

**IN THE HIGH COURT FOR ZAMBIA**  
**HP/157/2010**

**HOLDEN AT LUSAKA**

**(Criminal Jurisdiction)**

**BETWEEN:**

**THE PEOPLE**

**VS**

**BENNY MUMA KABWE**

**AARON VWALIKA**

**MULENGA NGOSA**

Before the Honourable Madam Justice F. M. Lengalenga this 1<sup>st</sup> day of June, 2012 in open court at Lusaka

**For the people                               :     Miss C. S. Soko - State**  
**Advocate**

**For the accused     :     Mr. K. Phiri - Senior Legal Aid**  
**Counsel,**  
**Mrs. M. T. Weza - Legal Aid Counsel**

---

**J U D G M E N T**

---

**Cases cited:**

- 1. THE PEOPLE v ROBERT PHIRI & ANOTHER (1980) ZR 249**
- 2. CHIMBO & OTHERS v THE PEOPLE (1982) ZR 20**

**3. MANONGO v THE PEOPLE (1981) ZR 152****4. KAMBARAGE MPUNDU KAUNDA v THE PEOPLE (1990) ZR 215****5. MBOMENA MOOLA v THE PEOPLE (2000) ZR 148**

The juvenile accused, Benny Muma Kabwe, Aaron Vwalika and Mulenga Ngosa stand charged with the offence of murder contrary to section 200 of the Penal Code, Chapter 87 of the Laws of Zambia. The particulars of offence are that Benny Muma Kabwe, Aaron Vwalika and Mulenga Ngosa, on the 30<sup>th</sup> day of January, 2010, at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown did murder one Ronnie Mulenga. All the juvenile accused denied the charge and the matter proceeded to trial where the prosecution called six witnesses to testify on its behalf.

The prosecution evidence according to PW1, Victor Mulenga, a mechanic who operates at Chilulu market in Lusaka was that he was seated with his friend Mutale Njalili at the roadside around 14:00 hours at Chilulu market on 30<sup>th</sup> January, 2010, when a person known to him as Fred called him aside and told him that his elder brother, Ronnie Mulenga was being beaten within the market. When he rushed to their workshop within Chilulu market, PW1 did not find any fight but later he saw Benny Muma Kabwe holding his brother, Ronnie Mulenga and he lifted him by the waist while Mulenga Ngosa was beating him. PW1 then rushed to the scene to try and separate them and Victor Mulenga testified

that as he was doing that, three other people arrived and these were Aaron Vwalika, Lusa and Elvis who joined in the fight. After PW1 failed to stop the fight, Mutale Njalili went to his assistance and they managed to stop the people who were beating Ronnie Mulenga as he was not fighting back. Thereafter Ronnie Mulenga ran to the back of the shop and then Benny Muma Kabwe, Aaron Vwalika and Mulenga Ngosa followed him and they continued beating him according to Victor Mulenga. He said that he found his brother on the floor and the three juvenile accused were stepping on him and they were joined by Lusa and Elvis in beating him until PW1 and his friend Mutale Njalili managed to stop them and then PW1 advised his brother Ronnie Mulenga to leave and his assailants also left. Victor Mulenga testified that after a short time passed, his elder brother, Ronnie Mulenga returned and he noticed that he was shivering and he had blood on the side of his head and face, injuries and blood was coming from his nose. PW1 advised his brother to go and report to the police at Emmasdale Police Station and Victor Mulenga remained at the workshop and later his brother Ronnie returned to the workshop with a medical report form. PW1 further testified that the following day on 31<sup>st</sup> January, 2010, he escorted Ronnie to Chipata Clinic where he was given pain killers and referred to the University Teaching Hospital (UTH). Victor Mulenga stated that his brother went home and remained there until 22<sup>nd</sup> February, 2010 when he started complaining of headaches then his family members namely, Victor Mulenga, his sister Albina Chibesa, his mother, Jennifer

Chikota and his young brother Mwape Mulenga escorted him to the University Teaching Hospital where he was admitted. After his brother's admission, PW1 went to Emmasdale Police Station to report what had happened and thereafter one police officer, Woman Constable Zulu accompanied him back to the UTH to record a statement from Ronnie Mulenga. He testified that after the statement was recorded they went back to Emmasdale Police Station where she opened a docket and assigned a police officer to go with PW1 to look for Benny Muma since PW1 claimed to know where he lived but when they got to the house they did not find him. Thereafter, they proceeded to Chilulu market where they found him coming out of the market and the police officer apprehended him.

Victor Mulenga testified further that after some days, maybe two or three, he saw Mulenga Ngosa passing in Chilulu market and he rushed to Emmasdale Police Station and got a police officer who later apprehended him. PW1 informed the court that the following day after his brother had died on 6<sup>th</sup> March, 2010, Benny Muma Kabwe led them with the police to the house of Aaron Vwalika in the morning and he was not there but he was apprehended later in the afternoon. Victor Mulenga had stated that he had known Benny Muma Kabwe, Mulenga Ngosa and Aaron Vwalika for about three years because they used to be found in the market at Chilulu where he does mechanical work at the workshop. PW1 identified the three juvenile accused in court

and he further stated that the doctor had told them that Ronnie Mulenga had serious damages on the head.

In cross-examination, PW1, Victor Mulenga said that Fred who had called him from the roadside did not, however, help him to separate the people in the fight. He also said that he did not notice any injuries on Benny Muma because he just concentrated on his brother but he heard that he had some injuries although he did not see them. He said that Fred did not tell him that his brother Ronnie had injured someone and he denied that his brother was the aggressor.

PW2, Mutale Remmy Njalili testified to the effect that on 30<sup>th</sup> January, 2010 he was seated at the roadside of Chilulu market with his friend, Victor Mulenga when a certain man approached them and called Victor to the side and after talking for about ten to fifteen seconds, they both headed into Chilulu market. However, after a few minutes another man went to PW2 and informed him that while he was seated, his friend, Victor was involved in a fight inside. After going inside the market, PW2 found his friend, Victor trying to drag one man from his late brother and he also noticed that Victor was not involved in a fight but that there were about four or five people who were attacking Victor's late brother. He identified one of the assailants as Benny who he also used to know as "Doc" and after noticing that Victor was outnumbered, he joined in trying to stop the fight but they

were still outnumbered. Later PW2 managed to pull one other man and Ronnie Mulenga then ran to the shop but the other two people ran after him and tripped him and started kicking him and stepping on him on the head and chest. Upon seeing that PW2 let go of the person he was holding and he rushed to Ronnie Mulenga but before he could reach him his assailants picked him up and started dragging him to the roadside. At that point Mutale Remmy Njalili and Victor Mulenga threatened to retaliate physically and then a few other people arrived and went to help out and then Ronnie's assailants started talking of handing Ronnie Mulenga to the police and they left. PW2 said that he noticed that Ronnie Mulenga was shivering and he was bleeding from the head and so he and Victor advised him to go and report the matter to the police and he went. PW2 saw him when he went to visit him at his house and at the time, Ronnie Mulenga complained of having a terrible headache and body pains. PW2 informed the court that Ronnie Mulenga died on 6<sup>th</sup> March, 2010. He also said that he had known Benny close to two years and six months as he used to go to the market quite often to drink beer and he also knew him as a trouble maker. He identified Benny in court as the 1<sup>st</sup> juvenile accused and Mulenga as the 3<sup>rd</sup> juvenile accused.

In cross-examination, PW2, Mutale Remmy Njalili said he did not observe any injuries on Benny's body. He was not surprised to learn that the assailants of Ronnie Mulenga had rushed to report to the police and he said that it was the routine in recent

times for the aggressors to rush to report to police just to get the police on their side. He said that he did not learn of Ronnie Mulenga injuring one of the people who were fighting him.

PW3, Soul Mudenda, a Clinical Public Service Health Provider at Chipata Hospital in Lusaka, testified that he has a diploma in tropical health medicine and clinical health science and also a Bachelor of Science degree in healthcare and community education and a certificate in theatre sciences including a teachers' certificate in health sciences and that he had been practicing since 1980. He testified further that on 31<sup>st</sup> January, 2010 when he was attending to patients at Chipata Clinic around 12:00 hours a patient named Ronnie Mulenga entered the clinic and complained of general body pains and a headache and he told him that he was assaulted at his work place. PW3 said that he presented a police medical report form which he signed after examining him. He said that upon examining the patient he observed some bruises on his scalp but since he could not examine the complex of the scalp he prescribed him some pain killers and then he gave him a referral to UTH for a brain scan. He explained that they recommend a brain scan whenever they suspect some cerebral head injuries. PW3 also asked the patient to go back for review after all the necessary investigations and the patient left and never went back to the clinic. He further testified that later on 23<sup>rd</sup> March, 2010 he was summoned to Emmasdale Police Station to go and identify the police medical

report which bore the name Ronnie Mulenga and he also gave a statement. The police medical report form originated from Garden Police according to the stamp that PW3 saw.

In cross-examination, PW3 explained that the importance of getting a brain scan is to determine head injuries especially when there are no visible head injuries. He stated that most of the head injuries, especially those that affect the brain have five percent (5%) chance of being cured.

PW4, Albina Chibesa, the elder sister to the deceased, Ronnie Mulenga, testified that on 20<sup>th</sup> February, 2010 her mother Janet Chakoti sent her young brother Richard Mwila Mulenga to ask her to go and see her young brother, Ronnie Mulenga at Chazanga as he was sick and could not eat or sleep. She testified further that she bought a medical scheme and took him to Chipata Clinic on 22<sup>nd</sup> February, 2010 where an X-ray was taken and he was referred to UTH as they were told that the brain did not appear well since he had a wound on the head. She also confirmed that her brother, Ronnie Mulenga was taken to the University Teaching Hospital where he was admitted and remained until he died on 6<sup>th</sup> March, 2010. Albina Chibesa had testified that she is the one who identified his body to the doctor before the post-mortem examination was conducted. She stated that when she last saw her brother, Ronnie Mulenga on 25<sup>th</sup> December, 2009 before she was called to go and see him on 20<sup>th</sup>



February, 2010, he was just well, drinking beer and smoking too much.

In cross-examination, PW4 said that her brother Victor Mulenga had told them he knew the deceased's assailants by appearance and not their names.

PW5, Woman Constable Susan Zulu, № 36169 of Emmasdale Police Station, testified to the effect that on 27<sup>th</sup> February, 2010 he was on duty at Emmasdale Police Station around 17:30 hours when she was assigned to go to the University Teaching Hospital (UTH) to record a statement from a man who had been beaten and was admitted there. She went there in the company of one of his relatives who led her to Ward G and bed 21 and she was introduced to the man whose name was Ronnie Mulenga. He told her that he was suffering from a headache and backache and later she recorded a statement from him as he narrated the events of 30<sup>th</sup> January, 2010 at Chilulu market where he was involved in the business of welding and brake bonding. He explained how he ended up being assaulted by some young men who approached him and told him to stop doing his business from where he was working from but he did not do so. He told PW5 that he was later rescued by his but when he saw what was happening to him and he was taken to Garden Police Post where he got a medical report form and then proceeded to Chipata Clinic where he was attended to and thereafter he went home. Ronnie

Mulenga also told PW5 that at the time he did not have enough strength to proceed to the police station to make a report until 22<sup>nd</sup> February, 2010 when his headache and backache got worse and he was taken to the hospital. Woman Constable Susan Zulu testified further that on 23<sup>rd</sup> February, 2010, the deceased's relatives went and reported the matter to Emmasdale Police Station and that is when they were told to take the medical report form to the police station. Then on 27<sup>th</sup> February, 2010 she was assigned to go and record a statement from the late Ronnie Mulenga. PW5 informed the court that she did not pressurize him to make the statement because he had difficulties in talking but he told her that he knew his assailants and that he could identify them. However she said that he was in bad shape and that sometimes he paused before talking and it was clear that he was very ill and he was complaining about the backache and headache and he could not move. She stated that after recording the statement she read it back to him and he admitted that it was correctly recorded before he signed it.

PW6, Detective Sergeant Alberto Makwembo, № 32196 of Emmasdale Police Station testified that on 1<sup>st</sup> March, 2010 he was allocated a docket of assault occasioning actual bodily harm where Ronnie Mulenga was the complainant to investigate. He also learnt that there was a suspect by the name of Benny Muma Kabwe who was in custody and he got him from the cells and interviewed him and according to his testimony, the suspect later

led him to a house near Sheki Sheki Road along Kabwe Road to his friend Elvis and Lusa. He stated further that when they arrived there, they found Elvis who was a security guard and he ran away and closed the gate to the premises and when they followed him inside the yard, he climbed a tree and jumped over the wall fence and ran away. PW6 added that when he tried to ask the owner of the house about his son Lusa, he was elusive and so they left and after leaving that house, he was led by Benny Muma Kabwe to Aaron Vwalika's house opposite Emmasdale Police Camp. He stated however that when they got there they did not find him and so they went back to the police station. He further testified that on 6<sup>th</sup> March, 2010 around midnight, he received a phone call from Victor Mulenga informing him that his brother Ronnie Mulenga had died and thereafter on the same day of 6<sup>th</sup> March, 2010 around 08:00 hours he interviewed Benny Muma Kabwe in connection with Ronnie Mulenga's murder. He also learnt from Benny Muma Kabwe that his other two colleagues, Aaron Vwalika and Mulenga Ngosa were also in custody at Emmasdale Police Station and he went and got them and took them to the Criminal Investigations Department (CID) office where he interviewed all three of them over the allegation of beating up Ronnie Mulenga. He explained that when they did not give him a satisfactory answer, he charged and arrested them for murder contrary to section 200 of the Penal Code, Cap 87 of the Laws of Zambia. PW6 informed the court that he decided to charge them based on the statements from the witnesses, the

depositions, medical report and post-mortem examination report as he had even attended the post-mortem examination. Detective Sergeant Makwembo testified further that the three juvenile accused under warn and caution in Bemba the language they appeared to understand better they freely and voluntarily denied the charge and he remanded them in custody.

Pertaining to the post-mortem examination, PW6, testified that the deceased's body was identified by Albina Chibesa to Dr. Musonda and Dr. Mudenda in his presence and afterwards he was given a post-mortem examination report which was produced and admitted in evidence as exhibit "P1". He said that the cause of death was indicated as (a) meningitis due to (b) head injury due to (c) fractured skull. Detective Sergeant Makwembo later identified the three juvenile accused in court.

In cross-examination, PW6 explained that he based the 3<sup>rd</sup> accused's arrest on the eye witness statements. He, however, admitted that according to the statement he got from the 3<sup>rd</sup> juvenile accused, Mulenga Ngosa, he said that he was not anywhere near the scene. He also conceded that there was no medical report relating to assault apart from the deceased's statement.

In re-examination, PW6 stated that he did not receive any medical report form from the 1<sup>st</sup> juvenile accused, Benny Muma

Kabwe. He also said that he was not the one who apprehended the 3<sup>rd</sup> juvenile accused, Mulenga Ngosa.

At the close of the prosecution case, I found that the prosecution had established a prima facie case against the three juvenile accused and I found them with a case to answer and accordingly put them on their defence. Later their rights were explained to them. All the three juvenile accused elected to give evidence on oath and not to call any witness.

DW1, Benny Kabwe Muma testified that on 30<sup>th</sup> January, 2010 he went to Chilulu market where he used to drink beer and he found his friends Aaron Vwalika and Mulenga Ngosa and they started drinking beer together. Later between 14:00 hours and 15:00 hours he went to the toilet and on his way back he found Ronnie Mulenga who was grinding and cutting some iron bars. DW1 testified further that since the late Ronnie Mulenga had his back to the entrance that he wanted to use and the metal that he was cutting was producing sparks, he asked him if he could pass but Ronnie Mulenga told him that he was working. Benny Kabwe Muma claimed that the deceased insulted him by calling him by his male organ in the Bemba language and told him to move away. He said that he reacted by insulting him with the same insult and thereafter there was a scuffle between them as they slapped and pushed each other and DW1 claimed that the late Ronnie Mulenga hit him with a small hammer on his left upper

forehead. He testified further that soon afterward that his friends, Aaron Vwalika and Mulenga Ngosa arrived and found him on the ground and after he pointed at the late Ronnie Mulenga as the person who had hit him and they grabbed him. Benny Kabwe Muma admitted that he joined his friends in pulling the deceased so that they could take him to the police station and he said that whilst they were doing that, two people arrived and joined Ronnie Mulenga and thereafter a fight erupted. DW1 claimed that they were overpowered by the other group so they went to Emmasdale Police Station where he was given a medical report form which he took to Chipata clinic so that he could be medically attended to and afterwards he took it back to the police station where he gave a report and a statement was recorded. DW1 further testified that he told the police that he did not know his assailant but he used to meet him at Chilulu market and he was told to go back the following day on 31<sup>st</sup> January, 2010. Benny Kabwe Muma told the court that on 31<sup>st</sup> January, 2010, he went to Chilulu market in the company of two officers and they asked where the person who worked at that place was and he claimed that the two people he asked answered that he had been around and so he remained in the market while the police officers went back. He said that he waited there until about 12:00 hours but he was nowhere to be seen and DW1 went back and told the police who told him to go back the following day. He, however, stated that he did not go back there as he got busy with his school work until he was

apprehended on 28<sup>th</sup> February, 2010 on an allegation of assaulting someone and he was charged with assault.

In cross-examination by learned State Advocate, Miss Cassandra Soko, DW1 Benny Kabwe Muma denied that he was also with Iusa and Elvis and he denied knowing Elvis. He said that the house he took the police to is Aaron Vwalika's house. He explained that Ronnie Mulenga was working at his workshop which was attached to the drinking place and that his friends arrived after he had been hit with a hammer and he also hit him. Benny Kabwe Muma also informed the court that he would not know why PW1, Victor Mulenga and PW2, Remmy Njalili came to court and fabricated stories and told lies about him. He also said that he did not know that Ronnie Mulenga would die from a head injury because he slapped him. He also stated that the charge was changed from assault to murder and that that is when the police took his medical examination report form from him. He had, however, stated earlier that the police took away his medical examination form after they apprehended him on 28<sup>th</sup> February, 2010.

DW2, Aaron Vwalika testified to the effect that he recalled 30<sup>th</sup> January, 2010 when he went to Chilulu market to drink beer and he found Benny Muma and Mulenga Ngosa in the bar and they started drinking until Benny Muma Kabwe went to the toilet and some time passed and they noticed that he did not return

and then the owner of the bar Lwembe went and informed them that their friend was fighting outside. Then when DW2 went outside, he found Benny on the ground and he was bleeding from the forehead. When he asked him what happened, he pointed at the person who had beaten him and DW2 went and grabbed Ronnie Mulenga and pulled him to the roadside but then Ronnie Mulenga's young brother, Victor Mulenga and another person arrived on the scene and he asked him to leave his brother and then a crowd gathered and there was confusion and a fight erupted between him and Victor Mulenga. According to DW2 when he realised that he had been overpowered, he ran away and he advised Benny who had gone to the road to go and report the matter to the police because he himself was swollen and could not manage to accompany him. He testified further that on 4<sup>th</sup> March, 2010 when he arrived home around 08:00 hours from his elder brother's house in Kalingalinga, his elder sister told him that the police had been looking for him and they claimed that he had assaulted someone. Aaron Vwalika informed the court that he proceeded to Emmasdale Police Station where he was put in police cells on an allegation of assault by a woman police officer. DW2 denied fighting with the late Ronnie Mulenga and he claimed that he fought with Victor Mulenga.

In cross-examination, he maintained that he fought with Victor Mulenga and not Ronnie Mulenga after he dragged Ronnie Mulenga to the roadside when he wanted to take him to the



police. DW2 said that he did not see any blood on Ronnie Mulenga but he saw blood on Benny Muma Kabwe. Aaron Vwalika maintained that he was the one who was dragging Ronnie Mulenga to the roadside and not Benny Muma and Mulenga Ngosa as they were carrying school bags. He informed the court that Ronnie Mulenga was drunk and so was he and he said that when he entered the bar, he found Ronnie Mulenga drinking in the bar. He also stated that before Benny Muma went to the toilet, Ronnie Mulenga went to his shop which was next to the bar. He also said that he fought with Victor Mulenga when he was trying to rescue his brother.

DW3, Mulenga Ngosa also testified to the effect that on 30<sup>th</sup> January, 2010 he left home and went to Chilulu market to drink beer and he found two of his friends, Aaron Vwalika and Benny Muma at the bar in the market. Whilst they were drinking, Benny Muma went to the toilet and when about 15 to 20 minutes passed without him coming back, the barman went and told them that their friend was being beaten outside. Thereafter, he and Aaron Vwalika went outside the bar and they found Benny Muma on the ground and he was bleeding from the forehead. After asking him what was wrong, Benny Muma pointed at someone as the person who had beaten him. DW3 and DW2, Aaron Vwalika followed the man and grabbed him so that they could take him to the police and then Benny also arrived on the scene and the three of them dragged him to the roadside. Thereafter, DW3 saw two men

approaching them and they asked them where they were taking the man who had hit Benny with a hammer but after they were told that they were taking him to the police those people told them that they would not allow them to take him to the police. Mulenga Ngosa claimed that as they struggled with him other people arrived and the situation became chaotic and the three of them left and went to Emmasdale Police Station where Benny Muma went and reported and he later emerged with a medical report. DW3 and DW3 escorted him to the taxi rank and he got into a taxi and left and DW3 and Aaron went home. Then on 6<sup>th</sup> March, 2010 as Mulenga Ngosa was coming from Chilulu market, he met a police officer who asked him his name and then he told him that he was wanted by the police at Emmasdale Police Station and he went there. On arrival there DW3 was told that he had killed someone and he was detained in cells. Mulenga Ngosa said that he would not know if he fought with the deceased because at the time they were dragging the deceased so that they could take him to the police as two people joined them and started fighting with them including other welders the deceased used to work with.

In cross-examination, DW3 denied murdering anyone in his life and he said that the two people who approached them fought with them in order to rescue Ronnie Mulenga. He also said that he did not know anyone by the names of Elvis or Lusa.

At the close of the defence case I carefully considered the evidence before the court in its entirety and the uncontroverted evidence is that Ronnie Mulenga died on 6<sup>th</sup> March, 2010 and the cause of death was indicated as (a) meningitis due to (b) head injury due to (c) fractured skull, according to the findings in the post-mortem examination report. Further according to the evidence adduced, the deceased, Ronnie Mulenga was brutally assaulted on 30<sup>th</sup> January, 2010 by a group of people and three juvenile accused were identified by PW1, Victor Mulenga and PW2, Mutale Remmy Njalili as having been among the group of the late Ronnie Mulenga's assailants. The 1<sup>st</sup> juvenile accused, Benny Muma Kabwe (DW1) denied assaulting the deceased but claimed to have been assaulted by the deceased instead with a small iron hammer and sustained a head injury or wound on his left upper forehead. He, however, did not deny having engaged in a scuffle with the deceased and to put it in his own words, they slapped and pushed each other before Ronnie Mulenga allegedly hit him with a small iron hammer on the forehead. Unfortunately, the medical examination report relating to that alleged assault on Benny Muma Kabwe was not produced by the 1<sup>st</sup> juvenile accused to prove his allegation so this court will never know the truth as there were no eye witnesses to the alleged assault. I will revert to the 1<sup>st</sup> juvenile accused later.

I turn to the 2<sup>nd</sup> juvenile accused, (DW2), Aaron Vwalika who admitted in cross-examination that a fight erupted but that it was

between himself and Victor Mulenga. Since he did not deny being at the scene of the fight where the deceased was and grabbing and pulling him to the roadside, the issue of credibility of the evidence is left to the court to decide the veracity of his evidence.

Finally, the 3<sup>rd</sup> juvenile accused (DW3) Mulenga Ngosa had testified that he and DW2, Aaron Vwalika had grabbed Ronnie Mulenga with a view of taking him to the police and then they were joined by Benny Muma Kabwe and the three of them dragged him to the roadside. DW3 told the court that there was a fight between them which included other welders that the deceased used to work with. He also said that he would not know if he fought with deceased which does not rule out that he did not fight him. Therefore, considering the evidence before the court, all three juvenile accused have been placed at the scene of the alleged fight and they all admitted having been involved in a scuffle with the deceased, Ronnie Mulenga at some point.

I turn to the evidence of PW1, Victor Mulenga and PW2, Mutale Remmy Njalili in relation to identification of the three juvenile accused and corroboration of the evidence. In the case of **THE PEOPLE v ROBERT PHIRI & ANOTHER**<sup>1</sup>, it was held that the adequacy of evidence of personal identification always depends on all the circumstances surrounding each case which must be decided on its merits. In the instant case, PW1, Victor

Mulenga claimed to have known the three juvenile accused for about three years as they were often found at Chilulu market where he used to do mechanical work. He, therefore, knew them quite well and he even led the police to where Benny Muma Kabwe lived and when they did not find him at home, later on, PW1 saw him in Chilulu market and he went and called the police who apprehended him as he was coming out of the market. In the case of **CHIMBO & OTHERS v THE PEOPLE**<sup>2</sup>, it was held by the Supreme Court that although recognition is accepted to be more reliable than identification of a stranger, it is the duty of the court to warn itself of the need to exclude the possibility of an honest mistake. Further in **MANONGO v THE PEOPLE**<sup>3</sup>, the Supreme Court held that when dealing with the issue of identification, the risk of honest mistake is one of the factors to be taken into account in testing the credibility of witnesses. In the present case, I have considered the basis upon which PW1, Victor Mulenga claimed to be able to identify the three juvenile accused as his late brother, Ronnie Mulenga's assailants. First and foremost, the incident happened during the day time between 14:00 hours and 15:00 hours. Secondly PW1 claimed to have known the three juvenile accused for about three years. Thirdly, PW1's evidence of identification was corroborated by PW2, Mutale Remmy Njalili who had testified that he had known Benny Muma Kabwe for about two years and six months as he used to frequently go to Chilulu market where PW2 worked at that time. He had also informed the court that he knew him as a trouble-

maker. PW2 also identified, the 3<sup>rd</sup> juvenile accused, Mulenga Ngosa in court as one of the deceased's assailants thereby corroborating PW1's evidence. Therefore, the court has excluded the possibility of honest mistake with respect to the identification of the juvenile accused and who incidentally admitted having been at the scene at Chilulu market.

I now turn to the question of credibility of the witnesses and the evidence of the three juvenile accused. With respect to PW1, Victor Mulenga's evidence, I warned myself of the danger of the possibility of false implication of the accused as the said witness was the young brother to the deceased. In the case of **KAMBARAGE MPUNDU KAUNDA v THE PEOPLE**<sup>4</sup>, it was held that prosecution witnesses who are friends or relatives of the prosecutrix may have a possible interest of their own to serve and should be treated as suspect witnesses. In the instant case, there was evidence of PW1, Victor Mulenga and PW2 Mutale Remmy Njalili having rescued Ronnie Mulenga when they found the three juvenile accused who were joined by one Elvis and Lusa in beating the deceased, Ronnie Mulenga. Benny Muma Kabwe and Aaron Vwalika denied beating him and only admitted pulling and pushing him, whilst Mulenga Ngosa mentioned a fight and he was not sure whether he fought with the deceased in the confusion. Therefore, what this court has to establish from the medical evidence in the post-mortem examination report is whether the cause of death indicated could have come about as a

result of grabbing, pulling and pushing the deceased. Further, since the defence did not offer any evidence to show why PW1 Victor Mulenga and PW2, Mutale Remmy Njalili would have a reason or motive to implicate them in an assault on the deceased, Ronnie Mulenga, I accept their evidence which may be weighed or evaluated against the medical evidence.

The late Ronnie Mulenga died on 6<sup>th</sup> March, 2010 as a result of (a) meningitis due to (b) head injury due to (c) fractured skull. PW1 and PW2's evidence was that the three juvenile accused who were joined by Elvis and Lusa were kicking and stepping on the deceased's body, especially the head and chest. These two witnesses' evidence is supported by PW3, Soul Mudenda's evidence that on 31<sup>st</sup> January, 2010 when Ronnie Mulenga went to Chipata Clinic, he complained of general body pains and a headache and he told him that he was assaulted at his work place, which was at Chilulu market. PW3 upon examining the patient had observed some bruises on his scalp and he referred him to the University Teaching Hospital (UTH) for a brain scan. I have noted that this was a day after the incident at Chilulu market.

The three juvenile accused were initially charged with assault occasioning actual bodily harm contrary to section 248 of the Penal Code, Cap 87 of the Laws of Zambia but later the charge was substituted with one of murder contrary to section

200 of the Penal Code, after Ronnie Mulenga died on 6<sup>th</sup> March 2010, according to PW6, Detective Sergeant Alberto Makwembo, № 32196 of Emmasdale Police Station. The issue that this court must resolve is whether or not the prosecution has proved the offence of murder against the three juvenile accused persons beyond reasonable doubt as required by the law and I refer to section 200 of the Penal Code which provides:

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

Section 204 provides how malice aforethought is established by a person killing another with malice aforethought or intention to commit a felony but I will not labour on the details.

In the case of **MBOMENA MOOLA v THE PEOPLE**<sup>5</sup>, the Supreme Court held *inter alia* that:

**“.....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.”**

Therefore, from the foregoing and the evidence before this court,, I can safely accept that the assault on the deceased, Ronnie



Mulenga by the three juvenile accused caused his death which occurred within a year and a day, and in particular within five weeks. The question, however, is whether malice aforethought has been established on the part of the juvenile accused by the prosecution evidence in terms of the definition in section 204 of the Penal Code for the offence of murder to be constituted. From the foregoing provision, it is clear that the prosecution evidence does not disclose malice aforethought on the part of the juvenile accused. There was evidence of a scuffle between the deceased and the juvenile accused and evidence of assault but no evidence of motive for murder or intention to kill and in the absence of proof of malice aforethought, a conviction for murder cannot stand. Therefore, I find that the prosecution has not proved its case of murder against the three juvenile accused beyond all reasonable doubt as required by the law and I find them not guilty of murder contrary to section 200 of the Penal Code. However, on the evidence before this court, I find that a case of manslaughter has been established as there was evidence that the deceased, Ronnie Mulenga was brutally assaulted on 30<sup>th</sup> January, 2010 and that on 6<sup>th</sup> March, 2010 he died. On the strength of the Supreme Court's decision in the MBOMENA case which I followed with approval, I also accepted that in the instant case the assault caused the death of Ronnie Mulenga in terms of the provisions of section 199 of the Penal Code which states:

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

Therefore, having satisfied myself that the prosecution has sufficiently adduced evidence to establish the offence of manslaughter contrary to section 199 of the Penal Code, Cap 87 of the Laws of Zambia against the three juvenile accused, namely, Benny Muma Kabwe (or Benny Kabwe Muma), Aaron Vwalika and Mulenga Ngosa, I find them guilty of this lesser offence and I convict them accordingly.

However, the three being juvenile offenders, I will await the social welfare report for guidance in meting out the appropriate punishment.

DATED this.....day of June, 2012 at Lusaka

.....  
F. M. Lengalenga

**JUDGE**