

IN THE HIGH COURT FOR ZAMBIA

HKS/08/2011

HOLDEN AT SOLWEZI

(CRIMINAL JURISDICTION)

BETWEEN:

THE PEOPLE

VS

KAJILO MUZUNGU

Before the Hon. Mr. Justice I.C.T. Chali in Open Court on the **21<sup>st</sup>** day of **February, 2011**

For the State: Mr. M.C. Hamachila and Mr. K.I. Waluzimba - State Advocates

For the Accused: Mr. K. Msoni – J.B. Sakala and Company

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JUDGMENT  
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**Cases referred to;**

1. *Mwewa Murolo v. The People (2004) Z.R. 207*
2. *Lubendae v. The People (1983) Z.R. 54*
3. *John Mpande v. The People (1977) Z.R. 440*
4. *Andrews v. DPP (1957) ALL E.R 522*
5. *Andrews v. Director of Public Prosecutions (1937) 1 ALL ER 552*
6. *R v. Adomako (1994) 3 ALL ER. 79*
7. *Kambarage Mpundu Kaunda v. The People (1990/92) Z.R. 215*

**Legislation referred to;**

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

**Texts referred to:**

1. *Halsbury's Laws of England, Volume II (1) 4<sup>th</sup> edition*

The Accused was charged with three counts of manslaughter Contrary to Section 199 of the Penal Code, Chapter 87 of the Laws of Zambia. The particulars of the offence in the said Counts are that the Accused, on the 30<sup>th</sup> day of April, 2010 at Mufumbwe in the Mufumbwe District of the North Western Province of the Republic of Zambia unlawfully caused the death of the three named persons.

The Accused pleaded not guilty to all the three Counts when he was called upon to plead thereto.

Throughout the trial in this case I have borne in mind, and I still remind myself, that the burden of proving every element of the offence lies from beginning to end on the prosecution. The law requires that the prosecution prove the case against the accused person beyond reasonable doubt. Should I harbour any doubt as to the guilt of the accused, I am required by law to resolve that doubt in favour of the accused and to acquit him. The accused has no duty to prove his innocence in any way and his evidence, if given at all, must also be properly considered without applying a similarly high standard of proof as to his innocence. This is trite and has been emphasized by the Supreme Court in such cases as **MWEWA MURONO v. THE PEOPLE (2004) Z.R. 207.**

Section 199 under which the accused was charged provide as follows;

**“199. Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed “manslaughter”.....”.**

Whereas the Section provides a definition of “**an unlawful omission**”, it does not define “**an unlawful act**”. However, I had the benefit of the decision of the Supreme Court in the case of **JOHN MPANDE v. THE PEOPLE (1977) Z.R. 440** as well as other authorities as to the approach to take in considering what constitutes “**an unlawful act**”. I shall return to that case as well as other authorities at an appropriate stage in this judgment.

Let me first summarise the evidence in support of the charges, so far as I see it is relevant, in my view, to the case at hand. This came from ten prosecution witnesses. For convenience and proper flow of the narrative, I proposed to start with the testimony of PW3 **VERA KAUNDA**, PW4 **SELITA MUSEBO**, PW5 **MARY KAUNDA**, PW6 **FOSTINA KAUNDA** and PW7 **VICTOR MUSUMALI**.

PWs 3,4,5 and 6 were all aged 15 years at the time of the trial. Upon observing them, I expressed my satisfaction that the said young persons could testify on oath and I accordingly proceeded to receive their sworn evidence without administering any *voire dire* on any of them. The evidence of these young persons as well as that of PW7 is similar in a lot of respects and relates to the incident of 30<sup>th</sup> April, 2010 the subject of these proceedings.

PW3 said she was sleeping on 30<sup>th</sup> April, 2010 when, around 05:00 hours, she heard people singing along the nearby main road. She woke up and went to the road side where she found a group of about 50 youths who were celebrating the victory of one Mr. KAMONDO of the United Party for National Development (UPND) in the Parliamentary by-election which had just taken place in the Mufumbwe Constituency. PW3 joined that group and went with the group along the main road

singing. At THANDIZA MARKET the group turned and started going back along the same road towards the Boma.

When the group reached near the NEW APOSTOLIC CHURCH, PW3 said she saw a white vehicle belonging to a Company called BELGA traveling from behind them along that road towards the Boma also. She said that vehicle passed without incident. She said the group was walking on the left shoulder of the road and not on the tarmac. PW3 said that after what she considered to be two minutes, she saw a Tipper Truck also belonging to the Company BELGA traveling from behind them towards the Boma. That truck also passed the group without incident.

As the group was near the junction to the Farmers Training College, PW3 said she saw ahead of them, coming in their direction from the Boma, a motor vehicle which had its lights on. She said the vehicle which she knew to belong to Mr. KAJILO, the Accused, was being driven on the lane opposite to the side on which the group was walking. The group at that point was still on the left shoulder of the road as they faced the direction of the Boma, while the vehicle was on the other side on the tarmac.

She said as the vehicle drew near the group, it flashed its lights thereby dazzling the group. In the process some members of the group run over to the other side of the road. This witness said she was at the back of the group but was able to see the vehicle start moving from one side of the road to the other and that in the process it started knocking down some members of the group. She said after knocking down some people, the vehicle did not stop but continued driving away past the group towards the direction it had been going.

PW3 said it was dawn and that there was enough light to observe the scene. She observed some five people had been hit, two of whom were young people both of whom had died on the spot. The other three, she said, were seriously injured and that both the dead and the injured were later taken to the Hospital. Among those who had been hit was PW3's niece DORIS MULENGA who had been walking with PW3 on the same side of the road at the time and who was PW3's niece born of PW3's older sister. Of the Accused, PW3 said she knew him for a year before that day having been seeing him in the same area. She said it even had written on its spare wheel at the back **"OBAMA 1"**.

PW3 said she did not know to which side DORIS had gone after the vehicle had dazzled them with its lights but that she had herself remained on the left side of the road as they were going towards the Boma. After the vehicle had passed, PW3 saw DORIS lying on the right side of the road bleeding from her nose and mouth. She said two of the victims lay on the left side shoulder of the road.

Under cross examination by Counsel for the Accused, PW3 said accused's vehicle had not switched on its lights when she first saw it coming towards her group. She said the vehicle had not stopped before starting to knock down the people. She admitted that she was at the back of the group and that she had not seen exactly how DORIS or the other victims had been hit. She denied that the group had covered or obstructed the road, or gone to the accused's vehicle. She said some members of the group had gone to the right side of the road when the Accused had threatened them with the vehicle by dazzling the group with its lights. She reiterated that all the bodies, after being knocked down, were on the sides of the road and no one was on the road.

PW4, PW5 and PW6, who were also related to DORIS all gave evidence which was in most material respects similar to that earlier given by PW3. Indeed some of them openly expressed hatred for the Accused for having killed their relative. Even PW7's evidence was similar with the addition of the names of the other victims as himself, **KAVULA, EMMANUEL SAMBO** and **ALDOPH MUYOYO**. He said **DORIS** died some three days later at **MUKINGE MISSION HOSPITAL** where the injured persons including PW7 himself had been transferred. In respect of his own injuries from that incident, PW7 identified a Police Medical Report Form (ID1) which was issued after he had been discharged from the Hospital. That medical report form was later in the trial by PW9 as Exhibit P1. I shall revert to that Medical Report as well as other medical evidence later in this judgment.

In the case of PW7, he said, under cross examination, that his group did not attack the Accused that day. Nor was the group armed with anything. It also came out during the evidence of PW7 that in fact at the time of the incident the result of the by-election had not yet been announced.

PW8 was WADDINGTON MKANDAWIRE, a Motor Vehicle Examiner with the Road Transport and Safety Agency (RTSA) based at Solwezi who was called to Kasempa to examine a Mitsubishi Pajero Registration Number ABF 1375 which the Accused was said to having been driving at the time of the incident. He conducted the examination of the vehicle at Kasempa Police Station in the presence of a Police Traffic Officer after which he compiled a report of his findings which he identified in Court as ID2 and which was produced and admitted as Exhibit P2. His conclusion was that the vehicle was in good condition

prior to the incident. One of his observations was that the right spot light, the type used in foggy conditions, was damaged.

PW9 was Detective Sergeant JAMES LUNGU of Mufumbwe Police Station at the time who said he learnt of the accident which had occurred along the Solwezi-Zambezi Road about three kilometers from the Mufumbwe Boma on 30<sup>th</sup> April, 2010. He was later assigned to the case and on that day, when he visited the hospital where the casualties had by then been taken, he learnt of the two who had died as KENNEDY KAVULA and EMMANUEL SAMBO, while the three who had been injured and admitted to the hospital as DORIS MULENGA, VICTOR MUSUMALI and ADOLPH MUYOYO. These three were later moved to MUKINGE MISSION HOSPITAL where DORIS MULENGA died some three days after the incident.

On 1<sup>st</sup> May, 2010 PW9 received information from Kasempa Police that they had arrested the driver of the vehicle involved in the incident and impounded the vehicle he had been driving.

On 3<sup>rd</sup> May, 2010 PW9 travelled with other officers to Kasempa and attended the Post Mortem examination at MUKINGE MISSION HOSPITAL on the bodies of KENNEDY KAVULA and EMMANUEL SAMBO which had been taken there for the purpose. He produced the two Post Mortem Reports which were admitted in evidence as Exhibits P3 and P4 respectively. PW9 later received into his custody a Post Mortem Report through Inspector JERE of Kasempa Police concerning DORIS MULENGA, which was produced and admitted in evidence as Exhibit P5.

In the course of PW9's investigations, he said he went with the accused to inspect the scene of the incident from which he drew a sketch plan

which was also produced and admitted as Exhibit P6. As already stated, PW9 also produced the Medical Report Form (ID1) in respect of PW7, which was admitted as Exhibit P1. He later charged and arrested the Accused initially for the offence of causing death by dangerous driving of the three deceased persons.

Under cross-examination PW9 said he only went to the scene of the incident with the Accused and not with any of the witnesses. By then all the bodies of the casualties had already been removed from the scene. He said he was not able to tell the points of impact but observed blood stains as well as broken glass on the road.

The last prosecution witness was PW10 Detective Inspector LISHOMWA MWIYA who said that when the Accused's docket of causing death by dangerous driving was returned from the Chambers of the Director of Public Prosecutions, there were fresh instructions to have the accused re-arrested for the offence of manslaughter concerning the same three deaths. This PW10 later did. He said under warn and caution in the English language which accused understood well, the accused gave a free and voluntary reply denying the charges. The accused was later released on bail, when he appeared in court, pending trial.

After the close of the prosecution's case and in my Ruling delivered on 16<sup>th</sup> February, 2011, I found the Accused with a case to answer on each count as charged and I put him on his defence.

After his rights were explained to him, the Accused elected to give evidence on oath and said he would not call any witness.

Again, I propose to summarise the evidence of the Accused, again, so far as I see it is relevant, in my view, to the case at hand.



He said that on 30<sup>th</sup> April, 2010 he was in Mufumbwe when at about 05:00 hours he saw that one of the tyres on his vehicle, the Mitsubishi Pajero ABF 1375, was running low on pressure and he decided to drive to CHIZELA to pump it up. As he was driving all alone and as he joined the MUTANDA – CHAVUMA road heading to CHIZELA at a point near the junction to the KAKIKASA Farm Training Centre, he saw in front of him a mob of people, that had covered the entire width of the road, going towards the direction he was coming from, the Boma. He said, as he approached that mob, he hooted by way of requesting for his way through. He did not get any response. He hooted the second time and at the same time flicked the lights of his vehicle, which were on at the time, by way of asking for the way through the mob. He said because of the lack of response from that mob, he decided to move to the right hand side of the road to avoid running into the mob.

He said that at that point he saw some of the people in that mob were carrying with them machets while others had their arms linked as they advanced toward him. He then knew that his vehicle had been identified as belonging to a member of the Movement for the Multi-Party Democracy (MMD) on whose ticket his father, Mr. MULONDWE MUZUNGU, was a candidate in the current Parliamentary by-election in the area. The Accused was himself involved in that campaign to help his father.

He moved on and in the process he hit into the crowd and, as he was pulling through, he could hear the crowd banging on his vehicle and shouting “OBAMA, OBAMA”. He knew that those were opposition cadres and because of the prevailing volatile political situation in the area, coupled with his own personal experiences of being attacked during the campaign, he realized his life was in danger. He said he

managed to pull through the crowd in the process of which he realized he had bashed some people, all in an effort to secure his life. After pulling through the crowd and upon looking in the indoor rear-view mirror, he saw the mob pursuing him, which then prompted him to drive on to avoid the apparently irate mob.

He said he thought of stopping but realized that it was not good for him. He wanted to return to Mufumbwe to report himself at the Police Station, but he again feared that he might be followed and that his vehicle would be burnt and himself probably killed. That is how he decided to proceed on to Kasempa where he ended up reporting the incident and where he was arrested the same day.

The accused said that at the place where he met the mob, he could not stop and reverse because the mob was charging on him. He could not leave the vehicle and run because he said the mob could have caught up with him because he is not a good runner.

He denied the allegation from the prosecution witnesses that he started driving his vehicle in a zig-zag way. He said he maintained his side of the road and was merely looking for space through the crowd. He said the people he had hit in that mob had actually been on the tarmac. He said that it had not been his intention to hit them and he very much regretted the incident.

In cross-examination by Counsel for the State the Accused said that the road is commonly known as the Solwezi-Zambezi road and that he knows it to be a public road which even pedestrians have a right to use. He said he had a duty to other road users including pedestrians. He also admitted that he knew there were some three villages as on either side of that road around the area where the incident occurred.

He also admitted that all the systems on his vehicle were mechanically fit at the time.

He said that he had not known any of the civilian witnesses in the case prior to that incident, let alone engaged in any violent encounters with any of them. He said he was driving at about 70km/h at the time.

The Accused said that as he was ploughing through the crowd he realized it was an opposition and hostile mob from the chanting and singing. However, they were not wearing any party regalia. He admitted that he was on the right side of the road when he hit some of those people. He was not too sure how many, but he thought it as about five people he had knocked down, three of whom he said were on the right side of the road while the others were hit in the middle of the road. Finally, he said that he had been looking for some space to get out of the maze of people.

At the close of the case for the defence, I invited Counsel from both sides to file in their written submissions which they did and which I have taken into account in arriving at my decision.

From the foregoing evidence from the prosecution and the defence, I must now make any findings of fact, starting with the areas that are not, in my view, disputed.

Firstly, the fact that the Accused did on the material day drive into and knock down some five people along (and I am not yet saying on the actual or sides) of the Solwezi-Zambezi road a public road in Mufumbwe, is not disputed. The evidence of prosecution witnesses 3,4,5, 6 and 7 was adequately supported by the Accused himself. The accused person himself admitted that he was the one who had

knocked down those people when he drove his motor vehicle Mitsubishi Pajero Registration Number ABF 1375. I do not, therefore, have to delve into the identity of who did it. According to the Motor Vehicle Examiner, PW8, the vehicle was, at the time and prior to the incident, in good mechanical condition as per his report, Exhibit P2.

It is not also in dispute that the five people who had been hit by the said car sustained injuries from which three of them died. No intervening incident has been suggested or indeed is known to me from the evidence on the record that the three deceased persons died from causes other than injuries sustained from that incident. The causes of deaths are given in the Post Mortem Reports were as follows:

1. Exhibit P3 in respect of KENNEDY KAVULA  
(1) **Fractured neck (2) Head injury (3) Ruptured heart.**

Other significant findings recorded in respect of this deceased person are:

1. Fractured cervical spine
2. Head injury
3. Ruptured heart
4. Fractured left femur

2. Exhibit P4 in respect of EMMANUEL SAMBO:  
(1). **Fractured neck (2) Head Injury.**

Other significant findings recorded in respect of this deceased person are:

1. Fractured cervical spine

2. Head injury
3. Fractured left femur

3. Exhibit P5 in respect of DORIS MULENGA:

- (1). **Blunt trauma to the head resulting in subdural haemorrhage in the left cerebral hemisphere of the brain.**

Other significant findings recorded in respect of this deceased person are

- (1). Bruised right leg and toes.
- (2). Bruised left knee
- (3). Deformed left thigh and left wrist
- (4). Laceration on the right chest and breast.
- (5). Bruises in the back, occipital and chin.
- (6). Swollen right temporal area of the head.

In respect of one of the surviving victims of the incident PW7, his injuries recorded on exhibit P1 are: **“Open Fracture of right tibia and fibula”** and that these are consistent with **“severe blunt trauma”**.

All the foregoing I find to have been proved by the prosecution beyond reasonable doubt.

The Accused said that he could not stop and reverse or otherwise avoid the on-coming mob, and that, fearing for his life, he had to plough through that mob which had covered and obstructed the whole road. He said the mob was not responding to his signals or requests to

give way, that is, the hooter he sounded two times and the flicking on and off of the lights of the vehicle. Hence his first going to the right side of the road to find space in the maze and then to plough through and speed off. He denied having, at that place, driven in a Zig-Zag way to hit the crowd.

It will be recalled that the prosecution witnesses had talked of being dazzled by the lights from the Accused's vehicle. This must have been when the Accused said he "flicked" the lights on in order to warn the crowd of his approach. The witnesses said they started scattering on seeing the accused do so. The Accused said he did not stop. That is indeed the story also given by the prosecution witnesses who were at the scene. He said he moved from his side of the road to the right. In my view, from the point of view of the on-coming crowd, the Accused had started driving in a Zig-Zag manner in order to get at them. Again the Accused himself said as he was ploughing through the crowd, he thought that he had knocked down five people, three of whom he said were on the right side of the road while others were on the middle of the road. To my mind, that is confirmation that he drove in a Zig-Zag manner through that crowd.

Although Counsel for Accused, for reasons he could not articulate, had initially tried to object to the admission of the Sketch Plan drawn by PW9 of his findings when he visited the scene of the incident, he eventually withdrew that objection and same was admitted in evidence as Exhibit P6. Admittedly, that Sketch Plan had been drawn long after the casualties had been removed from the scene. Although no eye-witness to the incident was present at the time of PW9's visits to the scene, the Accused was present. Further, although it was not drawn to scale, it was not seriously challenged as to the positions of the blood stains and broken glass at the scene of the incident. The Sketch Plan

reveals, for instance, the presence of two spots of blood stains on the right lane of the road three metres and two metres respectively from the right edge towards the middle white broken line of the road where the Accused had admitted to have gone; two other spots of blood stains ahead on the far left side of the left lane twenty-one metres apart; and another blood spot ahead of the last one but off the road on that same side. It also shows some broken glass very near to the broken white line on the left lane. In other words, the first two spots of blood stains are on the right lane to which the Accused had moved, from his proper lane; the other two were ahead on the far left side of the road; the fifth one completely off the left side of the road; and finally the broken glass, probably from the spot light, was nearly the last evidence on the road near the broken white line in the middle of the road. The positions of the various spots are as seen from where the Accused had been driving from, the Mufumbwe Boma.

Under the spot light of this evidence, I can only but accept the evidence of the prosecution witnesses as to how the Accused was driving at the material time, namely, in a Zig-Zag manner or from one side to the other side of the road.

The Accused had admitted that he had been driving at 70 km/h at the time and that he had not stopped in the face of the on-coming crowd. From his own evidence, he came to know that they were members of an opposition party as he was actually ploughing through them although they were not wearing the colours of any particular party. The crowd was composed of a majority of older people as well as very young persons such as some of the witnesses who came to testify in his case. The suggestion that the crowd was armed was only put to PW7 and not the four younger witnesses from the scene. And, needless to say, it was denied.

I have, therefore, come to the inevitable conclusion that, irrespective of the climate in the area at the time, which most of the eye-witnesses denied they had experienced, that particular crowd was not armed or prepared for any violence. I can only conclude further that this explains why the Accused's motor vehicle was not damaged, not even by a stone, except the spot light whose damage can only be explained to the impact with the victims in the crowd.

The question then arises, and I go back as to whether the Accused's conduct amounted to "*an unlawful act*" as an element required to be proved under Section 199 of the Code.

Firstly, I find guidance from the Learned authors of HALSBURY'S LAWS OF ENGLAND'S 4<sup>th</sup> Edition where, in Volume II (1) paragraph 436 they state of "**Involuntary manslaughter**" as being committed:

**"(a) where death results from an unlawful act which any reasonable person would recognize as likely to expose another to the risk of injury; and**

**(b) where death is caused by a reckless or grossly negligent act or omission"**

At paragraph 444 of the said text, and summarizing the position of the decisions in the English Courts, the Learned authors proceed thus:

**"where death is caused by an unlawful act, the person doing that act is guilty of manslaughter only if any reasonable person would inevitably recognize that the act would expose the victim to the risk of at least some harm.....Although it need not be proved that the accused himself intended, or even fore**



**saw, harm to another, the requirement of an unlawful act will ordinarily require proof that he had the requisite mens rea to render that act unlawful. Thus where, for example, the unlawful act alleged is assault, a verdict of manslaughter cannot be supported unless it is shown that the accused had the mens rea for an assault”.**

**“Accidental killing”** is accordingly excluded as a crime of manslaughter as was the case in the Supreme Court decision in **LUBENDAE v. THE PEOPLE (1983) Z.R. 54** in which it was held that:

**“An event occurs by accident if it is a consequence which is in fact unintended, unforeseen or such that a person of ordinary prudence would not have taken precautions to prevent its occurrence....”**

That was the interpretation placed by the Supreme Court in the **LUBENDAE** Case upon Section 9 of the Penal Code which provides thus (reading only the relevant parts):

**“9(1) .....a person is not criminally responsible for .....an event which occurs by accident”.**

Closer at home once again, I find the Supreme Court decision in the case of **JOHN MPANDE v. THE PEOPLE (1977) Z.R. 440** to be quite instructive on the point. The facts in that case were that the Appellant was originally charged with murder. The prosecution withdrew that charge and substituted it with one of manslaughter to which the appellant pleaded guilty. The plea was duly entered and the statement of facts was then read out. This statement alleged that in the course of

some kind of beer drink with both his step-father and his mother and administered quite a severe beating to his mother as a result of which she subsequently died. The appellant challenged these facts and said in particular that it was not true that he had fought with his mother. He said he was fighting his step-father, that his mother came along and started insulting him, apparently because he was playing drums, that he pushed her and she fell against a stool and cut her head. It was common cause that the deceased died as a result of this blow on the head. The prosecution accepted the facts as stated by the appellant, and the court proceeded to impose a sentence of fifteen years imprisonment with hard labour.

The Supreme Court said **“the offence of manslaughter does not consist simply in an unlawful act resulting in death”**. The Court then quoted with the approval the dictum of Humphrey, J in **R V. LARRIN (1943) 2 ALL ER 217** who had said:

**“ where the act which a person is engaged in is unlawful, then if at the same time it is a dangerous act, that is, an act which is likely to injure another person, and quite inadvertently the doer of the act causes the death of that other person by that act, then he is guilty of manslaughter.”**

The Court then cited the case of **R V. CHURCH (1965) 2 ALLER 72** in which Edmund - Davies, J at page 76 illustrated the sense in which **“dangerous”** as used in **LARKIN** should be understood which formed the holding in the **JOHN MPANDE** case:

**“...an unlawful act causing the death of another cannot, simply because it is an unlawful act, render a manslaughter verdict**

**inevitable. For such a verdict inexorably to follow, the unlawful act must be such as all sober and reasonable people would inevitably recognize must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm”.**

In the **JOHN MPANDE** case the Supreme Court did not find any evidence as to the circumstances in which the appellant had pushed the deceased, hence the setting aside of the conviction.

At page 57 of the report in the **LUBENDAE** Case the point of law clarified by the Court was that **“in any offence for which a particular mental element is required, it is a defence that, although the accused did the acts which would be criminal if done with intent, they were done by accident. It was held (Per Lord Lindley) in FENTON v. THORNLEY (1903) A.C. 443 at page 453, that the word “accident” is not a technical term with a clearly defined meaning”.**

The prosecution have in their submission in this case cited a number of cases of particular interest to the legal point I am here dealing with. In the English House of Lords case of **ANDREWS v. DIRECTOR OF PUBLIC PROSECUTIONS (1937) 2 ALL ER 552** Lord Atkins had this to say at Page 566 of the report:

**“The principle to be observed is that cases of manslaughter in driving motor cars are but substances of a general rule applicable to all charges of homicide by negligence. Simple lack of care such as will constitute civil liability is not enough. For the purposes of the Criminal Law there are degrees of**

**negligence, and a very high degree of negligence is required to be proved before the felony is established. Probably of all the epithets that can be applied “reckless” most clearly covers the case. It is difficult to visualize a case of death caused by “reckless” driving, in the connotation of that term in ordinary speech, which would not justify a conviction for manslaughter, but it is probably not all-embracing, for “reckless” suggests an indifference to risk, whereas the accused may have appreciated the risk, and intended to avoid it, and yet shown in the means adopted to avoid the risk such a high degree of negligence as would justify a conviction”.**

Another case I have been persuaded to look at by the prosecution is also an English House of Lords’ Case of **R v. ADOMAKO (1994) 3 ALL ER 79** in which the ANDREWS Case was revisited with approval as:

**“the most authoritative statement of the present law ....(and on which) the ordinary principles of the law of negligence apply to ascertain whether or not the (accused) has been in breach of a duty of care towards the victim who has died” (per Lord Mackay LC at page 86 of the report).**

Counsel for the Accused in his submission argued for the acquittal of his client, contending that the standard of proof set out in, for example, the English case of **ANDREWS v. DPP** as well as the Zambian Case of **JOHN MPANDE v. THE PEOPLE**, already referred to in this judgment, as well as a plethora of other authorities had not been fulfilled.

Relying particularly on the case of **KAMBARAGE MPUNDU KAUNDA v. THE PEOPLE (1990/92) Z.R. 45** Mr. Msoni submitted that the danger the accused faced to his life in those circumstances was such that it was reasonable for him to take the action that he did despite the

danger to those people of doing so. In the circumstances, Counsel submitted, the prosecution had not shown at what point the accused's action can be considered unlawful to the degree of recklessness or gross negligence. Counsel argued that the prosecution had failed to prove the charges against the accused beyond reasonable doubt, and he urged for an acquittal.

With that background of the facts in this case and the law, I now proceed to make my decision on the charge against the accused in this case.

The prosecution have submitted that the accused's conduct on that day was very bad and indifferent to the risk of causing death when he drove through the group of fifty or so people. He ought to have appreciated the risk and, therefore, to have avoided the crowd, if indeed it was actually on the tarmac.

I entirely agree with that submission. It will be recalled that the accused told this Court that as he was driving on that road at a speed of 70km/h, he saw a group of people ahead of him at a distance of fifty metres. He said further that as he approached that crowd and at about twenty metres from them he concluded that they were a hostile crowd, but he drove on. In my view, at that point he should have maneuvered his motor vehicle and driven back. But he proceeded and went to knock down some people in that crowd on both sides of and off the road. That conduct shows a reckness disregard for the consequences of his actions, it fell far below the standard of care expected of a reasonable person, and I adjudge it to be grossly negligent.

The accused had admitted in cross-examination that he indeed owed a duty of care to other road users, including pedestrians. He clearly breached that duty and ended up causing the death of three people. I am satisfied that by his actions, the accused intended to kill some human beings or to cause grievous harm; he foresaw human death or grievous harm as a likely result of his action; further a reasonably prudent person in his position would have realized that death or grievous harm was a likely result of such an act.

I found no evidence that the prosecution witnesses lied in any material particular or that they concocted their evidence or that they had falsely implicated him in the offence. Neither was there any motive for the witnesses to do so.

In the premises, I find that the case against the accused has been proved on all the three counts beyond reasonable doubt. I therefore, find the accused guilty as charged on each and every count and I convict him accordingly.

Delivered in Open Court at **Solwezi** this **21<sup>st</sup>** day of  
**February, 2011**

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I.C.T Chali  
**JUDGE**

