IN THE SUPREME COURT OF ZAMBIA Appeal No. 59/2015
HOLDEN AT NDOLA
(Criminal Jurisdiction)

B E T W E E N:

BERRY BOTHA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: **Phiri, Muyovwe and Lisimba, JJS**
on 2nd June, 2015 and 23rd September, 2020

For the Appellant: Dr. J. Mulwila S.C., Messrs Ituna Partners and
Mr. A. Ngulube, Director, Legal Aid Board

For the Respondent: Mrs. M.K. Chitundu, Principal State Advocate,
National Prosecutions Authority

J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court

Cases referred to:

1. **Moola vs. The People SCZ Judgment No. 35 of 2000**
2. **Njunga and Others vs. The People (1988-89) Z.R. 1**
3. **R. v Blaue (1975) 3 All E.R 446**
4. **Saluwema vs. The People (1965) Z.R. 4**
5. **Dorothy Mutale and Richard Phiri vs. The People (1995-1997) Z.R. 227**
6. **Jutronich and Others vs. The People (1965) Z.R. 9**
7. **Mwiba Mukela vs. The People Select Judgment No. 18 of 2012**
8. **Patson Simbaiula vs. The People (1991 - 1992) Z.R. 136**
9. **Madubula vs. The People (1993-94) Z.R. 91**

10. **Dickson Sembauke and Others vs. The People (1988-89) Z.R. 144**
11. **Musupi vs. The People (1978) Z.R. 271**
12. **Katebe vs. The People (1975) Z.R. 13**
13. **Yokoniya Mwale vs. The People SCZ Appeal No. 285/2014**
14. **Joseph Mulenga & Another vs. The People (2008) Z.R. 1 Vol 2**
15. **Lesley Mutale vs. The People App No. 187/2017**
16. **R. vs. Tubere Ochen (1945) 12 EACA 63**

Legislation referred to:

1. **Section 204 (a)(b), 199, 200 of the Penal Code, Cap 87 of the Laws of Zambia**

2. **Section 15(3) of the Supreme Court Of Zambia Act Cap 25 of the Laws of Zambia**

When we heard this appeal, we sat with Mr. Justice Lisimba who has since retired. This is, therefore, a majority judgment.

This is an appeal from a judgment of Mulongoti J (as she then was) delivered on 8th August, 2013 in which she convicted the appellant of murder with extenuating circumstances and sentenced him to 25 years imprisonment with hard labour.

The summary of the prosecution evidence is that on the 12th August, 2013 around 06:00 hours the appellant went to his father-in-law's home in Chongwe. The appellant sat down with his father-in-law (the deceased) and exchanged greetings. The appellant then informed the deceased, in an angry tone, that he was banning him from visiting his home because he was a wizard who was troubling

his daughter. The deceased told the appellant that he could not harm his granddaughter after all he had done no harm to his own daughter (DW2) married to the appellant. The appellant reacted by punching the deceased on the side of his head and the deceased fell. The appellant then stepped on him with his gumboots causing a deep cut on the deceased's left leg. PW1 tried to intervene to no avail. The deceased, while limping tried to get up the stairs into the house but the appellant kicked him on his back, and he fell from the stairs to the ground. The appellant left. The matter was reported to the police and the deceased was taken to Chongwe District Hospital the following day on 13th August, 2013 where he was examined by a doctor who confirmed that he had been assaulted. The deceased was unwell from that day until his demise on the 18th August, 2013. The appellant was apprehended and charged for the murder of the deceased.

The appellant and his witnesses who were his wife and son insisted that the deceased is the one who attacked the appellant with a hoe. It was alleged by the appellant's wife that prior to the material day, one of the deceased's children, Ellaman, lost his son and with the help of a witch finder, the deceased admitted to killing

Ellaman's son. The deceased even apologised and promised not to kill Minaki. In a nutshell, the appellant and his immediate family insisted that the deceased was the aggressor and that he had died from an infection in an old wound caused by a boil in the sole of his foot.

The learned trial judge considered the evidence and accepted the prosecution evidence that the appellant had attacked and injured the deceased who later died of bronchopneumonia caused by the wound becoming septic. The learned trial judge found that on the evidence before her, malice aforethought had been established on the ground that the appellant believed that the deceased was a wizard who was out to kill his daughter, Minaki, in the same manner he had killed Ellaman's son. That his intention was to cause grievous bodily harm when he stepped on the deceased with his boots. The learned trial judge found as a fact that the appellant and his wife believed that the deceased was a wizard who was out to harm their daughter, Minaki, and that he had confessed and asked for forgiveness. She noted that on the material day, Minaki was unwell which infuriated the appellant, and this was the reason why he drove to the deceased's home early

in the morning to confront him over the child's illness. She rejected the appellant's defence that he did not attack the deceased and found that he ought to have known or foreseen that stepping on the deceased with his boots would cause death or grievous harm.

Coming to the sentence, the learned trial judge considered the fact that the appellant and his wife believed that the deceased was a wizard who was bent on killing their daughter. Relying on the case of **Moola vs. The People**,[1] the learned judge found the appellant's belief in witchcraft as an extenuating circumstance. She sentenced the appellant to 25 years imprisonment with hard labour.

Before us, the appellant had the privilege of being represented by two lawyers. Six grounds of appeal were put up on behalf of the appellant as follows:

1. **The trial court erred in fact and in law by finding that the appellant inflicted a wound on the deceased's left leg and the appellant ought to have known or foreseen that hitting the deceased with his boots would cause death or grievous harm and that the cause of death was the assault.**

2. **The trial court erred in fact and in law by failing to find that the appellant's case was reasonably possible and that a reasonable doubt existed.**

3. **The trial court erred in law and in fact to convict the appellant of murder rather than manslaughter as murder requires specific intent which was not proved in this case. The trial court erred to find that the appellant intended to kill the deceased.**

4. **The learned trial judge erred in law and fact when she convicted the appellant despite having found that there were inconsistencies and contradictions in the evidence of PW1, PW2 and PW4**

5. **The learned trial judge misdirected herself when she disregarded the evidence of PW3 that the broncho pneumonia from which the deceased died could have been caused by anything including a disconnected leg.**

6. **The learned trial judge erred in law when she sentenced the appellant to twenty-five years imprisonment despite that there were extenuating circumstances of witchcraft.**

Mr. Ngulube argued grounds one to three and he relied on his filed heads of argument. He argued grounds one and two together. The thrust of his argument in the two grounds is that going by the postmortem report and the evidence of the pathologist, there was insufficient evidence to show that the appellant was responsible for the death of the deceased. Counsel argued that even if the appellant stepped on the deceased's leg, there was no evidence to show that the deceased died as a result of injuries to his leg. We

were invited to take judicial notice of the fact that jaundice kills, and broncho pneumonia also kills, and the deceased suffered from these two conditions. Further, that broncho pneumonia is not always caused by infection of wounds. Basically, Mr. Ngulube's argument is that the deceased failed to prevent the infection and the appellant cannot be held responsible for the fact that the wound became septic leading to the death of the deceased. The learned Director relied on the case of **Njunga and Others vs. The People**[2] where we held that:

> **"Where there is evidence of assault followed by a death without the opportunity for a *novus actus interviniens* a court is entitled to accept such evidence as an indication that the assault caused the death."**

The case of **R. v Blaue**[3] was relied upon in which according to Counsel, the accused stabbed a woman who was a Jehovah's witness. She refused a blood transfusion and the accused was convicted of manslaughter and the court stated thus:

> **"...The question for decision is what caused her death. The answer is the stab wound. The fact that the victim refused to stop this end coming about did not break the causal connection between the act and death. ..."**

Counsel argued that in this case, the wound was not the cause of death. As far as Counsel was concerned the chain of causation was broken.

Mr. Ngulube also attacked the learned trial judge's evaluation of the evidence which he claimed was unbalanced. His argument is that had the trial judge properly evaluated the evidence of the appellant and his witnesses he would have found that a doubt existed as to the guilt of the appellant. In support of his argument the case of **Saluwema vs The People**[4] was relied upon.

In the alternative, in ground three, Counsel for the appellant submitted that the wound which the appellant inflicted on the deceased's leg was not fatal. It was submitted that no intention can be imputed on the appellant to cause grievous harm or death to the deceased, therefore, a conviction for murder was wrong. Counsel opined that there being an unlawful act resulting in a wound on the deceased's leg, the appellant should have been convicted for manslaughter.

Dr. Mulwila, State Counsel, argued grounds four to six. In relation to ground four, it was submitted that the inconsistent

evidence between PW1 and PW2 was about the person who helped the deceased to get up after he was knocked to the ground. As regards PW4, that it was not clear when the postmortem was conducted and when the appellant was arrested as well as the person who identified the body of the deceased. Counsel referred us to the case of **Saluwema vs. The People**[4] where it was stated that:

> **"...If the accused's case is reasonably possible, although not probable then a reasonable doubt exists, and the prosecution cannot be said to have discharged its burden of proof. ..."**

It was submitted that the learned trial judge found that there were inconsistencies and contradictions in the evidence of PW1, PW2 and PW4. Counsel took the view that the prosecution evidence was discredited and should not have been relied upon by the trial court. Counsel disagreed with the learned trial judge's finding when in her judgment she stated:

> **"...The inconsistencies or contradictions between PW1 and PW2 are not fatal to the prosecution's case. What is material is that they both placed the accused at the scene, a fact he too acknowledged. ..."**

It was contended that if the learned trial judge had not put the appellant on his defence, the evidence of PW1 and PW2 would have

had no corroboration and the appellant would have been discharged at the close of the prosecution case.

In arguing ground five, Counsel submitted that the court below should have considered that the deceased's death could have been caused by something unrelated to the assault. This is in view of the pathologist's report that the deceased died of bronchopneumonia which could have been caused by the infection in the deceased's leg although he did not discount the possibility that the infection could have come from the disconnected leg. We must clarify here that according to the medical evidence on record, the deceased's leg was not disconnected otherwise this would mean that the leg was severed which was not the case but rather the skin on the affected part was 'eaten up' by the infection which was evident by the presence of pus.

It was submitted that although expert opinion is not binding on the court, the learned trial judge evaluated the evidence in an unbalanced way by highlighting and attaching undue weight and relevance to the evidence against the appellant. Relying on the case of **Dorothy Mutale and Richard Phiri vs. The People**[5] it was submitted that going by the pathologist's report, the finding that the

deceased died as a result of the assault was not the only inference. Counsel opined that the postmortem report raised some doubt leading to the conclusion that the prosecution failed to prove their case as the deceased's death could have been caused by other factors.

In support of ground six, it was submitted that the case of **Jutronich and Others vs. The People**[6] has set sentencing guidelines and we were urged to interfere with the sentence in line with those set guidelines. Counsel also reminded us of the case of **Mwiba Mukela vs. The People**[7] in which we guided that aggravating circumstances must be considered when passing sentence and we imposed a sentence of 30 years on account of extenuating circumstances because of the appellant's belief in witchcraft. It was submitted that in the case in *casu,* there were no aggravating circumstances to warrant a stiff sentence such as was imposed by the trial court. Counsel contended that had the trial judge considered the fact that the appellant did not exhibit any violent disposition towards the deceased, she would have imposed a lesser sentence. Counsel argued that the sentence is excessive in

comparison to other cases where aggravating circumstances were present.

The State filed its heads of argument in response which Mrs. Chitundu relied on. She tackled grounds one and two of the appeal together, then she proceeded to argue ground four, then ground five and then she argued grounds three and six together.

In response to grounds one and two, she cited Section 204 (a) of the Penal Code and emphasized that there was evidence that the appellant assaulted and kicked the deceased, an elderly person, with his boots. It was pointed out that the appellant confirmed in his evidence that he was wearing boots at the time of the incident. That in their evidence, PW1 and PW2 stated that the appellant continued kicking the 74-year-old deceased after he fell to the ground and when he tried to limp to the house, the appellant kicked him again. Counsel submitted that the appellant confirmed that the deceased was a very old man and, therefore, he knew or ought to have known that he could grievously harm or possibly kill the deceased person when he assaulted him and kicked him. Therefore, the appellant had an intention to cause grievous harm or death to the deceased whom he suspected of being a wizard.

With regard to the argument that there was a break in the chain of causation, Counsel argued that the findings of the pathologist clearly showed that there was no break in the chain of causation. We were referred to the case of **Patson Simbaiula vs. The People**[8] where we held that:

> **"Where a person inflicts an injury and the injured person later dies of a cause not directly created by the original injury, but caused by it, the requirement of causation is satisfied. Where the cause of death can be traced back in a clear chain to the actions of the person causing the injury, it is not always necessary for direct evidence to be led that the injured person received proper medical treatment."**

Counsel submitted that the attempt by the appellant and his witnesses to mislead the court that the deceased had a sore before the incident with the appellant which sore could have caused his death, must fail in the face of the prosecution evidence. That the medical report obtained the following day after the assault confirmed that the wound was a fresh one. It was submitted that there was no break in causation because from the moment the appellant assaulted the deceased person, his health deteriorated up to the time of his death. Further, the pathologist confirmed that the bronchopneumonia was as a result of the wound becoming septic

which wound was inflicted on the deceased by the appellant.

In relation to ground four, Mrs. Chitundu defended the trial court's holding that the inconsistencies or contradictions were not fatal to the prosecution's case. She pointed out that the alleged inconsistencies related to issues such as who helped the deceased to get up after he fell to the ground; who identified the body of the deceased; the date when the postmortem examination was conducted and the date of arrest of the appellant. She buttressed her argument by relying on the case of **Madubula vs. The People**[9] where we held that minor discrepancies in the prosecution evidence that do not go to the root of the case are not fatal to the prosecution's case. Mrs. Chitundu further referred us to the case of **Dickson Sembauke and Others vs. The People**[10] where we examined the issue of discrepancies and inconsistencies in a witness. Mrs. Chitundu submitted that despite the contradictions, the evidence placing the appellant at the crime scene and the evidence connecting the appellant to the offence remained unshaken.

Counsel contended that the star witnesses were the deceased's daughter and wife (PW1 and PW2) respectively but on the other

hand they were also related to the appellant as brother-in-law and son-in-law respectively. Mrs. Chitundu argued that these witnesses had no reason to falsely implicate the appellant. She buttressed her argument by relying on the cases of **Musupi vs. The People**[11] and **Katebe vs. The People.**[12] In **Katebe**[12] we held that where there are special and compelling grounds, it is competent to convict on the uncorroborated testimony of a suspect witness. According to Counsel, the postmortem examination report corroborated PW1 and PW2's evidence.

Regarding ground five, it was submitted that the medical doctor was clear as to the cause of death that the bronchopneumonia was caused by bacteria from the wound to the lungs. That the argument by the appellant's Counsel that the deceased could have died from jaundice was unsupported by the evidence on record.

In responding to grounds three and six on sentence, it was submitted, while relying on the case of **Jutronich, Schutte and Lukin vs. The People**[6] that this court has no basis to interfere with the sentence of 25 years as it is just and sound at law. That the sentence is neither excessive nor unjust adding that there were

aggravating factors in this case as the appellant brutally assaulted an old man who was also his father-in-law which is a taboo in our culture.

We have considered the arguments by Counsel for the parties.

We will deal with all the grounds of appeal together as they are inter-related. The issue for our determination in this appeal, is whether looking at the evidence before the trial court, the learned trial judge was on firm ground when she convicted the appellant of murder.

It is not in dispute that the deceased died on the 18th August, 2013. A postmortem examination was conducted on the body of the deceased and the cause of death was found to be bronchopneumonia due to septicemia from septic wounds due to assault.

The prosecution evidence was that the appellant attacked the old man; he fell to the ground and the appellant stepped on his left leg. The deceased sustained a cut on his left leg which never healed and ended up being septic leading to his death from bronchopneumonia. The appellant's defence was firstly, that the

deceased was the aggressor who attacked the appellant with a hoe and that he fell to the ground in the process of attacking the appellant. Secondly, that the deceased was suffering from an old wound/sore long before the alleged attack on the appellant and this was the wound that got infected leading to his death. This in sum was the evidence from the two sides.

One of the major issues raised in this appeal by Counsel for the appellant is that the learned trial judge should not have relied on the evidence of PW1, PW2 and PW4 because their evidence was full of inconsistences and contradictions.

The discrepancies and inconsistencies in the three witnesses' evidence noted by the learned trial judge were as follows: PW1 and PW2 differed as to who helped the deceased get up when he fell to the ground, and whether DW4 was with his father (the appellant) at the time of the incident or whether he had remained in the appellant's vehicle at the roadside. PW4 was inconsistent as to when the postmortem was conducted and when he arrested the appellant and also whether he recorded the statement from Edward a.k.a Clint Banda who identified the body of the deceased for postmortem examination.

In response to the argument on this issue, Mrs. Chitundu, relied on the case of **Dickson Sembauke Changwe and Another vs. The People**[10] in which we examined this issue. We stated in the **Dickson Sembauke**[10] case that:

> **"...For discrepancies and inconsistencies to reduce or obliterate the weight to be attached to the evidence of a witness, they must be such as to lead the court to entertain doubts on his reliability or veracity either generally or on particular points. ..."**

The discrepancies pointed out by the defence and which were acknowledged by the learned trial judge did not reduce the weight attached to the prosecution evidence and did not go to the root of the prosecution case. We agree with the learned trial judge's finding.

The key witnesses were all related to each other, to the appellant and the deceased. This was a case involving competing interests: the wife and daughter on one hand, fighting for justice for the deceased husband and father while on the appellant's side, his wife and son were fighting to keep him out of prison. Without a doubt, even in this case where the key witnesses are related to each other, the danger of false implication must be eliminated in line

with our holding in **George Musupi vs. The People**[11] where we held that:

> **"(i) Although there is a distinction between a witness with a purpose of his own to serve and an accomplice, such distinction is irrelevant so far as the court's approach to their evidence is concerned; the question in every case is whether the danger of relying on the evidence of the suspect witness has been excluded.**
>
> **(ii) The tendency to use the expression "witness with an interest (or purpose) of his own to serve" carries with it the danger of losing sight of the real issue. The critical consideration is not whether the witness does in fact have an interest or a purpose of his own to serve, but whether he is a witness who, because of the category into which he falls or because of the particular circumstances of the case, may have a motive to give false evidence.**
>
> **(iii) Once in the circumstances of the case it is reasonably possible that the witness has motive to give false evidence, the danger of false implication is present and must be excluded before a conviction can be held to be safe."**

As we have observed herein, the star witnesses for the prosecution were the wife and daughter of the deceased who gave evidence against their in-law. There was no evidence of motive as to why they would allege that the appellant injured his father-in-law. The allegation is a serious one with grave repercussions and we do not believe that the two witnesses deliberately implicated the

appellant. As we stated in **Yokoniya Mwale**[13] the evidence of the relatives of the deceased or the victim cannot be discounted for the simple reason that they are related to the deceased or victim. On the other hand, it is obvious that the appellant and his witnesses hatched up the story that the deceased attacked the appellant and that the deceased had a pre-existing condition in order to save the appellant from the gallows. We say so because these issues, which formed the appellant's defence were not raised in the cross-examination of PW1 and PW2. We gave guidance in the cases of **Joseph Mulenga and Another vs. The People**[14] and **Lesley Mutale vs. The People**[15] that an accused person should establish his defence from the time trial commences by cross examining the prosecution witnesses. In the **Joseph Mulenga**[14] case, we stated that:

> **"...During trial, parties have the opportunity to challenge evidence by cross examining witnesses, cross examination must be done on every material particular of the case. When the prosecution witnesses are narrating actual occurrences, the accused persons must challenge those facts which are disputed. ..."**

In **Lesley Mutale**[15] we stated that:

> **"...It is trite that an accused person must lay his defence from the**

commencement of the trial up to his defence. It is not the duty of the court to establish the defence raised by an accused person. ..."

Considering the above authorities, the appellant's defence that the deceased was the aggressor who also had a pre-existing condition was an afterthought.

We cannot fault the learned trial judge who had the opportunity to see the demeanour of the witnesses. All in all, the danger of false implication was eliminated in this case.

Counsel for the appellant accused the trial court of placing much reliance on the evidence of the prosecution. This accusation is unfounded. The learned trial judge considered all the evidence before her and rightly concluded that the appellant's case was not reasonably possible. The case of **Saluwema**[4] cannot assist the appellant having regard to the overwhelming evidence adduced by the prosecution, which evidence was rightly accepted by the learned trial judge.

The question which we must confront now is whether malice aforethought was established in this case. In their arguments, Counsel for the appellant contended that the facts and

circumstances of this case show that the appellant had no intention to cause grievous harm or death to the deceased. In addressing this issue, the learned trial judge had this to say:

> **"...It is trite that malice aforethought can be inferred from the surrounding circumstances such as the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the appellant before, during and after the attack. This was elucidated in the East African case of R. vs. Tubere Ochen. In that case the appellant was convicted for murder after assaulting the deceased severely with a walking stick and causing severe injuries from which he died shortly afterwards.....**
>
> **The circumstances and conduct of the accused, who believed the deceased was a wizard who was out to kill Minaki like he did Ellaman's son prove that he had malice aforethought as required by Section 204 of the Penal Code. He believed the deceased wanted to kill his daughter and thus attacked him with the intention to cause grievous harm or death. He kicked the deceased with his boots and inflicted the wound on the leg which caused his death as testified by PW3. It is immaterial whether he wore gumboots or not, the fact is he kicked the deceased with the shoes he wore that day. The deceased also sustained broken ribs. All this tends to show that the accused intended to kill or cause grievous harm. .....**
>
> **The only inference that can be made on the facts of this case is that of guilty. I accept the prosecution's evidence that the wound was inflicted by the accused during the fracas. The accused ought to have known or foreseen that hitting the deceased with his boots would cause death or grievous harm."** (Emphasis ours)

The learned trial judge applied Section 204 (a) and (b) which states that:

> **"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:**
> **(a) an intention to cause the death of 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 will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;"**

A perusal of the evidence shows that it was the appellant's wife (DW2) who stated that her father (the deceased) had confessed to killing Ellaman's son and that he would kill Minaki in the same fashion. It was erroneous for the learned trial judge to accept DW4's statement as proof that malice aforethought was established because the appellant denied attacking the deceased or even accusing him of being a wizard.

In the above excerpt taken from the judgment of the lower court, the learned trial judge acknowledged that the appellant in the case of **R. v. Tubere Ochen**[16] was convicted of murder after

assaulting the deceased severely with a walking stick and causing several injuries. In this case, according to the evidence of PW1 and PW2 the appellant reacted violently to the deceased's denial that he was bewitching his daughter. The record shows that the appellant hit the deceased on the side of the face and kicked him with his gumboots. The major injury sustained by the deceased was a deep cut on his left leg which cannot be described as severe although infection set in leading to the death of the deceased. The argument by Counsel for the appellant is that in view of the infection, the deceased's death could have been caused by something unrelated to the assault and that, therefore, there was a break in the chain of causation. In response to this argument, Mrs. Chitundu cited the case of **Patson Simbaiula vs. The People**[8] where we stated that:

> **".....the chain of causation was clearly not broken in this case where, on the facts accepted, the appellant evidenced a determined intention to cause death or at least very serious injury by setting fire to the deceased's house and then attacking with an axe and trying to prevent the escape of the deceased and her children from the burning inferno. As the cases of Banda and R v Jordan are distinguishable, the ground of appeal in this behalf cannot be accepted since, clearly, the death resulted from a chain of causation traceable right back to the fire."**

In her judgment, the learned trial judge considered the doctor's evidence in light of the prosecution evidence. It is clear that the chain of causation was not broken as the initial injury can be traced to the appellant. It was the injury caused by the appellant that became infected (a *novus actus interveniens*) and caused the bronchopneumonia which took the deceased's life. The argument by Counsel for the appellant that the deceased's death could have been caused by 'something unrelated' to the assault cannot stand.

From the circumstances of this case, can we say that the appellant had the intention to cause grievous harm and had knowledge that his actions would cause death or grievous harm? Section 4 of the Penal Code defines grievous harm to mean:

> **"Any harm which endangers life or which amounts to a main or which seriously or permanently injures health or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, member or sense;"**

Committing grievous harm means causing serious injuries which severely affect the health of the victim. In this case, the deceased was taken to Chongwe District Hospital on the same day and the doctor observed, amongst other things, that he had

tenderness over right 8-12 ribs. In the medical report the doctor stated that his findings were consistent with an assault. In the postmortem examination report the pathologist indicated that the deceased had four fractured ribs but that these did not cause his death as they were not life threatening. The injuries sustained by the deceased, in our view, do not fit in the definition of grievous harm. Committing grievous harm means causing serious injuries which severely affect the health of the victim. And this case can definitely be distinguished from the case of **R. vs. Tubere Ochen**[16] which the learned trial judge relied heavily on. We take the view that the learned trial judge's finding that the appellant had the intention to kill or ought to have known that his actions would cause death or grievous harm was against the weight of the evidence. We do not believe that the circumstances of the attack on the deceased were such that the appellant had the intention to kill or would have known that his actions would cause death or grievous harm to the deceased. All in all, we find that the learned trial judge erred when she found that malice aforethought was established in this case.

It follows, therefore, that the absence of malice aforethought

exonerates the appellant of the charge of murder. On a proper consideration of the facts of this case, the learned trial judge should have found the appellant guilty of manslaughter contrary to Section 199 of the Penal Code.

In line with Section 15(3) of the Supreme Court Act we hereby set aside the conviction for murder and the sentence of 25 years imprisonment imposed by the lower court. We find him guilty of the offence of manslaughter.

Before we come to the sentence, we wish to state that the learned trial judge erred when she found the belief in witchcraft as an extenuating circumstance. The appellant's defence as we have stated herein was that it was the deceased who attacked him. In short, the appellant did not raise the belief in witchcraft as a defence and it was, therefore, erroneous for the trial judge to make it available to him. We gave guidance to trial courts in the case of **Yokoniya Mwale vs. The People**[13] where we stated that:

> **"...For a belief in witchcraft to be treated as an extenuating circumstance, it ought to go further than merely someone's subjective thought process. There has to be a verifiable set of circumstances that motivate such a belief ..."**

Coming back to the sentence, we take note of the fact that the appellant assaulted and injured his father-in-law who was advanced in age. Such behaviour is an abomination in our society. Considering the circumstances of this case, the appellant is sentenced to 10 years imprisonment with hard labour. The sentence is with effect from the date of arrest.

Appeal allowed.

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G. S. PHIRI
SUPREME COURT JUDGE

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E. N. C. MUYOVWE
SUPREME COURT JUDGE