

2SPC/028/2017

**IN THE SUBORDINATE COURT OF THE FIRST CLASS
FOR THE LUSAKA DISTRICT
HOLDEN AT LUSAKA
(Criminal Jurisdiction)**

The People versus **KELLY DAKA**

BEFORE: HIS WORSHIP HON F. KAOMA

FOR THE STATE: J. BANDA

FOR ACCUSED: IN PERSON

J U D G E M E N T

CASES REFERRED TO

- a) **JUMA ZAKALIA v THE PEOPLE (1978) Z.R. 149 (S.C.)**
- b) **LENGWE v THE PEOPLE (1976) Z.R. 127 (S.C.)**
- c) **MICHAEL NJOBVU v THE PEOPLE (S.C.Z. Judgment No. 17 of 2011)**
- d) **R v. CHARLSON (1955) 1 W.L.R. 317**
- e) **THE PEOPLE v FELIX CHIBANDA (2011) ZR VOL TWO,**

CHARGE

In this case the accused stood charged with one count of UNLAWFUL WOUNDING, contrary to section 232(a) of the Penal code. The particulars of the first count allege that the accused on 13th day of December, 2016, at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, unlawfully did wound MASAUSO MWANZA.



The particulars of the second account allege that the accused on 13th day of December, 2016, at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, unlawfully did wound MUSONDA KABUNGO. Accused pleaded not guilty to both counts. However, at the close of the prosecution case accused was acquitted of count two on the grounds set out in the ruling.

WARNING

I warn myself from the outset that in criminal matters the onus is through-out the proceedings on the prosecution to prove their case beyond all reasonable doubt while the accused bears no burden to prove his innocence. Should there be any doubt in my mind as to the guilty of the accused persons then the benefit of that doubt shall be resolved in favour of the accused.

ANALYSIS OF THE LAW

At this point I propose to analyze the law creating this offence before considering the evidence adduced by both parties herein.

The offence of unlawful wounding is created by section 232(a) of the penal code which is couched in the following language;

"Any person who unlawfully wounds another is guilty of a felony and is liable to imprisonment for three years."

For the purposes of this offense the word "wound" is defined by section 4 of the Penal Code in the following terms;

"Any incision or puncture which divides or pierces any exterior membrane of the body and any membrane is exterior for the purpose of this definition which can be touched without dividing or piercing any other membrane."

It follows that in order to establish the guilty of the accused in this matter the prosecutions must prove each of the following ingredients beyond all reasonable doubt that is to say;

1. Wound on the victim
2. Identity of the offender
3. Intent of the offender
4. The wounding was unlawful

Having analysed the law creating this offense it has now become absolutely necessary to consider the evidence adduced in this matter. In the prosecutions endeavor to prove their case they called court 4 witnesses. At the close of the prosecution's case I put accused on his defense in count one and after explaining his rights under section 207 of the CPC he opted to give a sworn statement without calling any witness of which he is perfectly entitled to do at law. The evidence of both parties is as follows;

PROSECUTIONS' EVIDENCE

The first prosecutions witness in this matter was Masauso Mwanza a general worker of George Compound who I shall be referring to as PW1. This witness testified before this court that 13/12/16 he knocked off from work at around 18:00hrs. he went home and found his friend. As he was resting around 22:00hrs a Tenant by the name of Aliness came asked him to accompany her to the shops which he did. When coming back they came back with her cousin Musonda. As they were coming back he was just surprised by a male person who came and said putting in in his own words "my friend". He held him and then stubbed in the stomach. He turned to Musonda and stubbed her also besides the ribs. When he stubbed Musonda she held to him because he wanted to run away after stubbing them. He later ran to where this witness stay after which he called Jeff and Jeff answered. He told him to come and it was him that came to help them to apprehend the person. According to this witness, as he was being asked he lost strength because he was vomiting blood. He was taken to George police and later to George compound. Thereafter he became unconscious and only found himself in hospital with 7 stitches. He asked about Musonda after he was told that she was admitted. He added that he was also shown the medical form. This witness positively identified a medical in report which was later admitted in evidence and marked P1. After he was discharged he went to George Police to see if the person was there

and they found him. This witness identified accused in court to the person that stabbed him.

During cross examination by accused he testified that when he came they didn't talk to each other. He denied being asked as to why he was talking to his wife. This witness further denied coming with a chain from his house.

PW2 was Jeffrey Banda a 24 year unemployed of George Compound. This witness testified before this court that on 13/12/16 he was cooking Nshima when a Tenant he named Aliness came to PW1 and asked him to escort him. According to this witness the time was around 22:00hrs. That is how they went. At around 23:00hrs he just heard screaming coming towards their house. It was PW1 following the person that stabbed him. He called the name of this witness and he went out. He saw the person running passing by their yard. He chased after him and shouted "thief!" "thief!" until he apprehended him. He left the person with people and rushed PW1 to the police. Later they went to the clinic where he was rushed to UTH with an ambulance. By that time he was not talking. He further deposed that he was able to identify the person he apprehended and he accordingly identified the now accused to be the person he apprehended.

When cross examined by accused he deposed that he was not there when he stabbed him but added that he was he found him pursuing the now accused. He joined and apprehended him which he said was between 22:00hrs and 23:00hrs.

PW3 was Musonda Kubungo a trader of Lilanda Compound. She testified before this court that on 13/12/16 she recalled Kelly found her by the road side at about 22:00hrs. He just found them and without talking to them he started stabbing them. By then she was with Masauso. It was her evidence that he just took a knife and started stabbing them. He stabbed her below the breast. She failed down and later stood up. She went to her friend to tell her that she has been stabbed. They later went to the clinic. At the clinic they found an ambulance which took them to UTH. She stayed in UTH for 2 days. This witness identified accused in the dock to be the person that stabbed her.

During cross examination by accused she deposed that accused was alone when he found her at a place called 13:00hrs

PW4 was detective constable Dishon Hara a police officer of George Police post which is under Matero Police station. This witness recalled that whilst at CID section on 21/12/16

he was allocated 2 dockets of unlawful wounding of which the first docket was in respect of M/Masuso Mwanza of George Compound who complained that he was unlawfully wounded by a person he would identify if seen and he sustained a deep laceration on the stomach as the knife was allegedly used. The second docket was in respect of F/Musonda Kabungo also of George compound who complained that she was unlawfully wounded and she sustained a deep laceration beneath the left breast as the knife was allegedly to have been used. Both incidents happened on 13/12/16 around 23:00hrs in George Compound. He took time to interview both victims who narrated to him what transpired. According to this witness the assailant was apprehended right there and then by Masauso Mwanza who called for help from Jeffrey Banda. He came and his aid with the members of the public. He was taken to George police post. At the time the two dockets were allocated to him the suspect was in custody. He interviewed him after which he came to know him as Kelly Daka of Garden House. During the interview he told him that he met his wife in company of 3 male adults and upon him she decided to run away while the male persons charged at him and accused him of beating his wife all the time. They started beating him and one of them had a knife which accused managed to grab and in defend himself he injured Masauso Mwanza in the stomach and accidentally stabbed his wife. He was not satisfied with the explanation as a result he arrested and charged him with the offense of unlawful wounding. Under warn and caution statement in Nyanja he opted to remain silent. According to this witness at the time of interviewing the victim they were both admitted to UTH. In the course of his investigation he came across a medical issued to PW1 which he positively identified before this court and accordingly produced it as part of his evidence. It was admitted in evidence and marked P1. This witness positively identified accused in court as Kelly Daka the person he arrested and charged in this matter. He further told this court that the other medical report was not brought back to the police by the complainant despite it being issued.

During cross examination he testified that the knife was not recovered. However, he deposed that after the incident accused was apprehended and brought to the police as the person that wounded two people.

At the close of the prosecution's case I put accused on his defense and after explaining his rights he opted to give a sworn statement without calling a witness of which he is perfectly entitled to do at law. His evidence was as follows,

DEFENSE

The first and only witness for the defense was accused. In his sworn evidence he deposed that what he knows is that on 09/12/16 Musonda Kabungo ran away from home. She told him that she was going to the market but he was surprised that she never came back home. The following day her cousin came to call her but he was afraid to tell her that she didn't come back instead he decided to hide and told her that she had gone to the market. On 11/12/16 he met Musonda's friend who asked him what he had differed with his wife of which he said nothing. That is how that person told him that she was staying with her friend. When she told him where she was staying he went there at night. He found her and asked her to go home and if she didn't want she should be taken to her parents. After telling her that, she ran to the house of the landlord. That is when the landlord came out with a chain while Musonda remained in the house. Since he was drunk he decided to go back home. The following day Musonda's child came and asked where her mother was. He told her to go and find out from her grandmother. The same night he went to charge a phone at George compound. Whilst waiting for the phone he started taking some beer. When he got drunk he failed to get the phone. He saw Kubungo by the road side and when he called her to come she started running away. He was forced to try and get hold of her since her parents wanted him to pay. However, he was just surprised that gentlemen started beating him. According to accused one of them had a metal bar with which he hit him on the forehead and in the legs. He became unconscious and found himself in George police injured. That was all.

When cross examined he told this court the Musonda was his wife who he said was not home for 3 days of which he was not happy with. He however denied stubbing the person who was with his wife. He added that he went to see his wife at night because he was busy. He admitted to have seen the injuries PW1 sustained which he described to have been a big cut in the stomach. When further cross examined he deposed that he was very drunk that time to cause that injury. He further told this court that he reported his assault at the police although he does not know the people who were helping him when he was attacked.

This was the evidence in totality which I have closely considered from which it appears to me that some facts are not in dispute while other facts are actually in dispute as set out hereunder.

FACTS NOT IN DISPUTE

It seems from the evidence that accused does not dispute that PW1 had a big cut on the stomach. On the night in question accused found his wife herein after called PW3 with some men at night. It was during the same night he was taken to George Police where he was detained for allegedly unlawfully wounding PW1. I therefore find these to be fact in this case

FACTS IN DISPUTE

What seems to be in dispute to me in this matter is on the identity of the person that injured PW1. These are the facts in issue I have to resolve in this matter and I propose to resolve them concurrently with the application of the law.

Application of the law

a) Wound on the victim

The first question to be resolved is whether or not PW1 was wounded within the meaning of the law?

Before answering this question I wish to refer to the definition of a wound as expounded by the Supreme Court of Zambia in the case LENGWE v THE PEOPLE (1976) Z.R. 127 (S.C.). In that case the Supreme Court adopted the dictum of Barons ACJ in **Ng'ambi v The People (1975) Z.R. 97** and said that;

"A wound is defined in section 4 of the Penal Code as "any incision or puncture which divides or pierces any exterior membrane of the body". A laceration inflicted by a blow with stick which breaks the skin is not a wound within this definition. The meanings of the words "incision" and "puncture" make it clear that such a wound can be inflicted only by weapon with cutting edge or point. Of course this cutting edge or point need not be that of metal object such as a knife or spear, or indeed a bullet; a wound can equally be inflicted by a sharpened stone or stick"

In that case the appellant was convicted of the offence of unlawful wounding by the trial court, the injuries having been inflicted with a hammer and a spanner. The trial court held that the injuries fell within the definition of wound. However, the Supreme Court following the aforesaid dictum stated that conviction clearly could not stand because of the weapons used in this case, which are; a hammer and a spanner.

This position was also followed by the Supreme Court in the subsequent case of JUMA ZAKALIA v THE PEOPLE (1978) Z.R. 149 (S.C.). In that case the applicant and another man were convicted of unlawful wounding, the allegation being that they assaulted the complainant and inflicted injuries on him with an iron bar. The Supreme Court held inter alia that;

"Wound" is defined in s. 4 of the Penal Code as "any incision or puncture which divides or pierces any exterior membrane of the body". A laceration inflicted by a blow with an iron bar which breaks the skin is not a wound within this definition."

It follows that for any injury to constitute a wound at law two things must be proved. Firstly, it must be proved that there was any incision or puncture which divided or pierced any exterior membrane of the body; Secondly, the incision or puncture was occasioned by a sharp instrument with a cutting edge or point. However, it need not be a metallic instrument provided it is sharp.

Turning to the evidence in this case it seems not in dispute to me that there was an incision or puncture which divided the exterior membrane on the stomach which necessitated 7 stitches. The same was confirmed by the officer who examined the victim two days after the incidence whose findings were as follows;

"Stub wound on the epigastria open with visible , tender to

It is clear that the findings of the learned medical officer are consistent with the complaint of PW1 that a knife was used to stab him. In the circumstances both requirements are met that is to say incision or puncture which divides or pierces the exterior membrane and use

of a sharp instrument namely a knife. I am therefore satisfied that PW1 was wounded within the meaning of the law.

b) Identity of the offender

The question that rises at this point is as to the identity of the offender or simply put the identity of the person that wounded the victim herein.

In this case the prosecution has alleged that it was the now accused that wounded the victim herein which accused has denied.

Turning to the evidence PW1 adduced that it was at night at about 23:00hrs when he was attacked a person he did not know as he was walking home with Musonda. After stabbing him the assailant turned to Musonda and stabbed her as well. The assailant wanted to run away but screamed calling Jeffery who was at home as the incident happened near home and the assailant ran towards their home. Jeffrey came out and pursued the assailant and managed to apprehend him. When he was discharged he went to the police and saw the person that attacked him. He accordingly identified accused in the dock to be the person who attacked him. This evidence has been directly corroborated by the evidence of PW2 Jeffery. PW2 deposed to the effect that he heard PW1 screaming and calling on his name. He came out of the house and saw a person running passed their yard. He pursued him whilst shouting "thief"; "thief" and with the help of the members of the public they managed to apprehend the person. After apprehending the person he thereafter rushed PW1 to the clinic. This witness as well identified accused to be the person he pursued and apprehended after PW1 shouted for help. Further evidence was given by PW3 who happens to be accused's lover who was with PW1 at the time PW1 was stabbed. She named accused to be the person who attacked them although no evidence was led as to the amount of light at the time of attack and what made her identify accused. This casual approach on the identity of the offender may turn out to be fatal to the prosecution especially when dealing with single identifying witness. Notwithstanding, the defect is cured by the fact accused was apprehended though not at the scene but approximate to the scene of crime as he was fleeing the scene which melts away the possibility of mistaken identity. It follows therefore that the assertion of accused of the fact that it was him who

was attacked as he was trying to forcefully get his wife cannot carry any water. Further it cannot be said to be an accident as they were beating accused PW1 injured himself from a knife one of them had and it also injured PW3. Besides accused himself said his wife had run away so I don't see the possibility of her being injured by accident. Accused's evidence therefore is a mere concoction in his attempt to try and evade the wheels of justice. In the circumstance I am satisfied beyond all reasonable doubt that it was the accused herein that stabbed or wounded PW1 with a knife and I find the same to be a fact in this case.

c) Intent of the offenders at the time of wounding PW1

The question that rises at this point is the intent of the accused at the time he wounded the victim herein

Before resolving the foregoing I wish to state here that going by the wording of section 232(a) of the Penal Code no specific intent to wound is needed in order to constitute the offence of unlawful wounding. What the prosecution need to prove is that when the accused did the act which caused the injury, he was acting consciously, or he knew what he was doing and had no lawful justification. Illustrative of the foregoing is the decision in the case of R v. CHARLSON (1955)1 W.L.R.317 which is a case of grievous bodily harm. In that case the jury was directed that although no specific intent need be proved by the prosecution, yet the prosecution must prove that the act causing grievous bodily harm was committed unlawfully and maliciously, and unless they were satisfied that when the prisoner struck his son he was acting consciously, knowing that what he was doing, they should return a verdict of "not guilty"

By analogous to this case of grievous bodily harm which has similar wording with the offence of unlawful wounding, the prosecution therefore need not prove specific intent to wound the victim but proof of the fact that accused acted consciously or had knowledge of he was doing which caused injury to the victim..

Reverting to this case before me, it can be discerned from the evidence that accused injured the victim because he found him with his wife in the late hours of the night. In other words he acted out of sheer jealous for his purported wife. It is therefore clear that accused had

sufficient mens rea to constitute the offense of unlawful wounding that is to say he acted consciously and knowing exactly what he was doing.

d) Defense of accused at law

The question to be decided at this point is whether there is any defence available to accused in this matter.

I must hasten to mention here that I have closely considered the evidence of both parties from which it seems to me that accused is raising a defense of intoxication

In relation to the defense of intoxication section 13(4) of the penal code chapter 87 of the laws of Zambia enacts as follows;

“Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.”

It follows from the foregoing ~~that~~ ^{to be taken into account} when the accused allege intoxication it becomes mandatory for the trial court intoxication before satisfying itself as to the intent of accused in offenses of specific intent

Notwithstanding the supreme court of Zambia in the case of LUBENDAE v THE PEOPLE (1983) Z.R. 54 (S.C.) held inter alia that;

“Evidence of heavy drinking, even to the extent affecting the co-ordination of reflexes is insufficient in itself to raise question of intent unless the accused person's capacities were affected to the extent that he may not have been able to form the necessary intent.”

In the circumstance it can be construed from the foregoing that the burden lies with the accused to establish that he was not able to form the necessary intent.

Reverting to the evidence in this matter, it is clear from the evidence that while accused seems to plead intoxication, there is sufficient evidence of the fact that he was able to form the necessary mens rea. This can be discerned from the fact of identifying that the victim was with his purported with, the act of stabbing him coupled with an attempt to run away. All these put together raises sufficient evidence of the fact that accused formed sufficient intent to wound his victim. The defense of intoxication therefore fails out.

In the circumstances and by the reasons of the foregoing therefore I am satisfied that the prosecution has proved its case against the accused for the offense of unlawful wounding as charged in count one beyond all reasonable doubt and as such I find him guilty and I accordingly convict him.

DELIVERED IN OPEN COURT

DATED THE.....DAY OF.....2017



F. KAOMA

RESIDENT MAGISTRATE