

**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Criminal Jurisdiction)
BETWEEN:**

HP/201/2023

**THE PEOPLE
VS
CLIFFORD CHOONDE**

**BEFORE THE HONOURABLE MR. JUSTICE V. S SILOKA IN OPEN
COURT ON THE 31ST DAY OF JANUARY, 2024**

31 JAN 2024

For the State: Mrs. Susan Mwamba Besa and Mr. Voster Munsaka
– National Prosecution Authority

For the Accused: Mr. Steven Osborne Ngoma – Messrs. Steven
Osborne Advocates

JUDGMENT

CASES REFERRED TO:

1. *Lubandae Vs The People* (1983) Z.R. 54 (S.C).
2. *The People Vs Pelete Banda* (1977) Z. R 364.
3. *Katwishi Vs The People* (SCZ Judgment No. 20 of 1974) (unreported).
4. *Mbaye Vs The People* (1975) Z.R. 96 (S.C).

LEGISLATION REFERRED TO:

1. Section 200, 205 and 206 of the Penal Code Act Chapter 87 of the laws of Zambia.
2. Section 160 and 161 of the Criminal Procedure Code Cap 87 of the Laws of Zambia.

- 1.0 In this case the Accused stands charged with one count of Murder contrary to **Section 200 of the Penal Code, Chapter 87 of the Laws of Zambia.**
- 1.2 The Particulars of the first count are that Clifford Choonde on 14th day of June, 2020, at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia did murder Barbara Sinonge.
- 1.3 The particulars of the second count are that Clifford Choonde on 14th Day of June, 2020, at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, did attempt to cause the death of Andrew Phiri.
- 1.4 The particulars of the third count are that Clifford Choonde on 14th day of June, 2020, at Lusaka in the Lusaka District of the Republic of Zambia, did attempt unlawfully to cause the death of Kalozya Mwiinga.
- 1.5 When the matter came up for plea on the 12th of September, 2023, Defence Counsel informed the Court that in the previous session before Judge Newa and Judge Mwansa, an application was made pursuant to **Section 17 of the Criminal Procedure Code** to have the Accused medically examined. Counsel further informed the

Court that pursuant to that order, the Medical Report was now before Court.

1.6 The Report by Dr. P. C. Msone the Consultant Psychiatrist at Chainama Hills Hospital was dated the 10th of January, 2022. The conclusion of the report after examination is that, **“CLIFFORD CHOONDE CURRENTLY HAS COGNITIVE IMPAIRMENT (MEMORY DIFFICULTIES) FOLLOWING THE HEAD INJURY HE SUSTAINED AFTER THE ALLEGED OFFENCE. HE WILL REQUIRE CONTINUED NEUROLOGY FOLLOW UP AT UTH. “It is my OPINION THAT HE IS LIKELY TO HAVE ACTED IN A JEALOUSLY FRENZY AT THE TIME OF THE ALLEGED OFFENCE. HE CURRENTLY HAS COGNITIVE DYSFUNCTION. IT IS FURTHER MY OPINION THAT HE IS NOT FIT TO MAKE A PLEA, STAND TRIAL AND FOLLOW PROCEEDINGS OF THE COURT.”**

1.7 Consequently upon the said Medical Report, I proceeded to hear the Prosecution’s case pursuant to the provisions of **Section 161 of the Criminal Procedure Code.**

- 1.8 The Prosecution called a total of four witnesses to prove its case. The first prosecution witness was Martha M. Kombe aged 20 years herein after called **PW1**.
- 1.9 **PW1** informed the Court that on the 14th of June, 2020, while in the house with her aunt, Barbra Sinonge (now deceased), the now Accused came into their house. Upon entry into the house, an argument ignited between the now Accused and Barbra Sinonge. As the argument went on, **PW1** informed the Court that the now Accused went on to squeeze Barbra Sinonge on the throat after which he was chased from the house.
- 1.10 It was also **PW1**'s evidence that shortly after being chased, the now Accused came back into the house followed by **PW2**. Upon entry into the house, the now Accused, stated pacing up and down and in the process drew a pistol from his pocket shot in the roof and then shot Barbra Sinonge in the head. After shooting Barbra Sinonge, **PW1** told the Court that **PW2** then wrestled with him while the gun continued discharging.
- 1.11 It was **PW1**'s further testimony that after Barbra Sinonge was shot, she ran outside and that when she came back she found Barbra Sinonge lying in a pool of blood. **PW1** also identified the

- now Accused as the one who shot Barbra Sinonge in the head and Kaloza Mwiinga in the chest.
- 1.11 In Cross- examination, **PW1** told the Court that it was the now Accused who shot Barbra Sinonge in the head, **PW1** also confirmed that **PW2** wrested with the now Accused after Barbra Sinonge was shot in the head.
- 1.12 **PW1** also in Cross-examination told the Court that it was the now Accused who shot Mwiinga Kalozya and Andrew Phiri.
- 1.13 The second Prosecution Witness was Mwiinga Kalozya aged 33 years herein after called **PW2**.
- 1.14 It was **PW2**'s evidence that on the 15th of June, 2020, when he went to Barbra Sinonge's house. Upon arrival, he met the now Accused by the door, after which they both went in. Upon entry into the house, **PW2** informed the Court that the now Accused, produced a pistol and then shot Barbra Sinonge in the head.
- 1.15 It was **PW2**'s further testimony that after seeing that Barbra Sinonge was shot in the head, he then wrested with the now Accused and managed to grab the pistol from him but that in the process he was shot in the chest as per the medical report (**P2**).

- 1.16 In Cross-examination, **PW2** told the Court that it was the now Accused who shot Barbra Sinonge, Andrew Phiri and himself.
- 1.17 **PW2** further told the Court under cross- examination that the shooting of Barbra Sinonge was before the wrestling that ensued between himself and the now Accused.
- 2.0 The third Prosecution Witness was Tobias Malama employed as a police officer, herein after called **PW3**.
- 2.1 In brief, **PW3**'s evidence was to the effect that he opened a docket, carried out investigations and arrested the now Accused for the current offence.
- 2.2 It was **PW3**'s further testimony that in his investigations he interviewed **PW1** and **PW2**, who all confirmed to him that it was the now Accused who shot Barbra Sinonge, Andrew Phiri and Mwiinga Kalozya. Finally, **PW3** tendered into evidence **P1, P2, P3, P4, P5, P6** and **P7**.
- 2.3 The fourth Prosecution Witness was Banda Daniel employed as a Ballistic Expert by Zambia Police under the Forensic Department.
- 2.4 In his evidence, **PW4** informed the Court that on the 18th of June, 2020, the Ballistic Laboratory received a fire arm (**P2**) bearing serial number TKW90559, five rounds of ammunition (**P4**), three

- cartridges casings (**P6**) and one projectile (**P8**) for Ballistic Examination.
- 2.5 It was **PW4**'s further evidence that after carrying out a Ballistic Examination he produced a photo album (**P10**) and a report (**P11**).
- 2.6 It was **PW4**'s further evidence that according to his conclusion, the three exhibited casings picked from the crime scene were discharged by the same fire arm, TKW 90559 which is a Taurus Pistol belonging to the now Accused. That was the case for the State.
- 3.0 Coming to the case for Defence the Accused opted not to testify because of his condition but called two witnesses.
- 3.1 The first Defence witness was Tabita Mary Banda aged 40 years, wife to the now Accused.
- 3.2 In her evidence, **DW1** informed the Court that she was the wife to the now Accused and that during their marriage she learnt that her husband had an affair with Barbra Sinonge.
- 3.3 It was also the evidence of **PW1** that on the 14th of January, 2020, shortly after her husband left home, she received information to the effect that her husband was killed by a mob. Following receipt

of that information, **DW1** informed the Court that she rushed to the scene where she found her husband lying in a pool of blood together with other people who were shot. According to **DW1**, shortly after arriving, her husband and all the injured were taken to the hospital.

3.4 It was **DW1**'s further testimony that she knew that her husband was dating Barbra Sinonge because of the text messages that she retrieved from her husband's phone.

3.5 The second Defence witness was Timothy Moonga aged 42 years, herein after called **DW2**.

3.6 The gist of **DW2**'s evidence was to confirm that he was a good friend to the now Accused.

3.7 **DW2** further went on to confirm that he was aware that the now Accused was dating Barbra Sinonge and that in the evening of the fateful day, they saw the deceased kissing Mwiinga Kalozya on a public road.

3.8 It was **DW2**'s further evidence that shortly after parting company with the now Accused he received a phone call from the Accused's wife informing him that the now Accused was killed by members of the public after shooting Barbra Sinonge.

- 3.9 In cross-examination, **DW2** confirmed that he was aware that Barbra Sinonge was dating the now Accused.
- 4.0 I have considered the evidence adduced in this matter and the submissions by Counsel for both parties.
- 4.1 From the evidence adduced, it is not in dispute that the deceased Barbra Sinonge died as a result of gunshot wounds as per the Post Mortem Report (**P7**).
- 4.2 It is also not in dispute that the gun that was used to shot Barbra Sinonge, Andrew Phiri and Mwiinga Kalozya belonged to the now Accused, as per the Ballistic Report (**P11**).
- 4.3 It is also not in dispute that it was the now Accused who shot Barbra Sinonge.
- 4.4 It is also not in dispute that **PW1** and **PW2** were present when the now Accused shot Barbra Sinonge.
- 4.5 From the evidence on record there is direct evidence connecting the now Accused to the offence. **PW1** and **PW2** in clear cut terms informed the Court that it is the Accused who shot and killed Barbra Sinonge and at the same time wounded Mwiinga and Andrew Phiri.

- 4.6 Having considered the evidence on record, the issue for determination is whether the State has sufficient evidence to prove that it is the Accused who committed the offence. If there is no evidence, the Accused should be Acquitted.
- 4.7 Before I proceed to determine the above issue, let me say something briefly about **Section 161 of the Criminal Procedure Code**. In my own understanding where **Section 161 of the Criminal Procedure Code** is invoked, the implication is that there is no trial. Essentially, what takes place is an inquiry or a “sham” trial. On the premise that the Accused is not fit to plead and follow proceedings.
- 4.8 The main task for the Court under this Section is to either find that, it is the Accused who committed the offence and detain under the presidential’s pleasure or acquit if there is no evidence. Under **Section 161**, there is no trial.
- 4.9 Having stated as above, it is procedurally incorrect to proceed as the Defence proceeded in this matter. What I mean is that, it was wrong for the Defence to raise the defence of accident and provocation because what took place was not a trial. The Accused was not put on trial as such he cannot defend himself.

5.0 Even if for argument sake, the Accused had to defend himself at this stage, the Defence of accident would not be available to the Accused in the light of the guidance of the Supreme Court in **Lubandae Vs The People**.⁽¹⁾ Similarly, the Defence of provocation is also not available to the Accused in the light of the guidance of the Supreme Court in **Pelete Banda**⁽²⁾ and **Katwishi**⁽³⁾ case.

5.1 Having stated as above. I wish to restate my position that where the Accused opts to proceed under **Section 161** and, elects to call evidence the evidence called should attempt to show that the Accused did not commit the offence because of his condition. Evidence adduced must also show that because of his condition, he cannot stand trial. In the case in casu, aside from the medical evidence on record, I have not found any thing suggesting that the Accused, even slightly, that the Accused was of unsound mind.

5.2 Anyhow, my views are irrelevant since the Medical Report rendered by Dr. D. C. Msone a Consultant Psychiatrist of Chainama Hills College clearly states that Clifford Choonde

currently has cognitive impairment (memory difficulties) following the head injury after the alleged offence.

In light of the Doctor's findings, I find that there is sufficient evidence adduced to support that the Accused is not fit to stand trial. The Doctor's findings and my findings that there is evidence pointing to the effect that it is the Accused who committed the offence are sufficient to persuade me follow the guidance in **Mbaye vs The People**⁽⁴⁾ and **Section 161 (2) of the Criminal Procedure Code** as such, I order that the Accused be detained at the president's pleasure.

**DELIVERED AT LUSAKA IN OPEN COURT, THIS 31ST DAY OF
JANUARY, 2024.**



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**S. V. SILOKA
HIGH COURT JUDGE**