

**IN THE SUBORDINATE COURT OF THE FIRST CLASS 2SPG/207/2016
FOR THE LUSAKA DISTRICT
HOLDEN AT LUSAKA**

(Criminal Jurisdiction)

THE PEOPLE

VS.

JUSTINA MBEWE

FOR THE PEOPLE: MR. R. MALAMA, PUBLIC PROSECUTOR

FOR THE ACCUSED: MS. JEAN LUMAMBA MAKIZI OF MESSRS LEGAL AID BOARD

**BEFORE: HON. G. MALUMANI
(SENIOR RESIDENT MAGISTRATE)**

JUDGMENT

CASE LAW REFERRED TO:

1. Maxwell Chanda V. The people (1971) ZR
2. Machipisha Kombe V. The people (2009) ZR
3. Mkandawire and others V. The people (1978) ZR

LEGISLATION REFERRED TO:

1. Sections 4,248A of the Penal Code Cap 87 of the Laws of Zambia.
2. Section 2, 122(b) of the Juveniles Act Cap 53 of the Laws of Zambia.

In this case, the accused stands charged with two counts as follows:

Count one: Child battering contrary to section 248A of the penal code Cap 87 of the Laws of Zambia. The particulars of offence allege that Justina Mbewe on 5th November, 2016 at Lusaka in the Lusaka district of the Lusaka Province of the Republic of Zambia did assault Luswepu Zulu a child under the age of 16 year thereby occasioning her actual bodily hurt.

Count two: child battering contrary to section 248A of the penal code Cap 87 of the Laws of Zambia. The particulars of offence allege that Justina Mbewe on 5th November, 2016 at Lusaka in the Lusaka district of the Lusaka province of the Republic of Zambia did assault Chikondi Zulu a child under the age of 16 year thereby occasioning him actual bodily harm.

The accused denied the charge.

I bear in mind at the outset that the burden lies with the prosecution to prove the guilt of the accused beyond all reasonable doubt. Any doubt cast in my mind upon considering all of the evidence may be treated in her favour.

On a charge of child battering the following elements ought to be satisfied for the prosecution to prove its case. This is from what can be deciphered from section 248A of the penal code Cap 87 of the Laws of Zambia.

1. That the complainant was a child.
2. That the complainant was assaulted.
3. That the assault occasioned actual bodily harm.
4. That it is the accused who assaulted him.

Turning to evidence, the prosecution led evidence from a total of four witnesses. The details are on record. In brief, the evidence is this:

PW1 was LUSWEPO ZULU a girl child of 12 years old. She testified on oath after a voire-dire. She deposed that on Friday when she came back from school she changed her

uniform dress. Justina Mbewe referring to the accused told her to start sweeping. She was told to sweep again because she did not do so properly. She then started beating her. She pulled her hand, hit her with a broom and with hands. She said that she felt pain. She threatened to report her to her mother.

Under cross examination, she told the court that the accused beat her because she did not sweep well. And that the accused also beat her brother Chikondi who is PW2.

PW2 was Chikondi Zulu a child of 8 years old. He testified after a voire-dire. He deposed that on 4/11/2016 when he came back from school the accused told him to go and fetch water. If he did not he would be beaten. He did not because electricity went off. Justina Mbewe then took him in the house and started beating him. He said she used a pan handle and a plank and felt pain. Like PW1 Chikondi recalled that when beating him Tisa the sister to the accused was present.

Adding that when going to their mother's place around 19 hours a conductor asked why they were crying. He said they went to Chazanga police to report the matter.

Under cross examination by the defence counsel, PW2 maintained that he was beaten by the accused on 4/11/2016 on a Friday. He acknowledge that the accused told them that their dad refused them to go to the mother for a weekend. He said she also beat the sister because she did not sweep properly. He denied that he was told what to say in court.

PW3 was Charity Nayame the mother of the 2 children PW1 and 2. She testified on oath that on 4/11/2016 when she knocked off she received a call from her neighbour. She was told her children were beaten by the maid. When she reached the friend's place she found them and asked who beat them. She said Luswepo (PW1) had her hand twisted, beaten with a broom and that Chikondi (PW2) was beaten because he did not get the water bucket full with water he was told to draw.

She said she reported the matter to Muchinga police station the following morning on 5/11/2016. And that the children were treated at the clinic. She identified their medical report forms in court.

PW4 was Enock Kambirima the arresting Officer. He testified on oath that while on duty on 4/11/2016 a lady entered the enquires and reported that her children Luswepo and Chikondi were beaten. He said one was complaining about pain on the arm and the other had bruises. He advised her to go to any other nearest police station to be issued with medical report forms because they did not have at their station. On 8/11/2016 she returned with 2 signed medical report forms.

A docket was opened. The accused was already in custody. He interviewed her but denied beating the children. With the response she gave he charged her with assault on a child. Under warn and caution statement in nyanja she understood well, she is said to have freely and voluntarily denied the charge.

PW4 identified the complainant's medical report forms. They were produced in evidence and marked exhibits P1 and 2 on record.

Under cross examination by the defence counsel, PW4 clarified that he interviewed the 2 complainants on 4/11/2016 when the case was reported. He denied that they told him that they were crying because they were stopped to go to their mother. He said the children told him that the servant to the father assaulted them.

At the close of the prosecution case, the accused was found with a first case to answer and placed on defence. She elected to testify on oath and called one witness.

The accused Justina Mbewe testified that on 4/11/2016 her boss's children Luswepo Zulu and Chikondi Zulu went to school. They came back at 12 hours. The older Luswepo was not feeling well. She started crying. She said she wanted to go to their mother whom they used to visit every weekend. And recalled that it was a Friday. According to her the father told her not to be allowing them to go to their mother. She gave her a broom to sweep because she wanted her not to run away. She gave

Chikondi the other children K50 to go and fetch water. At 17 hours she was surprised that the children were missing.

The accused further recalled that with the father they went to report the missing children to Kabwata police. She denied that she beat them and was surprised that the mother to the children came with police.

On cross examination by the learned public prosecutor the accused told the court that Chikondi Zulu (PW2) only fetched 2 containers of water but wanted him to draw 4X5 litres container. On the children's demand to go to visit their mother she conceded that the children used to visit the mother's place during holiday and weekends.

On why she could just implicate her she said she did not know why.

DW2 was the father to the 2 children Mr. Bernard Zulu. He testified on oath that on 5/11/2016 he issued instructions to Justina Mbewe that children should not go back to their mother. He said the accused is his maid. He explained that the mother who had sued him for divorce had made attempts to pick them.

When he knocked off he asked where his children were. From the evidence on record, he made efforts to locate them. He visited the grandmother's place and reported to police. He called the residence to the mother and told they were not there. On 8th November, he was told there was an assault issue at Chazanga police station. He asked Justina Mbewe and was told the assault was made on 5/11/2016. He argued that the children were at the mother's place then not at his home. Adding that the accused has been his maid for 3 years and had not received any adverse report about her. He recalled that on 3 occasions she was at bedside when Luswepo was sick. He disputed having an affair with the accused.

Under cross examination by the learned Public Prosecutor, DW2 wondered why police could say the children were beaten on 5th if they were assaulted on 4th. He said he was at court to testify that his children were not assaulted at his house. This is the evidence as a whole in brief.

At the close of the defence case, I directed that final submissions if any be filed on or before 19/4/2017 at 17 hours. None were filed by the due date.

I have examined all the evidence adduced. From the evidence, I find no dispute and therefore a fact that the two complainants are below the age of 16. They were 12 and 9 years respectively in 2016. When this matter arose, they were living with the father who is living apart with the mother. It is a fact not in dispute that on 4/11/2016 they went to school from the father's home. They did not however sleep in his home on 4/11/2016. They left to their mother's home despite being stopped by the maid now the accused.

The dispute is on whether or not the accused beat them on 4/11/2016. The father DW2 also raised some kind of issue as to where they were when they were beaten. He said it was on 5/11/2016 when they were with the mother. The evidence on record do not however support this. It is not in dispute that the 2 children left the father's place on 4/11/2016. Before they left, they demanded to leave for a weekend but the accused stopped them. There is evidence from the mother PW3 that though the children got to her home on 4/11/2016 she only reported to police the following day on 5/11/2016. But an attempt to report the same day was made which the arresting officer PW4 corroborated. He advised her to report to the nearest police station because they did not have medical report forms. When I examined the 2 medical report forms, I found that the evidence of the report having been made the following day is on firm ground, so to say that the children were beaten when they were already with the mother has no basis and is rejected.

Turning to the dispute, the explanation made by the accused is that she did not as she only stopped them to leave to their mother's place for a weekend. This is because their father had instructed her not to. This is what she appears to say in her evidence. This appears to be a casual or plain denial in my view.

The prosecution contend that she beat the children. I took time to examine the evidence of the alleged assault. What I note is that it has not been shown why the two

children could allege that they were beaten from without. This can be affirmed from the response given even by the accused during cross examination by the learned Public Prosecutor. When asked why she could just be implicated she expressed ignorance. The evidence in fact do show that something happened which made the accused react in the way she did. As hitherto alluded, the children demanded to leave to their mother's place where they used to go before. She stopped them. In reaction she gave PW1 the complainant on the first count a broom to sweep, a child she knew was not even well. On PW2 the complainant on count two, she sent him to draw water. He only managed to draw 2 containers out of 4X5 litres she wanted. I agree with the prosecution that these are the events which made her react the way she did.

In addition, I had the privilege to observe each of the two children when they testified. I observed their demeanour. I was satisfied that they are creditworthy witnesses.

I accept the evidence that the accused did pull PW1's hand and hit her with the broom she gave her to sweep with. This is because she claimed that she did not sweep properly. On PW2 the accused used a pan handle and a plank. This is because he did not draw the quantity of water she wanted.

I also took time to examine the medical report forms for each of the complainants. Exhibit P1 for PW1 Luswepo, the medical officer confirmed the allegation of infliction of bodily hurt. It states that the victim sustained tender left arm due to trauma. Exhibit P2 for Chikondi confirmed that he sustained tender right leg due to trauma. The findings were said to be consistent with the allegations.

I now turn to the law, on a charge of child battering contrary to section 248 (A) of the Penal Code Cap 87 of the Laws of Zambia, the victim must be a child as earlier stated. Section 2 (interpretation) of the Juveniles Act Cap 53 of the Laws of Zambia defines a child as a person below the age of 16. It being a fact that the two victims were aged 12 and 9 when the incident occurred the first ingredient on both counts is satisfied.

The second ingredient is on the question of assault, this element has equally been satisfied on both counts. It is a fact I found, that the accused did pull and hit PW1 with a broom. She also hit PW2 with a pan and plank. This act extends to the 4th element, that it is the accused who assaulted them. Identity is not in dispute.

The third is on whether the assault occasioned actual bodily harm. From what can be deciphered from section 4 and 248A of the penal code Cap 87 of the laws of Zambia, the fact of occasioning actual bodily hurt is premised on the meaning of the word "**harm**". It is the harm which constitutes "**battering**". And "**harm**" means any bodily hurt, disease or disorder whether permanent or temporary. It follows therefore, that harm was occasioned the moment the accused did the inexcusable act of pulling the hand and hitting PW1 with a broom and PW2 with a pan and plank.

In the case of **Maxwell Chanda V. The people (1)** it was held that in a case of assault causing actual bodily harm, medical evidence is necessary only when the defence ^{denies} ~~de~~ denies injury and the same is in issue on the matter before me, there is medical evidence vide the two medical report forms tendered (P1 and 2). The reports confirm the bodily harm inflicted on each of the complainants. The infliction element constitutes the battery suffered.

However, am mindful that the evidence of battery requires corroboration in this matter. This is on account of the proviso under section 122 (b) of the Juveniles Act Cap 53 V. 5 of the laws of Zambia. It states "**.....provided that where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating the accused**". PW1 and 2 are children below the age of 14. They testified after voire-dire. So by this provision the accused cannot be convicted on their evidence without corroboration.

The question therefore is, is there corroboration in this matter.

In the case of **Machipisha Kombe V. The people (2)**, a new principle on corroboration was established. The Supreme Court states that law is not static, it is developing. There need not now be a technical approach to corroboration. Evidence of something more, which though not constituting corroboration as a matter of strict law, yet satisfies the court that the danger of false implication has been excluded, and it is safe to rely on the evidence implicating the accused. It was stated that odd coincidences constitute evidence of something more. They represent an additional piece of evidence which the court is entitled to take into account. They provide a support to evidence of a suspect witness or an accomplice or any other witness whose evidence requires corroboration. This was said to be the less technical approach to what constitutes corroboration.

As can be noted, it is no longer a requirement that corroboration be evidence which implicates the accused in a material particular. The less technical approach requires evidence of something more. This is evidence which satisfies the court that the danger of false implication has been excluded. This is where odd coincidences can be used to that effect. Of course if unexplained as held in **Mkandawire and others V. The people (3)**. On the matter before me, the following incidences have struck my mind.

- i) When the children came from school on 4/11/2016 they demanded to go to visit their mother.
- ii) The accused stopped them but they insisted.
- iii) Because they insisted the accused desirous to punish them gave PW1 a broom to seep at the house. The other was told to draw water. PW1 was unwell and the accused knew.
- iv) When the mother attempted to report the matter on the same day 4/11/2016 at police, she found the arresting officer PW4, PW4 saw the 2 children. There is evidence. They complained of pain. The assault was confirmed on the medical report forms.

These factors in my view do constitute evidence of something more. Am quite satisfied that the danger of false implication has been excluded. As earlier stated, something happened which made the accused react by beating the children. They insisted to go to their mother's place for a weekend where they used to go before.

In the light of the foregoing I will hold that the prosecution have proved its case beyond all reasonable doubt. All elements of the charged offence have been satisfied and links the accused to the commission of this offence. The mens rea (guilty intention) has been shown in the evidence. There is no doubt which may be entertained in her favour. I thus find her guilty of child battering contrary to section 248A of the penal code Cap 87 of the Laws of Zambia and Convict her forthwith.

DELIVERED AT LUSAKA IN OPEN COURT THIS 21ST DAY OF APRIL, 2017.



G. MALUMANI ESQ

SENIOR RESIDENT MAGISTRATE

