

**IN THE HIGH COURT FOR ZAMBIA**

**HP/106/2017**

**AT THE CRIMINAL REGISTRY**

**HOLDEN AT LUSAKA**

**(Criminal Jurisdiction)**

**BETWEEN:**

**THE PEOPLE**

**V**

**BRIAN CHIMWASU**

**Before Hon. Mrs. Justice Irene Zeko Mbewe on the 30<sup>th</sup> day of  
June 2017**

*For the State:*

*Mrs. M. Chanda, State Advocate, National  
Prosecution Authority*

*For the Accused:*

*Mr. I Nyambe, Legal Aid Counsel,  
Legal Aid Board.*



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## **R U L I N G**

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**Cases Referred To:**

1. *Mwewa Murolo v The People* [2004] ZR 206
2. *The People v Japau* [1967] ZR 65
3. *David Zulu v The People* [1979] ZR 151

4. *Banda v The People SCZ No 30 of 2016*

**Legislation Referred To:**

1. *The Penal Code, Cap 87 of the Laws of Zambia*
2. *The Criminal Procedure Code, Cap 88 of the Laws of Zambia*

The accused herein is charged with the offence of Murder contrary to Section 200 of the **Penal Code, Cap 87 of the Laws of Zambia**. Particulars of the offence are that Brian Chimwasu on 4<sup>th</sup> May 2016 at Lusaka in the Lusaka Province of the Republic of Zambia did murder Hildah Ngoma ("the deceased").

In aid of its case, the prosecution called a total of five (5) witnesses.

**PW1** was Paul Benson Ngoma who testified that whilst residing at Rosewood Lodge in Kitwe he came to know the accused who was working at the Lodge as a gardener. The accused's employment was terminated and he then approached **PW1** for employment. That he was subsequently interviewed by the deceased and since one of the worker's at **PW1's** farm had been fired, the accused was employed. That in 2016, **PW1** received a phone call from his daughter Natasha informing him that the deceased had been assaulted and injured. **PW1** rushed to Lusaka and found the deceased at University Teaching Hospital (UTH) admitted in Ward C13. **PW1** testified that his wife died just before 11<sup>th</sup> August 2016 which was about two weeks from the date of the attack. **PW1** testified that prior to the attack, the deceased was healthy.

Under cross-examination **PW1** testified that the deceased told him that she did not know the person who attacked her though she

suspected the accused. **PW1** confirmed that it was accused's duty to wade off any attack at the farm and there was nothing unusual about the accused being seen or found with a machete or stick. **PW1** testified that the deceased was murdered and that there was a post-mortem showing that the deceased died as a result of the attack.

There was no re-examination of **PW1**.

**PW2** was Leonard Yomena. **PW2** testified that 4<sup>th</sup> May 2016 he was at the road side at Zani Muone and was called by a friend Ignatius Ngoma to get a taxi and rush to his parents' farm as he did not know what was happening other than that his mother had fallen.

**PW2** testified that he rushed to the farm with a taxi and upon arrival found the gate open, and that when he reached the house, he found the deceased lying on the floor near her bedroom door and the grandson **PW4** was with two other women. That he found the deceased lying on the floor in a pool of blood and water had been poured on her. **PW2** testified that the deceased explained that she did not know what hit her on the head and she was crying. **PW2** testified that they put the deceased in the taxi and when they were about to drive out, the accused was seen coming from his house located near the hammer mill. **PW2** then left together with the other workers who came with a taxi and the two women. **PW2** testified that the deceased was first taken to SOS Clinic and then they were told to take her to UTH which they did. **PW2** testified that he knew the deceased as they had stayed with her in Kabwata

in 1998 until she shifted to Zani Muone where they met again. **PW2** further testified that he only saw the accused coming from the direction of the hammer mill as they were about to leave and prior to that he did not see him. **PW2** identified the person coming from the direction of the hammer mill as the accused. **PW2** testified that he had only known the accused for a period of about eight (8) months. **PW2** identified the accused as the person in the dock.

Under cross-examination, **PW2** testified that the deceased did not tell him who had attacked her. **PW2** testified that in his statement to the Police, he had mentioned that the accused was seen coming from the direction of the hammer mill even though it was not recorded in the statement. **PW2** testified that he told the Police how he found the deceased lying on the floor and that there was blood from the kitchen and it was smeared over the kitchen unit. **PW2** denied ever attacking the deceased. **PW2** testified that the only time he saw the accused was when they were leaving the farm and he was coming from his house near the hammer mill. **PW2** testified that the deceased never mentioned any name of any person who attacked her except to say she was hit from behind. **PW2** testified that he never saw any tool, axe, machete or anything else around the house. That when he saw the accused, he was behaving in a normal way.

In re-examination, **PW2** testified that he found the deceased on the floor near the bedroom but that there was blood from the kitchen up to where she was lying on the floor.

**PW3** was Paul Ngoma who testified that whilst in Kitwe he received a message telling him to travel to Lusaka which he did and arrived at 21:00 hours. Upon inquiring from his sister Natasha of the deceased's whereabouts, **PW3** was told that she was admitted at UTH. **PW3** then went to UTH the following morning and found the deceased with cuts on the head which had been stitched. **PW3** testified that the deceased was crying and informed **PW3** to go back to the farm and look after the workers. **PW3** testified that he went back to the farm and fed the sheep and went into the banana field to prune the fruit trees and he then saw a handle of a hoe. **PW3** testified that upon a close look he found it had blood and it had nails with hair on it. **PW3** testified that he picked up the hoe and informed the police officers who came to the farm and picked up the hoe handle. **PW3** identified the hoe handle in Court. (Exhibit P1).

Under cross-examination, **PW3** testified that **PW1** had told him that the deceased was attacked by one of the workers at the farm. **PW3** testified that in his statement he stated that the deceased was attacked by unknown persons and that this information came from **PW1**. **PW3** testified that he knew the accused person and that the deceased had grey hair and it looked like the same hair found on the hoe handle which was grey and not black.

**PW4** was Ephraim Muyabe who testified that around 10:00 hours three (3) boys came to the farm and were whistling at the gate and wanted to see the accused. **PW4** testified that when he asked the

accused about the people who had come to the gate, the accused told him that they were looking for Elliot a worker at the farm. **PW4** testified that the deceased gave him curtains to wash and he went near the pump to do so. That one of the female workers went to get clothes from the house and found the kitchen door locked and when she peeped through the window she saw the deceased lying on the floor. **PW4** testified that he broke the door and found the deceased on the floor covered with blood, and he ran out and the female worker asked him to go back. **PW4** testified that the deceased told him that she had been electrocuted and was not to be touched or moved. **PW4** testified that he got a phone and called an uncle who advised him to call for a taxi and call the worker Elliot who was off duty. **PW4** testified that he found the bedroom door open but the store room was locked from the inside. That he went to the accused's house and called him four times and there was no response. **PW4** testified that a taxi came and hooted by the gate and the accused was nowhere. **PW4** further testified that he found the storeroom door open and then saw the accused coming out of his house and when he was asked where he was, the accused responded that he was at his house. **PW4** testified that the accused requested for the phone to call **PW1**. That thereafter, the accused went to the banana orchard to look for firewood and when **PW4** approached him the accused was on the phone, and he cut off the phone and gave him back the phone, and left the accused at the banana field. **PW4** testified that the distance from the main house to the accused house was 15-20 metres, and the distance from

where the taxi parked and was hooting, to the accused's house was about 10 metres. **PW4** testified that from the time he found the deceased injured, 40 minutes had passed.

In cross-examination **PW4** explained that the attack took place between 13:00 – 14:00 hours. **PW4** explained that he had knocked at the accused house and called him 3 times but there was no response and that he found it unusual that the accused was not at his house as the deceased used to give him lunch and accused was not allowed to go out without permission. **PW4** reiterated that the deceased had told him that she had been electrocuted.

There was no re-examination.

**PW5** was Peter Musa a Detective sergeant at C.I.D. Lusaka Division. It was his testimony that on 5<sup>th</sup> May 2016 he was allocated a docket of attempted murder of Hildah Ngoma of Zani Muone. That the complainant had been badly assaulted by unknown person using an unknown item and she sustained cuts on her head. That the incident occurred on 4<sup>th</sup> May 2016 at her farm and that the victim was admitted at UTH.

Upon arriving at the scene of the crime, he observed that the victim was attacked from the kitchen and there was blood found in the kitchen, sitting room, walls and kitchen utensils. **PW5** testified that a wooden handle of a hoe was picked up in a field about 20 metres from the main house. That at the time of the incident, the victim was with the accused and grandchildren. **PW5** testified that he searched the accused's house which was 30 metres from the

main house and found a blue T-shirt with suspected blood stains. The hoe handle had suspected blood and grey hair which **PW5** suspected was the weapon used in the assault. The Court was informed that forensic investigations were undertaken and the accused was interviewed. That the accused alleged he did not know anything as he was asleep and only woke up when he heard vehicles at the gate and learnt of the assault from people he found outside the main house.

**PW5** testified that on 6<sup>th</sup> August 2016 Hildah Ngoma deceased died and he charged the accused with murder. Under warn and caution in a language he understood, he denied the charge. **PW5** testified that the hoe handle and T-shirt were not examined as at the material time, there were no reagents from forensics laboratory.

Under cross-examination **PW5** explained that when he recorded a statement from the deceased she could not recall the person who attacked her as the assault occurred from behind. **PW5** arrested the accused on the basis that he was told by witnesses that he was the only male person at the time of the incidence, and that the accused could not be found at the material time and only came after the deceased was taken to the hospital. That the accused was later found with a blood-stained T-shirt.

**PW5** explained that the deceased had told him that she did not know who attacked her and **PW5** interviewed several people including Leonard Yomena **PW2**. That the accused was seen running towards the main house after the attack. **PW5** explained



that he found the blue T-shirt in the washing bag in the house and that it was not immersed in water. **PW5** explained that the T-shirt was misplaced at the Forensics Laboratory and was told there were no reagents for testing of fingerprints. **PW5** explained that the hoe handle identified in Court was part of the tools at the farm and used by all the workers. That fingerprints were not lifted from the hoe handle and it was impossible to say if it had any fingerprints of the accused.

There was no re-examination.

Both parties elected to rely on the evidence on record.

I have seriously considered the evidence on record.

The law pertaining to a case to answer or no case to answer in criminal proceedings is set out in section 206 of the **Criminal Procedure Code Chapter 88 of the Laws of Zambia** which states as follows:

*"206. If, at the close of the evidence in support of the charge it appears to the Court that a case is not made out against the accused person sufficiently to require him to make a defence, the Court shall dismiss the case, and shall forthwith acquit him."*

Section 291 (1) of the **Criminal Procedure Code Chapter 88 of the Laws of Zambia** provides as follows:

*"291 (1) When the evidence of the witnesses for the prosecution has been concluded, and the statement or evidence*

*(if any) of the accused person before the committing Court has been given in evidence, the Court, if it considers that there is no evidence that the accused or any one of the several accused committed the offence, shall after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding”.*

Section 291 (1) of the **Criminal Procedure Code, Cap 88 of the Laws of Zambia** demands that the prosecution should make a case against the accused sufficiently requiring the accused person or persons to make a defence. Anything falling short of that allows that Court to dismiss the prosecution’s case and acquit the accused immediately.

The case of **Mwewa Murono v The People**<sup>1</sup> is instructive where it was held that:

*“The finding that a Judge has to record under Section 291 (1) in our view is the same as that under Section 206.... The Judge on considering that there is no evidence that the accused or any one of the several accused committed the offence must acquit the accused. The finding must show that there is no evidence that the accused committed the offence followed by an order acquitting the accused”.*

The offence with which the accused is charged with is murder contrary to section 200 of the **Penal Code Cap 87 of the Laws of Zambia** 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”.

The cardinal question in such instances is whether in the event that the accused chose to remain silent and no explanation is offered in view of the evidence so far adduced, would a tribunal fittingly directing itself convict him? If the answer is yes, then a prima facie case is made out. If no, there is no case to answer. At this point in the proceedings, the prosecution need not prove the case beyond reasonable doubt. A prima facie case does not mean proving each and every ingredient of the offence charged. If there is evidence to prove one element then there is a prima facie case to require the accused to be put on his defence.

Instructive is the often-cited celebrated case of **The People v Japau**<sup>2</sup> where Evans J stated as follows:

**“....In short the test is: there is a case to answer if the prosecution evidence is such that a reasonable tribunal might convict upon it if no explanation were offered by the defence. A submission of no case to answer may be properly upheld: if an essential element of the alleged offence has not been proved; and when the prosecution evidence has been so discredited by cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it”.**

From a reading of **Section 200 of the Penal Code**, not only should there be malice aforethought but also that the accused caused the death of the deceased herein by an unlawful act or omission. It is not enough to show that the deceased was killed. The prima facie case against the accused should be such that it requires an explanation without which the accused would be convicted by a perspective tribunal correctly directing itself.

It is clear that the prosecution evidence is anchored on circumstantial evidence. The deceased prior to her death told **PW1** and **PW5** that she did not know who had assaulted her as she was assaulted from behind. The deceased told **PW4** that she had been electrocuted. The deceased had informed **PW1** that she suspected the accused but did not know who had assaulted her. **PW5** arrested the accused on the basis that he was the only male at the time of the incident. At the time the deceased was found lying on the kitchen floor covered in blood, **PW2** and **PW4** confirm that he was not near the house and could not be found until the time they were leaving the farm to take the deceased to the hospital. **PW2** testified that he saw the accused at the gate whilst **PW4** testified that he saw him coming from his house which was 20 -30 metres away from the main house from where the deceased was assaulted.

In respect to the murder weapon, **PW2** informed the Court that he found the hoe handle in the banana field with blood and grey hair that looked like the deceased's hair. **PW4** pointed out that after he found the accused, he saw him going towards the banana field to

make a phone call. **PW5** confirmed that the blood and hair on the hoe handle was never tested as there were no reagents at the Forensic Laboratory. This evidence does little to prove the prosecution's case. **PW5** further testified that when he searched the accused house, he found a blood-stained T-shirt. This T-shirt was never examined for the blood and whose blood it was. In Court, PW5 was shown a blue T-shirt and disclosed that the T-shirt was not the one he found at the accused's house.

The prosecution has concluded its case on circumstantial evidence. Circumstantial evidence is defined as evidence based on inference and not personal knowledge or observations. I rely on the case of **David Zulu v The People**<sup>3</sup> where Chomba J. S. as he then was opined that:

*"...It is competent for a Court to convict on such evidence as it is to convict on any other types of admissible evidence. However, there is one weakness peculiar to circumstantial evidence, that weakness is that by its very nature circumstantial evidence is not direct proof of a matter at issue but rather is proof of facts not in issue but relevant to the fact in issue and from which an inference of the fact in issue may be drawn... It is therefore incumbent on a trial Judge that he should guard against drawing wrong inferences from the circumstantial evidence at his disposal before he can feel safe to convict, be satisfied that the circumstantial even has taken the case out of the realm of*

*conjecture so that it attains such a degree of cogency which can permit only of an inference of guilt”.*

Instructive is the Supreme Court case of **Banda v The People**<sup>4</sup> where Malila J. S observed when he opined that:

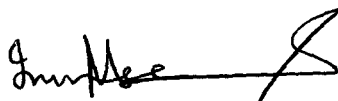
*“Where the prosecution case depends wholly or in part on circumstantial evidence, the court is, in effect called upon to reason in a staged approach. The Court must find that the prosecution has established certain basic facts. These facts do not have to be proved beyond reasonable doubt. Taken by themselves, those facts cannot therefore prove the guilt of the accused person. The Court should then infer or conclude from a combination of those established facts that a further fact or facts exists”.*

The deceased had indicated that she was hit from behind and did not know her assailant except that she suspected the accused. However, no evidence was adduced as to who caused the deceased's death and it remains unknown. In my view, the circumstantial evidence does not connect the accused to the commission of the offence.

I am convinced that a prima facie case has not been made out against the accused. I am therefore reluctant to put the accused herein on his defence on the charge of murder.

Accordingly, I find that the accused namely **Brian Chimwasu** has no case to answer upon the information for murder and I dismiss the charge. The accused is acquitted.

Delivered in Open Court this 30<sup>th</sup> day of June 2017



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**HON. IRENE ZEKO MBEWE**  
**HIGH COURT JUDGE**