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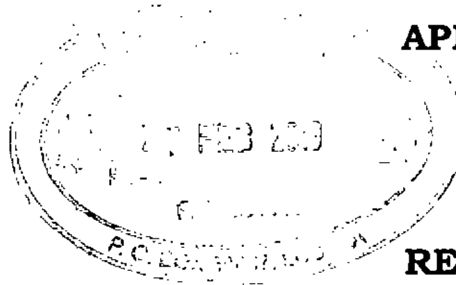
IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 135 OF 2018

HOLDEN AT NDOLA

(Criminal Jurisdiction)

BETWEEN:

KASEBYA MWABA **APPELLANT**



AND

THE PEOPLE **RESPONDENT**

CORAM: Chashi, Lengalenga, Siavwapa, JJA

ON: 19th and 27th February, 2018

For the Appellant: *C. Siatwiinda, Legal Aid Counsel, Legal Aid Board*

For the Respondent: *A. K. Mwanza (Mrs), Senior State Advocate, National Prosecutions Authority*

JUDGMENT

CHASHI JA, delivered the Judgment of the Court.

Cases referred to:

1. **Mushemi Mushemi v The People (1982) ZR, 71**
2. **Elias Kunda v The People (1980) ZR, 100**

3. **David Zulu v The People (1977) ZR, 151**
4. **Muvuma Kambanja Situna v The People (1982) ZR, 115**
5. **Saluwema v The People (1965) ZR, 4**
6. **Chabala v The People (1976) ZR, 14**
7. **Jack Maulla & Another v The People (1980) ZR, 119**
8. **Chiyovu Kasama v The People (1978) ZR, 252**
9. **Mbomena v The People (1967) ZR, 89**
10. **Nyambe Mubukwanu Liyumbi v The People (1978) ZR, 25**
11. **Jack Chanda and Kennedy Chanda v The People SCZ - Judgment No. 29 of 2002**
12. **Nkhata and 4 Others v The Attorney General (1966) ZR, 124**
13. **Madubula v The People SCZ – Judgment No. 11 of 1994**
14. **Felix Silungwe and Shadreck Banda v The People (1981) ZR, 286**
15. **James Chibangu v The People (1978) ZR, 37**
16. **Simutende v The People SCZ - Judgment No. 29 of 2002**
17. **Kanyanga v The People SCZ - Appeal No 145/2011**
18. **Dickson Sembauke Changwe and Ifellow Hamuchanje v The People (1989) ZR, 144**
19. **Kaposa Muke and another v The People (1983) ZR, 94**
20. **David Dimuna v The People (1988-1989) ZR, 199**

21. **Peter Yotamu Haamenda v The People (1977) ZR, 184**
22. **Mbinga Nyambe v The People SCZ - Judgment No. 5 of 2011**
23. **Coghlan v Cumberland (1898) 1 CH 704**
24. **Nikatisha and Another v the People (1978) ZR, 300**
25. **Kenious Sialuzi v The People (2006) ZR, 87**

Legislation referred to:

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

This appeal emanates from the Judgment of the High Court delivered on 9th April, 2018, in which the Appellant was convicted of the offence of murder contrary to section 200 of **The Penal Code**[1] and given the mandatory sentence of death.

The particulars of the offence were that, the Appellant on an unknown date but between 7th and 8th February 2018, at Ndola in the Ndola District of the Copperbelt Province of the Republic of Zambia, did murder one Rodgers Kalunga (the deceased).

The prosecution's evidence was mainly premised on the evidence of four witnesses, PW1, PW2, PW3 and PW4, the Appellant's neighbours who had known him for a long time.

A summary of the prosecution's evidence is that, on the material date around 01:00 hours, the Appellant tied the legs of the deceased with a wire cable and cloth, whom he accused of being a thief. He beat and dragged him up to his gate, whilst threatening to kill him. A large crowd gathered and pleaded with the Appellant to let the deceased go, to no avail. The crowd failed to rescue the deceased as the Appellant was violent.

The Appellant then dragged the deceased into his yard and got an electric grinder from his house and threatened to cut the deceased into pieces. When the grinder was grabbed from him, he went back into the house and got an iron bar, which he used to hit the deceased all over the body.

The body of the deceased was discovered the following day in the morning.

In his defence, the Appellant alleged that, the deceased was dragged and beaten by the mob, which accused him of being a thief. That, the only part he played was to drag the deceased from the mob into his yard in an attempt to rescue him, but he failed as he was outnumbered.

After considering the evidence, the learned trial Judge opined that there were discrepancies in the prosecution evidence because they did not

come out of their houses at the same time. That as a result, they witnessed the occurrences at different stages or none at all. The learned Judge was however satisfied that the discrepancies, were not fatal to the prosecution's case, as the evidence each witness gave related to what they witnessed or what role they played.

The learned Judge found that the Appellant was present at the crime scene and he admitted dragging the deceased into his yard.

Also based on the evidence of PW2 and PW3, he found that it was the Appellant who assaulted the deceased. The learned Judge found PW2 and PW3 to be truthful, credible and reliable witnesses who had no motive to implicate the Appellant.

The learned Judge found the Appellant's defence as a concocted story in order to extricate himself at all costs and therefore dismissed it.

Dissatisfied with the Judgement, the Appellant has appealed to this Court advancing the following grounds:

1. The court below erred in both law and fact when it held that the discrepancies in the evidence of the prosecution witnesses were not fatal to the prosecution's case.

2. The trial court misdirected itself by finding that it is the Appellant who tied the legs of the deceased which finding is perverse as it is not supported by any evidence on record.
3. The court below erred in both law and fact when it dismissed the Appellant's defence that he was rescuing the deceased from people who were beating him up, which explanation could reasonably be true.
4. The lower court fell in error when it held that it was absolutely unnecessary to delve into the issue of not lifting fingerprints or subjecting the rope, wire and cloth for forensic examination as these items were used to tie the deceased and thus, could have determined whether there was dereliction of duty on the part of the police.

In the alternative:

5. The trial court erred in both law and fact when it failed to attach considerable weight to the prosecution witnesses' evidence that the Appellant suspected the deceased to be one of the thieves who had previously stolen from his house despite having accepted the prosecution witnesses as being credible, truthful and reliable.

6. The court below misdirected itself when it failed to consider and evaluate the defence of provocation which was revealed in the prosecution witnesses' evidence despite having accepted their evidence as reliable and credible.
7. The lower court misdirected itself by accepting the Appellant's evidence in cross examination that the deceased did not steal any property from his house or at all as credible, without giving any reasons when it had already held that the defence's case was not cogent.
8. The lower court erred in both law and fact when it failed to find that there were extenuating circumstances warranting any sentence other than death.

At the hearing of this appeal, Counsel for the Appellant, Mr Siatwiinda relied on the arguments advanced in the Appellant's heads of argument and briefly augmented the same with oral submissions.

In support of ground one, Counsel for the Appellant referred us to an excerpt from the learned trial Judge's Judgment where the trial Judge observed that there were some discrepancies in the evidence of the prosecution witnesses but that such discrepancies were not fatal to their

case, as the witnesses observed the events of that material day at different stages or none at all.

Counsel submitted that, the trial Judge in arriving at that decision did not analyse and evaluate the evidence of the key witnesses. If he had done so, he would have discovered that, their evidence was loaded with material discrepancies which were fatal to their case.

Counsel led us through the evidence of PW1, PW2, PW3 and PW4 and submitted that these witnesses were all neighbours who lived in the same locality as the crime scene and as such must have heard the noise and observed the events of that night at the same time. Counsel thereafter took us through the alleged material discrepancies as follows;

Regarding the Appellant beating the deceased with the iron bar; Counsel argues that while all the witnesses deposed to being present at the crime scene, only PW2 observed the Appellant hitting the deceased with an iron bar. According to Counsel, it is improbable that PW1 and the other witnesses would not have observed, when PW2 confirmed that he was with PW1 for close to an hour at the crime scene.

With regard to the visibility on the material night, Counsel submitted that, PW1 in his evidence deposed that it was dark and that he had to use the light from his phone in order to identify the deceased; that this

was confirmed by PW3 who testified to the effect that there was a bulb from the Appellant's house which illuminated one side of the yard and the other was dark. It was argued that this contradicted the evidence of PW2 who testified that there was sufficient lighting from the Appellant's verandah.

Further, Counsel referred us to the evidence concerning the grinder and iron bar, he contended that while PW1 made no mention of the grinder and iron bar, PW2 testified that he first saw the Appellant with an iron bar hitting the deceased and later went into the house and brought out the grinder. PW3 on the other hand, testified that the Appellant was first seen with the grinder and when it was grabbed from him, he went inside the house and came out with an iron bar. In addition, PW4 made no mention of the grinder. According to Counsel, these pieces of evidence amount to serious contradictions and make it difficult to ascertain which witness is being truthful.

With regard to the nature of the noise, Counsel submitted that, while PW1, PW2 and PW4 deposed that they heard people chanting ***thief! thief!*** this contradicted the evidence of PW3 who testified to the effect that he heard people shouting ***leave him! leave him!***

Counsel, further submitted that while PW2 in his evidence denied seeing PW3 at the scene and PW3 equally denied having seen PW2, it is inconceivable how PW2 could not have seen PW3 who made several attempts to stop the Appellant from pulling the deceased. Counsel opined that such inconsistency could be attributed to the fact that the witnesses were telling lies about their presence and roles at the crime scene or that there was poor visibility as suggested by PW1.

Lastly, Counsel referred us to the evidence of PW2 who deposed that when he woke up, he inquired about what was happening; he was told that "***they had killed a person***" according to Counsel, the use of the word ***"they"*** could have been a reference to the mob that had assaulted the deceased.

It is Counsel's contention that the above discrepancies were fatal to the prosecution's case as they touch on the credibility of the witnesses and as such did not aid the trial court in arriving at the truth of what really transpired on that fateful night. The trial court ought to have looked for something more before accepting the evidence of the witnesses.

Counsel further submitted that the learned trial Judge in his Judgment, stated that he found PW2 and PW3 to be truthful, credible and reliable witnesses. The learned Judge however, did not give reasons for accepting

their evidence over that of PW1 and PW4 who were also eye witnesses. It was argued that the trial Judge fell in error by considering the evidence of PW2 and PW3 in isolation from the rest of the other prosecution witnesses. In support, thereof, we were referred to the case of **Mushemi Mushemi v The People**[1], where the Supreme Court held as follows:

> *"'(i) A conviction which is based on a finding of fact which is in direct conflict with the overwhelming balance of the evidence, that evidence having been glossed over, cannot be upheld.*
>
> *(ii) The credibility of a witness cannot be assessed in isolation from the rest of the witnesses whose evidence is in substantial conflict with that of the witness. The judgment of the trial court faced with such conflicting evidence should show on the face of it why a witness who has been seriously contradicted by others is believed in preference to those others."*

It was Counsel's contention that the evidence relied upon by the trial Judge cannot be said to be credible. Our attention was drawn to the case of **Elias Kunda v The People**[2] where the Court held as follows:

"A Judgment of a trial court can only be challenged on the basis that the evidence relied upon could not reasonably have been held to be credible"

That the finding by the trial court was perverse and there was no proper evidence to support such finding.

With regard to ground two, Counsel submitted that, the trial court in arriving at the conclusion that the Appellant tied the deceased's legs with a wire and rope, it relied on circumstantial evidence and held that it had taken the case out of the realm of conjecture and permitted only an inference of guilt.

Relying on the case of **David Zulu v The People**[3], Counsel submitted that, there were several inferences that could be drawn from the evidence namely; that it is possible that the Appellant could have tied the deceased or that it could have been other people, as there was evidence on record from PW1 and PW4 who heard people chanting ***thief! thief!*** Further that, the Appellant was not found in possession of similar wires or cloths as those used on the deceased. Counsel contended that, the circumstantial evidence was very weak allowing for several inferences to be drawn.

In ground three, it was submitted that the Appellant gave a truthful account of what occurred on that ill-fated night but the learned trial Judge in his Judgment did not evaluate this evidence. In support thereof we were referred to the case of **Muvuma Kambanja Situna v The People**[4], where the Supreme Court held as follows:

> *"The Judgment of the trial court must show on its face that adequate consideration has been given to all relevant material that has been placed before it, otherwise an acquittal may result where it is not merited."*

It was argued that at no time, did the trial Judge interrogate, evaluate or analyse the Appellant's defence nor give its reasoning for dismissing it, but he merely found that it lacked cogent evidence to support it.

Counsel contended that, there was strong evidence on record that supported the Appellant's explanation of events. For instance, the evidence by the prosecution witnesses that they heard people shouting **thief! thief!** While others shouting **leave him! leave him!** corroborated the Appellant's story.

Further the evidence of PW2 to the effect that he was told by a number of people that ***"they had killed a person"*** confirms the Appellant's version that indeed it was the mob that had beaten the deceased and not

the Appellant. And that if indeed the Appellant beat the deceased, the crowd would have informed PW2 that it was the Appellant that beat the deceased.

It was argued that, the four key prosecution witnesses and the Appellant had similar evidence except when it concerns to the issue of the Appellant having beaten the deceased. PW2 was the only witness who observed the Appellant beat the deceased while the rest did not observe the Appellant beat the deceased. Counsel opined that PW2 could possibly have a motive to falsely implicate the Appellant. According to Counsel, the trial Judge ought to have found the Appellant's explanation reasonably true. We were referred to the case of **Saluwema v The People**[5] where it was held as follows:

> *"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."*

According to Counsel, the inconsistency in the statements of the witnesses concerning the Appellant having beaten the deceased, raises reasonable doubt in the prosecution case and as such the prosecution cannot be said to have discharged their burden of proof to the requisite

standard. The Appellant, on the other hand, has no onus of proving his explanation. Reliance was place on the case of **Chabala v The People[6].**

According to Counsel, the prosecution upon realising that their witnesses contradicted themselves in a material particular, ought to have called further witnesses in order to remove the doubt that was raised, in light of the fact that there were more eye witnesses at the crime scene. We were referred to the case of **Jack Maulla & Asukile Mwapuki v The People[7]** where the Court held that:

> *"(i) There is no rule in the law that the evidence of more than one witness is required to prove a particular fact. However in any given set of circumstances where there is evidence that more than one person witnessed a particular event, and in particular the finding of an incriminating object in the possession of an accused, if the happening of the event is disputed when first deposed to and the prosecution chooses not to call any of the other persons alleged to have been present, this may be a matter for comment and a circumstance which the court will no doubt take into account in the decision as to whether the onus on the prosecution has been discharged. Nelson Banda v The People (2) followed.*

(ii) The need for the calling of other witnesses arises when doubt is cast upon the evidence of a witness to the extent that further evidence is required to corroborate that witness and thus remove the doubt. If there is no doubt about a witness, there is no need for supporting evidence nor is there any need for comment by the trial court on the absence of such evidence."

It was submitted that, the explanation proffered by the Appellant was reasonable and the trial Judge ought to have accepted it.

Coming to ground four, Counsel for the Appellant argued that there was a clear dereliction of duty on the part of the police for failure to subject the wire and cloth for fingerprint analysis. Following the case of **Chiyovu Kasamu v The People**[8], it was argued that the failure to test for fingerprints resulted in a rebuttable presumption in favour of the Appellant. That the fingerprint analysis would have the effect of disclosing evidence that would either implicate the Appellant, exonerate the Appellant or it could be neutral. Further that, no reasonable justification was advanced for failure to uplift the fingerprints or any evidence led to show that the fingerprints or DNA could not be uplifted from any of the items.

Counsel submitted that, the circumstances of the case do not reveal any strong evidence to displace the presumption in favour of the Appellant.

Grounds 5 to 8 were argued in the alternative and together as they are interrelated.

The gist of the said grounds is that, the evidence of the prosecution witnesses appeared to suggest a defence of provocation, as the Appellant believed that the deceased was a thief. We were referred to the evidence of PW2 and PW3, that their evidence revealed that the Appellant was provoked by the deceased.

Counsel submitted that, the trial court having found that the prosecution witnesses were truthful and credible, it ought to have attached weight to their evidence concerning the observations that the Appellant thought he was dealing with a thief. In addition, Counsel submitted that, a trial court has a duty to consider a defence though not raised by the defence. In support, thereof, we were referred to the case of **Mbomena v The People**[9], where the Supreme Court held as follows:

> ***"where there is evidence which could reasonably support an alternative defence to that put forward, this defence must be considered, although not in terms maintained by the prisoner."***

We were further referred to the provisions of section 205 and 206 of **The Penal Code**[1] providing for the defence of provocation and also to the case of **Nyambe Mubukkwanu Liyumbi v the People**[10] where the elements of provocation were discussed as follows:

> *"(i)There are three inseparable elements to the defence of provocation - the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. All three elements must be present before the defence is available.*
>
> *(ii) The question is not merely whether an accused person was provoked into losing his self-control, but also whether a reasonable man would have lost his self-control and, having done so, would have reacted as the accused did."*

According to Counsel, the elements of provocation were satisfied even though the evidence did not reveal what the deceased stole or was attempting to steal. That, the fact that he was suspected to be a thief was sufficient to provoke the Appellant, as he had been a victim of thefts and robberies.

With regard to the element of losing control, both actual and reasonable, it was argued that PW2's evidence to the effect that the Appellant was

behaving like a person who was possessed by an evil spirit, was evidence of such loss on the part of the Appellant causing him to retaliate in the manner he did. The retaliation indicates that the Appellant must have lost a fortune from the previous thefts he suspected were orchestrated by the deceased.

It was further submitted that, should we be inclined to find that the defence of provocation fails, we should take into account section 201 of **The Penal Code**[1] and consider the failed defence of provocation as an extenuating circumstance. Our attention was drawn to the case of **Jack Chanda and Kennedy Chanda v The People**[11], where the Supreme Court held as follows:

> *"Failed defence of provocation; evidence of witchcraft accusation; and evidence of drinking can amount to extenuating circumstances."*

On the other hand, Counsel for the State, Mrs. Mwanza, relied entirely on their filed heads of argument.

In response to ground one, it was submitted that, the trial court considered the evidence on record and found that, the prosecution had discharged its burden of proof. That the learned trial Judge in his Judgment gave reasons and specific points for determination and for

arriving at the decision, he did. The lower court addressed the issue concerning the discrepancies at page 117 and whether such discrepancies raised any doubt.

It was further submitted that, even though PW1 did not make reference to the iron bar, grinder or see the Appellant beat the deceased, he testified that he saw the deceased being dragged into the Appellant's premises. That the trial Judge considered PW1's evidence and found that it was in line with that of PW2 and PW3 and was satisfied that it was the deceased who was being dragged into the Appellant's premises.

It was further submitted that, even though PW3 did not see the Appellant actually beat the deceased, his evidence to the effect that he saw the Appellant with an iron bar and when the Appellant almost struck him with the iron bar, he left the scene, hence the reason he did not see the Appellant hit the deceased. This was also confirmed by PW4 who found the Appellant with an iron bar in his hands. It was argued that it is this iron bar that caused the death of the deceased. It was submitted that, PW2 was categorical in his testimony that he saw the Appellant hit the deceased with an iron bar.

Our attention was drawn to the case of **Nkhata and 4 others v The Attorney General**[12] where the Court held as follows:

"A trial Judge sitting alone without a jury can only be reversed on fact when it is positively demonstrated to the appellant court that...

(d) In so far as the Judge has relied on manner and demeanor, there are other circumstances which indicate that the evidence of the witnesses which he accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer."

According to Counsel, there is nothing on record indicating that the prosecution witnesses were being economical with the truth. The court considered the evidence of both the prosecution and the defence and found the evidence of the prosecution to be credible. We were further referred to the case of **Madubula v The People**[13], where it was held that:

"Minor discrepancies in the prosecution's evidence that do not go to the root of the case are not fatal to the prosecution case."

Counsel submitted that, the only inconsistency in the evidence of the prosecution relates to the evidence of PW2 and PW3 on whether the Appellant brought out the grinder or the iron bar first and not whether the deceased was dragged and assaulted to death. The trial Judge correctly found that PW1, PW2 and PW3, all witnessed the events at different stages.

findings of fact by the trial court were supported by evidence on record. It was submitted that the Appellants explanation was bereft of merit and the trial Judge correctly found so.

With regard to ground four, it was submitted that, the issue of uplifting fingerprints was rendered nugatory when the trial Judge considered the circumstantial evidence on record and found that it was the Appellant that tied the legs of the deceased. That the Appellant admitted having dragged the deceased to his premises but no evidence was adduced to show that other people had assaulted the deceased and tied his legs. The evidence points to the fact that, the people that gathered watched helplessly as the Appellant was violent. We were referred to the case of **Felix Silungwe and Shadreck Banda v the People**[14] where the Supreme Court held as follows:

> *"(1) Where the circumstances are such that there is no doubt that a defendant has been in possession of the vehicle or of an article, the failure to take fingerprints from the vehicle or from the article could not be a dereliction of duty and the absence of finger prints cannot raise the presumption that the defendant's fingerprints could not have been on the vehicle or on the article."*

It was submitted that even in the absence of the fingerprints, the evidence on record was so overwhelming that the only inference to be drawn was that of guilt.

In response to grounds five, six, seven and eight, we were referred to section 206 of **The Penal Code**[1] dealing with the defence of provocation and to the cases of **James Chibangu v The People**[15], where the Supreme Court held as follows:

> *"In Zambia the test for provocation is objective but only in a limited sense in that it is of a parochial nature, namely, faced with similar circumstances can it be said that an ordinary person' of the accused's community might have reacted to the provocation as the accused did?"*

And also to the case of **Simutende v The People**[16] where the Court held as follows:

> *"Provocation consists mainly of three elements - the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. These elements are not detached."*

It was submitted that the three elements highlighted above have not been met. The mere fact that the Appellant suspected the deceased to have been a thief who stole from him previously did not warrant his reaction of dragging and assaulting the deceased. It was further submitted that, if we indeed find that the Appellant was provoked, the reaction by the Appellant was not proportionate to the provocation. The Appellant used excessive force by dragging the deceased and assaulting him to death. That his actions reveal his intention of causing grievous harm to the deceased. It was argued that the retaliation was out of proportion.

It was further pointed out that at no point did the Appellant raise the issue of provocation. His defence alleged that he dragged the deceased in an attempt to rescue him from the mob. It was submitted that the defence of provocation was an afterthought.

Counsel for the State, further submitted on whether there were any extenuating circumstances. We were referred to section 201 of **The Penal Code**[1] and a dictionary definition of extenuation. Our attention was also drawn to the case of **Jack Chanda and Kennedy Chanda v The People**[11].

That the evidence that the Appellant dragged the deceased into his premises coupled with the evidence of PW2 to the effect that the Appellant while pulling the deceased, stated that he would kill him shows that the

Appellant had the intention of killing the deceased for the alleged previous thefts. Therefore, there was no evidence amounting to extenuating circumstances.

Our attention was drawn to the case of **Kanyanga v The People**[17] where the Supreme Court held as follows:

> *"We are satisfied that the findings in question were not perverse or made in the absence of any relevant evidence or upon misapprehension of facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly could reasonably make. This is what we said in Wilson Zulu v Avondale Housing Project."*

It was submitted that, the trial court had the opportunity of seeing and hearing the witnesses and was best placed to finding of fact. That the evidence on record can only lead to one conclusion, which is that the Appellant committed the offence and was accordingly sentenced.

We have considered the evidence on record, the Judgment of the lower court and the submissions by both learned Counsel.

We have no doubt that the deceased was severely beaten on the material night into the wee hours of 8th February 2018. As a result, the deceased

suffered injuries that caused his death. The doctor's findings following the post-mortem examination were consistent with the evidence of PW1, PW2, PW3 and PW4. The crucial question that falls to be determined in this appeal is whether the Appellant caused the death of the deceased.

As to the first ground of appeal, Counsel for the Appellant highlighted discrepancies in the fabric of the prosecution's case, centering on the evidence of PWs 1, 2, 3 and 4. He argues that the said discrepancies materially affected the prosecution's case. The lower court acknowledged that there appeared to be some discrepancies in the evidence of the prosecution. However, he minimised the importance of such inconsistencies. At page 117 of the record, the lower court observed as follows:

> *"From the outset, it is worthy to point out that there appears to be some apparent discrepancies in the evidence of the prosecution witnesses simply because all the witnesses did not come out of their houses at the same time during the fateful night. As a result, they witnessed the occurrences at different stages or none at all. Therefore, I am satisfied that such discrepancies are not fatal to the prosecution's case, as each witness gave evidence relating only to the part he witnessed or the role he played."*

We find it necessary to recite the evidence of the four key prosecution witnesses in order to fully appreciate the Appellant's argument regarding the incongruities contained therein. The evidence of these witnesses was as follows:

PW1 deposed that, around 01:00 hours, he heard some people shouting ***thief! thief!*** when he went outside, he found a large crowd had gathered and found the deceased lying unconscious. He used the light from his phone to try and identify the deceased. He then went away to try and call the police but when he returned to the scene, he found that the deceased was being pulled into his neighbour's premises by a person known as Sable. He then heard the people who gathered say ***"Sable leave this person, stop pulling that person"***. As the body was being pulled, he heard someone shouting from Sable's premises saying: ***Whoever will come into this yard, I will also grind him because these are the thieves who stole from me!*** It is at this point that PW1 left the crowd and went back into his house. He stated that he did not see the Appellant beat the deceased but saw the deceased being dragged into his yard.

PW2, deposed that, he was awakened by the noise outside around 01:25 hours. He found a crowd of people gathered behind the Appellant's house. he found the deceased lying on the grass naked and his legs tied with a

wire and some pieces of material. Later, he saw the Appellant welding an iron bar and started beating the deceased with the iron bar on every part of the body. Regarding the visibility, PW2 informed the court that there was light from the Appellant's veranda.

PW2 also heard the Appellant asking the deceased, ***"can I know your accomplices"*** and then told him that ***"if you won't say the people you work with you are bidding farewell to your dear life".*** The Appellant then pulled the deceased around saying he was going to kill him as the crowd pleaded with him to spare the life of the deceased but to no avail. PW2 then saw the Appellant go to his house and returned with a grinder threatening to cut up the deceased into pieces but that a brother to the Appellant took it from him. Two other persons tried to stop the Appellant from further harming the deceased but failed and left the scene.

A third attempt was made by a friend to the deceased called Abbias Mwanza who came forward saying he was with the deceased drinking but that the Appellant hit him on the forehead with the iron bar. Then the crowd stopped the driver of a Canter truck that was passing to assist but that the Appellant threatened to damage the vehicle thereby forcing the driver to leave.

He left the scene at around 02:45 hours. However, on his return in the morning, he found the body of the deceased at the back of the home of the accused. PW2 observed that the deceased was swollen and blood oozing from the nose, eyes and ears.

As for PW3, he was awakened by the noise outside, he heard people shouting ***"leave him! leave Him"*** when he went outside, he saw the Appellant pulling the deceased by the belt of his trousers while paying no heed to the crowds clamour for him to stop. PW2 approached the Appellant and pleaded with him and cautioned him against what he was doing as he was committing a serious offence, the Appellant responded saying, ***"You neighbours are not good, you don't help! When people used to rob me, you never assisted me so leave me alone."***

The Appellant then pulled the deceased until he reached his house while people were still pleading with him. PW3 held the Appellant with both hands from behind but that he pushed him away and he fell down. The Appellant then entered his premises leaving the deceased at the gate and went to bring a grinder that was connected to an electric cable saying he was going to cut off the legs of the deceased. However, the Appellant went back to the house and the people took the grinder away.

PW3 told the court that when the Appellant found that the grinder had been taken away, he pulled the deceased into his premises, went into his house and returned with an iron bar. PW3 came close to the Appellant who struck at him but missed. PW3's wife then advised that they should leave as the Appellant was very violent. PW3 confirmed that there was light from an electric bulb which illuminated one side of the verandah and the other was dark.

According to PW4, he heard noise coming from his neighbour's house, when he went outside, he found the deceased lying on the ground by the Appellant's house while people were shouting ***thief! thief!*** PW2 then advised him to talk to the Appellant as he was familiar with him. At the time, the Appellant had an iron bar in his hands. When PW4 advised the Appellant that he was committing an offence, the Appellant responded by insulting him and his parents. PW4 then left for his home. According to PW4, he was not present at the time the Appellant was beating the deceased. He further stated that people feared to get close to the Appellant because he was violent.

On a conjoint reading of the evidence of PWs 1, 2, 3 and 4, we note that these witnesses were awakened by the noise at different times and to that

extent we agree with the learned trial Judge that they observed the occurrences of that ill-fated night at different stages.

Regarding the visibility, the Appellant argues that while PW2 and PW3 testified that there was sufficient light from the Appellant's house, it is surprising that PW1 who was present at the scene, deposed that it was dark and he required light from his phone in order to identify the deceased.

We have carefully perused the evidence of PW1 and it is clear to us that PW1 was one of the people who were first on the scene, before the body of the deceased was dragged to the Appellant's premises where there was light. It is for this reason that he used the light from his phone to try and identify the deceased. When he returned from calling the police, he found the body of the deceased being dragged by someone called Sable and it is at this point that he returned to his house.

PW2, PW3 and PW4 were present at the Appellant's premises and could see what was happening using the light from the Appellant's verandah. PW1 only saw the body of the deceased being dragged to the Appellant's house but did not stay long enough to observe the subsequent actions of the Appellant at his premises. The evidence of PW2, PW3 and indeed that

of the Appellant himself confirms that there was sufficient lighting from the Appellant's verandah.

Regarding the beating of the deceased by the Appellant, the Appellant argues that it is improbable that only PW2 observed the Appellant beating the deceased and yet the other witnesses were present at the crime scene. A perusal of their evidence indicates that PW2 was present at the scene of incident from the point that the Appellant dragged the deceased into his premises up to the point when the Appellant used the iron bar to beat the deceased. PW3 deposed that he observed the Appellant drag the deceased into his premises and left when the Appellant nearly struck him with an iron bar as he attempted to talk to him. This clearly shows that PW3 left the scene before the Appellant hit the deceased with the said iron bar. PW4 equally testified that when he was asked to talk to the Appellant, the Appellant was holding the iron bar in his hands, after being cautioned, the Appellant insulted PW4 and his parents, it is at this point that PW4 left the scene.

Regarding the nature of the noise, Counsel argues that when PW1, PW2 and PW4 woke up, they heard people shouting **thief! thief!** While PW3 heard, people shouting **leave him! leave him!**

As we earlier indicated, these witnesses were awakened at different times. The witnesses all gave an account according to what they heard and observed when they woke up. There is evidence that PW4 was at the scene for twenty minutes. PW2 was awakened at 01:25 hours, PW1 at 01:00 hours, which explains why the witnesses heard what they heard.

With regard to the fact that PW2 denied having seen PW3 at the scene and vice versa. The evidence from the prosecution witnesses and the Appellant is that there were multitudes of people that had gathered at the scene on that material night. It therefore makes it possible that the reason PW2 did not see PW3 was due to the fact that there were a lot of people at the scene. Which fact was not disputed.

Further it was also stated that there was discrepancy in the evidence of PW2 when he testified that when he woke up, he inquired from the people that had gathered as to what was happening, he was informed that ***"they have killed a person".*** It was argued that the use of the word ***they*** could be reference to the mob. However, PW2 was categorical in his testimony that he observed the Appellant beat the deceased with an iron bar. In his evidence at page 7 of the record, he had this to say:

> *"Then he started clobbering him, every part of the body was being battered. I vividly remember he used an iron bar. It was 01:25*

hours, the lights were on at the verandah so I could see everything."

This clearly shows that the deceased was assaulted by the Appellant and not the mob.

Lastly, regarding the issue of the grinder and the iron bar. The Appellant argues that while PW1 made no mention of the grinder and the iron bar, PW2 testified that the Appellant brought out the grinder and when it was grabbed, he went back in the house and brought out the iron, PW3 on the other hand, testified that the Appellant brought out the iron bar and later the grinder.

We agree with the State that this is the only discrepancy we see in the evidence of these witnesses. We find that this discrepancy is minor, immaterial and insignificant as it does not go to the root of the prosecution's case. This discrepancy is one that could be attributed to the lapse of memory rather than to the untruthfulness of the witnesses. The important part of their evidence is that they both saw the deceased being dragged by the Appellant into his premises, they saw him pick up a grinder in an attempt to cut the deceased's legs and also saw him with an iron bar. PW3's evidence corroborates that of PW2 that the Appellant beat the deceased with an iron bar.

In the case of **Dickson Sembauke Changwe and Ifellow Hamuchanje v The People**[18] the Supreme stated as follows:

> *"For discrepancies and inconsistences 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."*

We have demonstrated through a detailed scrutiny of the evidence of each witness for the prosecution that the discrepancies in their evidence were not fatal to the prosecution's case. No doubt was raised in the prosecutions' evidence. The discrepancies cannot militate against the veracity of the core of the testimony provided by the four key prosecution witnesses. There is an impress of truth in the substantial fabric of the testimony delivered by the witnesses.

It was further argued under this ground that the trial Judge did not indicate why he found PW2 and PW3 to be truthful, credible and reliable witnesses but not PW1 and PW4. We are of the considered view that the basis for the trial court arriving at that decision is PW2 and PW3 are the two witnesses who were at the scene observing what was happening for an extended period of time. PW1 returned to his house after he saw the deceased being dragged into the Appellant's yard. PW4, in evidence stated

that he spent close to twenty minutes at the scene. It cannot therefore be said that the trial court considered their evidence in isolation or preferred the evidence of PW2 and PW3 over that of PW1 and PW4. We are of the considered view that the trial Judge considered all relevant evidence that was placed before him.

The first ground fails.

We will deal with the second and fourth grounds together, as they are closely linked, dealing with the rope and cloth that was used to tie the legs of the deceased.

The Appellant argues that there was dereliction of duty on the part of the police for failure to obtain finger prints from the said rope, wire and cloth in order to determine whether the Appellant indeed tied the legs of the deceased as held by the trial court.

We agree with the position in the case of **Chiyovu Kasamu v The People**[8] referred to by the Appellant that where fingerprints are not lifted there is a rebuttable presumption that such fingerprints as they were, did not belong to the accused. However, it must be emphasised that before placing a duty on the police to test for fingerprints, it must be established that the article or material in question can retain fingerprints that would

be subject of a fingerprint analysis. In the case of **Kaposa Muke and Another v The People**[19] the Supreme Court held *inter alia* that:

> *"(i) Before there can be a duty upon the police to test for finger prints, there must be evidence that the article in question had surfaces receptive to fingerprints."*

Further in the case of **David Dimuna v The People**[20], the Supreme Court held that:

> *"(1) Whilst it could be a dereliction of duty from which certain presumptions would arise, when the police have an opportunity to take fingerprints and do not do so, it must be established that the police did in fact have an opportunity to take fingerprints, in that the surface of the material to be tested, the climatic conditions and other circumstances would enable prints to be taken. In the absence of such evidence there is no dereliction of duty."*

In light of the above authorities, the question we must ask ourselves is whether the articles, in this case, whether the wire, rope and material could retain fingerprints. And our answer is in the negative. We are of the view that the articles in question do not have suitable surfaces on which fingerprints can easily be deposited. We do take Judicial notice that the article or material in question in order to retain finger prints ought to be

of a relatively smooth surface to be receptive of fingerprints. We do take judicial notice of the fact that in Zambia, it would prove difficult for such articles to be subjected to fingerprint analysis as we do not have the sophisticated technology to uplift fingerprints from porous surfaces such as the cloth/material and rough surfaces such as the rope that were used in the present case.

In the circumstances of this case, we find that there was no evidence indicating that there was any dereliction of duty on the part of the police and subsequently we find that the trial court cannot be faulted for not considering this issue.

However, even assuming that the omission by the police to uplift fingerprints amounted to dereliction of duty and raised a rebuttable presumption in favour of the Appellant, we are of the considered view that the evidence on record is so overwhelmingly convincing as to displace the said presumption. In the case of **Peter Yotamu Haamenda v The People**[21], the Supreme Court held *inter alia* that:

> *"(i) Where the nature of a given criminal case necessitates that a relevant matter must be investigated but the Investigating Agency fails to investigate it in circumstances amounting to a dereliction of duty and in consequence of that*

> *dereliction of duty the accused is seriously prejudiced because evidence which might have been favourable to him has not been adduced, the dereliction of duty will operate in favour of the accused and result; in an acquittal unless the evidence given on behalf of the prosecution is so overwhelming as to offset the prejudice which might have arisen from the dereliction of duty."*

The learned trial Judge rightly observed that there was no direct evidence from any of the witnesses that the Appellant was seen binding the legs of the deceased with the wire and cloth. However, the trial court in its Judgment at page 123 of the record, considered the evidence of PW2, PW5 and PW6 who were witnesses who testified that the deceased had his legs bound with a wire and cloth. In addition, the trial Judge considered the postmortem report which equally captured the observations as follows "***the legs were bound together on the lower third of the shank with wire and strip of red cloth***"

Coming to the crucial question, whether it was the appellant who tied the legs of the deceased, the trial Judge, considered the prosecution's evidence and that of the Appellant's, that at the time the deceased was being assaulted and hauled by the Appellant, the deceased already had

his legs tied. The trial Judge rejected the evidence of the Appellant that there was a mob that tugged the deceased before the Appellant intervened in an effort to rescue the deceased from the said mob. The trial Judge found that the deceased fell captive to the Appellant. Consequently, the only reasonable inference to be drawn from all the circumstances was that the Appellant was the person who had tied the legs of the deceased before he started beating him.

The law on circumstantial evidence was clearly espoused in the case of the **Mbinga Nyambe v The People**[22], where the Supreme Court stated as follows:

> *"1. Circumstantial evidence or indirect evidence is evidence from which the judge may, infer the existence of the fact directly.*
>
> *2. It is a weakness peculiar to circumstantial evidence that by its very nature it is not direct proof of a matter at issue, but rather is proof of facts not in issue. But relevant to the facts in issue and from which an inference of the fact in issue may, be drawn.*
>
> *3. A trial judge must be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture, so that it attains such a degree of cogency which can permit only an inference of guilt.*

4. Where a conclusion is based purely on inference, that inference may, be drawn only if it is the only reasonable inference on the evidence; an examination of the alternative and a consideration of whether they or any of them may, be said to be reasonably possible cannot be condemned as speculation."

We have considered the principles highlighted in the above cited authority and the circumstantial evidence relied upon by the trial Judge, we are satisfied that the evidence took this case out of the realm of conjecture, and allowed the lower court to draw an inference of guilt. We cannot fault the trial court for drawing such an inference.

We are therefore of the view that if indeed there was a dereliction of duty on the part of the police, which we highly doubt, the evidence given on behalf of the prosecution is so overwhelming as to offset the prejudice which might have arisen from the dereliction of duty and consequently displaces the presumption in favour of the accused.

For the reasons stated above, this ground of appeal fails.

In ground three, the Appellant contends that the trial court erred by rejecting the explanation proffered by the Appellant that he was rescuing the deceased from the mob, which explanation could reasonably be true.

We have perused the Judgment of the trial Judge; it is evident at pages 120 – 127 of the record that in dismissing the Appellant's defence, the trial Judge dealt with the evidence of the prosecution witnesses in detail and arrived at the conclusion that they were credible and reliable witnesses. And found that there was no known reason for them to falsely implicate the Appellant.

It is also clear that at page 122, the learned trial Judge dismissed the Appellant's defence that the mob assaulted the deceased and rejected the Appellant's explanation that he dragged the deceased into his premises in an effort to try and rescue the deceased from the mob. He found no cogent evidence to support the Appellant's assertion.

The learned trial Judge found that the deceased died as a result of the injuries he sustained after he was viciously assaulted by the Appellant and that, such an assault was unwarranted. He was of the view that the assault was the proximate cause of death in the absence of an intervening act. He was satisfied beyond reasonable doubt that it was the Appellant that caused the death of the deceased.

The trial court at page 124 of the record, further considered the Appellant's defence that the deceased was beaten by the mob after he attempted to steal from a nearby guesthouse. The trial court found that

although PW7 testified that he was informed by PW2 that the deceased was seen with Abbias Mwanza at the lodge, that was not confirmation that the deceased was assaulted at a lodge and that he spent a night there.

He opined that the Appellant in his own testimony admitted dragging the deceased into his yard in the name of rescuing the deceased from the mob while the deceased was still alive. He found no evidence to support the Appellant's assertion that the deceased was a thief who wanted to steal from a guest house, in light of the fact that the Appellant in his testimony deposed that the deceased did not steal any property from his house on the material date or any other day. The court found that the explanation proffered by the Appellant was concocted in order to extricate himself.

This Court is aware that a court of first instance has the advantage of observing witnesses as they testify and forms its opinion on the truthfulness of the witness based on their demeanour as did the learned trial Judge in this case. In the case of **Coghlan v Cumberland**[23], it was stated as follows:

> *"...When as often happens much turns on the relative credibility of witnesses who have been examined and cross examined before*

> *the Judge, the Court is sensible of the great advantage he has had in seeing and hearing them, it is often very difficult to estimate correctly the relative credibility of the witnesses from written dispositions; and when the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the Court of Appeal always is and must be guided by the impression made on the judge who saw the witnesses who stole. But there may obviously be other circumstances quite apart from manner and demeanor which may show whether a statement is credible or not and these circumstances may warrant the Court in differing from the judge when on question of fact turning on the credibility of witnesses whom the Court had not seen.*

We are of the view that on a test of credibility, the learned trial Judge was entitled to rely on the prosecution evidence.

The question is, therefore, whether in the circumstances of this case before us, a reasonable explanation was given by the Appellant. As stated above, the trial judge found the Appellant's explanation to be illogical and concocted. We find that the trial court ably considered the evidence of the Appellant and he cannot be faulted for arriving at the conclusion he

evidence. The evidence on record was sufficient to prove the case beyond reasonable doubt.

Grounds five, six, seven and eight have been argued together as they are interrelated. We do not think these grounds afford the Appellant any assistance in the circumstances but they do deserve some consideration.

The Appellant argues that the prosecution's evidence suggests a defence of provocation and that the trial Judge ought to have considered this defence even though it was not raised by the Appellant. And that, in the event that, this defence fails, we should consider it as amounting to an extenuating circumstance to reduce the Appellant's culpability.

Regarding the issue of the deceased being a thief, the learned trial Judge in his Judgment at page 125 of the record found that, based on the evidence of PW2 and PW3, the reason for the assault on the deceased is that the Appellant suspected the deceased to be a thief. However, he took note that when the Appellant was cross examined on this issue, the Appellant deposed that the deceased did not steal any property from his house on the material date nor had any theft occurred at his house. He found that the deceased was an innocent person and therefore his assault was unwarranted.

PW1 testified that he was awakened by noise of people shouting **thief! thief!** and after he returned from trying to call the police he then heard the people who had gathered say ***"Sable leave this person, stop pulling that person"***. As the body was being pulled, he heard someone shouting from Sable's premises saying: ***Whoever will come into this yard, I will also grind him because these are the thieves who stole from me!***

Further PW2 also heard the Appellant asking the deceased, ***"can I know your accomplices"*** and then told him that ***"if you won't say the people you work with you are bidding farewell to your dear life".***

In addition, when PW3 cautioned the Appellant on what he was doing, as he was committing a serious offence, the Appellant responded saying, ***"You neighbours are not good, you don't help! when people used to rob me, you never assisted me so leave me alone."***

This evidence suggests that the Appellant was labouring under the impression that the deceased was a thief. It is based on this evidence that the Appellant's Counsel beseeched us to find that the Appellant was provoked, more so that he had in the past experienced some robberies and thefts.

Section 205 of **The Penal Code**[1] provides for provocation as a defence as follows:

"205. (1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion, caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only.

(2) The provisions of this section shall not apply unless the court is satisfied that the act which causes death bears a reasonable relationship to the provocation."

Provocation is further defined in section 206(1) of **The Penal Code**[1] as follows:

"206. (1) The term "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done or offered to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial, or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered. For

the purposes of this section, "an ordinary person" shall mean an ordinary person of the community to which the accused belongs."

We have perused the record with the utmost care and we find no evidence on record to indicate that the deceased was indeed a thief who stole or attempted to steal any property. However, for the sake of argument, evening assuming that, indeed the deceased was a thief and that the Appellant might have felt provoked, does the evidence on record prove the above highlighted requirements of provocation? Placing emphasis on the fact that the act which causes death must bear a reasonable relationship with the provocation.

The witnesses' account of the beating and the weapons used on that fateful night was analogous in all material respects. We did find in ground one that these witnesses observed the events of that night at different times, which entails that the attack on the deceased was over an extended period of time. The witnesses deposed to having seen the Appellant drag the deceased into his yard and get an electric grinder from his house in an attempt to cut the deceased's legs into pieces. When the grinder was grabbed from him, he went back into the house and got an iron bar, which he used to hit the deceased all over his body.

It has been settled in grounds two and four that it is the Appellant that tied the legs of the deceased with a wire, cable and some other material proving that the deceased was not in any position to defend himself. The deceased was found with no weapon and the witnesses characterised the Appellant's behavior as violent, outlandish and something that they had only seen in movies.

There was further evidence on record from PW2 that he observed that blood was coming out of the deceased's nose, ears and eyes. PW5 testified that he observed that the body of the deceased had no shoes, pant or shirt but that the trousers were torn. He also noticed that the body had a deep cut at the back of the head while the skin on the back had been removed or peeled off. There were blisters on his chest and the abdomen appeared as if a hot metal had been used to torture him. The deceased further had blister like bruises on his pelvic area. PW6 observed a deep cut behind the head with blood oozing out and multiple injuries while the legs were tied with a wire. The postmortem report at page 129 of the record confirms the observations by the prosecution witnesses.

These pieces of evidence reveal that the force used by the Appellant was excessive and unreasonable. This vicious attack was uncalled for, in light

of the fact that the deceased was unarmed. The force bears no relationship to the alleged provocation.

However, as earlier stated we find that this defence offered no assistance to the Appellant, mainly because for the defence of provocation to be available, the Appellant ought to have expressly admitted to killing the deceased. The Appellant categorically denied having injured the deceased. He argued that he was in fact rescuing the deceased from the crowd that was beating him after he allegedly stole from a guesthouse. The Appellant maintained his innocence and implicated the mob.

We therefore find that the inculpatory evidence on record is incompatible with his innocence and as such the defence of provocation is not available. Consequently, we find no failed defence of provocation.

We also had an opportunity to consider section 17 of **The Penal Code** which provides for the defence of property. It reads as follows:

> *"17. Subject to any other provisions of this Code or any other law for the time being in force, a person shall not be criminally responsible for the use of force in repelling an unlawful attack upon his person or property, or the person or property of any other person, if the means he uses and the degree of force he employs in*

doing so are no more than is necessary in the circumstances to repel the unlawful attack."

The Supreme Court had occasion to consider section 17 of the Penal Code in the case of **Kenious Sialuzi v The People**[25] where it held that:

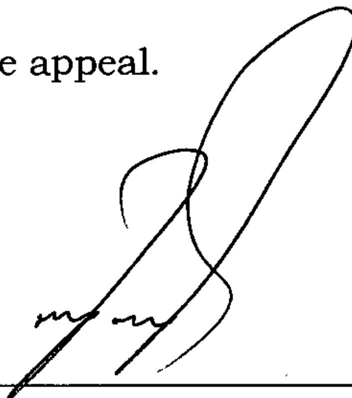
> *"A person shall not be criminally responsible for the use of force in repelling an unlawful attack if the means he uses and the degree of force he employs in doing so are no more than is necessary in the circumstances. The force used was more than necessary and excessive."*

The above authority entails that depending on the circumstances under which the Appellant apprehended the deceased, he could use force to repel the intruder as per the law. As we have highlighted above, the force used by the Appellant was excessive, more than was necessary in the circumstances to repel the unlawful attack as the deceased was found with no weapons and as such could not have posed any danger to the Appellant. The Appellant was expected to apprehend him and have him confined. And where the deceased was armed with a weapon, then the Appellant was expected to equally arm himself with the aim of either defending himself or incapacitating the deceased.

We are satisfied that the Appellant was possessed with the requisite malice aforethought as envisaged in section 204 of **The Penal Code**[1], as he was armed with the knowledge and realization that grievous harm or death was a probable consequence of his actions.

On the whole of the evidence, we are satisfied that the trial court dealt with this case correctly and none of the grounds of appeal can succeed. In the absence of extenuating circumstances, the death penalty imposed on the Appellant is maintained.

We accordingly dismiss the appeal.



J. CHASHI
COURT OF APPEAL JUDGE

F. M. LENGALENGA
COURT OF APPEAL JUDGE

M. J. SIAVWAPA
COURT OF APPEAL JUDGE