IN THE HIGH COURT FOR ZAMBIA **HP/04/2018**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

THE PEOPLE

V.

BRUCE CHIKOTI

Before Hon. Mr. Justice M. Chitabo at Lusaka, the 6th day of March, 2018

For the State: *Ms. M. Hakasenke – Senior State Advocate*

For the Accused: *Mr. H. M. Lunda – Messrs LM Chambers*

JUDGMENT

Cases referred to:

1. *Cosmas Bala Mambwe v The People (1987) ZR 11.*
2. *Dorothy Mutale and Richard Phiri v The People SCZ No. 11 of 1997*
3. *Esther Mwiimbe v the People (1986) ZR 15*
4. *Kalebu Banda v The People (1997) ZR 169*
5. *Katebe v The People (1975) ZR 13*
6. *Lengwe v The People (1976) ZR 127*
7. *Mwewa Murono v The People (2004) ZR 207*
8. *Palmer v R(1971) 1 ALL E.R. 1088,*
9. *Phiri and Others v the People (1973) ZR 47 (C.A)*

10. *The People V Mudewa (1973) ZR 147*
11. *The People v Abel Zimba HJ/02/2011*
12. *R v Bird (D) 81 Cr. App. R 11C A*

Legislation Referred to:

1. *Penal Code Chapter 87 of the Laws of Zambia*

Works Referred to:

1. *Archbold Criminal Pleading, Evidence and Practice, 2010 (Thomson Reuters (Legal) Limited)*

The accused person stood charged with the offence of Murder contrary to section 200 of the Penal Code Chapter 87 of the Laws of Zambia. Particulars of the offence are that Bruce Chikoti on the 10th day of March, 2017 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, did murder one **Augustine Mulenga**.

The accused person pleaded not guilty to the charge. The State called three witnesses to support its case.

PW1 was **Chief Inspector Chiwala Solochi** of UTH Police Post who testified that on 2nd March, 2017 between 14:00hrs and15:00hrs the accused went to UTH Police Post reporting a shooting case. He reported that he had shot the deceased, a suspect whom he brought to UTH for medical attention. He said that the accused explained that he shot the deceased because he was loitering on his premises and that he later asked the accused to surrender the gun used and was instructed to go and assist the deceased with the medical

procedures. He further informed the accused to return to the police and report whatever the outcome at the hospital.

He narrated that the accused returned and informed them that the deceased had been admitted at UTH. The accused was advised to report the matter to Kanyama Police where the incident occurred as that was within their jurisdiction while the gun remained in his custody. The witness positively identified the 9mm pistol that was used to shoot the deceased which was later admitted into evidence and markedP1.

When cross examined the witness explained that the reason the accused went to report the matter at UTH police was because a Medical Report was required to treat the deceased. He told the Court that he was not the one involved in the investigation and therefore he referred the accused to Kanyama Police. He confirmed that the accused told him that the deceased had criminally trespassed and stated that the accused did not mention that an IPad was stolen.

He explained that he gave a report to the Officer-in-Charge at Kanyama Police and conceded that in that report he did not mention that the deceased was loitering. The said report was admitted into evidence and marked D1. He said he was not given the licence for the said gun by the accused and that he did not see the deceased but sent a Sergeant to go and check on the matter.

PW2 was **Detective Chief Inspector Vincent Chibesa** a forensic expert in ballistics at Police Headquarters. He testified that on 22nd

March, 2017 Detective Mwiilu of Kanyama Police Station submitted a fire arm with a serial number ERK 284 and two cartridges for the purpose of carrying out a ballistic forensic analysis. He examined the exhibits in all aspects of forensic analysis. He explained that the firearm was known as Glock made in Austria and was designed to house cartridges of 9mm parabellum.

He test fired the firearm by finding out the possibility of it firing without pressing the trigger and he observed that both the cocking and firing mechanisms were perfect. He then loaded and discharged one cartridge and observed that it was capable of loading and discharging as well as ejecting cartridges of the same caliber. He further examined the two cartridges submitted and they were in caliber 9mm parabellum and they were live which meant they were capable of being discharged from a firearm.

He then made a conclusion that the firearm was in its good working condition. He stated that both the firearm and cartridges were both dangerous commercial weapons which are capable of causing injury or death to any animal or human target once the firearm is loaded and discharged. He added that this firearm could only be possessed by those with a licence or permit. He then compiled a report on his findings. The Report was admitted into evidence and marked P2.

When cross examined the witness confirmed that this firearm was permitted for people who had the relevant licences to use to protect themselves or their property.

PW3 was **Detective Sergeant Manfred Mwiya** of Kanyama Police station who testified that on 3rd March, 2017 he reported on duty and whilst on duty he received a report from Joseph Mulenga of Garden House area that his young brother was shot at by the accused person. The deceased was admitted at UTH as he sustained a gunshot wound on his left leg. The witness went to UTH to visit the patient and at UTH he found the deceased with a deep cut on his left leg. He interviewed him and recorded a statement from him. He said the deceased explained that as he was going to church, he passed by the accused's place where the road passed. He found a pool of water and decided to pass near the accused's wall fence. As he was passing the accused came from his house with a gun and shot him on his left leg and accused him of wanting to steal from his premises. He was then taken to UTH by the accused but first passed through the UTH police post to get a medical report.

The witness narrated that he also passed through the UTH Police Post to confirm the deceased's story and he found the gun that was used and the same was handed over to him. When he went back to his station he summoned the accused person who was later detained for the offence of grievous harm. He interviewed him and the accused told him that he shot the deceased because he wanted to steal. Not being satisfied with this explanation he charged and arrested accused for causing grievous harm. The accused was released on police bond and on 9th March, 2017 the witness

received a call from Joseph Mulenga who informed him that the deceased had died.

The following day he summoned the accused who upon arrival was informed that his victim had died and detained him for murder. A postmortem was conducted and the cause of death was established as due to the gunshot wound. The accused was formally arrested and charged with the offence of murder which charge he denied. The deceased's statement was admitted into evidence and marked P3 while the postmortem report was marked P4.

The witness explained that he was initially furnished with a licence book for the accused person's firearm. However, the licence book had been misplaced in the exhibit room but that they had a photocopy of the original firearm licence. This copy was admitted into evidence and marked P5. The accused person's warn and caution statement was also admitted into evidence and marked P6.

When cross examined the witness explained that the original licence book was handed over to him on 3rd March, 2017 at UTH Police Post. He confirmed that the firearm was acquired in November, 2011 and that the licence had renewal endorsements which stated that the gun was legally owned.

The witness said he remembered making a report that the accused said he shot the deceased when he wanted to enter in his premises and that he acted in self defence. The report by the officer was admitted into evidence and marked D1.

The officer admitted that the accused said he was acting in self defence because the victim had stolen his IPad from his vehicle on his premises and his two friends came to attack him when the deceased was being confronted. He said he was not in a position to know if the said IPad was still at Plainview Police Post. He said the officer Mulonga was no longer at Plainview but was at Los Angeles Police post in Kanyama. He said he had no idea that the IPad was recovered at the scene where the deceased was shot.

He further stated that he was not aware that officer Mulonga was pursing the matter of aggravated robbery against the deceased. He visited the crime scene and he was shown the place where the deceased was shot. He said that the deceased was shot by the roadside and not inside the fence. The witness further narrated that he intended to interview the neighbours but none of them were willing to give statements. He said there was no eye witness to this incidence.

He asserted that the crime rate in Kanyama was very high and the accused was attacked the following day after he was charged with grievous harm. He admitted that a lot of things were stolen from the accused's home and a few things were later recovered. He admitted that the deceased was at the accused's premises and the accused gave chase to recover his IPad. He also admitted that according to the accused while outside the deceased linked up with his friends outside and in the process a struggle ensued with the deceased and his two friends culminating in the shooting of the deceased.

He further narrated that he then went back in the yard and got the vehicle from which the deceased got the IPad and he went to where he had left the deceased and he found the deceased had moved to the opposite side of the road. He then picked him from the ground with the help of his neighbor who had since come. He helped him remove the deceased's shirt which they used to tie on his wound to stop the bleeding. They put him in the vehicle and rushed to Chinika Police Station and he reported that he had shot a person in self defence when he came to steal a phone from his premises.

The accused however, was advised to go to UTH Police where he went and reported the incidence to him and the officer on duty issued a medical report and he took him to casualty at UTH. After leaving him there he went back to the police station and he was advised to go to the nearest police post where the incidence occurred. He then went to Plainview Police Post where he reported the incidence. The Police went to the scene with the accused and the accused demonstrated exactly how the whole incidence happened. They then went outside where the deceased was shot and just there officer Mulonga, DW3 retrieved the IPad that was alleged to have been stolen.

They went back to the police station where he was advised to report again the following day. The following morning he went to Plainview police and they decided to go to UTH but before they left he received a phone call from PW3 requesting him to go to the police. He then went to Plainview and found PW3 who recorded another statement from him and charged him with causing grievous harm. He was

granted bail and was asked to report on Wednesday which he did. On Friday the accused received a call from the PW3 informing him that the deceased had died. He was then charged with murder and put in police custody where he had been since.

He narrated that the phone that was stolen was a Huawei Idios white in colour and that the same was left in police custody. According to him he was attacked by three grown men he was in a state of panic and he avoided shooting up which could have landed on the upper part of the body. His only way to rescue himself from immense danger was by shooting the deceased in the leg. The accused demonstrated exactly how he was attacked.

He told the Court that the crime rate in his area was very high as there was no police station in his area and as a result crime occurred in the area on a daily basis. He explained that he had experienced thefts at his residence several times. He narrated that two days after his arrest for murder, his house was broken into and several goods were stolen and this was brought to his attention when his wife went to report the matter to the police station where he was. The suspects were also apprehended and placed in the same cells as the accused.

In cross examination the accused told the court that he could not tell if the deceased was armed nor could he tell if the other two gentlemen were armed. He stated that at the time of the incidence there were no people working at the nearby plots. He admitted that he did not fire a warning shot as he pursued the deceased. He said

his neighbor who helped him put the deceased in the vehicle saw the two other attackers. He said the reason for discharging a firearm was not intended to cause the deceased harm.

In reexamination he said that the reason he did not fire a warning shot was because he could see the deceased at close range and he was of the view that he would apprehend him which he actually did but for the other two attackers who came to beat him. He therefore did not have an opportunity to fire a warning shot.

DW2 was **Kombe Masauso Kamanga** of Garden House Compound in Lusaka who testified that on an unknown date in March 2017 at around 16:00hrs to 17:00hrs when he was about to pack his goods from where he was working from, when he saw four people, particularly, three people were beating one person. He was about 110 to120 meters away. As he was watching he heard a gunshot and he stopped what he was doing and ran there. He then noticed that it was his neighbor, the accused, who was being beaten.

After the gun shot two people ran away and one fell down and when he got there he saw the accused coming out of the yard with a vehicle. He then helped remove the deceased's shirt and then tied the gunshot wound with that shirt and then he was lifted and taken to the vehicle.

In cross examination he said he did not know exactly why the attack started. He did not see anything around the crime scene area. He said he heard the accused shouting during the attack but

because they were at a distance they were just watching what was going on.

DW3 was **Detective Sergeant Cornwell Mulonga** of Los Angeles Road Police Post who testified that on 2nd March, 2017 he knocked off around 15:00hrs and he went home. While he was home he received a phone call from the officers who were manning Plainview Police Post. They informed him that there was a report of a shooting incidence. He rushed back to the police post and found the accused and he interviewed him.

He narrated to him that while he was in his bedroom he saw someone picking an IPad from the bonnet of his vehicle. He said in the bedroom he was armed and attempted to shoot the person he saw picking his IPad but decided to give a chase of the suspect. He narrated to him that he chased the suspect outside the wall fence until he apprehended him. According to the accused, he started struggling to take the suspect inside the yard and that whilst doing so he was informed that two men came to rescue the suspect and launched an attacked on the accused. He then decided to shoot the deceased in the leg.

The witness asked him to take him to the crime scene and while there he found a pool of blood. While looking for a cartridge he found the white IPad which was in a puddle of water and the accused identified it as the one that was stolen. He then told the accused to accompany him to the police and at the police he

handed him over to the arresting officer and he prepared a report of his findings.

He further explained that when they learnt that the deceased had died and the accused was arrested for murder, he received word that there were people looting at the accused's premises. The witness informed his officer in charge to organize transport to go and rescue the family. However, the police reached late such that they found most items looted and very view items were recovered. He clarified that the accused complained about his IPad being stole.

In cross examination he told the Court that when he visited the deceased he was unable to talk and later handed over the matter to the arresting officer. He said he interviewed a number of women who were nearby but no one was interested to come forward.

In reexamination the witness told the Court that the reason he did not produce the report he made because he was not asked to do so and the same was given to the arresting officer together with the IPad.

At the close of the defence, Defence Counsel made written submissions and he cited the case of ***Mwewa Murono v The People (2004) ZR 207*** where the Court held that:

> *1. In criminal cases, the rule is that the legal burden of proving every element of the offence charged, and consequently the*

guilt of the accused lies from beginning to end on the prosecution.

2. The standard of proof must be beyond all reasonable doubt.

3. The accused bears the burden of adducing evidence in support of any defence after he has been found with a case to answer.

4. The statements made by the deceased were not contemporaneous of spontaneous with the event. The possibility of concoction or distortion was very high in the circumstance of the case.

He argued that the evidence on record reveals a strong defence of self defence. The accused person not only had a legitimate and legal right to recover his stolen IPad from the thief who was the deceased herein but also to save his life when he became a subject of a brutal attack by the deceased and his two other colleagues.

He submitted that PW3 lied when he claimed that he did not see the IPad. That the Court would also note thatPW3 was evasive when cross examined on the aspect of self-defence on account of the accused. Counsel cited ***Katebe v The People (1975) ZR 13*** the Supreme Court held that there is no onus on the accused person to establish his alibi, the law as to the onus is precisely the same as in cases of self defence or provocation.

He argued that there was no evidence from the prosecution to controvert/contradict the testimony of the accused. He cited the

case of ***Phiri and Others v the People (1973) ZR 47 (C.A)*** where the Court of Appeal observed that:

> *"The courts are required to act on the evidence placed before them. If there are gaps in the evidence the courts are not permitted to fill them by making assumptions adverse to the accused. If there is insufficient evidence to justify a conviction the courts have no alternate but to acquit the accused, and when such an acquittal takes place because evidence which could and should have been presented to the court was not in fact presented, a guilty man has been allowed to go free not by the courts but by the investigating officer."*

The Learned Defence Counsel submitted that exhibit P3 admitted into evidence did not constitute *res gestea* and was not a dying declaration and as such did not fall within the exceptions to the rule against hearsay evidence. He again referred to the Supreme Court's holding in the *Murono case* where it was held that the statement made by the deceased was not contemporaneous or spontaneous with the event. The possibility of concoction or distortion was very high in the circumstances of the case. Counsel argued that in the case in casu, the circumstances of the case did not rule out the possibility concoction and distortion

It was his further submission the deceased stole from the premises of the accused and as was the evidence of PW1, PW3, DW1 and DW3, the deceased was on the wrong end of the law and should

have been prosecuted had he survived the gunshot injury. That the deceased had every motive to distort facts about what led to his being shot by the accused and concoct lies about going for choir practice when he was on a mission to steal and did steal an IPad from the accused's premises.

He argued that it did not make sense that the accused would just accost the deceased without any reason. The prosecution equally produced the P3 merely for purposes of showing the Court that it was made but there was no other evidence to corroborate the deceased's illogical and concocted story.

It was counsel's contention that the accused had discharged his evidential burden in so far as the pleaded defence of self-defence was concerned. That the accused was a victim of a felonious attack and was confined by his assailants thereby inhibiting his ability to retreat. He argued that it would be too much to expect a person in the position of the accused to temporize because he was in pursuit of the deceased and rightly so because the deceased had his property which he had feloniously taken from the accused's premises.

He submitted that the force that the accused used was reasonably necessary to repel the attackers and he indeed managed to repel the attackers as two of them ran away leaving the deceased behind.

He cited the case of ***Lengwe v The People (1976) ZR 127*** where it was held that *in the circumstances in this case, a man cannot expected to consider dispassionately precisely what force he may use*

or whether a weapon which happens to hand which he picks up in the heat of the moment is or is not more than the occasion warrants.

He stated that the accused told the Court that his intention as he pursued the deceased was to merely apprehend him but unknown to him the deceased had company in the guise of the two other thieves. He submitted that in the heat of the moment the accused had to use what was at his disposal to save his life.

According to Counsel, the State sought to suppress the evidence of the IPad being in their custody but that DW3 did confirm that the same was indeed given to PW3 by him. That the said IPad was very relevant to the matter in casu as it was the item that was stolen by the deceased and was later recovered. He cited the case of ***Kalebu Banda v The People (1997) ZR 169*** the Supreme Court held, inter alia that:

> *"Where evidence available only to the police is not placed before the Court it must be assumed that had it been produced, it would have been favourable to the accused.*
>
> *The first question was whether the failure to obtain the evidence was a dereliction of duty on the part of the police which may have prejudiced the accused. When evidence had not been obtained in the circumstances where there was a duty to do so and a fortiori when it was obtained and not laid before the Court and possible prejudice had resulted, then an assumption favourable to the accused must be made."*

Counsel further cited the case of ***Pesulani Banda v. The People (1979) ZR 202*** where the Supreme Court held that if the contents of the document are referred in evidence either the document should be produced, or acceptable evidence should be given as to why its production is impossible.

Counsel finally submitted that the accused had fully discharged his evidentiary burden and had successfully pleaded the defence of self defence. He asked this Court that based on the evidence he urged the Court to acquit the accused.

I have considered the evidence on record and the submissions by counsel. Having considered the evidence before me I make the following findings of fact:

1. That the deceased person on the second of March 2017 *passed through the accused person's premises*
2. *That the accused person following that pursued the deceased.*
3. *That the accused shot the deceased on his left leg*
4. *That the accused then rushed the deceased to the University Teaching Hospital UTH where he was admitted.*
5. *That on the 9th of March the deceased died*
6. *That the cause of his death was the gunshot wound that he sustained.*

Having established the above findings of fact, it is now left for this Court to determine whether the accused person who has admitted

to having shot the deceased, has successfully established the defence of self defence.

It is trite law that the defence of self-defence is used, where it is applicable, to justify conduct which would otherwise be an offence. This was noted by the Supreme Court in the case of ***Cosmas Bala Mambwe v The People (1987) ZR 11***.

The learned authors of Archbold Criminal Pleading, Evidence and Practice, 2010 (Thomson Reuters (Legal) Limited) in paragraph 19 41 at p. 1928 have stated that:

> *"Where a defence of self-defence is raised, the burden of negativing it rests on the prosecution but the prosecution are not obliged to give evidence in chief to rebut a suggestion of self-defence before that issue is raised, or indeed to give any evidence on that issue at all. If on consideration of the whole evidence, the jury are either convinced of the innocence of the prisoner are left in doubt whether he was acting in necessary self-defence, they acquit."*

In the case of ***The People v Abel Zimba HJ/02/2011***, Justice Dr. Matibini, SC (as he then was) guided that:

> *"The defence of self-defence has two aspects. The first is a question of retreat and the second is the degree of retaliation. A failure to retreat is an element in considering the reasonableness of an accused conduct. Thus it is a factor to be taken into account in deciding whether it was*

necessary to use force and whether the force used was reasonable. The obligation to retreat rather to strike down is not absolute. Thus, it is not the law that a person threatened must take to his heels and run in a dramatic fashion. What is necessary is that a person threatened, or attacked must demonstrate by his actions that he does not want to fight. He must demonstrate that he is prepared to temporize and to disengage and perhaps to make some physical withdrawal."

In the English case of ***R v Bird (D) 81 Cr. App. R 11C A*** the Court of Appeal held that:

"If the defendant is proved to have been attacking or retaliating or revenging himself, then he was not truly acting in self-defence. Evidence that the defendant tried to retreat or call off the fight may be a cast-iron method of casting doubt on the suggestion that he was the attacker or retaliator or the person trying to revenge himself. But it is not by any means the only method of doing that."

Further, in the case of ***The People V Mudewa***, the Court cited the case of ***Palmer v R [1971] 1 ALL E.R. 1088***, where it was held that:

"If a person is under a serious attack and is in immediate peril, then immediate defensive action may be necessary. Thus, if the moment is one of crisis for someone in imminent danger, he may have to avert the danger by some instant

necessary to use force and whether the force used was reasonable. The obligation to retreat rather to strike down is not absolute. Thus, it is not the law that a person threatened must take to his heels and run in a dramatic fashion. What is necessary is that a person threatened, or attacked must demonstrate by his actions that he does not want to fight. He must demonstrate that he is prepared to temporize and to disengage and perhaps to make some physical withdrawal."

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"If a person is under a serious attack and is in immediate peril, then immediate defensive action may be necessary. Thus, if the moment is one of crisis for someone in imminent danger, he may have to avert the danger by some instant

reaction. In so doing, it is recognized that a person defending himself is not expected to weigh to a nicety the exact measure of his necessary defensive action. When a person is the object of a murderous assault it is too much to expect a nice discrimination in the method he chooses to defend himself. In calm retrospect other alternatives, may appear. However, it is always important to bear in mind that in such circumstances any man acts under the stress of the moment. Quite often in such circumstances a person has to act swiftly and decisively."

I have also been guided by the Supreme case of in the case of ***Esther Mwiimbe v the People (1986) ZR 15*** the Supreme observed that:

"In our view the authorities make it abundantly clear that the facts of any particular case will show whether or not the situation in which the accused found himself, including the nature of the attack upon himself or the gravity of imminent peril was such that it was both reasonable and necessary to take the particular action which has caused death in order to preserve his own life or to prevent grave danger to himself or another"

In the present case the evidence on record is clear that the accused person shot the deceased in the leg and according to him and that he did this amidst a brutal attack on him by the deceased and his alleged friends. The evidence of PW3 indicates that the accused

informed him that the deceased stole an IPad from the accused's vehicle and that was what necessitated the chase. He however said he did not see any IPad nor was he aware about it.DW3 confirmed that he found an IPad in the paddle of mud which had blood stains and the same was handed over to the arresting officer, PW3.

The evidence of DW2 was that as he was packing his goods when he saw a group of four men in a struggle where three men were beating one man. He said he could hear the man shouting and then when he heard a gunshot he saw two of the men scamper while the other two remained. He then approached the two men and found that it was the accused person and the deceased. He told this Court that he helped the accused put the deceased into the vehicle before the accused left.

There is also evidence on record that while in hospital the deceased gave a statement that he was shot by the accused person while he was on his way to choir practice. This evidence, Defence counsel has strongly submitted that, was not qualified to be *res gestae* because the time between him being taken to the hospital and when the statement was given was long and allowed for the possibility of concoction.

The prosecution's evidence supports the position that the deceased was passing near the accused's place when the accused person shot at him. The accused person does not dispute having shot the deceased but that he did so in self defence following an attack launched on him by the deceased and two co-suspects. DW2 in

cross examination said he heard some shouting as he watched the attack but did not do anything as this was happening from quite a distance.

Defence Counsel raised an issue that the IPad that was allegedly stolen was not before Court despite the same being recovered from the crime scene. This contradicts PW3's evidence who told this Court that he was not aware of the alleged stolen IPad. DW3 who testified that he found the said IPad and handed it over to PW3 is also a police officer. Counsel said it was a dereliction of duty on the part of the police officers.

The two police officers gave contradictory evidence pertaining to the whether there was in fact an IPad recovered bringing this Court to draw two possible inferences. The first one being that there was no IPad recovered because there was never an IPad stolen in the first place. The second inference is that there was an IPad recovered at the crime scene and thereby showing that the accused chased the deceased after the alleged IPad was stolen from his vehicle. The Supreme Court in the case of ***Dorothy Mutale and Richard Phiri v The People SCZ No. 11 of 1997*** has made it very clear that:

> *"Where two or more inferences are possible, it has always been a cardinal principle of criminal law that the Court will adopt the one, which is more favourable to an accused if there is nothing in the case to exclude such inference."*

In the present case I am left with no choice but to draw the inference that an IPad was in fact recovered from the crime scene. I

agree with the authority cited by Counsel that where a documents should have been produced but was not, then it must be assumed that had it been produced it would have been in favour of the accused.

I further agree that once the IPad was handed over to the arresting officer as has been found by this Court, it should have been brought before this Court as the same would be favourable to the accused. There is therefore no doubt that there was a dereliction of duty on the part of the Police on this point.

Having established this, I will now turn to the evidence of the attack. The accused illustrated before this Court that when he chased after the deceased with the intention of apprehending him, he chased him until he apprehended him. Once apprehended he saw two gentlemen approach them and launched an attack on him. He said the three including the deceased surrounded him and started to beat him. He lost balance and fell to the ground. At that point the attack became severe and as they kicked him.

He told this Court that when he realized that he was in danger, he pulled out the pistol which he had put in his pocket ant aimed to shoot the deceased on the leg. He said he avoided shooting up as he knew that that would kill someone. When cross examined he said he shouted for help and when the attack continued his only option was to shoot. He conceded that he did not fire a warning shot as he felt he would apprehend the deceased which he did.

The authorities I have referred to have shown that it is important to consider whether the accused person in this case retreated or infact attempted to retreat. In the present case, and the facts as testified by the accused show that there was no opportunity for the accused to retreat as he was surrounded. It was further stated that he shouted for help andDW2 confirms seeing this attack and hearing the accused shouting. In view of this I find that in this case there was no opportunity for the accused to retreat.

With regard to the mode of retaliation, I call in aid the case of ***Esther Mwiimbe v. The People*** which I have cited that the situation in any particular case will show whether or not the situation in which the accused found himself, including the nature of the attack upon himself or the gravity of imminent peril was such that it was both reasonable and necessary to take the particular action which has caused death in order to preserve his own life or to prevent grave danger to himself or another.

Further in *Palmer V R* cited in the *People v Mudewa* which I have also referred to in this judgment it was held that when a person is the object of a murderous assault it is too much to expect a nice discrimination in the method he chooses to defend himself. In calm retrospect other alternatives, may appear.

I agree with this position. While the retaliation may not seem proportionate, this case is instructive that one cannot discriminate in method he chooses to defend himself. Similarly in the present case based on the evidence of the accused, he was under a brutal

attack and he did not know if his attackers were armed. In my view, there is some merit in his position that his only resort was to shoot in the deceased's leg. Even if I was not convinced that the death of the deceased was in self defence, the very possibility that it could have been in self defence raises doubt on the prosecution's case.

The standard of proof in criminal cases is high as it is beyond all reasonable doubt as was stated in the Murono case. This doubt has not been successfully removed from my mind. In view of this I am left without a choice but to acquit the accused person for the offence of murder.

Leave to Appeal is granted.

Delivered under my hand and seal this 6th day of March, 2018

Mwila Chitabo, SC
Judge