I order that the accused be detained during the President's pleasure.

**Delivered in open Court at Chipata this 16<sup>th</sup> day of December, 2016.**



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M. Mapani-Kawimbe  
**HIGH COURT JUDGE**