

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

HK/32/2010

BETWEEN:

THE PEOPLE
V
WINFORD MULUBWA
KENNEDY SIMFUKWE

Before the Hon. Mr. Justice I.C.T. Chali in Open Court on the 30th day of January,
2012

For the State: Mr. M.C. Hamachila – State Advocate

For the Accused: Mr. I. Choongwe – Senior Legal Aid Counsel

JUDGMENT

Case referred to:

1. *Mwewa Murono v. The People (2004) Z.R. 207*
2. *The People v. Njobvu (1968) Z.R. 132.*
3. *The People v Chimbala (1973) Z.R. 118*
4. *Mugala v. The People (1975) Z.R. 282*
5. *Zonde & Others v. The People (1981) Z.R. 337*
6. *Boniface Chanda Chola & Others v. The People (1988/1989) Z.R. 163*
7. *Kalebu Banda v. The People (1977) Z.R 169*
8. *Katebe v. The People (1975) Z.R. 13*
9. *Machipisha kombe v. The People (2009) Z.R. 282*

Text referred to:

1. *Phipson on Evidence, 14th Edition*

Legislation referred to:

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

The two accused persons now before me were initially charged with a third person, BRIAN SITAKA who was Accused Number 2, with two counts of murder contrary to section 200 of the Penal Code Chapter 87 of the Laws of Zambia, and one count of aggravated robbery contrary to section 294(1) of the Penal Code.

In the first count of murder the particulars of the offence alleged that the three accused persons, on the 6th day of May, 2009 at Chambishi in the Kalulushi District of the Copperbelt Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown, did murder one MATHEWS KALUBA.

In the second count of murder the particulars of the offence alleged that the three accused persons, on the 6th day of May, 2009 at Chambishi in the Kalulushi District of the Copperbelt Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown, did murder one JIMMY KAPYA SITALI.

In the third count, of aggravated robbery, the particulars of the offence alleged that the three accused persons, on the 6th day of May, 2009 at Chambishi in the Kalulushi District of the Copperbelt Province of the Republic of Zambia, jointly, and whilst acting together with other persons unknown, did steal US\$42,531, K133,923,891 and 100 airtime cards altogether valued at K349,943,891 the property of SINO METALS LIMITED and at or immediately before the time of such stealing did use or threatened to use actual violence to MATHEWS KALUBA and JIMMY KAPYA SITALI in order to obtain or prevent or overcome resistance to their being stolen.

All three accused persons denied the charges whereby the matter went to trial during which I heard evidence from five prosecution witnesses. At the end of the case for the prosecution I found A2, BRIAN SITAKA, with no case to answer and I accordingly acquitted him. Accordingly in this judgment, for convenience, I shall refer to WINFORD MULUBWA as the First Accused Person (A1) and to KENNEDY SIMFUKWE as the second Accused Person (A2).

I pause here first to remind myself that in criminal cases, the burden of proving each element of the offence charged and thereby the guilt of any accused person lies throughout the proceedings on the prosecution. The standard of proof required is very high, namely, one beyond reasonable doubt. If I should harbour any doubt as to the guilt of any of the accused persons, I am required by law to acquit that person. This is the law as propounded in the Supreme Court's decisions such as in the case of MWEWA MURONO v. THE PEOPLE (2004) Z.R. 207 in which it was held"

"In criminal cases, the rule is that the legal burden of proving every element of the offence charged and consequently the guilt of the accused lies from beginning to end on the prosecution. The standard of proof is high".

I further pause to re-state the offences charged.

In the case of murder section 200 of the Penal Code provides:

"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 defined under Section 204 of the Penal Code as follows (reading only the relevant part of the Section):

"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....."*

The case will be deemed to have been proved against an accused if the following elements are established beyond reasonable doubt:

(a). That the accused caused the death of the deceased;

- (b). That death resulted from an unlawful act or omission; and
- (c). That it was with malice aforethought.

In this regard see the case of THE PEOPLE v. NJOBVU (1968) Z.R. 132.

If any of these elements is not proved beyond reasonable doubt then the charge falls away altogether.

In the case of aggravated robbery the relevant part of Section 294(1) under which the accused persons were charged provides:

“Any person who, being armed with any offensive weapon or instrument, or being together with one person or more, steals anything, and, or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony of aggravated robbery...”

Regarding a charge of aggravated robbery, the Supreme Court, in the case of THE PEOPLE v CHIMBALA (1973) Z.R. 118, held:

“It is necessary, under a charge of aggravated robbery, to prove that the taking ad force used or threatened contemporaneously with the taking was accompanied by an intent to deprive the owner permanently of the thing taken.”

Also in the case of MUGALA v. THE PEOPLE (1975) Z.R. 282 the Supreme Court held that in a case of aggravated robbery:

“It is necessary for the prosecution to show that the violence was used in order to obtain or retain the thing stolen”.

I now turn to consider the evidence from the prosecution witnesses.

The evidence of PW1, MATHEWS KAMBANGAZI CHIZHEZHI, a Sergeant at SINO METALS Mine Police at the time, was that on the morning of 6th May, 2009 at about 05:30 hours he was on duty at the Tailings Dam Leach Plant when he was directed by Senior Inspector Lumande to proceed to the Administration Offices to check on the officers who had been assigned to work there. This was because those officers MATHEWS KALUBA and BULONGO had not been responding to the radio calls the Inspector had been making.

PW1 reached the Administration Offices at about 06:00 hours and found Senior Inspector LUMANDE had already arrived and was standing by a broken window at the Finance Offices. PW1 asked LUMANDE where the officers who had been deployed there were but was instructed to go around the building checking, which PW1 started doing. When he reached the office of the Chief Executive PW1 heard someone screaming from inside the offices. As he went towards the direction of the screams, PW1 met VICTOR KALUMBA, who was crying, who pointed inside the offices. Upon entering the offices, PW1 found an overturned lounge suite and a dead body on the floor which he identified as that of MATHEWS KALUBA. The body's legs were tied with a sisal string. PW1 then saw another body in the corridor in a pool of blood. He identified the second body as that of JIMMY KAPYA SITALI. Its legs were also tied with a sisal string and it had deep cuts on the forehead. He then went outside and reported to Mr. LUMANDE who said he would alert the Security Manager MBASELA. PW1 was later joined by other Mine Police Officers at the scene until the arrival of Detective Inspector NAMA and Detective Chief Inspector CHOOBWE from Chambishi Police Station some twenty to twenty-five minutes later.

PW1 said that when he entered the offices he observed sofas and records scattered, holes in the ceiling and in the floor, and that the mortice lock on the door had been damaged.

PW2 was BENSON LUMANDE NG'ANDWE an Inspector at SINO METALS at the time of the incident. He said that MATHEWS KALUBA and JIMMY KAPYA SITALI had, on 5th

May, 2009, been assigned to work at Administration offices. At about 19:00 hours, PW2 phoned the Administration offices and spoke to SITALI who told him that the two of them, KALUBA and SITALI, had reported for work there. At about 05:00 hours PW2 contacted the controller, CHISHALA, to find out how the situation was at the entire plant. He was told by CHSHALA that there was no response from the guards at Administration Offices. PW2 tried to contact those guards by his radio, mobile phone as well as land line but got no response from there. PW2 then contacted PW1 and asked him to meet PW2 at the Administration Offices. PW2 arrived there first. He checked the outside of the premises and saw that the dog was tied behind the premises. He saw broken window panes and burglar bars. He also observed that the entrance to the Administration Offices was open. When he entered the building he found JIMMY SITALI and MATHEWS KALUBA who had been battered and killed. He saw injuries all over the bodies of the two dead men. He said the chairs in the offices were scattered around. PW2 then reported the findings to the Chief Security Officer and went to report the incident at Chambishi Police Station. He later returned to the plant with Police Officers. After the Scenes of Crime Officers had inspected the place, PW2 helped in transporting the bodies of the two deceased guards to Chambishi Hospital Mortuary.

When PW2 returned to the plant, he was among the team of Police Officers and other people who checked the surroundings. In the process they found a safe in the bush at a distance of about 400 to 500 metres from the Administration Offices. The safe had been forced open.

PW2 said that later in the same month of May, 2009, Police Officers went to SINO METALS Offices with a man they said was a suspect in the case. PW2 identified Accused 1 as the suspect the Police Officers had taken to SINO METALS Offices later in May, 2009. He said Accused 1 led them around the premises up to the place in the bush where the safe had earlier been found. He said he had seen Accused 1 at the plant on about three or four occasions before the incident.

PW3 was CHISHALA JAMES KAULU, a Security Officer at SINO METALS at the time of the incident. He said that he reported for work at about 19:00 hours on 5th May, 2009. From about 04:20 hours on 6th May, 2009 he tried by radio to contact MATHEWS KALUBA and JIMMY SITALI who had been deployed at Administration Offices but got no response from them. At about 05:30 hours he informed PW2 about the lack of response from KALUBA and SITALI. PW2 tried to contact those guards also, but they were not responding. That is when PW2 instructed PW1 to proceed to the Administration Offices to check on those men and later went there himself.

PW4 was PETER KALASA who was an Assistant Human Resources Manager at SINO METALS at the time of the incident. He said at about 16:00 hours on 5th May, 2009 he borrowed a company vehicle, a Mitsubishi Twin Cab registration number ABD 4937, to enable him go into Chambishi Township to have a tyre from his personal vehicle mended. He returned to the Plant around 17:00 hours and found all the senior personnel, including the Head Driver with whom he wanted to leave the key for the company vehicle he had borrowed, had knocked off. He decided to leave the car key with MATHEWS KALUBA before he knocked off and left for home.

On 6th May, 2009 early in the morning, PW4 learnt of what had happened at the Administration Offices. He rushed to the Plant and found a lot of people had already gathered, including officers from the Zambia Police. He observed that the windows and burglar bars to the Finance Offices were broken. After being briefed by the Head of Mine Police, PW4 entered the building. By the Reception area PW4 saw the body of MATHEWS KALUBA. It had deep cuts on the head and there was blood all over the place. He observed holes in the ceiling.

On proceeding towards his office, PW4 found the body of JIMMY KAPYA SITALI which was lying across from the Finance Office. It had a cut on the head which looked like it had been inflicted by an axe or a panga. He also observed that one of SITALI's arms looked broken. The doors to both his office and Finance Office appeared intact.

After the matter had been reported to Chambishi Police Station and upon his return to the Plant, PW4 was asked about the key to the company vehicle he had borrowed the previous day. They checked the guard room where they expected the key could have been deposited, but it was not there. They checked the pockets of the deceased's clothes before the bodies were taken to the mortuary, but they did not find it.

PW4 said that when he was checking the offices he observed that one of the safes was missing from the Finance Office. That safe, he said, was used to keep Company money and other valuables. He observed marks on the floor along which the safe appeared to have been dragged up to a broken window out of which the safe had apparently been taken out of the building. Outside the building they saw some tracks leading away into the bush. Following those tracks, they found the same some 900 metres away. There was also a wheelbarrow which was apparently used to transport the safe from the building. The safe had its door forced open and was off its hinges. There were also a lot of papers scattered all over the place including Chinese meal cards in red, blue and green. PW4 later learnt that some meal cards and airtime cards could not be accounted for. Also cash in the sum of US\$42,000 and K133,000,000 was missing from the safe.

On 19th May, 2009 PW5 was called to Chambishi Police Station where he was asked by the CIO Mr. CHOOBWE if he could identify a key among some items the Police had recovered in the course of their investigations. PW4 said he immediately identified the car key he was shown because he had been using it a lot and for quite some time such that he had become familiar with it. He also recognized it by the registration number ABD 4937 that had been engraved on it before it was lost. In Court, PW4 identified the said key by the features he had indicated to the police earlier.

On 20th June, 2009 PW4 was again called to Chambishi Police Station where the CIO showed him a letter of the termination of employment of one KENNEDY SIMFUKWE by SINO METALS. PW4 confirmed to the Police that indeed said KENNEDY SIMFUKWE had worked for the company before he was terminated. He recognized the letter of termination which the Police showed him and later matched it with the copy he had on

the file at the company. The particulars on the letter as to National Registration Card Number also matched with the National Registration Card and Voter's Card the Police had recovered. He then learnt that said KENNEDY SIMFUKWE was a suspect in the case.

On that day PW4 was also shown some meal cards which they had recovered. He recognized them as some of the Chinese meal cards that had gone missing after the incident of 6th May, 2009. He said those meals cards were very peculiar to SINO METALS only. At the trial PW4 identified the letter of dismissal for KENNEDY SIMFUKWE (Accused 2) as well as the Chinese meal cards.

Under cross examination, PW4 said that there had been no forced entry to either his office or the Finance Office; that even the burglar door to the Finance Office was found intact. He said all the employees at the Company knew that the safe that had been taken was used to keep money because it was also the pay point.

PW5 was DETECTIVE CHIEF Inspector DAGREY CHOOBWE who was the CIO at Chambishi Police Station at the time of the incident and who also carried out the investigation in this case. He said that upon receiving a report of the incident at SINO METALS on 6th May, 2009, he proceeded there with other officers including Scenes of Crime Officers from Kitwe District Headquarters. He saw that one of the offices had been broken into through a window which had been used as entrance and exit by some people. At the Scene PW5 said he found two dead male persons with multiple injuries on them lying in pools of blood in the offices. He said arrangements were made to transport the bodies to the Mortuary where postmortem examinations were later conducted on them.

They then started searching the area. They followed what appeared to be a trail of a wheelbarrow from the building leading to the bush. About 300 to 400 metres into the bush they came upon a cash box that had been reported stolen from the offices. The cash box had been broken open. There were also iron bars, an axe and a wheelbarrow.

These items were taken into safe custody. PW5 also received a complaint of a missing car key for a Mitsubishi registration number ABD 4937.

PW5 said on 14th May, 2009 he received information from Serenje Police that they had some two suspects in custody by the names of EMMANUEL CHISALA and KELVIN BWALYA. PW5 travelled to Serenje where he was shown the two men who were in Police custody. He immediately recognized KELVIN BWALYA as WINFORD MULUBWA KABELAULA whom he knew before. He did not know EMMANUEL CHISALA.

PW5 interviewed the two, starting with EMMANUEL CHISALA. CHISALA told PW5 that he had come from Samfya with his uncle WINFORD MULUBWA KABELAULA, alias KELVIN BWALYA, to Serene for shopping. PW5 next interviewed MULUBWA, now Accused 1, whom PW5 had known earlier to be a resident of Chambishi. Accused 1 informed PW5 that he had picked his nephew CHISALA from Samfya for shopping in Serenje. PW5 became suspicious of Accused 1 over the name of KELVIN BWALYA he had given to Serenje Police and over the US Dollars and Kwacha he was found with. The two men also had a lot of goods with them when they had been apprehended, including about 5 new blankets, 20 chitenge materials, 8 sets of new pots, a TV set and new clothes. PW5 then travelled to Samfya with the two men. At CHISALA's house where Accused 1 was staying, PW5 found other goods including a solar panel, radio cassette player, clothes, heavy duty battery, power inverter, and musical home theatre. All these looked new. Upon searching Accused's trousers, PW5 said he found vehicle keys for a MITSUBISHI. PW5 then recalled the report of a lost car key for a MITSUBISHI vehicle at SINO METALS. PW5 then confiscated the car key and the pair of trousers in which it had been found. He decided to let off CHISALA and then travelled to Chambishi with Accused 1 and the items that had been recovered. PW5 said the car key that was recovered in Samfya was later on 21st May, 2009 identified by PW4 to be the one that he had entrusted to the guard on 5th May, 2009 as belonging to the SINO METALS. The witness also said that Accused 1 had been found with US\$ 3,192 and K3,160,000 cash.

PW5 took a warn and caution statement from Accused 1 which I admitted in evidence after a trial within a trial. I shall return to that statement later in this judgment.

PW5 said that after taking the said warn and caution statement he was led by Accused 1 into the bush where he recovered Chinese meal cards near an ant hill in Chambishi. He said this was about five to six kilometers from the SINO METALS Plant.

I have in this judgment left out PW5's evidence regarding how he went about apprehending the second suspect in the case, BRIAN SITAKA, because I do not find it to be relevant to the case now before me. It does not add value to the case for the prosecution or to the defence.

Regarding Accused 2, PW5 said that Accused 2 had been a suspect in the case from the information he had received during the investigations.

On 19th June, 2009 PW5 received information as to Accused 2's whereabouts in Chimwemwe Township of Kitwe. On the said day, he and other police officers went to where Accused 2 lived and apprehended him. They searched Accused 2's house and found suitcases with clothes and documents. Among the documents the police officers found were a letter of termination of Accused 2's employment at SINO METALS, an N.R.C, Bank card and voter's card all bearing the name of Accused 2. Also found in a suitcase were Chinese meal cards. That is how Accused 2 was taken to Chambishi Police Station and later arrested and charged jointly with others with the subject offences. Under warn and caution in the Bemba language which the accused persons understood well, both accused persons denied the charges.

PW5 produced the items recovered during the investigations including the Post Mortem Reports on the two deceased persons. These were all admitted in evidence.

Under cross examination PW5 said he had not lifted finger prints from the car key or the cash box that was recovered in the bush. The two items, he said, had rough surfaces.

He said at the crime scene a few finger prints were lifted by the Scenes of Crime Officer, CHUSHI, whom he had gone with. However, the witness said he did not know the result and if they matched those of the accused persons. In the case of the wheelbarrow the witness said the Scenes of Crime Officer told him that he could not lift any finger prints from it because it had rained heavily that night. In the case of the iron bars that were recovered PW5 said no finger prints were lifted therefrom because they had rough surfaces.

PW5 said that he recovered some Chinese meal cards from Accused 2's suitcase when it was searched at Accused 2's living quarters in Chimwemwe Township. No finger prints were lifted from the meal cards which PW5 described as of plastic material and a bit hard. PW5 said that the meal cards were in Chinese language because SINO METALS is a Chinese owned company.

That marked the close of the prosecutions case, after which I found the two accused persons each with a case to answer on the three counts and I put them on their defence.

Upon their rights being explained to them, Accused 1 elected to give evidence on oath and to call one witness. However, at the commencement of Accused 1's defence his witness was not available and he elected to dispense with the witness. In respect of Accused 2, he too elected to give sworn evidence and called one witness.

Accused 1 testified that on 3rd April, 2009 he left Samfya in the company of his nephew, EMMANUEL CHISALA, to go to Serenje to buy some goods. Upon arrival in Serenje and after his shopping he went to the Station with the goods to wait for transport to go back to Samfya. Whilst at the Station, Serenje Police Officers approached him and asked where he had gotten the items he had. He told the police officers he had just bought the goods from town. However, the police officers told Accused 1 that they suspected those goods to have been stolen. They then took him, his nephew and the goods to the Police Station where the Officers asked Accused 1 for invoices or receipts

evidencing his purchase of the goods. When Accused 1 produced three receipts bearing the name of KELVIN MUTALE the Officers decided to detain him because the name on the receipts were different from the names he had given the Police, namely WINFORD MULUBWA. Accused 1 said KELVIN MUTALE was one of his customers around the Lake Bangweulu area who had sent for some of the items he had bought.

After spending some four days in Police custody, Accused 1 said, he was handed over together with his nephew and the goods to Police Officers who had arrived from the Copperbelt. The goods included a heavy duty battery, 21 inch TV set, home theatre, a Philips Radio Cassette, 2 Solar Panels, an invertor, a DVD Player, 10 blankets, 20 chitenge materials, assorted baby clothes, one foam mattress, and 3 sets of pots. Accused 1 also had cash in the sum of US\$ 4,500 and K7,500,000=00 at the time he was searched by offices at Serenje which amounts were handed over to the Officers from the Copperbelt.

Before Accused 1 was taken to the Copperbelt he was asked by the officers from the Copperbelt where he lived. When he told them that he lived in Samfya they decided to first proceed to Samfya to go and search his house. At Samfya Accused 1 showed the police officers where he lived at his elder brother's house which was searched and from which they recovered two floor mats. At that point EMMANUEL CHISALA was left behind while Accused 1 was driven with the recovered items to Chambishi Police Station. At Chambishi, Accused 1 said he was informed that he had been picked up in connection with some money that had been stolen and two people who had been killed. Accused 1 told the Police Officers that he did not know anything about that case. They asked him for the names of people in some of the photographs they had taken from his suitcase, and he gave them the names of some of the people he could remember but said he did not know where those people lived.

Accused 1 said after reaching Chambishi he did not lead the Police to any place or bush to recover any items. He also denied having been found with any car key. He said apart from KELVIN MUTALE' s items, the rest were his property.

Accused 1 said that he had lived in Chambishi until around 2008 when he left to go and live in Samfya.

Under cross examination Accused 1 said that Police at Serenje had detained him under the name of KELVIN MUTALE which appeared on the invoices he had. He said they had refused to detain him under the correct name WINFORD MULUBWA. He said he did not tell the Police where his customers lived. He said Police did not ask him about KELVIN MUTALE.

Accused 2's case was that at about 13:00 hours on 17th June, 2009, a team of police officers arrived at his home in Chimwemwe Township in two vehicles. Without even interviewing him, the Police Officers got hold of him and started beating him. He said he sustained a broken hand and painful ribs in the process. They took out everything from the one room his wife was renting. They took out a mattress and beddings and three suitcases which had his and his wife's clothes. They took him and the items to Chambishi Police Station.

Accused 2 said that Police found a wallet on him which contained his National Registration Card, voter's card, connect Card and a letter of termination of employment from SINO METALS where he said he used to work. He said Police did not find any meal cards in his house.

Accused 2's witness was his wife, BIBIAN SIMFUKWE. She testified as to how the Police Officers had gone to their home on 17th June, 2009 around lunch time and started beating her husband. The Police Officers said they had gone to apprehend Accused 2 because he was a thief. They took a mattress, pots and beddings. They also took suitcases with clothes leaving out only her clothes. Those items were taken to Chambishi Police Station where she and Accused 2 were detained. She was only released after six days while Accused 2 remained behind.

At the end of DW1's evidence the defence closed its case.

At this point I must make my findings of fact and conclusions.

From the evidence of the prosecution witnesses there can be no doubt, and I find as a fact, that on the morning of 6th May, 2009 it was discovered that the offices of SINO METALS at Chambishi had been broken into and various property stolen there from. It is not in dispute that the method of breaking was quite violent as evidenced by the broken window panes and burglar bars. I have come to the inevitable conclusion that the persons who broke into those premises were the ones that inflicted the fatal injuries on MATHEWS KALUBA and JIMMY KAPYA SITALI which resulted in the deaths of those guards.

The Post Mortem Report in respect of MATHEWSA KALUBA shows the cause of his death to have been due to **“close fracture of the skull right side with brain damage”**. He was found with a fracture of the left shoulder, nine broken ribs, long injury, a ruptured liver and numerous stab wounds on the body.

Similarly for JIMMY KAPYA SITALI, his death was due to **“intracranial hemorrhage with brain damage”**. He was found, inter alia, with numerous head cuts, wounds and bruises.

There can be no doubt that infliction of such injuries meets the definition of malice aforethought under Section 204(1) of the Penal Code.

There is also no dispute that the two deceased persons had been deployed at the Administration Offices to secure or guard and protect company property. It is obvious that the perpetrators of the break-in used actual violence in order to obtain or retain the property that was stolen. This is borne out from the manner of entry in the offices as well as the vicious assault on the guards.

The only question is as to who were the culprits in the two murders and the robbery. In other words, is there any evidence linking the accused persons or either of them to the crimes charged?

The learned authors of PHIPSON ON EVIDENCE 14th Edition have discussed the various forms or types of evidence starting with the definition of the word itself thus at paragraph 1 – 03:

“Evidence as used in judicial proceedings, has several meanings. The two main senses of the word are: first, the means, apart from argument and inference, whereby the court is informed as to the issues of fact as ascertained by the pleadings; secondly, the subject matter of such means. The word is also used to denote that some fact may be admitted as proof and also in some cases that some fact has relevance to the issues of fact. In a real sense evidence is that which may be placed before the court in order that it may decide the issues of fact”.

Further at paragraph 1-04 the same authors deal with direct, indirect and real evidence as follows:

“By direct evidence is meant that the existence of a given thing or fact is proved either by its actual production, or by the testimony or admissible declaration of someone who has himself perceived it. By indirect or presumptive evidence is meant that other facts are thus proved, from which the existence of the given fact may be logically inferred. The two forms are equally admissible, and the testimony, whether to the factum probandum (i.e. the fact which requires to be proved) or the facta probantia (i.e. the facts which are given in evidence to prove other facts in issue), is equally direct; but the superiority of the former is that it contains at most only one source of error, fallibility of assertion, while the latter has, in addition, fallibility of inference. Little is to be gained from a comparison of their weight, since, save in the case of actual production, both forms admit of every degree of cogency from the lowest to the highest”.

Of ***“real evidence”***, the authors of PHIPSON ON EVIDENCE say at paragraph 1-05:

“Material objects other than documents, produced for inspection of the court, are commonly called real evidence. This, when available, is probably the most satisfactory kind of all, since, save for identification or explanation, neither testimony nor inference is relied upon. Unless its genuineness is in dispute, the thing speaks for itself”.

In this case the evidence connecting Accused 1 to the case is the car key that got lost during the night of the robbery. PW5 testified that the car key was found in Accused 1's trouser pocket at his home in Samfya after a search. Accused 1 in his defence said that the house in which he lived in Samfya belonged to his elder brother. He also said that it was searched by the police officers from the Copperbelt, whom I find included PW5. Accused 1 said police took only two floor mats from the said house after the search. He did not speak of any car key having been found there. He only denied having been found with any car key.

There was also evidence from PW5 that after Accused 1 had been apprehended and taken to Chambishi, Accused 1 led Police Officers, including PW5, into the bush some five to six kilometers from SINO METALS plant where they recovered Chinese meal cards which had been lost in the incident. Those meal cards were peculiar to SINO METALS, a Chinese owned company. However, Accused 1 denied having led the police to any place after his apprehension.

I have found as a fact that the car key that was said by PW5 to have been recovered in Samfya in Accused 1's trouser pocket belonged to SINO METALS and was left by PW4 in the custody of the deceased guards for safe keeping. It was engraved with the company's car registration number and was duly identified at the trial by PW4 who had been using it for a long time before it got lost.

As I have said, the meal cards that were recovered in the bush where PW5 said they had been led by Accused 1 were identified as belonging to SINO METALS.

Accused 2 was said by PW5 to have been found with similar Chinese meal cards when he was apprehended at his home in Chimwemwe Township. These were found in one of the suitcases. They were identified as belonging to SINO METALS and as having been among those that were lost in the incident in question. That set of meal cards is said by the prosecution to be the evidence connecting Accused 2 to the commission of the alleged offences. However, Accused 2 denied that he was found with any meal cards when he was apprehended.

I have considered that the evidence shows the incident took place on 6th May, 2009. Accused 1 was apprehended shortly thereafter and handed to PW5's team at Serenje on or about 14th May, 2009. The car key was recovered on or about 15th May, 2009. Accused 1 was warned and cautioned on 18th May, 2009 and led the Police Officers shortly thereafter into the bush where Chinese meal cards were recovered. Accused 2 was apprehended and meal cards discovered in his suitcase on 17th June, 2009.

In this case at the end of the trial within a trial, I had ruled that Accused 1's warn and caution statement had been given freely and voluntarily and I accordingly admitted it in evidence. I have reconsidered the circumstances under which that statement had been taken and I still think it was properly taken. In that statement Accused 1 clearly admitted his part in the commission of the aggravated robbery and by necessary implication in the murder of the deceased persons. That apart, he was found with the car key in Samfya that had been lost on the night of the incident in Chambishi about 10 days earlier. Likewise Accused 2 was found with Chinese meal cards within a short period of about 10 days after the incident.

In the case of ZONDE & OTHERS v. THE PEOPLE (1981) Z.R. 337, the Supreme Court held:

“The doctrine of recent possession applies to a person in the absence of any explanation that might be true when found in possession of the complainant’s

property barely a few hours after the complainant had suffered an aggravated robbery”.

That doctrine in my view does not only apply to “**a few hours**” after the incident but also to “**a few days**” thereafter depending on the circumstances of the case. In the absence of an explanation as to how the two accused persons come to be found with the property of SINO METALS which had been recently lost in the robbery and murders, I can only conclude that the two accused persons were among the culprits in that robbery and murders. This is not to say they had any duty to explain, but that I find no evidence suggesting that they are not the culprits.

On PW5’s evidence that Accused 1 led police officers in the bush where they recovered some Chinese meal cards, Mr. Choongwe, Counsel for the accused persons argued on the Supreme Court’s decision in the case of BONIFACE CHANDA CHOLA & OTHERS v. THE PEOPLE (1988/1989) Z.R. 163 which held:

“The leading by an accused of the police to a place they already know and where no real evidence is uncovered cannot be regarded as a reliable and solid foundation on which to draw an inference of guilt”.

The evidence of PW5 was not that Accused 1 led them to the place where they had earlier recovered the safe or cash box, wheelbarrow, iron bars and axe. That was some 400 to 500 metres from the Administration Offices. Where Accused 1 led the Police Officers after the warn and caution statement was some five to six kilometers from the SINO METALS plant, a different place where the Police Officers had not known about or gone before. And they did discover material, real and fresh evidence by way of meal cards which was not in their possession before then. In my view that authority does not assist the defence.

On the authority of the decision of the Supreme Court in the case of KALEBU BANDA v. THE PEOPLE (1977) Z.R 169 Mr. Choongwe further argued that the failure by the prosecution to adduce evidence of the results of finger print examination from the scene

of crime and to lift finger prints from objects such as the safe or cash box, iron bars wheel barrow and axe is fatal to the prosecutions case. In the KALEBY BANDA Case the Court held:

- “(1). Where evidence available only to the Police is not placed before the Court it must be assumed that, had it been produced, it would have been favourable to the accused.***
- (2). In this context “available” means “obtainable”, whether or not actually obtained.***
- (3). The first question is whether the failure to obtain the evidence was a dereliction of duty on the part of the police which may have prejudiced the accused. When evidence has not been obtained in circumstances where there was a duty to do so – and a fortiori when it was obtained and not laid before the court – and possible prejudice has resulted, then an assumption favourable to the accused must be made.***
- (4). 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”.***

Indeed the Police did not give an explanation as to why they did not adduce the evidence of the Scenes of Crime Officer, CHUSHI, who had lifted finger prints from the scene. As to the other items recovered, PW5 gave an explanation that these did not have smooth surfaces from which to lift such finger prints. However, bearing in mind the evidence of Accused 1 and Accused 2 having been found in possession of the items lost in the incident, it is my view that the accused persons cannot be said to have been prejudiced by the non-tendering of finger print evidence.

Lastly, I have warned myself of the possibility of false implication of the accused persons. I have considered whether that indeed could have been so in the instant cases. In the case of KATEBE v. THE PEOPLE (1975) Z.R. 13 and that of MACHIPISHA KOMBE v. THE PEOPLE (2009) Z.R. 282, the Supreme Court emphasized the need for the trial court to ensure that the danger of the false implication of or allegation against an accused is excluded. However, in this case, I have not found any motive for PW5 to deliberately and dishonestly allege that he found Accused 1 with the car key and that he later led the Police in the bush to where they found Chinese meal cards; or indeed that Accused 2 was found with the Chinese meal cards in his suitcase.

I therefore find that the prosecution have proved the case against both accused persons beyond reasonable doubt.

In the circumstances, I find both accused guilty on the two counts of murder and one count of aggravated robbery and I convict them accordingly.

Delivered at Kitwe in Open Court this 30th day of January, 2012

I.C.T. Chali
JUDGE