

IN THE HIGH COURT FOR ZAMBIA

HP/089/2020

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BETWEEN:

THE PEOPLE

vs.

RONNY CHINYAMA

CEPHAS NG'ANDU

CHANDA MUNKOMBWE

STEPHEN PHIRI

MUMBA KASELA

**BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO,
ON THE 25TH DAY OF MARCH, 2021, IN OPEN COURT.**

For the People:

*Ms. R. M. Jackson – State
Advocate, National
Prosecutions Authority.*

For the 1st to 3rd Accused Persons:

*Mr H. Mulunda – Legal Aid
Counsel, Legal Aid Board.*

For the 4th to 5th Accused Persons:

*Ms. M. Marabesa – Senior
Legal Aid Counsel, Legal Aid
Board & Dr. O. Kaaba – Pro
Bono Counsel*

JUDGMENT

CASES REFERRED TO:

1. *The People v Njovu* (1968) Z.R. 232;
2. *Douglas Mpofu and Washington Magura v The People* (1988-89);
3. *John Mwansa and Another v The People* – SCZ/APP/No. 170/2014;
4. *Mutambo and Others v The People* (1965) Z.R. 15;
5. *Shawaz Fawaz and Prosper Chelelwa v The People* (1995) Z.R. 3;
6. *Mbandangoma v The Attorney General* (1976/HP/768);
7. *Peter Yotamu Hamenda v The People* (1977) Z.R. 184;
8. *Saluwema v The People* (1965) Z.R. 4 (CA);
9. *Donald Fumbelo v The People* – SCZ Appeal No. 476/2013;
10. *Haonga and Others v The People* (1976) Z.R. 200 (SC); and
11. *Mulumbo and Others v The People* (1965) Z.R. 15.

LEGISLATION REFERRED TO:

1. *The Penal Code, Chapter 87, Volume 7 of the Laws of Zambia.*

1 INTRODUCTION

- 1.1 The Accused Persons **Ronny Chinyama, Cephas Ng'andu, Chanda Munkombwe, Stephen Phiri** and **Mumba Kasela** stand charged with one count of the offence of Murder contrary to **Section 200** of **The Penal Code**¹.
- 1.2 The particulars of offence are that, **Ronny Chinyama, Cephas Ng'andu, Chanda Munkombwe, Stephen Phiri** and **Mumba Kasela**, on the 26th day of February, 2020, at Lusaka, in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst

acting together, did murder **Jimmy Daka** (hereinafter referred to as the Deceased).

1.3 The Accused Persons denied the charge and a plea of not guilty was recorded for all of them.

1.4 For convenience sake, I will refer to **Ronny Chinyama** as (A1), **Cephas Ng'andu** as (A2), **Chanda Munkombwe** as (A3), **Stephen Phiri** as (A4) and **Mumba Kasela** as (A5).

2 THE PROSECUTION'S CASE

2.1 The Prosecution called a total of seven (7) witnesses in support of their case and closed their case.

2.2 **PW1** was **Boyd Phiri**, a Caretaker residing in Linda Compound, who testified that on 19th February, 2020, at around 20:00 hours, the Deceased who appeared drunk passed through his yard and when he was told that there was no through-road, he went straight to A3's yard, where he found A3. A3 started beating the Deceased with a weapon as he moved him from his yard to the road-side, after which A1 who lived with PW1 joined A3 in beating up the Deceased.

2.3 According to PW1, the place where the Deceased was being beaten was near his house and he could see what was happening as there were some security lights that lit up the place. He stated that there was no other person there except the two that were beating the Deceased. PW1 saw the Deceased dragged further away to a place that was much darker and at that point, he

could not see but he heard A1 asking for a machete and say that the people who were gassing should not be let free. He later heard a voice asking where they had put the sexual organ that had been cut off from the Deceased and A1 responded that he had just thrown it where the body was.

- 2.4 PW1 further testified that when A1 went back to his home, he got some water saying that he needed to wash off the bad luck. After he finished bathing, A1 went to sleep. Later, when A1 woke up to the cries of people outside, he told PW1 that if anyone came looking for him, he should tell them that he did not know him and soon after he left the house with his belongings.
- 2.5 In cross-examination, PW1 reiterated that he saw A1 who lived with him beat the Deceased with A3 who was his neighbour.
- 2.6 PW2 was **Lonas Mbewe**, a housewife and wife to PW1, residing in Linda Compound. She testified that on the 19th of February, 2020, she was seated outside her house with her husband and A1, when the Deceased who appeared drunk passed by them. When he was told that there was no through-road, the Deceased went next door to A3's yard. A3 came outside from his house with a weapon in hand and started beating the Deceased, whilst alleging that the Deceased was one of the "gasser"s that people were talking about. A3 dragged the Deceased to the road-side and continued beating

him, at which point, A1 stood up and joined A3 in beating the Deceased.

- 2.7 PW2 further stated that she and PW1 went inside their house and locked the door. She continued to peep through a window and could clearly see what was happening as the place where the Deceased was dragged to was near her home.
- 2.8 After a short while, she saw A4 who appeared to be in a very drunken state go to the place where A1 and A3 were beating the Deceased, but he did not beat the Deceased. Soon after, A4 left the scene and proceeded to his house, leaving A1 and A3 beating the Deceased. At that point, she saw A5 going to the scene with a machete and joined A1 and A3 in the beating of the Deceased. After beating the Deceased, A3 decided to go home whilst continuously shouting that they had apprehended a "gasser". The two that remained at the scene, A1 and A5, decided to undress the Deceased and continued to beat him. A1 then asked A5 for the machete to cut off the Deceased's sexual organ.
- 2.9 A group of people that had gathered asked A1 where he had taken the sexual organ that he had cut from the Deceased and A1 told them that he had thrown it on the Deceased's body. Someone in the crowd suggested that they burn the Deceased's body, which was then set ablaze with grass and tyres. Thereafter, A1 left the scene and went to PW2's home where he washed his hands whilst saying that he was washing off bad luck.

After he finished bathing, he entered the house and proceeded to the room where he normally slept. Later that night, upon hearing some people crying outside, A1 woke up and told PW1 and PW2 that it appeared as if relatives of the Deceased had recognised him. A1 then packed his belongings and said that if anyone came looking for him, they should say that they did not know him. Soon after, A1 left the premises.

2.10 In cross-examination, PW2 testified that she could clearly see what transpired as the place where the Deceased had been dragged to was very close to her house. She further testified that she never saw the sexual organ being cut off but heard that it had been cut off. She reiterated that A4 did not participate in beating the Deceased as he appeared to be in a drunken state and kept falling down on his own.

2.11 PW3 was **Chanda Nkhuwa**, a 17 year old pupil residing in Linda Compound, whose testimony was that on the 19th of February, 2020 at around 20:00 hours, he saw a mob of people shouting “gasser” and saw A1, A3 and A5 beating the Deceased. He further testified that he did not see A4 at the scene. However, he saw A2 standing on the side with a stick in his hands but he did not see him participate in the beating of the Deceased. PW3 testified that he knew A1 because he had worked with him for a month and that A2 and A5 were his neighbours. He further testified that he had known A3 for a year.

- 2.12 In cross-examination, PW3 reiterated that although A2 who he had known for a very long time had a stick in his hand, he did not see him participate in beating the Deceased. He stated that he did not see the people who burnt the Deceased.
- 2.13 PW4 was **Isaac Mbilichi**, a 40 years old resident of Linda Compound, with a speech impairment, who testified through an interpreter that on the 17th of February, 2020, A5 asked to borrow his machete for use in cutting firewood, which he identified in Court and it was marked "ID1". On the 23rd of February, 2020, A5 returned the machete to him. On the 28th of February, 2020, at around 20:30 hours, he heard a knock at his door and when he opened the door he found three police officers with one handcuffed person. The police asked him for the machete and took him to the Police Station where a statement was recorded from him. Thereafter, he took them to where the machete was, which was retrieved by the police and then he was taken back to the Police Station where he signed the statement.
- 2.14 In cross-examination, PW4 testified that he gave the machete to A5 at 10:00 hours and reiterated that he is the one that led the police to where the machete was as he had been using it.
- 2.15 PW5 was **Joseph Manda**, a Detective Sergeant who testified that on the 9th of March, 2020, he reported for work at the Criminal Investigations Department where he was assigned to interview and conduct a scene

reconstruction for five (5) suspects who were in custody. He prepared the General Criminal Investigations Office in readiness for the interview and brought in the 5 suspects. PW5 cautioned the 5 Accused Persons, informed them of the purpose of the interview and of their rights. A3 who was a Juvenile had his mother, Mwansa Mulalu, in attendance. The other four (4) Accused Persons were not represented.

2.16 PW5 further testified that the 5 Accused Persons voluntarily and willingly accepted to take the officers to the scene of crime in Linda Compound. Each Accused person stated the role that they played and the whole process was captured on video by Detective Sergeant Kazhimoto. Upon finishing the scene reconstruction, none of the Accused Persons expressed displeasure on how the scene reconstruction was conducted.

2.17 In cross-examination, PW5 testified that even though the Accused Persons denied committing the offence, they voluntarily and willingly led the police officers to the scene of the crime. He further testified that he was not aware that the Accused Persons lived in the area where the crime was committed as he was not the investigating officer. He conceded that if indeed they lived in that area it would be normal for them to have a general idea of the developments in that area.

2.18 PW6 was **Patron Kazhimoto**, a Scene of Crime Officer stationed at Lusaka Division, who testified that on the 9th of March, 2020, at the Lusaka Division Scene of

Crime Office, he was assigned to attend to a scene of crime reconstruction for a murder which Chilanga Police Station was investigating. He went to Chilanga Police Station, with a Panasonic video camera and whilst at Chilanga he met Detective Sergeant Manda, who was the interviewer for that proceeding and whilst in the General Criminal Investigation Department Office, the 5 Accused Persons were brought inside the office. Before they could proceed with the assignment, Detective Sergeant Manda informed the Accused Persons of their rights to have either legal, friend or family representation during the proceedings. PW6 testified that this was the first part of the proceedings which he captured on video. Among the 5 Accused Persons, A3 had his mother in attendance, whilst A1, A2, A4 and A5 opted to proceed without any representation.

2.19 PW6 stated that the scene reconstruction which was also captured on video began with A1 showing the interviewer where the victim was killed, followed by A2, next was A3, then A4 and finally A5. PW6 further testified that he produced 3 DVD copies of the scene reconstruction. The video was played in Court and it showed the 5 Accused Persons showing the police where the incident happened and that all the five (5) Accused Persons denied having committed the offence.

2.20 In cross-examination, PW6 stated that the Accused Persons were not told what to say on the video and

voluntarily stated that they knew where the Deceased had died from. He further stated that it was normal for an accused person who has denied the crime to lead the Police to the crime scene. He also testified that none of the Accused Persons demonstrated how or said that they had killed the Deceased in the video.

2.21 PW7 was Detective Sergeant **Kennedy Chiluba Chisulo**, stationed at Chilanga Police Station, who testified that on 25th February, 2020, he reported on duty and was allocated a docket for a case of murder and he instituted investigations into the matter. The complainant Willard Daka reported that his Uncle the Deceased had been killed and set ablaze after being suspected of being a “gasser”.

2.22 According to PW7, the Deceased’s body was collected by the Police and taken to the mortuary, where a post mortem was conducted on the body of the Deceased on the 22nd of February, 2020, with Detective Sergeant Kaputula in attendance. A Post Mortem Report was then availed to PW7 who continued with the investigations. PW7 stated that through the help of their informers, the names of the suspects were availed to him and together with some other officers, they apprehended the suspects. Through further investigations, PW7 learnt that the suspects were involved in killing the Deceased and that a machete and a pick handle were used in the act. He further testified that A5 led to the recovery of the machete and that A2

led them to the recovery of a black pick handle. PW7 later engaged a Scene of Crime Officer Detective Sergeant Kazhimoto to help conduct a crime scene reconstruction. It was following the crime scene reconstruction that he decided to charge the 5 Accused Persons with murder. A warn and caution statement was administered and the five (5) Accused Persons freely and voluntarily replied denying the charge.

2.23 PW7 identified all exhibits collected during investigations and they were produced in Court as follows: -

1. Machete – marked as **P1**;
2. DVD – marked as **P2**;
3. Pick Handle – marked as **P3**; and
4. Post Mortem Report – marked as **P4**.

2.24 In cross-examination, PW7 conceded that the machete did not have blood stains and had not been processed forensically. He stated that A5 led them to PW4, where the machete was recovered. He further testified that he would not know whether the genitalia was missing from the Deceased's body as he had not had occasion to look at the body, but conceded that the post mortem report did not indicate that the Deceased's genitalia was missing.

2.25 In re-examination, PW7 testified that by the time they went to recover the machete and pick handle, it had

taken sometime and the items had been used in other activities, thus nothing would have been achieved in subjecting them to forensic tests.

2.26 That marked the close of the Prosecution's case. At the close of the prosecution case, I formed the opinion that the prosecution had established a *prima facie* case against **A1 (Ronny Chinyama)**, **A2 (Cephas Ng'andu)**, **A3 (Chanda Munkombwe)** and **A5 (Mumba Kasela)** and I accordingly put these four Accused Persons on their defence. **A4 (Stephen Phiri)** was acquitted as the prosecution's evidence had not disclosed any evidence that implicated him in the commission of the offence. The four Accused Persons elected to give evidence on oath.

3 DEFENCE'S CASE

3.1 **DW1** was Ronny Chinyama (A1), aged 56 years, residing in Makeni Villa at Plot No. 1719 and a bricklayer by profession. DW1 testified that on the 26th of February, 2020, at around 21:00 hours to 22:00 hours, he was seated by the veranda with PW2 in Linda Compound, when a group of people came whilst shouting "gasser". The Deceased who was being referred to as a "gasser" was dropped where DW1 was seated. DW1 stood up and told the group of people to remove the Deceased as it was his yard. The Deceased was taken to another place and that was the same place where the Deceased was later found dead.

- 3.2 The next morning, DW1 got up and started fixing the door. When PW1 came, he told him to stop what he was doing and that he had gone to look for transport money so that DW1 could go home. He asked PW1 what had happened but PW1 responded by saying that he should just leave as things were not okay. DW1 took the money (K30.00) from PW1 and told him that as soon as he was done working, he would leave. Thereafter, he boarded a bus and went to his home in Makeni. He stayed in Makeni for almost a week when to his surprise, the police officers went to apprehend him.
- 3.3 According to DW1, PW2 was the person that he sat with on that material day and as such he was very surprised when she came to testify against him. DW1 stated that he did not assault the Deceased but merely chased him and the group of people out of his yard. DW1 testified that he did not know anything about the testimony of PW1 and PW2 of asking for a machete from A5 and that he did not cut off the private parts of the Deceased as he was at home. On the issue of him taking a bath, DW1 testified that when he knocked off from work, he did not take a bath as he often delays before taking a bath. Therefore, he had not yet taken a bath on that day, but was yet to take a bath.
- 3.4 According to DW1, on the material day, PW1 was not around as he is a security guard and that it was not true that PW1 was sleeping on that day. He testified that PW1 was one of the people who were nominated to be

moving around to monitor the neighbourhood. DW1 further testified that he did not run away from home and had even been offered food in the morning by their new neighbour, whose name he could not remember.

3.5 During cross examination, DW1 conceded that he had not brought his new neighbour that offered him food to Court. He further conceded that PW1 and PW2 were never asked about whether DW1 was given something to eat by their new neighbour as this issue only came up in his testimony. Furthermore, DW1 conceded that he had not brought anyone to confirm that PW1 was guarding the neighbourhood on the fateful day and that at no point did his lawyer ask PW1 whether he gave him money to go to Makeni. DW1 also conceded that he had raised the issues of being given money by PW1 and of PW1 working as a guard for the first time. He denied that this testimony were after thoughts. DW1 further denied that he has said that he beat up the Deceased in the video that was played in Court.

3.6 **DW2** was Cephas Ng'andu (A2), aged 20 years and a Business Man by profession, who resides in Linda Compound, Lusaka. His testimony was that on the 19th of February, 2020, at around 21:00hrs, DW2 was in the poultry house when he heard a lot of noise around the compound. He left the poultry house with a stick in his hand to go and see what had transpired outside. When he reached near where a multitude of people were, he felt scared and seeing that he could not see what was

happening or recognise the person being beaten, he returned to his poultry house to continue his work until the next morning.

3.7 After 5 days, at around 03:00 hours, police officers went to his home and apprehended him. They took him to the Police Station where he was interrogated about the death of a person that he did not know. He further testified that he has been in custody since then. DW2 also testified that as he looks after the poultry he uses a stick and when he went towards the crowd he had actually forgotten that he had carried it in his hands.

3.8 During cross examination, DW2 stated that when he went to the place where the crowd was he did not see any dead body. He stated that he was scared because there were a lot of people there and others looked as though they were drunk. He was also scared because he saw a lot of people near his poultry. DW2 further testified that the pick handle that he carried in his hands on the particular day was his as he uses it in his poultry work. DW2 reiterated that he did not see the dead person as there was no light and there were a lot of people.

3.9 **DW3** was Chanda Munkombwe (A3), aged 15 years old, a school pupil in Grade 10 and resident of Linda compound. His testimony was that on the 26th of February, 2020, at around 21:00 hours, he heard some noise outside whilst watching television. As he peeped through the window, he saw some people beating a

person outside. He looked at the side of his neighbour's house and saw PW1 with his wife PW2. When he went outside the house, he met PW1 who told him that they had apprehended a "gasser". He and PW1 went to the scene to see the person who was being beaten by a mob and stood on sand about 8m to 10m, from the place where the victim was being beaten. They watched the mob continue beating that person.

3.10 DW3 then saw his neighbour Mr. Isaac, who inquired about what was happening. DW3 and PW1 told Mr. Isaac that there was a "gasser" who had been apprehended and he was being beaten outside the house. Mr. Isaac later went to sleep. PW2 then came out of the house and told PW1 to go and bath. Thereafter, DW3's mother came and told him to go inside the house. As they were going inside the house, DW3's father, Xavier Chiwila came and he secured the door. His father then called the police and told them to come to the scene as the person who was being beaten by a mob could be killed. As they were in the house, the noise outside increased, but DW3 decided to go and sleep, leaving his father and mother watching television.

3.11 The next day, his friend Stanley came to DW3's home and asked DW3 whether he had seen the person who had been burnt. DW3 was surprised to learn that the person was burnt and his friend took him to see the scene where the person was set ablaze. After they left scene, DW3 forgot about everything and was surprised

to see police officers come to his home 5 days later. He was taken to the police station where he was kept in custody for 2 months till he was brought to Court.

3.12 DW3 denied PW2's testimony that she saw him beating the Deceased, but stated that PW2 told the truth when she testified that his mum came to take him home. He further said that A1 was not at the scene of the crime.

3.13 During cross examination, DW3 testified that no one told him that they had apprehended a "gasser". He stated that he was with PW1 when they met Isaac and that he left PW1 outside when his mother came to pick him. DW3 further stated that he was with PW1 from the time the noise started at around 21:00 hours, which information he gave to his lawyer. He conceded that his lawyer did not cross-examine PW1 on whether he was with DW3 during the night of the disturbance. DW3 testified that he was with PW1 at the scene of the crime, though DW1 had testified that PW1 was not around as he was guarding. DW3 also testified that he was surprised when the police apprehended him as he had not participated in beating the Deceased. DW3 conceded that he did not tell the Court that he told the police officers that at some point during the incident he had gone back inside the house. He further conceded that he did not have evidence to prove that the police officers were paid to release other Accused Persons.

3.14 **DW4** was Mwansa Mulalu, aged 41 years, who is a bar tender and mother to DW3. Her testimony was that on

the 26th of February, 2020, at around 21:00 hours, she found a lot of people at the boundary of her yard. There was a lot of noise, but she only concentrated on seeing where DW3 was. She then called out his name and saw him standing by the door. She advised him to go inside the house. Thereafter she locked the door and they slept.

3.15 During cross examination, DW4 conceded that she did not know what transpired on the fateful night and the allegations against DW3 as she was not there.

3.16 **DW5** was Mumba Kasela (A5) aged 25 years, a building helper, residing at Linda Compound, whose testimony was that on the 26th of February, 2020, he did not participate in the beating of the victim. He stated that he went to the scene of the crime to check if the person being beaten was his relative but did not see the victim. He did not spend a lot of time at the scene as he went back home to sleep. When he knocked off from work the following day, he found out from his neighbours that someone had been murdered. After seven days he was surprised to see the police officers at around 02:00 hours on the 29th of February, 2020, who then apprehended him. According to DW5, he was detained in police custody with other Accused Persons till they were brought to Court. He further testified that on the 17th of February, 2020, he borrowed the machete for cutting firewood and he returned it on the 23rd of

February, 2020. DW5 denied participating in the beating of the Deceased.

3.17 During cross examination, DW5 testified that he only passed by the scene of the crime to check if the person being beaten was his relative and that at that time, he had already taken the machete back to PW4. He further said that the reason he was arrested was because he lived near the place where the victim was killed.

3.18 The Defence closed its case and the Court directed the parties to file their respective Submissions within a given time frame. Only the Prosecution filed their final Submissions on 27th of August, 2020. The Defence did not file any submissions despite being given ample time to do so.

4 SUBMISSIONS

4.1 In their final submissions, Learned Counsel for the Prosecution gave a brief summary of the facts as well as the evidence adduced against the Accused Persons by PW1 and PW2 to demonstrate to this Court the evidence of the commission of the offence.

4.2 It was contended by the Prosecution that though PW1 was arrested by the Police Officer, the evidence on record showed that he was apprehended in order to help the police in finding A1 who was on the run and that PW1 was released as soon as A1 was apprehended. Based on the foregoing, the Prosecution submitted that PW1 was not a suspect witness in this case. It was

further submitted that if this Court found that PW1 was a suspect witness, his evidence was corroborated by the evidence of leading as there was evidence of leading in the video where A1 clearly stated that he beat up the Deceased and took off his trousers when beating the Deceased as he believed that the Deceased would disappear.

- 4.3 The Prosecution further submitted that A1 in his testimony stated that he left the PW1's house because he was given money by PW1 so that he could leave the house. The Prosecution contended that this part of A1's testimony was an afterthought, as PW1 was not cross examined about this issue in Court and that it only came up when A1 was giving his defence.
- 4.4 It was further submitted by the Prosecution that the requirement to prove malice aforethought was highlighted in the case of ***The People v Njovu***¹ and cited **Section 204 (a) and (b) of *The Penal Code***¹, which provides for what amounts to malice aforethought. Based on the foregoing authorities, it was argued that the Accused Persons had an intention to cause the death or inflict grievous harm on the Deceased and that they had knowledge that their actions would either cause the death of the Deceased or inflict grievous harm.
- 4.5 Counsel for the prosecution cited the case of ***Douglas Mpofu and Washington Magura v The People***², where the Court stated that: -

"It is possible that there be certainty as to who did the actual leading, under what circumstances and whether or not incriminating evidence was found."

4.6 Based on the foregoing authority, Counsel submitted that there is evidence of leading on the record which was properly done as it shows that each Accused Person led the police to the alleged scene.

4.7 The case of ***John Mwansa and another v The People***³ was cited for its holding that:

"It is a well-established principle that there where the leading of the police to the scene or elsewhere by the accused whether voluntarily or not, had resulted in the discovery of real evidence, or the discovery of anything else not already known to the police, the evidence of leading is always admissible."

4.8 Based on the foregoing authority, the Prosecution submitted that this Court accepts the evidence of leading as something not already known to the police was discovered in this case, being the confession by A1 which was made freely and voluntarily that he took part in the beating of the Deceased. It was further submitted that the evidence of leading was admissible as a caution was recorded and it corroborated the testimony of PW1 and PW2.

4.9 Counsel for the prosecution contended that there was evidence on record that showed that the Accused Persons jointly acted together by beating the Deceased

and cited the case of ***Mutambo and others v The People***⁴, in support of this submission. It was further submitted that the Accused Persons joined in the prosecution of unlawful common purpose of beating the Deceased to his death.

4.10 Finally, it was submitted that DW1 in his testimony stated that PW1 was not at home on the material day as he was at work at night, whilst DW3 stated that he was with PW1 that night and that they were together for some time. It was argued that this inconsistency clearly showed that the Accused Persons were not telling the truth. In support of this argument, Counsel cited the case of ***Shawaz Fawaz and Prosper Chelelwa v The People***⁵ where the Court held that: -

“Cross examination cannot always shake the evidence of an untruthful witness in every respect. It is sufficient to show the unreliability of a witness if he is shown to have told an untruth about an important part of his evidence.”

4.11 In conclusion, the Prosecution submitted that the Accused Persons caused the death of the Deceased with malice aforethought and prayed that this Court convicts them for the offence of murder.

5 DECISION OF THE COURT

5.1 I have considered the case before me together with all the evidence adduced by the witnesses. I have further considered the Submissions by Counsel for the Prosecution and the authorities cited, for which I am

grateful. I may not discuss all the authorities cited, but I am alive to the principles espoused therein.

5.2 I have throughout the trial and indeed at the time of writing this Judgment borne in mind that the burden of proving the charge against the Accused Persons lies from beginning to end on the Prosecution and that they must prove every element of the offence beyond reasonable doubt. If at the end, I harbour any doubt as to the guilt of the Accused Persons or either of them, I am obliged to acquit that person. There is no burden whatsoever on the Accused Person to prove his innocence.

5.3 The Accused Persons stand charged with murder contrary to **Section 200 of The Penal Code¹**. The cardinal principle ingredient in murder is malice aforethought. **Section 200 of The Penal Code¹** provides that: -

“Any person who of malice aforethought causes the death of another person by unlawful act or omission is guilty of murder.”

5.4 Malice aforethought relates to the state of mind of the Accused Person at the time that he caused the death of the deceased. It is defined under **Section 204** of the said **The Penal Code¹** as follows:-

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

- a) *An intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;*
- b) *Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;*
- c) *An intent to commit a felony;...”*

5.5 It is not in dispute that on the 26th of February, 2020, the Deceased was beaten and burnt to death and that the cause of death was inhalation of smoke (Toxic Gases) due to fire due to assault by mob as indicated in the Post-mortem Report produced in evidence as Exhibit P4. The critical issue in this case is whether the Accused Persons with malice aforethought caused the death of the Deceased. In the case of ***The People vs. Njovu***¹, Blagden, C.J., as he then was, stated as follows:-

“...to establish 'malice aforethought', the prosecution must prove either that the accused person had an actual intention to kill or to cause grievous harm to the deceased... or that he knew that what he was doing would be likely to cause death or grievous harm to someone.”

5.6 From the foregoing, so far as this case is concerned, the burden of proof is on the Prosecution to establish the

charge of murder against A1, A2, A3 and A5, beyond all reasonable doubt. This is also in accordance with the definition of Murder under **Section 200 of The Penal Code**¹, which requires the Prosecution to prove beyond reasonable doubt that: -

- 1) The Accused Persons caused the death of the deceased Jimmy Daka;
- 2) By unlawful act or omission; and
- 3) With malice aforethought.

5.7 In the case of **The People vs. Njovu**¹, Blagden, C.J., as he then was, also stated as follows: -

“Malice aforethought relates to the state of mind of the accused person at the time he caused the death of the deceased.”

5.8 It is evident that the key ingredient is malice aforethought. *In casu*, the Prosecution must prove that the Accused Persons A1, A2, A3 and A5 either had an actual intention to kill or to cause grievous harm to the Deceased, Jimmy Daka, or that each of them knew that what they were doing would be likely to cause death or grievous harm to Jimmy Daka.

5.9 From my analysis of the evidence before me, it is the evidence adduced by PW1, PW2 and PW3 which directly links the Accused Persons to the commission of the offence. According to their testimonies, A3 was seen dragging the Deceased to the roadside and beating him with a weapon. A1 and A5 joined A3 in beating the

Deceased and that A3 left whilst A1 and A5 remained beating the Deceased. A2 was seen at the scene of the crime with a stick in his hands and that the Deceased was set ablaze.

5.10 It has been contended by the Prosecution in their Submissions that PW1 was not a suspect witness and that he was arrested to assist in locating A1 who was on the run following the incident. From the testimony of PW7, it was asserted that PW1 was apprehended in order to assist the police in locating A1 who had been living with him but had been on the run and that it was PW1 who directed the police officers to A1's relatives, which eventually led to his apprehension in Makeni. Additionally, PW1 confirmed that he had been arrested to assist the police in locating A1 and that he was released after a week, when A1 was apprehended. From my analysis of the foregoing submissions and testimonies, I find that PW1 was not a suspect witness as he was not arrested in connection with the offence before this Court but that he was apprehended to assist the police in conducting their investigations. It is trite that the police can only arrest persons for offences and have no power to arrest anyone to make inquiries about him. I am fortified in this position by the case of ***Mbandangoma v The Attorney General***⁶ where it was held as follows: -

"The arrest of the plaintiff was unlawful. The police can only arrest persons for offences and have no

power to arrest anyone in order to make inquiries about him."

5.11 In the foregoing authority, the government was condemned in damages arising from a criminal matter where the Plaintiff was detained pending further investigations. Based on the foregoing authority, I must state that the approach taken by the police was wrong at law as the police have no powers to arrest an individual for the purposes of conducting investigations. The police could have requested PW1 to go to the police station for questioning, which could have still resulted in the apprehension of A1. Therefore, the police should not have held him in custody for a week as they had no authority to do so. However, I find that PW1's testimony is credible as his testimony was consistent and I believe his version of the events that transpired at the scene of the crime.

5.12 I shall now consider the evidence of PW5 and PW6 concerning the scene reconstruction video produced as P2. In that video, the Accused Persons are each seen leading the police officers to the place where the Deceased was beaten and burnt. From my analysis of the video, I find that all the Accused Persons freely and voluntarily led the police officers to the scene of crime and is an indication that they knew the place where the Deceased was killed.

5.13 With regards A1's alleged confession, I find that A1 did not admit to beating the Deceased as contended in the

Prosecution's Submissions, but is heard admitting that he cut the beads from Deceased's wrists. In my view, the portion that would appear as a confession by A1 is the response to a question by the interviewer in which A1 agrees that the Deceased was the one that was burnt and not that he was admitting that he was the one who burnt the Deceased. I find that the said response did not amount to a confession. In fact, during the cross examination of PW5, who was the interviewer, he testified that none of the Accused Persons admitted to beating the Deceased. Additionally, during cross examination of PW6 who was the camera man during the recording of the scene reconstruction, he testified that A1 in the video did not say that he burnt or murdered the victim. Therefore, I find that A1 did not confess to beating or burning the Deceased.

5.14 I will now proceed to consider PW2's testimony regarding the weapons used during the attack of the Deceased. According to PW2, she heard A1 request for a machete from A5 so that he could use it to cut the Deceased's genitals. The said machete was recovered from PW4 who testified that he had lent it to A5 on 17th February, 2020, for the purpose of cutting firewood and that he returned it on the 23rd of February, 2020. However, the said machete was not subjected to forensic examination in order for finger prints to be uplifted or the possible blood on it to be examined in order to determine whether

it was used during the attack of the Deceased. According to the case of **Peter Yotamu Hamenda v The People**⁷, the Supreme Court held as follows: -

"Where the nature of a given criminal case necessitates that a relevant matter be investigated but the investigation agency fails to investigate it in circumstances amounting to dereliction of duty, the accused is seriously prejudiced because the 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 derelictions of duty."

5.15 Based on the foregoing authority, I do not accept that the said machete was the one that was used by A1 and A5 at the scene of the crime, as the prosecution have not conclusively adduced evidence to that effect. Additionally, PW4 testified that A5 borrowed the machete on the 17th of February, 2020 and returned it on the 23rd of February, 2020. This testimony was corroborated by the testimony of A5 who stated that by the 26th of February, 2020, on the day the Deceased was killed, he had already returned the machete to PW4. Further, according to the Post Mortem report, the private parts of the Deceased were not reported to have been cut off as alleged and accordingly, I find that the said act did not occur.

5.16 For convenience, I will now proceed to address the evidence against A2. From the testimonies of PW1, PW2 and PW3 alluded to above, A2 was seen with a stick at the scene of the crime but that they did not see him beating the victim. From A2's testimony in his defence, he stated that the reason he went to the scene with a pick handle in his hand was because he had been attending to the chickens in his chicken run and had the pick handle that he used during his security duties. He further stated that when he heard the noise of the mob outside his chicken run, he went outside to see what was happening and did not realise he had a pick handle in his hands. The existence of the said chicken run was confirmed by the testimony of PW7 who visited A2's home and testified that indeed there was a chicken run.

5.17 In the case of ***Saluwema v The People***⁸, it was held as follows: -

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

5.18 Based on the foregoing authority, I find that the explanation of A2 regarding his presence at the scene of the crime with a pick handle in his hands, is reasonably possible and I therefore accept it. Further, no forensic evidence was adduced by the prosecution that could link the said pick handle and A2 to the commission of the offence. I therefore find that the said pick handle

was not used at the scene of the crime as the prosecution have not led sufficient evidence that directly implicates or from which an inference can be drawn that A2 participated and used the pick handle in the commission of the offence. I therefore find A2, **Cephas Ng'andu**, not guilty of the offence of murder and I accordingly acquit him.

5.19 I will now proceed to consider the evidence of A1, A3 and A5 adduced in their defence. In his defence, A1 testified that he left Linda Compound at the request of PW1 and not because he had run away. He further testified that he was still at PW1's home the morning after the incident and was offered a meal by their neighbour whose name he could not remember. Further A1 conceded during cross examination that he was raising the issue of leaving at the request of PW1 and being offered a meal by his neighbor for the first time in Court and that he did not tell this to the police officers nor did he bring the said neighbor to Court to support his assertion. In the case of **Donald Fumbelo v The People**⁹, the Supreme Court stated as follows: -

"When an accused person raises his own version for the first time only during his defence, it raises a very strong presumption that the version is an afterthought and, therefore, less weight will be attached to such version. Therefore, in a contest of credibility against other witnesses, the accused is likely to be disbelieved. This is the approach which the trial Court took. We find no fault in it."

5.20 Based on the foregoing authority, I find that A1's explanation of the events that led to him leaving PW1's home was an afterthought and as such cannot be relied upon. I therefore accept the evidence of PW1 and PW2 that A1 left their home immediately after he heard people crying following his attack on the Deceased that resulted in his death.

5.21 I must state that I find it odd that A1 left the house immediately after the incident. If indeed A1 had not partaken in the beating of the Deceased, having witnessed the incident, he would have stayed within the area and assisted the police officers in identifying the people that had allegedly beaten the Deceased but he did not do so. Instead, he chose to leave the area after the incident and was only apprehended days later in Makeni. This clearly satisfies this Court that he ran away as per Prosecution evidence adduced before this Court.

5.22 Additionally, there were some inconsistencies in the testimonies of A1 and A3. A1 testified that he was with PW2 on the night the victim was killed and that PW1 who was a guard was not around on the said night. This was contradicted by A3 who testified that on the fateful night he peeped through the window when he heard noise outside and saw PW1 and PW2, who were his neighbours. He further testified that he saw PW1 and PW2 when he went outside and that he went with PW1

to the scene of the crime. This contradicted the testimony of A1 who had testified that PW1 was not around on that material day.

5.23 Additionally, A3 testified that after coming back from the scene of the crime, his mother (DW4) told him to go inside the house. He collected his chamber pot and went inside the house together with his mother and father. Thereafter, he heard his father phoning the police and went to sleep leaving his parents watching television. This testimony contradicts the testimony of his mother (DW4) who testified that when she got home on the fateful night, she called out to her son A3 and advised him to get inside the house. Thereafter, DW4 and A3 entered their house, locked the door and went to sleep. There was no mention from DW4 of her husband being there, calling the police or watching television. In fact, in cross-examination, DW4 categorically testified that she did not know anything that transpired in line with the allegations against A3 as she was not there. In the case of **Shawaz Fawaz and Another v The People**⁵, the Supreme Court held as follows: -

“Cross examination cannot always shake the evidence of an untruthful witness in every respect. It is sufficient to show the unreliability of a witness if he is shown to have told an untruth about an important part of his evidence.” (Court’s emphasis)

5.24 Based on the foregoing authority, I find that the inconsistencies in A1 and A3’s testimonies indicate that they were untrue and as such cannot be relied upon.

5.25 A3 and A5's testimonies in their defence consisted of bare denials. A3 stated that he did not beat the victim and was merely a by-stander at the scene of the crime. He further stated that he returned home when his mother requested him to return home. A5 stated that he was at the scene of the crime only to check if the person being attacked was his relative and that the reason he was arrested was because he lived near the area where the victim was killed.

5.26 Although A1, A3 and A5, allege that they did not beat the Deceased, the evidence of PW1, PW2 and PW3 clearly shows that this was a group attack. They clearly saw A1, A3 and A5 jointly beat the Deceased who had been dragged to a place that was within visible distance from PW1 and PW2's house. Further, there was no reason advanced in their defence as to why PW1, PW2 and PW3 would tell a lie about them nor did A1, A3 and A5 advance credible evidence to cast doubt on the evidence of PW1, PW2 and PW3. In my view, PW1 and PW2 had no motive to lie as A1 was living with PW1 and PW2 in their home prior to and on the night of the incident. Furthermore, PW1, PW2 and PW3 had known A1, A2, A3 and A5 from Linda Compound for a reasonable time as they all stayed in the same neighborhood. Therefore, I do not accept A1, A3 and A5's testimonies that they are not the ones who beat the Deceased.

5.27 The fact that A1, A3 and A5 descended on the Deceased and beat him using their hands and unknown weapons

is enough to satisfy this Court that the ingredient of malice aforethought has been established. A1, A3 and A5 ought to have known that their actions would cause harm to the Deceased, but they continued beating him till he was too weak to defend himself and was subsequently set ablaze.

5.28 In the case of **Haonga v The People**¹⁰, the Supreme Court held, *inter alia*, as follows: -

"If a death results from the kind of act which was part of the common design then if the offence be murder in one then it is murder in all."

5.29 Further, **Section 22** of **The Penal Code**¹ provides as follows: -

"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

5.30 Additionally, in the case of **Mutambo and others v The People**¹¹, the Court held as follows: -

"The formation of a common purpose does not have to be by express agreement or otherwise premeditated, it is sufficient if two or more persons join together in the prosecution of a purpose which is common to him and the others and each does so with intention of participating in that prosecution with the other or others. Secondly, it is the offence which was actually

committed in the course of prosecuting the common purpose which must be a probable consequence of the prosecution of the common purpose."

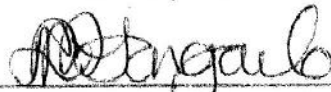
5.31 Based on the foregoing authorities, though A1, A3 and A5 may not have expressly agreed to cause grievous harm to the Deceased, it is sufficient that they joined together in prosecution of a common purpose and as such liability for the offence committed attached to each of them. I further believe that A1, A3 and A5's acts of beating the Deceased were done with the knowledge that they would inflict grievous bodily harm taking into account the manner in which they beat the Deceased. I therefore find that the Prosecution has discharged its burden of proof to the hilt.

5.32 In view of the above, I find the Accused Persons **Ronny Chinyama (A1)** and **Mumba Kasela (A5)** guilty of the offence of Murder, contrary to **Section 200 of The Penal Code¹** and I convict them accordingly. The charge for the offence of Murder, contrary to **Section 200 of The Penal Code¹** is proved against the Juvenile Offender **Chanda Munkombwe (A3)** and an Order will be made upon such finding.

5.33 You are advised of your right to Appeal.

Signed, Sealed and Delivered at Lusaka, this 25th day of

March, 2021.



**P. K. YANGAILO
HIGH COURT JUDGE**