

She peeped through her window. Deceased knelt down and pleaded with the accused to stop assaulting her and forgive her. The accused did not stop the assault. She then heard deceased shout that the accused, referring to him by the name of her child Chenai, had stabbed her with a knife.

She stopped pleading with him after this and they went into their room.

Some time passed before the senior wife emerged from their room and call her to announce that the deceased had been stabbed by one Masendeke. To her knowledge Masendeke had never been to the residence around this time. She did not respond to this claim but decided to go into their room to check on the deceased.

Inside, she called out deceased's name. Deceased was groaning in pain and she could hardly respond. Her responses continued to fade till she did not respond at all.

She urged the pair to take her to hospital. The pair expressed doubt that deceased could survive the stabbing taking into account the knife used to stab deceased.

She left.

Later accused came and told her that deceased had died.

Amongst her tenants who were present were Judith Gorimbo, now late, Linda Chikwanda and James Komochi.

She went with the others to report the death of the deceased the same night. The Police did not pick up the body of the deceased till the next morning.

The only other State witness called was James Komichi.

He told the court that he had been drinking with the accused and his senior wife before they went back to House 684 together.

After he retired to bed, he heard commotion from accused's room. This raised him from slumber. He then heard words to the effect that, accused had stabbed the speaker with a knife. The speaker according to him, asked why he, the accused, was killing her. He knew that the victim was the deceased and that the perpetrator was the accused.

Previously the accused had fought with his wives. When the witness tried to intervene, the accused had attacked him with a log. He decided not to get involved with the accused's wives.

He learnt that same night that deceased had died. He did not see the attack on the deceased by anyone nor did he claim to have witnessed the manner in which deceased met her death.

The two witnesses gave their evidence in an unequivocal manner. Only Annie Bhila told the court how the commotion began, progressed and ended.

We believe her evidence because she was the sober of the two.

She remained unshaken in her answers during cross-examination.

She impressed us as the more truthful as compared to the accused.

On the other hand the accused came along not as a witness for the truth.

In his defence outline which was prepared on his instruction to Ms *Chafamba*, his counsel, he told the court that he had fought with deceased. In the process deceased grabbed his private parts which she then pulled, causing him pain.

In order to force her to release this hold, he had taken a knife and tried to stab her buttocks but missed and stabbed her in the back.

He did not intend to kill her.

In court he gave a different account.

He told us that upon arrival he found the deceased engaged in an exchange with one Masendeke.

He immediately recanted this version in the next breath and claimed that he found deceased crying. He asked her why she was crying. Deceased told him that she had been stabbed by Masendeke.

He then made a report to the Police which led to the arrest of Mr Masendeke by the Police. Later the Police released Masendeke and arrested him.

His story changed for the third time when he was asked during cross-examination. He reverted to the earlier version that he found deceased in an altercation with Masendeke.

When pressed as to which version was the truth, he told the court to make its judgment as it pleased.

There is no direct evidence of an eye witness in this case. The case is therefore based on circumstantial evidence. The law regarding circumstantial evidence is well settled. When a case rests upon circumstantial evidence, such evidence must satisfy three tests.

- (1) The circumstances from which an inference of guilt is sought to be drawn must be cogently and formally established.
- (2) Those circumstances should be of a definitive tendency unerringly pointing towards the guilt of the accused;
- (3) The circumstances, taken cumulatively should form a chain so complete that there is

no escape from the conclusion that within all human probability the crime was committed by the accused and no one else.

In general, the circumstantial evidence, in order to sustain a conviction, must be complete and incapable of explanation by any other hypothesis than that of the guilt of the accused.

The circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

The above is the legal position. It is trite.

In light of the above we have to examine whether the circumstantial evidence in the instant case satisfies the requirements of the law.

The evidence in the present case can be divided into three parts

- (a) The oral evidence;
- (b) The recoveries at the instance of the accused; and
- (c) The medical evidence.

(a) The Oral Evidence

Two witnesses said that accused arrived from the beer hall with his other wife. The one witness said by then the deceased had already retired to bed.

They both agree that soon after, there was commotion emanating from accused's room. The one witness, Annie Bhila, saw deceased emerged from the room with accused assaulting her. The deceased pleaded with him to stop the assault and asked for forgiveness but he did not relent.

Both witnesses later heard the deceased cry out that the accused had stabbed her.

The accused says he fought with the deceased but later changed and said he never did; but that his other wife told him it was Masendeke who stabbed the deceased.

We reject his version and prefer the version of the witnesses who testified to the commotion.

So there is commotion during which the accused assaulted the deceased with a log seen by Bhila, and heard by James

There are words uttered by the deceased to the effect that the accused had stabbed her with a knife, heard by both witnesses around the same time.

There is no suggestion that anyone else assaulted the deceased.

(b) The recoveries by the Accused

Police recovered a knife at accused's residence at the indications by the accused, according to Annie Bhila. He even took an okapi knife from the roof. Exhibit 5 (a) is the knife.

(c) The Medical Evidence

The Post Mortem Report Exh 4 by Dr Tarumbwa indicates that the deceased clothes were soiled by blood.

There was a laceration entry point 1cm wide on the back of the chest wall.

He concluded that death was caused by penetrating thoracic trauma and retroperitoneal bleeding.

Taken separately these three parts of evidence maybe innocuous and individually do not point to the accused as the person who stabbed the deceased. However if taken cumulatively the inescapable conclusion is that the accused only, is the person who stabbed the deceased. There is no other rational explanation, to the death especially in light of his failure to explain why the witness should all say he is the one, including the deceased. The next question to consider is whether the accused had actual or legal intention when he stabbed his wife.

We are in agreement that as there was no preconceived plan to kill the deceased and in-light of the assault that preceded the stabbing, only a finding of constructive intend is appropriate.

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