

IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT REGISTRY
(CRIMINAL JURISDICTION)

HK/63/2011

BETWEEN:

THE PEOPLE
AND
JAIROS CHIRWA

Before the Hon. Mr. Justice I.C.T. Chali in Open Court on the 25th day of August, 2011
For the State: Mr. M.C. Hamachila – State Advocate
For the Accused: Mr. T. Chabu – Ellis and Company

JUDGMENT

Cases referred to:

1. *Mwewa Murono v. The People* (2004) ZR 207
2. *The People v. Njovu* (1968) Z.R. 132
3. *Chibovu and Chibovu v. The People* (1981) Z.R. 28
4. *Mwanza and Others v. The People* (1977) Z.R. 221
5. *Mbomena Moola v. The People* (2000) Z.R. 148
6. *John Timothy and Feston Mwamba v. The People* (1977) Z.R. 394
7. *Kalebu Banda v. The People* (1977) Z.R. 169
8. *Tembo v. The People* (1980) Z.R. 218
9. *R v. Barker* (2010) EWCA Crim 4 (Case No. 2009/02867/C5):
10. *Sinyama v. The People* (1993-1994) Z.R. 16

Legislation referred to:

1. *Penal Code Chapter 87 of the Laws of Zambia*
2. *Criminal Procedure Code, Chapter 88 of the Laws of Zambia*

The accused was initially jointly charged with one ISAAC CHIRWA with one count of murder contrary to Section 200 of the Penal Code Chapter 87 of the Laws of Zambia.

The particulars of the offence were that the Accused, on the 5th day of December, 2010 at Kalulushi in the Kalulushi District of the Copperbelt Province of the Republic of Zambia, jointly and whilst acting together did murder one FRIDAH MULONGWE.

They both pleaded not guilty to the charge.

I must also mention that JAIROS is the older brother of ISAAC CHIRWA. At the close of the prosecution's case I found ISAAC CHIRWA with no case to answer and I accordingly acquitted him. That left only JAIROS CHIRWA whom I had put on his defence.

I am alive to the legal principles that in criminal cases the burden of proving every element of the offence charged, and therefore the guilt of the accused, lies on the prosecution from beginning to end and that standard of proof is high, i.e. one beyond reasonable doubt. I am, therefore, bound to acquit the accused should I harbour any doubt as to his guilt (see the case of **Mwewa Murono v. The People (2004) Z.R. 207**).

Section 200 of the Penal Code under which the Accused was charged provides:

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

“Malice aforethought” is

“deemed to be established by evidence proving anyone 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;
- (d). an intention by an act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”

Blagden, CJ in the case of **The People v. Njovu (1968) Z.R. 132** said that:

“To establish “malice aforethought” the prosecution must prove either that the accused had the actual intention to kill or to cause grievous harm to the deceased or that the Accused knew that his actions would be likely to cause death or grievous harm to someone”

In the instant case I must be satisfied of the following, namely, that:

- (a). the Accused caused the death of FRIDAH MULONGWE;
- (b). by an unlawful act; and
- (c). with malice aforethought.

I heard four witnesses for the prosecution as well as from the Accused after he was found with a case to answer and was put on his defence. The following is the summary of that evidence.

PW1 was a twelve year old school pupil, FALESI MULONGWE, a young sister who lived with the deceased. I received her sworn evidence after conducting a voire dire and after satisfying myself that she qualified to give evidence on oath.

PW1 said that at about 17:00 hours she was with the deceased and other members of the family in the shelter at their home having supper when ISAAC arrived. They invited ISAAC to join in the food but he declined and just sat by. After eating, the deceased went inside the house leaving everyone outside. Where they had remained outside, she heard ISAAC say, **“I will not go until she gives me my money”**. When the deceased emerged from the house, ISAAC demanded his money. The debt was for a chicken

FRIDAH had taken which she had not paid for. She replied that she was going to give ISAAC his money as long as he ensured that his friend, who had got beer from her on credit, also paid her the K19,000 he owed her. ISAAC agreed to ensure that payment. However, FRIDAH told him to come back the following day to get his money because ISAAC was drunk. ISAAC then left.

Shortly thereafter, PW1 said they saw JAIROS coming. He was alone. He asked what was going on. PW1 said FRIDAH went in the house. JAIROS remained outside the house, took off his shirt, picked up a stick and stood by the door to the house. As FRIDAH was coming out of the house, JAIROS hit her with the stick on the left arm. FRIDAH went back inside the house and shouted to PW1 to run over to the neighbour's house to call them to her rescue. PW1 went and returned with CHINEMENA and LISELI who stopped the fight. JAIROS left and FRIDAH and the family later retired to sleep in the house.

PW1 said that at about 02:00 hours they heard something hit the door. FRIDAH asked who it was who was at the door, and they heard a voice say **"it is me JAIROS"**. She asked him what he wanted at that hour. He answered that **"The young man ISAAC you were quarrelling with has died by the stream. Come and collect his corpse and bring it here to mourn him"**. FRIDAH responded that she did not know how ISAAC had died and refused to come out.

PW1 said they then peeped through the window and saw JAIROS by the door with an axe. She said they were able to see JAIROS because of the moonlight. JAIROS then threatened to burn the house since FRIDAH was troubling him. He proceeded to fetch some grass and lit it from the fire which was in the shelter outside. When FRIDAH saw this she bolted to the neighbours place for help. JAIROS threw down the burning torch of grass and pursued FRIDAH. PW1 followed and came to see JAIROS take out a knife from his trousers pocket and stab FRIDAH who fell to the ground. JAIROS got hold of FRIDAH's hand and started dragging her towards the road while FRIDAH was mourning that she had been stabbed with a knife and that she was dying. She also shouted to

PW1 to go and get some help. By the road side to where he had pulled FRIDAH, PW1 saw JAIROS hit FRIDAH with the axe handle to her head. He had carried along the axe during his pursuit of FRIDAH.

PW1 then run to the neighbour's place and returned to the scene with CHINEMENA. They found JAIROS circling FRIDAH where she was lying motionless. CHINEMENA went back for more help and returned with LISENI and LWAMBULA and apprehended JAIROS and tied his hands and made him sit in the shelter by the house. The body of FRIDAH was then covered with a blanket and LWAMBULA went to report the incident to the Police. PW1 said she had known both JAIROS and ISAAC for two years before the date of the incident and identified the Accused as the JAIROS who had stabbed FRIDAH and hit the deceased with the axe handle to her head. PW1 said she was about one metre from the Accused when he stabbed the deceased with the knife. She described both the knife and axe used and identified them when they were shown to her in Court.

Under cross examination by Mr. Chabu, Counsel for the Accused, PW1 admitted that the deceased was her blood sister. She said her sister was married to a polygamist who on the date in question was at the second wife's home. She denied that the incident happened on 4th December, 2010 but on 5th December, 2010. She said when ISAAC arrived at their home he did not say anything until they had finished having their meal. That is when he demanded his K12,000 FRIDAH owed her for the chicken. She said when ISAAC was told by FRIDAH that she did not have the money that day and told him to return the following day, ISAAC did not complain. He just started going away. PW1 said ISAAC was drunk but he did not quarrel with FRIDAH over the money. PW1 denied that FRIDAH had hit ISAAC with a pot.

PW1 said they had called for help around 18:00 hours and the people who had come to separate the fight were ERICKSON, FRIDAH's father, and JEREMIAH CHINEMENA their uncle. She denied that they had come with an axe. After the quarrel between JAIROS and FRIDAH was separated everyone else left FRIDA's place.

It was also PW1's evidence that when JAIROS arrived around 18:00 hours ISAAC was leaving. JAIROS was apparently nearby when FRIDAH was telling ISAAC to go and return the following day for his money. When ISAAC saw JAIROS take off his shirt, ISAAC called out of his brother to leave FRIDAH alone. He said "**JAIROS, just leave them alone, let's go**". But JAIROS was saying "**yes, bring that money**", meaning the money for ISAAC's chicken. FRIDAH told JAIROS also that she did not have the money that day but would look for it the following day. But JAIROS refused to go away and instead picked a stick with which he struck FRIDAH when she emerged from the house. At that time PW1 said it was ISAAC who was drunk. She said JAIROS looked normal or sober. Around 02:00 hours, PW1 said it was only JAIROS who returned to their house. She was sleeping in the sitting room when she heard the bang at the door and went to awaken FRIDAH who was in her bedroom. She said FRIDAH ran out of the house when she saw JAIROS trying to set the house on fire with the lit grass torch he had. PW1 admitted she was scared when all this was happening but she did not scream nor did FRIDAH. She only followed her sister who was being pursued by JAIROS. She said throughout that time JAIROS was alone.

PW2 was JEREMIAH CHINEMENA who said that on 5th December, 2010 around 19:00 hours FALES (PW1) went to his home and informed him that JAIROS and ISAAC were beating FRIDAH. PW1 wanted PW2 to go and intervene. PW2 and his brother in law, ERICKSON, left for FRIDAH's home. There PW2 said he found JAIROS beating FRIDAH with the stick he had while ISAAC stood nearby. PW2 intervened. ISAAC had a cut on his eye brow which he said had been inflicted by ERICKSON for beating FRIDAH. After the said intervention by PW2, ISAAC and JAIROS left but PW2 suspected that the two brothers would return to harm FRIDAH so he invited her to go and spend that night at his home. But FRIDAH refused and remained at her home.

Around 02:00 hours PW2 was woken up by his wife who said she had heard shouts outside as if there was a fight. When PW1 arrived to tell them that JAIROS was at FRIDAH's home with an axe PW2 told PW1 to wake up KEN at the nearby house. As PW2 was approaching FRIDAH's house he heard her crying and saying "**You have**

killed me. Leave me alone”. Before PW2 reached the scene where the cry was coming from KEN caught up with PW2. When they reached the scene PW2 said he saw JAIROS with an axe pacing up and down around FRIDAH who was lying on the ground screaming. JAIROS then snatched the torch which PW2 had and started looking for something he seemed to have dropped at the scene. PW2 asked JAIROS what he was looking for but got no reply. It was FRIDAH who said she had been stabbed with a knife by JAIROS and that she was dying. Upon hearing what FRIDAH had said, JAIROS went over to where she was lying and struck her with something. PW2 could not tell what JAIROS had struck FRIDAH with because he was a little distance from the two but only heard the sound. By then KEN had gone back to seek more help and PW2 was scared and also run back to his house. As he was running he heard footsteps behind him and when he turned he saw JAIROS who had raised an axe to strike PW2. JAIROS only stopped from doing so when PW2 identified himself. The two then started going back to the scene where they found a lot of people had by then gathered. They found FRIDAH had died. That is when JAIROS was apprehended. PW2 identified the Accused as the JAIROS he was talking about. He said he had known both the Accused and ISAAC for two years before the incident in question and that they used to live at neighbouring farms in the area.

PW2 said ISAAC was not there when FRIDAH was killed. He was only present earlier in the day when the two brothers were beating FRIDAH. PW2 said he later saw the knife that was said to have been used to stab FRIDAH with as well as the axe. He described both weapons and identified them in court.

Under cross examination, PW2 denied that he and ERICKSON were related to FRIDAH. He said ERICKSON had been fighting with JAIROS and ISAAC earlier in the evening and that ISAAC was bleeding from an injury he had sustained in that fight. He denied having heard other people had attacked JAIROS and ISAAC or that ERICKSON had stabbed the deceased. He had heard FRIDAH complaining of the injuries she had sustained and he saw her bleeding. That night, JAIROS had said he was looking for JUKA who had injured and killed ISAAC. JAIROS was very angry that night.

The last prosecution witness was Detective Inspector EMMANUEL MSONI (PW4) who investigated the case upon receiving a report of death of the deceased. He said he visited the scene at MUKUTUMA Village, picked the body and transferred it to the mortuary. He also picked up the two suspects in the case who included the Accused. He was present when the body was identified to the Pathologist Dr. Olga by RODSON MWALE before a postmortem examination was conducted on it. He later received the Report on Post Mortem Examination which was received in evidence as Exhibit P.3. The cause of death on P3 was indicated as:

“Stab injury of abdominal cavity with profuse internal bleeding, pain and bleeding shock”.

Other significant /abnormal findings at examination were:

“Death due to stab wound on left side of abdominal cavity (2cm) with injury of the spleen and profuse internal bleeding, pain and bleeding shock”.

This witness also recovered an axe and knife which he produced in court and were admitted in evidence as exhibits P1 and P2 respectively. Lastly, he made up and his mind and charged and arrested the Accused and his brother for the offence of murder which the Accused denied after a warn and caution was administered to him.

Earlier, PW3 Inspector OSCAR MWIMBE conducted an identification parade at which PW1 identified the Accused as the person who had gone to their home at 02:00 hours and attacked the deceased leading to her death.

After finding the Accused with a case to answer at the close of the case for the prosecution, and upon his rights being explained to him, he elected to give evidence on oath and to call his brother ISAAC, who had recently been acquitted, as his witness.

In his evidence the Accused said that on the material day he left to go to FRIDAH's home to collect money she owed him for a chicken. On the way he found his brother ISAAC being beaten by FRIDAH, JEREMIAH (PW2) and several other people. Also present at the scene were ERICKSON, a relative of FRIDAH, who had a knife, KENNEDY and many other people. Accused said whilst there he saw ERICKSON stab ISAAC with the knife on the eye brow, left arm and shoulder whereby ISAAC started bleeding profusely and became unconscious. When Accused tried to find out why those people were attacking his brother, they turned on him and started beating him with sticks and a chain. Those people were accusing his brother of having been troubling their sister, FRIDAH, over a chicken. He said he tried to lift his brother to take him away but the people who surrounded him prevented him from doing so. They continued beating him and in the process ERICKSON took the knife to try to stab the Accused, missed his target and ended up stabbing FRIDAH who was nearby. FRIDAH cried that she had been stabbed which prompted ERICKSON to throw the knife to the ground. By then the Accused had sustained injuries and was himself covered in blood like his brother who lay there unconscious. The people then overpowered the Accused, whom they accused of having stabbed FRIDAH, and tied up his hands and legs and detained him in the shelter at FRIDAH's house where he remained until the following day when he was taken to Lufwanyama Police Station and later to Kalulushi with his brother who had also been picked. He said he had been beaten so badly that night that he even lost consciousness until about 06:40 hours the following morning. He denied having gone to FRIDAH's home at 02:00 hours to threaten to burn her house. He said by that time he had already been subdued and chained and was in the shelter. He said he had known JEREMIAH and ERICKSON for two or three years before that incident and he said both were related to FRIDAH.

However, under cross examination the Accused said he did not know the relationship between JEREMIAH and ERICKSON and the deceased. He said the money he had gone to collect from FRIDAH was for his chicken she had taken a week earlier. He said it was not for ISAAC and that he had not sent ISAAC to collect the money for the Accused. He said ISAAC was being beaten because of that chicken. He said there

were thirty to thirty five people who had attacked him and ISAAC that day. They beat them to the point where both of them lost consciousness.

ISAAC CHIRWA testified in defence of his brother, the Accused. He said on the material day he went to FRIDAH's home to get a K20,000 which FRIDAH owed for a chicken she had taken from him. He said he found other people who were drinking beer by the shelter, among those people he recognized FREDDY. However, FRIDAH told ISAAC that she could not give him the money and that ISAAC should get his money from his friend who owed FRIDAH some money for the beer he had drunk earlier. ISAAC said he did not know that friend but decided to go away. As he was going FRIDAH went to hit him on the head from behind using a pot. He said he did not know why she did that and he sustained an injury and fell to the ground. Other people went to his rescue and to get him up. He said he then left for his home. After going about 30 metres he saw other people coming in front who included JEREMIAH, ERICKSON and KENNEDY who grabbed and started beating him while accusing him of having been troubling their sister. Despite denying that he had been troubling FRIDAH those people continued beating him. In the process ERICKSON took out a knife and stabbed ISAAC on the left eye brow and left thigh. He said he felt dizzy and fell to the ground unconscious and only woke up at his home around 07:00 hours the following morning. As he was preparing himself to go and report the incident of the previous day to the Police, FRIDAH's relatives including JEREMIAH arrived and apprehended him and later handed him to the Police on allegations that he and JAIROS killed FRIDAH.

Under cross examination, ISAAC said the people who attacked him after leaving FRIDA's house were about nine and had not been among those who had been at FRIDAH's house when he had left. He said he was only stabbed two times, on the eye brow and on the thigh, not on the shoulder. He did not find out who had taken him home after he fell unconscious.

That is the summary of the evidence from both the prosecution and the defence from which I have to make my findings of fact.

On behalf of the Accused, Mr. Chabu has raised various issues in his submission that the prosecution has failed to prove the case against the Accused beyond reasonable doubt. I would like to deal with these in turn.

Firstly, it was contended that there was a dereliction of duty on the part of the prosecution in failing to call the medical practitioner to explain the cause of death. The fact that death occurred does not appear to be an issue, but only the cause thereof. Section 191 A(1) of the Criminal Procedure Code Chapter 88 of the Laws of Zambia provides:

“191A(1) The contents of any document purporting to be a report under the hand of a medical officer employed in the public service upon any matter relevant to the issue in any criminal proceedings shall be admitted in evidence in such proceedings to prove the matters stated therein:

Provided that-

- (i). the court in which any such report is adduced in evidence, may, in its discretion, cause the medical officer to be summoned to give oral evidence in such proceedings or may cause written interrogatories approved by the court to be submitted to him to reply, and such interrogatories and any reply thereto purporting to be a reply from such person shall likewise be admissible in evidence in such proceedings;**
- (ii). at the request of the accused, made not less than seven days before the trial, such witness shall be summoned to give evidence”.**

In the instant case, I did not find it necessary to call the pathologist to explain the contents of or her conclusions in the post mortem report. In my view the cause of death was clear and not from natural causes. Secondly, the accused and his Counsel made no application to have the pathologist called. In my view it is not in every case involving death that a medical officer ought to be called.

I am mindful of the various decisions of the Supreme Court touching on Section 191A some of which Mr. Chabu cited. For example, in the case of **Chibovu and Chibovu v. The People (1981) Z.R. 28**, the Supreme had this to say at Page 32 of the Report:

“All that the above provisions say is that the report of a medical officer....shall be admitted “to prove” the contents thereof. The section does not say that the report shall necessarily be admitted as proof conclusive of its contents. No doubt the legislature has specifically provided for the summoning of the medical officer, when either party or indeed the court may summon him as a witness in any event, in the face of an inconclusive as much as an involved or vague report. Usually indeed the contents of the medical report will in the least require elucidation...”

In the case of **Mwanza and Others v. The People (1977) Z.R. 221** which was referred in the Chibovu Case, the Supreme Court said at Page 222 of the Report: **“There may be cases in which the medical report will be sufficient to supply (the) information without it being necessary to call the doctor....”**

I did not find the post mortem report to be inconclusive, vague or involved. On the contrary, the information that was required, as to the cause of death, was given. In my view, the non-summoning by the court or by the prosecution did not prejudice the Accused in his defence.

Further in the case of **Mbomena Moola v. The People (2000) Z.R. 148 (S.C)** it was held that:

“It is not necessary in all cases for medical evidence to be called to support a conviction for causing death. Where there is evidence of assault followed by a death without the opportunity for a novus actus interveniens, a court is entitled to accept such evidence as an indication that the assault caused the death”.

From the foregoing it is my finding that the cause of death is as stated in the Post Mortem Report. There was no dereliction of duty.

The second issue raised by Mr. Chabu is that there was a dereliction of duty on the part of the police by failing to uplift and analyze finger prints from the axe and the knife which were said to have been handled by the Accused that day. He referred me on the point to the case of **John Timothy and Feston Mwamba v. The People (1977) Z.R 394** in which the Supreme Court held, *inter alia*:

“That if there is a dereliction of duty on the part of the Police in not testing an article for finger prints there will, if the article has surface on which fingerprints could be detected, be presumption in favour of the accused that there were fingerprints on the article which did not match the fingerprints of the Accused”.

The issue had been raised also in the earlier decision in the case of **Kalebu Banda v. The People (1977) Z.R. 169** in which the Supreme Court held:

“The presumption will not necessarily be fatal to the prosecution case; “favourable” means “in favour of” not “conclusive”. The extent of the presumption will depend on the nature of the evidence in question and the circumstances of the case; it is an item of evidence presumed to exist, but its probative value will depend on the facts. The presumption is simply notional evidence to be considered along with all the other evidence in the case”.

In the case before me now, PW4 the Investigating Officer was questioned under cross examination if finger prints were lifted for forensic examination. The witness said it was not possible to get finger prints from the knife because it was during the rainy season and many people had handled it. In my view this explanation is acceptable in the circumstances of this case and I, therefore, find that there was no dereliction of duty in this respect.

The evidence linking the Accused to FRIDAH's death was received from PW1 and PW2. PW1 said when Accused returned around 02:00 hours he was armed with an axe. After Accused's threats of torching the house, PW1 followed when FRIDAH run out to seek refuge at the neighbours house. She was behind the Accused who was pursuing her sister. That is when she saw the Accused take out the knife and stabbed FRIDAH who fell to the ground. She heard FRIDAH cry that she had been stabbed. PW1 said the Accused started dragging FRIDAH towards the road. She also said Accused hit FRIDAH with an axe handle to the head. It is at that point that PW1 run to seek help from PW2. It was PW1's evidence that she had the opportunity to see the Accused take out the knife from his trousers pocket and that she was about a meter from him when he stabbed FRIDAH.

PW2 said that when he was woken up and started going to the scene, he heard FRIDAH say **"you have killed me. Leave me alone"**. When PW2 reached the scene with KEN they found FRIDAH lying on the ground screaming while the Accused was pacing up and down around FRIDAH who said she had been stabbed with a knife by the Accused and that she was dying. PW2 later saw the knife that was said to have been used by the Accused to stab FRIDAH.

It is the said evidence of PW1 and PW2 which Mr. Chabu has submitted is not sufficient to warrant the conviction of the Accused. He submitted, firstly, that the evidence of PW1, a child of tender years, required to be corroborated. Secondly, Mr. Chabu argued that since PW1 was related to PW2 the latter's evidence could not corroborate her because they are witnesses with a possible interest to serve.

PW1 had said under cross examination that PW2 was her uncle. However, PW2 denied that the deceased was related to him. And although the Accused had initially spoken of a family relationship between PW2 and FRIDAH, he admitted under cross examination that he did not know if there was any such relationship.

I shall return to this issue later in this judgment.

Let me now deal with the evidence for the defence. Accused denied having been the person who stabbed the deceased. He said it was ERICKSON who had stabbed her after he missed stabbing the Accused who was his target. It was also his evidence that at the time FRIDAH was stabbed there were a lot of people numbering thirty to thirty five who had been attacking him and his brother. He said both himself and his brother got injured and bled to the extent that they lost consciousness. Although the Accused did not say what time he and ISAAC were attacked, I concluded from ISAAC's evidence that they were talking about the incident of early that evening when ISAAC had gone to demand the money FRIDAH owed him, that is, shortly after ISAAC had left FRIDAH's house.

According to ISAAC only a few people accosted him as he was going away and started beating him. Accused said he was stabbed on the upper left side of the head, on the eye brow, on the left wrist and the big left toe, while ISAAC was stabbed by ERICKSON on the left eye, on the head and on left arm near the shoulder. However, ISAAC in his evidence said he was stabbed on the left eye brow and left thigh before he lost consciousness.

My conclusion on the evidence of the Accused and his brother was that it was poorly rehearsed and exaggerated. In the case of the Accused I had observed that he hesitated a lot when answering questions under cross examination. I came to the conclusion that the evidence of both the Accused's and ISAAC was fabricated and an afterthought. As such I have rejected it.

I now return to the evidence of PW1 and PW2. Firstly, it is my finding that PW1 was the only eye witness to the stabbing of the deceased. PW2 arrived afterwards and did not see how FRIDAH had been stabbed. Mr. Chabu argued that as a child her evidence required to be corroborated and cited the case of **Tembo v. The People (1980) Z.R. 218** in which it was held that the evidence of all children who give evidence in court must be corroborated. The holding in the **Tembo Case** appears to still be the law in Zambia, although other jurisdictions are approaching the question differently. For

example, the court of Appeal for England and Wales had this to say about that approach to the evidence of child witnesses in the case of **R v. Barker (2010) EWCA Crim 4 (Case No. 2009/02867/C5)**:

“Many accreted suspicions and misunderstandings about children, and their capacity to understand the nature and purpose of an oath and to give truthful and accurate evidence at a trial have been swept away” (para 33).

However, that is because of the legislative provisions by way of the Youth Justice and Criminal Evidence Act 1999 in England.

In the **Barker Case**, the Court of Appeal further said:

“There remains the broad question whether the conviction which is effectively dependent upon the truthfulness and accuracy of this young child is safe. In reality what we are being asked to consider is an underlying submission that no such conviction can be safe. The short answer is that it is open to a properly directed jury, unequivocally directed about the dangers and difficulties of doing so, to reach a safe conclusion on the basis of the evidence of a single competent witness, whatever his or her age, and whatever his or her disability. The ultimate verdict is the responsibility of the jury” (Paragraph 51)

However, in the case before me I am bound to find corroboration to PW1’s evidence if I have to find the Accused had indeed stabbed FRIDAH.

This brings me to the evidence of PW2. Although this witness arrived at the scene after FRIDAH had already been stabbed, he said as he was approaching the scene he heard the voice of FRIDAH saying **“You have killed me. Leave me alone”**. And when PW2 arrived at where FRIDAH was lying, FRIDAH said she had been stabbed with a knife by the Accused and that she was dying.

With respect to what PW2 heard FRIDAH say, I find and will treat FRIDAH's words to be part of res gestate, or as words spoken by a person who is dying. In this regard, I have considered the case of **Sinyama v. The People (1993-1994) Z.R. 16** in which the Supreme Court had this to say as Page 19 of the Report:

“If the statement has otherwise been made in conditions of approximate, though not exact, contemporaneity by a person so intensely involved and so in the throes of event that there is no opportunity for concoction or distortion to the disadvantage of the defendant or advantage of the maker, then the true test and primary concern of the court must be whether the possibility of concoction or distortion should actually be disregarded in the particular case. The possibility has to be considered against the circumstances in which the statement was made”.

In the **Sinyama Case** the appellant had collected his wife, the deceased, from her uncle's house where she lived and went with her to his house. After an argument, the appellant doused the deceased with paraffin and set her ablaze. She fled to her uncle's house from where she had been collected a short while earlier and in answer to a question told her relatives, who came to be witnesses at the trial of the appellant that it was the appellant who had set her ablaze after losing his temper over a pair of shoes she had lost. The court accepted the application of that legal principle and allowed the admission of the evidence from the deceased's relatives.

The application of that principle was refused in the case of **Mwewa Murono v. The People (2004) Z.R. 207** in which the evidence indicated that quite a considerable time passed between the assault and the making of the statement. The court found that the statements made by the deceased implicating the appellant to her assault, which led to her death, were not contemporaneous or spontaneous with the event. It found that the possibility of concoction or distortion was very high in the circumstances of that case.

I accordingly accept that FRIDAH's words as narrated to the court by PW2 is corroborative of PW1's evidence as to who stabbed FRIDAH.

Although PW1 had said PW2 was an uncle to FRIDAH, and hence to her, I do not find that to be the case given the denial of PW2, an adult who knew better about family relationships. The Accused failed to establish any such relationship between PW2 and the deceased. In the circumstances I restate that PW1 could be and was actually corroborated by PW2.

On the evidence before me I find no evidence or reason to believe that PW1 and PW2 falsely implicated the Accused or that they were witnesses with a possible interest of their own to serve.

As I have already stated earlier, the stabbing of FRIDAH was done by the Accused. The stabbing was itself an unlawful act with an intention to cause grievous harm to the deceased. By stabbing the deceased with the knife Accused knew that he would probably cause the death of or grievous harm to the deceased. On the night in question the Accused was said to have been armed not only with a knife but also with an axe and had threatened to torch the deceased's house. He therefore had an actual intention of doing grievous harm to the deceased. Even when the deceased tried to run away, he pursued her. That in my view is what constitutes "**malice aforethought**".

Mr. Chabu submitted, in the alternative, that the Accused acted under provocation when he found that ISAAC had been assaulted by ERICKSON and that the charge ought to be reduced to manslaughter.

I find this argument unsupported by the evidence on the record. My finding is that FRIDAH did not assault ISAAC that day. Apart from the evidence of the Accused and ISAAC saying that FRIDAH had assaulted ISAAC, which evidence I found to be a fabrication, there was no evidence to suggest that this was the case.

There was no evidence of any acrimony between ISAAC and FRIDAH when he went to demand the money for the chicken. ISAAC simply started off to go. I do not find any

reason, therefore, for FRIDAH to have taken a pot to hit ISAAC with when they had not quarreled.

Even if it were to be accepted that FRIDAH had done so after failing to pay ISAAC, that incident took place around 19:00 hours while the Accused's act causing the death occurred around 02:00 hours. The act of stabbing FRIDAH could not be said to have been committed "**in the heat of passion, caused by sudden provocation.....and before there (was) time for his passion to cool**" as defined in Sections 205 and 206 of the Penal Code. In the circumstances that defence is not available to the Accused and I dismiss it.

The result is that on the totality of the evidence on the record, I am satisfied that the prosecution have proved the case of murder against the Accused beyond reasonable doubt. I accordingly find the Accused guilty of the murder of FRIDAH MULONGWE and I convict him thereof.

Delivered at Kitwe in Open Court this **25th** day of **August**, 2011

I.C.T. Chali
JUDGE