

IN THE SUBORDINATE COURT OF THE FIRST CLASS

IPD/140/2017

FOR THE LUSAKA DISTRICT

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

THE PEOPLE

VS

MARY MAINZA

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J U D G M E N T

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Cases cited

*Fagan v Metropolitan Police Commissioner [1968] 3 All ER 447*

*R v Latimer (1886) 17 QBD 359*

*R v Miller (1954) 2 Q.B. 282*

*Rex v Khuswayo (South African court of Appeal)*

In this case the accused stand charged with one count of **ASSAULT OCCASSIONING ACTUAL BODILY HARM**, contrary to section 248 of the Penal Code Chapter 87 of the Laws of Zambia. The particulars of this offence allege that the accused on the 21<sup>st</sup> November, 2016, at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, did assault Marian Mulemu thereby occasioning her actual bodily harm. The accused person pleaded not guilty to this charge hence leading to this trial.



I warn myself from the outset that the burden of proof in criminal proceedings such as the present ones lies squarely with the Prosecution. Notwithstanding the defenses available to an accused person, the primary responsibility to prove the allegations against such a person remains with the Prosecution.

The Prosecution in this case is required to prove each ingredient that constitutes this offence **beyond reasonable doubt**. I must reiterate that proof **beyond reasonable doubt** is not synonymous with proof beyond any **shadow of doubt**. In the event of reasonable doubt, such doubt must be decided in favor of the accused and he must accordingly be acquitted.

The offence of ASSAULT OCCASSIONING ACTUAL BODILY HARM is created by section 248 of the Penal Code Chapter 87 of the Laws of Zambia which is couched in the following language;

“Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.”

The word “harm” is defined in section 4 of the Penal Code to mean any bodily hurt, disease or disorder whether permanent or temporary;

However, the penal code does not define the word ‘assault’ neither is it defined anywhere in the Zambian authorities. I therefore find it necessary to borrow the English definition of assault established in *Fagan v Metropolitan Police Commissioner* [1968] 3 All ER 447. In that case Lord PARKER CJ defined an **assault** as any act which intentionally—or possibly recklessly—causes another person to apprehend immediate and unlawful personal violence. He further defined “**battery**” as the actual intended use of unlawful force on another’s person without his consent.



In the light of the foregoing therefore and going by the wording of section 248 of the penal code the noun "assault" seems to have both meanings of 'assault' and 'battery' as elucidated by Lord Parker above. Consequently, it is safe to state that there is no distinction between assault and battery as they can both be succinctly referred to as 'assault' for the purposes of the Zambian criminal jurisprudence. It follows that, if either of the two is proved to have caused actual bodily harm on the complainant, then the *Actus Reus* for this offence is established.

In the circumstances in order to prove their case the prosecutions must prove all the ingredients of this offence. They must as such prove;

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- ) Assault on the person of the victim
    - a) That the assault occasioned the victim actual bodily harm
    - b) The identity of the offender
    - c) Intent of the offender at the time of the assault.

Having stated the law in relation to the case before me, I will briefly consider the evidence adduced herein in order to satisfy myself as to its truth or falsity.

To establish their case the prosecutions called to court 2 witnesses and at the close of the prosecutions' case accused was put on her defense. After her rights were explained to her she opted to give sworn statement and called 1 witness of which she is perfectly entitled to do. The evidence of both parties on record is as follows;

The first prosecutions witness was Marian Mulemu 25 of Marapodi who testified that on 21/11/16 around 23 hours she heard some noise outside the house and upon going out she found it was her husband with accused and told him to get inside the house and it was at that point that accused picked a stone and hit her with it and later reported the





matter to police. She testified that she sustained a deep cut on the fore head. She said she was able to tell it was accused who threw the stone as there were security light and was able to see clearly. She testified that accused is a girlfriend to her husband and have a child together. This witness identified the medical form she was given at the police and was marked ID1 in court. She said she did not allow accused to assault her.

When cross examined she said accused wanted to stone her husband but the stone ended on her.

PW2 was Eliot Besa the arresting officer who testified that he was allocated a docket of Assault to investigate in which the complainant was Marian Mulemu of being assaulted by a known person called Mary Mainza on 22/11/16 and that a stone was used and she sustained a deep cut. Acting on the report he was led by PW1 to accused's place and effected an arrest. He said he interviewed her and took a warn and caution statement in Bemba language accused understood better and voluntarily denied the charge. He said accused informed him that it was not her intention to hit PW1 but her husband. He said he then officially charged her for the offence of Assault. He said he also issued ID1 to PW1 to seek medical attention and it was produced as P1 in court.

Accused in her defense testified that on the material date whilst with PW1's husband they went to the shops and asked him to escort her but asked his friend to accompany him to escort her and on the way his elder brother called asking where he was as he was hearing some noise. She said few minutes later his wife came but just by past. She testified that they later started arguing with PW1's husband and she picked a stone to hit him but the stone ended up hitting PW1 as she was coming from where she had gone and she went to report the matter.



When cross examined she said PW1's husband has a child with her.

DW2 was Milton Vumbunu who testified that on the material night whilst with accused she demanded that she escorts her but he refused and an argument ensued, then started dragging each other and in the process accused picked up a stone and threatened that if he does not escort her she will stone him which she did but accidentally hit PW1 and the matter was reported to police.

When cross examined, he said accused was his wife and has a child with her and that it was accused who stoned PW1.

This is the evidence in totality from which it is clear to me that accused do not dispute that PW1 was hit with a stone on the forehead and sustained a cut. It is not in dispute also the identity of the person who assaulted PW1 as both accused and her witness have testified to the effect that it was accused. These are the facts in this case.

The first question I ask myself in this case is whether PW1 was assaulted within the meaning of the law?

Turning to the evidence adduced in this case, there is direct evidence that accused assaulted PW1 and this is evidence of Accused herself, PW1, DW2 who was an eye witness though qualifying it as an accident after missing him and end up hitting PW1 as well as the findings of the learned <sup>medical</sup> officer cannot certainly be defaulted. I therefore find as a fact that PW1 was assaulted as charge and further there being no consent from the victim to such act, the act is certainly unlawful. In the circumstances I am satisfied beyond all reasonable doubt that PW1 was assaulted with the meaning of the law.



The question to be decided at this point is whether or not the assault did occasion actual bodily harm on the victim within the meaning of the law?

I wish to state here that while the penal code provides the definition for the term 'harm', it does not define the phrase 'actual bodily harm'. Solace is therefore found in the definition provided by Lord Lysker J in *R v Miller (1954) 2 Q.B. 282* in which he defined the phrase to mean an assault which causes a hysterical and nervous condition.

It follows from the foregoing that harm need not be serious but it suffices to prove any bodily hurt or disease which causes emotional instability of the complainant whether permanent or temporal.

Turning to the evidence adduced in this case, the harm inflicted on the victim in this matter as perceived by the learned medical officer is supported by the witness as well as accused herself.

I wish to state here that in this matter I need not stretch my mind in order to satisfy myself that an assault of hitting someone with a stone ~~on the~~ is sufficient to cause sufficient emotional instability to the complainant. I am therefore satisfied beyond all reasonable doubt that the assault did occasion actual bodily harm on PW1

The crucial question to be decided in this matter is as to the identity of the offender or offenders or simply put who assaulted the victim herein which assault occasioned actual bodily harm on his person. I will not ~~to~~ be labour on this as the issue of identity is well settled in this matter.



The question that rises at this point is as to the intent of the accused at the time of assaulting her victim.

I must state here that from the wording of section 248 it is clear to me that this offence is an offence of basic intent thus what must be proved is either specific intent to assault or possibly recklessness.

Reverting to the evidence in this case, PW1 deposed that the accused threw a stone which hit her and DW2 and accused confirmed that she wanted to stone DW2 but unfortunately it hit PW1. It is clear from the evidence that the assailant intended to assault someone who is DW2 and it does not change that she intended to cause harm to her victim and did so consciously consequently; there was sufficient *mens rea* to assault. The fact that she caused harm to other than the person at whom she aimed, she is guilty of Assault and this was held in the case of; ***R v Latimer (1886) 17 QBD 359*** as well as in the case of; ***Rex v Khuswayo South African court of Appeal*** where the court held that accused was guilty of murder when he shot at a figure in the bush thinking it was his creditor however a different person was killed.

I have closely considered the evidence adduced from both parties from which I must confess that I don't find anything that may be deemed to be defense for accused at law.

In the circumstances I am satisfied that the prosecutions have proved their case against accused in this case beyond all reasonable and as such I find her guilty of the offense of assault occasioning actual bodily harm and I accordingly convict her.

Delivered in Open Court this 28<sup>th</sup> July, 2017.

  
Betty Simukama Malupenga (Mrs)

Magistrate Class 1.

