

**IN THE COURT OF APPEAL OF ZAMBIA  
HOLDEN AT KABWE**

Appeal No. 157/2020

*(Criminal Jurisdiction)*

**BETWEEN:**

**SAILI KABWENGA**

**VS**

**THE PEOPLE**



**APPELLANT**

**RESPONDENT**

**CORAM: Mchenga DJP, Majula and Muzenga JJA  
On 18<sup>th</sup> May 2021 and 27<sup>th</sup> May 2021**

*For the Appellant : Ms Z. Ponde, Legal Aid Counsel—Legal Aid Board*

*For the Respondent: Mr. M. Libuku, Senior State Advocate—National  
Prosecution Authority*

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**J U D G M E N T**

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MAJULA, JA delivered the Judgment of the Court.

**Cases referred to:**

- 1. Dickson Sembauke Changwe and Ifellow Hamuchanje vs The People (1988 - 1989) Z.R. 144 (S.C.).*
- 2. The People vs Njovu (1968) Z.R. 132 (H.C.)*

## **1.0 INTRODUCTION**

1.1 Saili Kabwenga, the appellant herein, was charged with murder contrary to section 200 of the Penal Code. The particulars were that on 4<sup>th</sup> July 2019 at Chibombo in the Chibombo District of the Central Province of the Republic of Zambia, he murdered Richard Moonga.

## **2.0 EVIDENCE IN THE COURT BELOW**

2.1 The facts of this case make very sad reading. On 9<sup>th</sup> April 2019 Emmanuel Kuni a farmer and a member of community crime prevention unit (CCPU) had received a report from a member of the community called Sikazwe that he had been assaulted by the appellant.

2.2 The following morning around 10.00 hours whilst in the company of his colleague Richard Moonga, they saw the appellant coming from Chibombo on an ox-cart. They attempted to stop him. Richard stood in front and he stood at the back. The appellant picked up a 1 meter long stick, hit the oxen twice and the third strike he attempted to hit him but he knelt and that's how he was missed. Richard, who was in front of the ox-cart, jumped as it started moving and unfortunately he was hit with a stick on the head by the appellant which caused him to fall to the ground.

2.3 Emmanuel started screaming for help and the appellant moved away from the scene. A number of people came



forward and Richard was taken to the police and later to Liteta hospital. An x-ray examination revealed that his head was fractured. He was referred to Kabwe Central hospital and later the University Teaching Hospital (UTH) where he transitioned 3 months later.

- 2.4 Edwin Kabulo (PW2) was Richard's father who after being told by Emmanuel that his son had been hit, rushed to the crime scene. He found him bleeding from the right eye and nose.
- 2.5 A post-mortem was conducted and was attended by McDonald Kayomena (PW3) and Constable Missile Chikampa (PW5). The appellant was apprehended on the same day at around 22.00 hours and taken to the police station. Constable Chikampa took photographs of the post-mortem as well as went for scene reconstruction and compiled a photographic album.
- 2.6 Detective Inspector Boniface Halinga subsequently charged and arrested the appellant.
- 2.7 In his defence, the appellant elected to remain silent.

### **3.0 FINDINGS AND DECISION OF THE TRIAL COURT**

- 3.1 After analysing the evidence, the learned trial court made the following findings of fact:
  1. That the deceased was hit with a stick by the appellant after which he fell from the ox-cart and was found in a pool of blood.

2. That the deceased died from the injuries sustained from the assault.

3. That a post-mortem was conducted which showed the cause of death as blunt force head injury caused by blunt hard object.

3.2 He dismissed the suggestion by the defence that the injury could have been caused on hard ground. The trial Court then concluded that the prosecution had proved its case against the appellant and convicted him for murder.

#### **4.0 GROUNDS OF APPEAL**

4.1 Dissatisfied with the conviction and sentence, the appellant has appealed to this court on one ground stated as follows:

*“The learned trial Judge erred in both law and fact and misdirected itself by convicting the appellant of the offence of murder when the prosecution evidence did not prove the ingredient of malice aforethought beyond reasonable doubt.”*

#### **5.0 APPELLANT’S HEADS OF ARGUMENT**

5.1 Ms. Ponde, the appellant’s counsel filed heads of argument in support of the appeal. In the sole ground of appeal, she argued that the prosecution failed to establish malice aforethought in the court below which is a prerequisite mental element for the offence of murder.



- 5.2 She pointed out that from the evidence, the appellant was only trying to free himself from Emmanuel and the deceased who were members of the CCPU. That this fact was also confirmed by Emmanuel when he testified that the appellant never intended to kill them. Counsel observed that it was during the struggle that the deceased was hit and he fell to the ground.
- 5.3 In order to persuade us on her assertion, counsel referred us to the case of **Dickson Sembauke Changwe and Ifellow Hamuchanje vs The People**<sup>1</sup> where it was held:

*“As sections 200 and 204 of the Penal Code show, murder is a crime which requires a specific intent or a specific frame of mind and it is for the prosecution to adduce evidence which will satisfy this requirement.”*

- 5.4 In light of the cited case, Ms. Ponde fervidly submitted that the trial court should have acquitted the appellant of murder or found him guilty of the lesser offence of manslaughter. In concluding her arguments, she urged us to allow the appeal by quashing the conviction for murder or substituting it with manslaughter.

## **6.0 RESPONDENT’S HEADS OF ARGUMENT**

- 6.1 In response to the ground of appeal, Mr. Libuku argued that the appellant’s actions against the deceased showed that he had the necessary *mens rea* for the offence he was convicted for. He observed that this include the act of picking a stick

which he used to hit the deceased in the head leaving the deceased unconscious. Reliance was placed on the case of ***Dickson Sembauke and Another vs The People***<sup>1</sup> where it was held:

*“It is a question of fact whether a reasonable person must know or foresee that serious harm is a natural and probable consequence of throwing someone out of a moving train. If, armed with this realisation and foresight, and knowing that serious harm could result, an intent founded on knowledge of the probable consequences will be evident and will be sufficient to satisfy section 204 of the Penal Code.”*

It was counsel’s position that in light of the appellant’s actions, the claim that he only wanted to free himself cannot hold water and hence his appeal ought to be dismissed.

## **7.0 CONSIDERATION AND DECISION OF THE COURT**

- 7.1 We have meticulously examined the evidence on record and taken into account the arguments by the parties.
- 7.2 On the one hand in support of the appeal Ms. Ponde has spiritedly argued that there was no intention on the part of the appellant to kill the deceased and the prosecution had failed to establish malice aforethought which is an ingredient of the offence for murder to be proved beyond all reasonable doubt.



7.3 On the other hand, Mr. Libuku has forcefully argued that the malice aforethought was proved beyond all reasonable doubt.

7.4 We will start by reproducing section 204 of the Penal Code which establishes malice aforethought:

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

*(a) Any intention to cause death 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 would probably cause death or grievous harm to someone, whether such;*

*(c) An intent to commit a felony;*

*(d) An intention by the act or omission to facilitate.*

7.5 This definition in our view is self-explanatory. Malice aforethought is proven in any one of the circumstances stipulated, that is to say, if a person has an intention to cause death or do grievous bodily harm to the deceased, with the knowledge that the act or omission is likely to cause death or cause grievous harm.

7.6 In the case adverted to by Mr. Libuku on behalf of the State, of ***The People vs Njovu***,<sup>2</sup> Blagden, CJ put it aptly that to establish malice aforethought, the prosecution must prove either that the accused had an actual intention to kill or to

cause grievous harm to the deceased or that the accused knew that his actions would likely cause death or grievous harm to someone.

7.7 The Supreme Court in their wisdom clearly explained the provisions of section 204 of the Penal Code in **Dickson Sembauke and Another vs The People**<sup>1</sup> when they said:

*“It is a question of fact whether a reasonable person must know or foresee that serious harm is a natural and probable consequence of throwing someone out of a moving train. If, armed with this realisation and foresight, and knowing that serious harm could result, an intent founded on knowledge of the probable consequences will be evident and will be sufficient to satisfy section 204 of the Penal Code.”*

7.8 The trial Judge found as a fact that on 9<sup>th</sup> April, 2019 the deceased was hit by the appellant and fell and lay in a pool of blood. From the post-mortem he found that the cause of death was blunt force head injury by blunt hard object.

7.9 Against this backdrop, he found that the prosecution had proved the case of murder against the appellant beyond reasonable doubt. It is not disputed by the appellant that indeed he struck the deceased with a stick but he is contending he did not harbour the intention to kill.





- 7.10 From our standpoint, the appellant by picking up a stick and striking the deceased knew or ought to have known that it might cause grievous harm or even death. The stick he used was described as being approximately one meter in length and was one used for whipping of animals, specifically oxen.
- 7.11 According to the evidence of PW1, the appellant started by first hitting the oxen twice and they started moving. He then attempted to hit PW1 but fortunately for him, he ducked and was missed. He proceeded to launch a vicious attack on the deceased by striking him on his head who then fell to the ground. In the meantime, unperturbed by what transpired the appellant went off with the animals without rendering any help.
- 7.12 We are left to wonder that if indeed he had no intention to kill or cause grievous harm why on earth did he conduct himself in the manner that he did. The conduct of the appellant leaves much to be desired and leads us only to one inescapable inference that he possessed the requisite malice aforethought envisaged in section 204 of the Penal Code.
- 7.13 We are fortified in so stating by the case of **Dickson Sembauke and Another vs The People**<sup>1</sup> aforecited in that the appellant as a reasonable person ought to have known or foreseen that by striking someone on the head with a stick, the natural consequence is that grievous harm or death may arise.

7.14 Surely, the appellant should have foreseen serious injury or death. We can infer from the conduct of hitting the deceased on his head forcefully with a large stick that he nurtured the intention to cause substantial injury or harm to the deceased. The trial court can therefore not be criticized for finding that malice aforethought was established given the circumstances of this particular case.

7.15 The claim that the appellant was simply trying to extricate himself from PW1 and the deceased person has no legal leg to stand on, as malice aforethought had been established.

7.16 We find no merit in the sole ground of appeal and dismiss it accordingly. The conviction and death sentence imposed by the court below are upheld.

  
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C.F.R. Mchenga  
**DEPUTY JUDGE PRESIDENT**

  
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B.M. Majula  
**COURT OF APPEAL JUDGE**

  
.....  
K. Muzenga  
**COURT OF APPEAL JUDGE**