

BETWEEN:

THE PEOPLE

V

CHRISTOPHER BANDA

Before the Hon. Mr. Justice Dr. P. Matibini, SC, this 20th day of November, 2012.

For the People: Mrs. M. Chipanta – Mwansa, Ag Assistant Senior State Advocate in the Director of Public Prosecutions chambers.

For the Accused: Mr. J. M. Chimembe of Messers JMC and Associates Legal Practitioners.

JUDGMENT

Cases referred to:

1. *Woolmington v Director of Public Prosecutions [1935] A.C. 462.*
2. *R v Mancinelli (1955-1958) N.R.L.R. 19.*
3. *R v Fulunete (1957) R and N 332.*
4. *Hermes v R (1961) R and N 34.*
5. *Kapowezya v The People (1967) Z.R. 35.*
6. *The People v Njovu (1968) Z.R. 132.*
7. *Kampangila v The People (1969) Z.R. 59.*
8. *Ratten v R [1972] A.C 378.*
9. *The People v Ng'uni (1977) Z.R. 376.*
10. *Mwale v The People (1984) Z.R. 76.*
11. *R V Andrews [1987] A.C. 281.*
12. *Tembo v The People SCZ Appeal Number 56 of 2006 (unreported).*

Legislation referred to:

1. *Penal Code, cap 87 ss. 199 and 200.*
2. *Criminal Procedure Code, cap 88, ss. 128, 149, 168, and 192.*

Works referred to:

1. P J Richardson, Archbold Criminal Pleading, Evidence and Practice 2012 (Thomson Reuters (Professional) UK Limited, 2012.)
2. Hadge M. Malek, Phipson on Evidence, Seventeenth Edition, (Thomson Reuters (Legal) Limited, 2010)

The 1st accused; Christopher Banda, aged 24, stands charged with the murder of Humphrey Makombe, on 16th May, 2010, contrary to section 200 of the Penal Code. In a bid to prove the offence, the prosecution called seven prosecution witnesses.

The first prosecution witness was Lucia Chezango; a headwoman of Chikwema village, Lusaka. I will continue to refer to her as PW1. PW1 recalled that the deceased was suspected to have stolen some maize. As a consequence, he was arrested by the accused, and two other persons by the name of Bostone, and Greenwell Chulu; the 2nd accused. After he was arrested, he was questioned about the theft. In the process of questioning, the deceased was slapped twice by the 1st accused. After this incident, the deceased went home, and fell ill. Shortly afterwards, PW1 learnt that the deceased had died.

The second prosecution witness was Joshua Kaingu, a brother to the deceased. He also resides at Chikwema village, Lusaka. I will continue to refer to him as PW2. PW2 testified that he was not present when his younger brother was beaten. However, when he knocked off from his work place, he was informed by a friend that his brother; the deceased, had been beaten. When he arrived home, he found him and was not well. PW2 enquired from his brother what had happened. He replied that he had been taken to PW1's home where he had been beaten by the accused person because he was found stealing maize. In the course of the beating, he started coughing blood. After the beating his brother complained of pain in the neck and the ribs. The following day, PW2 decided to call on PW1, and enquired from her what transpired the previous day. PW1 confirmed the incident as narrated above.

After receiving the brief from PW1, PW2 returned home. And still found that his brother was not well. With the assistance of his wife, PW2 bathed his brother, and put him to sleep. Thereafter, PW2 went out to visit and socialize with his friends at the Tavern. Shortly afterwards, PW2's wife followed him at the Tavern. And informed him that the condition of his brother had deteriorated. In response, PW2 requested his younger brother to rush back home, and check on the condition of his brother. When the younger brother reported back, he informed PW2 that his brother was stiff.

After PW2 received that information, he decided to summon the accused persons. The accused persons responded positively to the summons. And later the accused persons, accompanied by PW2, went to check on the deceased. When the trio arrived home, they found that his brother had passed on. PW2 immediately reported the death of his brother to the police. And he informed the police that his brother was beaten by the accused persons, on Thursday 13th May, 2010. And later passed on, on Sunday 16th May, 2010.

The third prosecution witness, was Jackson Mwalabulu. Aged 34, he is a businessman, and cousin to the deceased. And I will continue to refer to him as PW3. PW3 recalled that on 20th May, 2010, he went to identify the deceased in the mortuary at the University Teaching Hospital (UTH). He was accompanied by Sergeant Makuyi of the Zambia Police Service. PW3 was requested to identify the deceased because prior to his death, he had known him for a long time. The deceased was identified by PW3. And his body was taken for post mortem. PW3 proceeded to make arrangements for the burial of the deceased.

The fourth prosecution witness was Peter Mongela, aged 56 years. He is a Small Scale farmer. He is resident in Chikwema village. PW4 recalled that on 13th May, 2010, he was summoned to a meeting which was discussing the management of the village. Whilst at the meeting, came four young men. PW4 knew three of them by name. Namely, Christopher Banda; 1st accused, Greenwell Chulu; 2nd accused; and Austin Nkausu. PW4 later learnt that the fourth person was the deceased.

During the course of the village management meeting, PW4 was requested by PW1 to attend to the four young men, since the meeting was about to come to an end. The four young men narrated to PW4 what had transpired. And in the process of the brief, an argument ensued amongst them. And in the process, the 1st accused person slapped the deceased twice. Also present, was Shelly Muluwe who kicked the deceased on the left side of his ribs. And the deceased is said to have exclaimed in response that: “*you will injure me.*”

In the course of the trial, I was informed by Mrs. Chipanta-Mwansa, that the 2nd accused person Greenwell Chulu died on 10th January, 2011. And she called upon Sub-Inspector Siuma to testify to the death of the 2nd accused. I will continue to refer to Sub-Inspector Siuma as PW5. PW5 informed me that whilst in custody the 2nd accused person fell ill, and was admitted at the Prison Clinic. Owing to the persistence of the illness, the 2nd accused was referred to UTH, where he eventually died on 19th January, 2011. A copy of the Certificate for Cause of Death was admitted in evidence. Following the admission of the documentary evidence relating to the death of 2nd accused, PW5 proceeded to enter a *nolle prosequi* against the 2nd accused person. This was in keeping with the decision of the Supreme Court in *Tembo v The People SCZ Appeal number 56 of 2006* (unreported). In the *Tembo* case (*supra*), it was held that whenever an accused person dies, other than of course when a matter is on appeal, the State should enter a *nolle prosequi*.

The sixth prosecution witness was Dr. Dennis Musonda, aged 44 years. He is medical doctor; from the University of Zambia. He holds Bachelor of Science degrees in: Biology and Chemistry; human biology; medicine; and surgery. He has practiced medicine for 14 years. And another 10 years as a pathologist. I will continue to refer to him as PW6. PW6 recalls examining the deceased as a pathologist. Upon examining the deceased, PW6 compiled a report which was admitted in evidence, and marked as Id2. The report shows that the deceased was well nourished. Disclosed evidence of *peretheral cyanosis*. A condition diagnosed by examining finger nails and the soles of

feet to test for sufficiency of air in the body. If positive, finger nails and the soles of the feet tend to be blueish in colour.

PW 6 testified that during the post mortem he did not observe any mark of injury on the body. However, he observed some disfigurement in the neck area. And when he pressed the neck, it had *creptios*. That is, air under the skin. Of note, the body of the deceased was not at the time of the examination pale. He also testified that internal examination of the body revealed that the skull was intact. The lungs suggested the presence of *emphysema*, or the unusual presence of air. Closer examination of the lungs revealed the presence of about 200mls of fluid in the right lung. And about 50mls of fluid in the left lung. The rest of the internal organs were intact and healthy. PW 6 also took some blood sample for toxicology. At the time of testifying, PW 6 had not yet received the results for the toxicology. In the opinion of PW 6, the cause of death was *surgical emphysema*. A condition which is consistent with trauma arising from an injury. In the end, PW6 tendered the post mortem report; P2, as part of his evidence.

The seventh prosecution witness was Detective Sergeant Davis Makuyu. He is based at Woodlands Police Station. I will continue to refer to him as PW 7. PW 7 recalled that on 20th May, 2010, whilst on duty he received a docket for murder. And two suspects were held in custody for allegedly committing the offence. PW 7 arranged and attended the post mortem of the deceased. On concluding the post mortem, PW 7 investigated the matter. Specifically, he interviewed the accused persons. Following the interview, he administered a warn and caution. And charged the accused persons of the offence of murder. And ultimately lodged them in custody.

At the conclusion of the case of the prosecution, I formed the opinion that a *prima facie* case had been established against the accused. I therefore decided to put him on his defence.

The accused opened his defence on 30th May, 2011. I will continue to refer to him as DW1. DW1 testified that on Thursday, 13th May, 2010, he decided to visit his friend Greenwell Chulu (deceased) at his home. He did not find him at home. He only found

his son, who informed him that his father had gone to see the headwoman; PW1. DW1 decided to follow Greenwell Chulu. On his way, DW1 met Greenwell Chulu, Boston Nkausu, and the deceased. The trio informed DW1 that they were going to the headwoman's place to resolve the issue of the maize that was allegedly stolen by the deceased, and Joshua Kapolo.

When they arrived at the headwoman's place, they found the Secretary and the Chairperson of the Village Management Committee. Present also, was Whitson Mulumbwe. Upon arrival, the headwoman; PW1, was informed by Greenwell Chulu that they had come to see her in connection with the maize that was allegedly stolen by the deceased. PW1 interrogated the deceased about the stolen maize. The deceased explained, and confessed that he stole some maize from his master's field. PW1 also asked the deceased about the K5,000=00, that he had offered Boston Nkausu, as a bribe to conceal the theft. The deceased denied that it was a bribe. The deceased explained that the K5,000=00, was meant to buy some *dagga*. In the process, an argument ensued between the deceased, and Boston Nkausu. It was in the course of that argument that, DW1 slapped the deceased. And ordered him to sit down. When the situation got out of control, PW1 decided to postpone the meeting to the following day; to enable the deceased master to be present. DW1 maintained that the only thing he did in the entire episode was to tap on the deceased's shoulder. And also to maintain order.

Further, DW1 recalled that on Sunday, 16th May, 2010, around 15:00 hours, he was patronising a drinking place with Joshua Kaingu; PW2. In due course, DW1 was informed by PW2, that the deceased was seriously ill. Upon receipt of that information, DW1 suggested that they should call on the deceased immediately, and take him to the clinic. When DW1 and PW2 arrived at the deceased home, they found that he had already passed on. And there was a group of persons mourning him.

The following day; on Monday, 17th May, 2010, at around 14:00 hours, a police vehicle came through and collected the body of the deceased. The body was taken to UTH by the police, accompanied by the accused persons. Soon after lodging the body at UTH,

the accused persons were taken to Woodlands Police Station, where they were warned and cautioned. And later charged of the offence of murder.

DW1 called one witness; Lydia Nakazwe Zulu. I will continue to refer to her as DW2. DW2 recalled on 13th May, 2012, visiting a *Shabeen*-an illicit drinking place. At the *Shabeen*, DW2 met the deceased. The deceased narrated to DW2 that he had been beaten by one Watson Mululwe because he was suspected of having stolen two bags of maize. As consequence of the beating, he started vomiting green substances. At that point, DW2 testified that DW1 decided to summon Watson Mululwe. When Watson Muluwe arrived, DW1 informed DW2 that the green substance that the deceased was vomiting was a result of him drinking a liquor called "*Tungi*"; mixed with a totapak. DW2 questioned the explanation by DW1. In the meanwhile, the deceased continued vomiting. Around 15:00 hours of the same day, the deceased was picked from the *Shabeen* by some good Samaritan, and taken home.

On Sunday 16th May, 2010, DW2 visited the deceased at about 06:30 hours. He found the deceased with his sister-in-law. DW2 asked after the deceased health. DW2 was told that he was not well, and had excruciating chest pains. Further, DW2 testified that during that visit, the deceased's sister-in-law maintained that the deceased informed her that she was beaten by Watson Mululwe. DW2 bade farewell to the deceased, and informed him that he would visit him again the following day. The deceased is said to have replied that he would not be alive the following day. Indeed, the following day, DW 2 gathered that the deceased had passed on, around 17:00 hours.

The second defence witness was Margaret Sakala. Margaret Sakala is a Public Analyst and Chemist with the Ministry of Health. She holds a Bachelor of Science degree (BSC) from the University of Zambia, and a Master of Science degree (MSC) in pharmaceutical science from the University of Wales in the United Kingdom. I will continue to refer to her as DW3. DW3 testified that she was employed by the Ministry of Health sometime in 1981, as a Chemist. And was later gazetted as a Public Analyst in 1988. As a Public Analyst and chemist, she analyses food, drugs, water, and

toxological samples. DW3 confirmed that she received a blood sample referred to in the post-mortem report of the deceased. The blood sample was analyzed for alcohol. Upon analysing the sample for alcohol, DW3 prepared a report, which she sent to the Coroner's office where the request originated. During re-examination, DW3 explained that the report showed that the blood sample contained 190 milligrams of alcohol. DW3 pointed out that the optimum level of alcohol in the blood is 80 milligrams. The optimum level is in fact a product of the food that is eaten, and later digested into alcohol. Thus, DW3 opined that, any alcohol in excess of the 80 milligrams represents alcohol that is directly consumed. DW3 further opined that in this case, the deceased must have consumed alcohol. And since 190 milligrams, of alcohol was detected in the blood sample, DW3 opined that the deceased must have at the material time consumed spirits.

Towards the end of the trial, Mr. Chimembe made an application to recall PW6 in order to attest to the report of DW3. In the interest of justice I allowed the application. My decision to allow the application was at any rate fortified by the following; first, by P J Richardson's Archbold Criminal Pleading, Evidence and Practice 2012 (Thomson Reuters (Professional) UK Limited). The learned author states in paragraph 8 – 303, at page 1329, that a judge has discretionary power to recall or allow the recall of, any witness at any stage of the trial prior to the conclusion of the summing up, and of putting questions to them as the exigencies of justice require, and the Court of Appeal will not interfere with the exercise of that discretion unless it appears that an injustice has thereby resulted: R v Sullivan, 16 Cr App. R 121, and R v Mc Kenna, 40 Cr. App. 65.

Second, by the decision of the Supreme Court in the case of *Mwale v The People* (1984) Z.R. 76. In the *Mwale* case (supra), the Supreme construed section 149 of the Criminal Procedure Code which is expressed in these words.

“149 Any Court may at any stage of an inquiry, trial or other proceeding under this Code summon any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine; any person already examined and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.

Provided that the prosecutor or the advocate for the prosecution or the accused person or his advocate shall have the right to cross-examine any such person, and the Court shall adjourn the case for such time if (any) as it thinks necessary to enable such cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of such person as a witness.”

Delivering the judgment of the Supreme Court in the *Mwale* case (supra), Ngulube D.C.J., explained that the power conferred upon the trial Court by section 149 is designed to ensure that justice is done not only to the accused, but to society as well. But the power so conferred should only be exercised in a proper case, and for that reason must be regarded as discretionary. Ngulube, D.C.J, went on to explain at page 79, that though the terms of section 149 are wide and the discretion considerable, the section could not be legitimately be used for purposes such as supplying evidence to remedy defects which have arisen in the prosecution case, or where the result would merely be to discredit a witness. Ngulube D.C.J., also cautioned at page 80, that unless a vital point has arisen *ex improvis*, which is essential to clarity, the Court should not normally exercise its discretion of its own motion when the result may be simply to make an accused’s position worse than it already is.

To continue with the narration, PW6 confirmed that the report originated from the Food and Drug Control Laboratory. The report referred to a blood sample that PW6 had sent to the laboratory for analysis. From the analysis it was established that the blood sample contained 190 milligram of alcohol. DW 6 opined that the results show that the amount of alcohol in the blood was quite high. DW 6 pointed out that in terms of the Blood Alcohol Concentration (BAC); a test employed in detecting the level of drunkenness of motorists, the acceptable level is 80 milligrams.

At the end of the trial, I invited counsel to file written submissions. On 31st August, 2011, Mrs. Chipanta-Mwansa filed into Court the prosecution’s final submissions. Mrs. Chipanta-Mwansa observed from the outset that of course it is not in dispute that the deceased is dead. And that the cause of his death was *emphysema*, due to trauma. What is in dispute however is whether or not the accused caused the death. Mrs.

Chipanta-Mwansa contends that the accused caused the death of the deceased by slapping him during the resolution of the conflict between the deceased, and the community. This assertion, Mrs. Chipanta-Mwansa argued is supported by the testimony of the accused, who admitted in his defence that he executed the action in question, and his action was not intentional; it was only intended to bring peace, and discipline the deceased.

Mrs. Chipanta-Mwansa went on to submit that since the accused person did not intend to cause the death of the deceased, but merely to discipline him, the main ingredient of the offence of murder was absent. Mrs. Chipanta-Mwansa recalled the counsel in *Woolmington v Director of Public Prosecutions [1935] A.C. 462*, that the prosecution must prove all the ingredients of the offence beyond reasonable doubt. In this case, Mrs. Chipanta-Mwansa submitted that there is some doubt in the accused's intention in murdering the deceased person, because the death resulted from an alleged fight or unintentional beating. Since there was no intention on the part of the accused to cause the death of the deceased, she submitted that a lesser charge of manslaughter has been satisfied. In this regard, she pointed out that section 199 of the Penal Code is in these words:

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

Mrs. Chipanta-Mwansa pointed out that eye witnesses PW1, and PW4, saw the accused slap the deceased. Mrs. Chipata-Mwansa argued that although the accused simply slapped the deceased, the slap was sufficient to cause the trauma; and eventually the death. In aid of the submission that the accused should be convicted of a lesser offence of manslaughter, Mrs. Chipata-Mwansa relied on the case of *Kampangila v The People (1969) Z.R. 59*. In the *Kampangila* case (supra), the Court made the following observation at page 61:

“No offence can be a minor offence.... Unless it carries a lesser penalty than the offence with which the accused person is originally charged, and unless it is cognate to the offence originally charged, that is to say, of the same genus or species.”

Further, my attention was drawn to the case of *Kapowezya v The People* (1967) Z.R. 35. In the *Kapowezya* case (supra), the following observation was made at page 46:

“The Court, however may convict the accused person on the charge as laid or on any of the visible or invisible alternatives provided it can do so without unfairness to him. This may involve adopting the procedure suggested by Bell C.J; when putting the accused on his defence, it may be necessary to follow some similar procedure at the close of the defence case and before judgment if it is thought he might be taken by surprise. There will, however be cases where the Court can convict the accused of a minor offence without following any of this procedure, if in the particular circumstances of each case the Court can decide what action if any, it should take so as not to be unfair to him.”

Lastly, Mrs. Chipanta-Mwansa drew my attention to the case of *Mwale v People* (supra), where the Supreme Court considered it unsafe to allow a conviction of murder when the undisputed facts amply justified a conviction on the lesser charge of manslaughter.

On 12th September, 2011, Mr. Chimembe filed the submissions on behalf of the accused. At the outset of the submissions, Mr. Chimembe posed the following question: what must the prosecution prove to establish that the accused murdered the deceased. He suggested that the answer is to be found in the dicta of Blagden, C.J., in the case of *The People v Njovu* (1968) Z.R. 132 at pages 133 - 134:

“The burden of proof is on the prosecution to establish the charge against the accused and the standard of proof which must be attained before there can be a conviction is such a standard as satisfies me of the accused guilty beyond all reasonable doubt....

In accordance with the definition of murder in section 177 of the Penal Code, to obtain a conviction for murder, it is necessary for the prosecution to prove to the standard which I have just described... namely, the accused caused the death; by an unlawful act; and with malice aforethought.”

Mr. Chimembe posed another cardinal question: did the accused cause the death of the deceased? Mr. Chimembe submitted that according to the testimony of PW6; a State Forensic Pathologist, the cause of the death was *surgical emphysema*, and is consistent with trauma. Mr. Chimembe asked yet another question: what is *surgical*

emphysema. In answer, Mr. Chimembe submitted that the dictionary defines *emphysema*, a noun; as “*air in tissues.*” The definition goes on to state as follows:

“In pulmonary emphysema the air sacs (alveoli) of lungs are enlarged and damaged, which reduces the surface area for the exchange of oxygen and carbon dioxide. Severe emphysema causes breathlessness which is made worse by infections. The mechanism by which emphysema develops is not understood although it is known to be particularly common in men in Britain and is associated with chronic bronchitis, smoking and advancing age. In surgical emphysema, air may escape in the tissues of the chest and neck from leaks in the lungs. Or esophagus; occasionally air escapes into other tissues during surgery and bacteria may form gas in soft tissues. The presence of gas or air gives the affected tissues a characteristic cracking feeling to the touch, and it may be visible on x-rays. It is easily absorbed once the leak or production is stopped.”

Mr. Chimembe submitted that conversely “*trauma*” is defined as a physical wound or injury such as a fracture or blow. In light of the definition of *surgical emphysema*, Mr. Chimembe posed the ultimate question: what was the effect of the accused’s slapping the deceased, vis-à-vis the cause of death, on one hand. And the effect of Shirley Mulube’s kick in the deceased rib, on the other. Mr. Chimembe argued that the prosecution has not established the effect of the slap or indeed the kick by Shirley Mulube in relation to the death of the deceased. Mr. Chimembe pointed out that when PW6 was asked what trauma the deceased suffered, he replied that it was not possible to identify any trauma that the deceased may have suffered. If it was not possible to identify any trauma, how can it then be said to be the cause of the death, Mr. Chimembe argued.

Mr. Chimembe also recalled the testimony of PW1, that the accused slapped the deceased. And that the slap was so slight that it did not even produce a sound. Mr. Chimembe pressed that the slapping of the deceased could not have caused “*surgical emphysema consistent with trauma.*” Mr. Chimembe suggested that what might have caused the trauma was the kick administered by Shirley Mulube, and whom the prosecution did not even arrest. This suggestion, Mr. Chimembe argued, is confirmed by the testimony of PW4, who testified that Shirley Mulube kicked the deceased on the

left side of his body. In reaction, the deceased is said to have exclaimed; “*you will injure me*”.

Mr. Chimembe submitted that PW4’s testimony corroborates the evidence of DW2, and DW3 who testified that before the deceased died he said: “*God does not allow people to tell lies*”. And went on to state: “*Let me tell you why I am sick. I am sick because of the kick by Watson [Shirley Mulube] in the chest. Even if I die today, it is because of the kick by Shirley Mulube*”.

Mr. Chimembe submitted that the testimony of DW2 was corroborated by DW3. In view of the foregoing, Mr. Chimembe urged me to find that it was the kick by Shirley Mulube that caused the death of the deceased, as opposed to the slap by the accused.

Mr. Chimembe also submitted that the discussions between the deceased, DW2, and DW3, prior to his death are dying declarations in which the deceased clearly stated the circumstances which led to his death. In this regard, Mr. Chimembe submitted that the conditions upon which a Court admits dying declarations are as follows:

- i) the death of the declarant;
- ii) the trial should be for his murder or manslaughter;
- iii) the statement must relate to the cause of the declarant’s death;
- iv) declarant’s settled hopeless expectation of death; and
- v) the declarant must be a competent witness.

Mr. Chimembe argued that the declaration made by the deceased satisfies the criteria set out above.

Mr. Chimembe submitted that the other element that the prosecution needs to prove is that the accused’s act was unlawful. Mr. Chimembe argued that it is clear from the testimony of the accused that he was trying to maintain peace. He also contends that the slap administered by the accused was not excessive. It was only meant to restrain the deceased from being unruly.

Mr. Chimembe submitted that the third element that is required to establish the charge of murder is malice aforethought. This requirement was in the case of *The People v Njovu (1968) Z.R. 132*, explained by Blagden C.J. in these words at page 134:

“Malice aforethought relates to the state of mind of the accused person at the time he caused the death of the deceased. By section 180 of the Penal Code malice aforethought is expressed to include specific intents and knowledge on his part. So far as this case is concerned, to establish “malice aforethought,” the prosecution must prove that the accused either had an actual intention to kill or to cause grievous harm to the deceased his wife, or that he knew that what he was doing would be likely to cause death or grievous harm to someone.”

Mr. Chimembe submitted that none of the prosecution witnesses testified that the accused had the intention to kill or cause grievous harm to the deceased. Mr. Chimembe recalled that the accused together with his friends arrested the deceased because he was suspected of having stolen some maize. After his arrest, he was taken to the headwoman to establish whether or not he stole the maize in question. This conduct, Mr. Chimembe submitted, is not consistent with a person who had the intention to kill.

Mr. Chimembe also observed that the prosecution has realised that the charge of murder cannot stand due to the absence of malice aforethought. The prosecution has therefore changed its position, and is now persuading me to convict the accused of the lesser offence of manslaughter; on the authorities of *Kampangila v The People (supra)* and *Mwale v The People (supra)*.

Mr. Chimembe submitted that the case of *Kampangila (supra)* is distinguishable from this case in the following way: In the *Kampaingala case (supra)*, the charge was proved. But the appellant pleaded self-defence. This is not the position in this case, because there is no evidence to justify the substitution of the charge of murder for manslaughter. *The Kapowezya case (supra)*, Mr. Chimembe argued, should equally be distinguished from this case. In the *Kapowezya case (supra)*, in substituting the charge of robbery for common assault this what the Court of Appeal had to say at page 39 - 40:

“In order to make the position abundantly clear, we restate again the judgment of this Court given in Rex v Muhloja and Rex v Home meaning nothing more than this: where an accused person is charged with an offence he may be convicted of a minor offence although not charged with it, if that offence is of a cognate character, that is to say the same genus or species. Furthermore, we point out that the wording of section 179(2) is permissive only and that in our opinion, when the major offence charged, is murder, a Court should exercise its discretion most warily before convicting a person charged with any alternative offence, although cognate, other than manslaughter. The test the Court should apply when exercising its discretion is whether the accused person can reasonably be said to have had a fair opportunity of making his defence to the alternative.”

Mr. Chimembe submitted that in view of the decision in the *Kapowezya* case (supra), a lesser charge cannot and should not be substituted for murder in this case. Mr. Chimembe argued that the case of *Mwale v The People* (supra) should, also be distinguished from this case. Mr. Chemembe submitted that in the *Mwale* case (supra), the Supreme Court held that the trial Court misdirected itself by not recalling evidence under section 149 of the Criminal Procedure Code to rebut the evidence of the appellant that it was the deceased who provoked him by knocking out two of his teeth. In the *Mwale* case (supra) the charge of murder was substituted for that of manslaughter because although the death had resulted at the hands of the accused, this was due to provocation by the deceased. Mr. Chimembe argued that the position is different in this case. In this case, Mr. Chimembe submitted, there is no evidence that the accused murdered the deceased. And it is also very difficult to ascertain the cause of the death. In sum, Mr. Chimembe submitted that on the totality of the evidence of both the prosecution and the defence, it is very clear that the accused is neither guilty of murder, nor manslaughter. Mr. Chimembe therefore urged me to acquit the accused.

I am indebted to counsel for their spirited arguments and well researched submissions. I would like to state from the outset that the burden of proof is on the prosecution to establish a charge against the accused. And the standard of proof which must be attained before there can be a conviction is such a standard as satisfies the Court, the accused's guilt beyond reasonable doubt. (see *The People v Njovu* 1968 Z.R. 132 at page 133 per Blagden C.J.).

In accordance with section 200 of the Penal Code, to obtain a conviction of murder it is necessary for the prosecution to prove to the standard which has been described above. That is, the following elements must together be proved; that the accused caused the death; the death was caused by an unlawful act, and with malice aforethought. Malice aforethought relates to the state of mind of the accused person at the time the accused caused the death of the deceased. In order to establish malice aforethought, the prosecution must prove that the accused either had an express intention to kill or to cause grievous harm to the deceased, or that he knew that what he was doing would be likely to cause death or grievous harm to someone. (See *The People v Njovu* (supra) at p. 133).

Although the accused was in this case charged with the offence of murder, Ms Chipanta-Mwansa relying on the cases *Kapowezya v The People* (1967) Z.R. 35; and *Kampangila v The People* (1969 Z.R. 59, reneged from the charge of murder, and instead submitted that the accused should be convicted of a lesser offence of manslaughter. A question that therefore arises is whether or not it is legally tenable and competent to convict an accused person of a lesser offence than he was initially charged with. The answer to the question is to be found in the case of *Kapowezya case* (supra); the Court of Appeal a forerunner to the Supreme Court, considered a situation where a person charged of robbery could be convicted of common assault. In a judgment delivered by Doyle J.A, the Court of Appeal opined that the answer to the question depended on the interpretation to be given to section 168 of the Criminal Procedure Code. Section 168 enacted that:

“Where a person is charged with an offence consisting of several particulars, a combination of some of any of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.”

In *Kapowezya* (supra), Doyle J.A. observed at page 37 that section 168 referred to above was a facsimile of sub-section (1) and (2) of section 238 of the Indian Penal Code, and was to be found in identical form in the Codes of each of the East African territories. Doyle J.A. noted that *prima facie* where a section has two subsections, these must have different meanings. Doyle J.A. referred to the learned author of Sohonis The Code of Criminal Procedure, 15th edition, who had the following to say at page 37:

“Sub-section 1 contemplates cases where the offence charged consists of several particulars, a combination of some of only of which constitutes a complete minor offence. Under this sub-section, all the particulars which complete a minor offence must be present in the major offence. They may be an aggravated form. It is further clear from the reading of this section that there might be other particulars which might be present in the major offence and which are not present in the minor offence. It is not necessary to prove the offence charged in the indictment to the whole extent, provided the facts proved constitute a complete offence. Similarly, it is to necessary to prove the offence charged in the same aggravated from, provided what is proved constitutes a complete offence.

Sub-section (2) contemplates cases where a person is charged with an offence and facts are proved which reduce it to a minor offence. There are all the particulars present in the case with which make it a major offence. But certain additional facts are brought before the Court either by the prosecution or by the defence to reduce the offence to a minor charge.”

Doyle J.A. explained in the *Kapowezya* case (supra) at page 37 that sub-section (1) of section 168 covers a case where only some of the particulars are proved, while sub-section (2) covers where all the particulars are proved, but there is some additional factor which reduces the charge. An example of the latter which immediately sprung to Doyle’s J.A. mind in English, Indian, and Zambian law, is the reduction of murder to manslaughter by reason of provocation. In such a case, Doyle, J.A. pointed out, all the particulars which constitute murder may be proved, but the fact of provocation reduces the offence.

In the same *Kapowezya* case (supra), Ramsay, J, also explained at page 44 that so far as sub-section 1 of section 168 is concerned, a Court can convict an accused person of a minor offence when the circumstances are such that the minor offence is contained in

the major offence, and the particulars of the major offence have given notice to the accused of all the ingredients of the minor offence.

Conversely, Ramsay J, explained at page 44, that sub-section (2) of section 168 is wider in its scope when the major offence is not proved, a Court may convict of a minor offence provided:

- a) it is cognate to in the sense of being of the same genus as the major offence;
and
- b) the accused had had a fair opportunity of answering the charge of the lesser offence.

Ramsay, J, pointed out that what is a fair opportunity was considered in an opinion by Bell C.J. in *R v Mancinelli (1955 – 1958) 6 N.R.L.R. 19*. The facts of the case were that the accused was charged in the Court of the Resident Magistrate, Lusaka, with indecently assaulting a boy under the age of fourteen years contrary to section 137 A of the Penal Code. At the close of the prosecution case, the Resident Magistrate considered that the charge had not been made out, in that it had not been proved that the boy was aged under fourteen years, but there was *prima facie* evidence to support a lesser charge of indecent practices contrary to section 137 of the Code.

In the *Mancinelli case* (supra) doubts arose as to whether the accused should be discharged under section 189 of the Criminal Procedure Code, or whether the case should proceed on the lesser charge. So the Resident Magistrate submitted the case to the High Court for its opinion on the following points:

- a) could the trial continue in the Resident's magistrate Court on the lesser charge, and if so, what procedure should be adopted? and
- b) should the Resident Magistrate Court dismiss the case and proceed on the lesser charge?

The answers to the preceding questions were provided by Bell, C. J., at page 22 in the following terms: if at the close of the prosecution case the Court finds, whether of its

own motion or on a submission by the defence that the charge with which the proceedings commenced is not made out so as to require the accused person to be put on defence, it must dismiss the case, and discharge the accused person as to that particular charge, but is perfectly free and entitled to go on with the hearing of invisible alternatives which have been disclosed. These invisibles are just as much before the Court on the charge sheet; as if each one of them had been pleaded specifically in the alternative on the charge. When that position is reached, Bell, C.J., explained that even though the criminal procedure is silent on the point, it would be fairer to put the substantive alternative or alternatives to the accused rather than to allow the proceedings to continue without letting the accused person know what is happening, or is about to happen. Bell, C.J., went on to explain that the Court should accordingly inform the accused person that in its opinion there is a *prima facie* case to answer on such charge. Namely, on one of the invisible alternatives. Belly, C.J, opined that it would be fair and wise for the Court to frame a charge, read it to the accused person, call upon him to plead to it, and give him (an the analogy of section 192 of the Code), the opportunity of having any prosecution witnesses recalled to give his evidence afresh or to be further cross examined by the accused person or his advocate, and to give the prosecution the right to re-examine any such witness.

The procedure outlined above, was followed by Somerhough J, in *R v Fulanete (1957) R and N 332*, when he called upon the prisoner for his defence to a charge of assault; he did so because in his view of the law “the effect of a simple, unqualified finding that there was no case to answer in the charge of murder amounts to a finding of not guilty of the offence actually charged and of each and every offence of which the defendant might have been found guilty, Somerhough, J, said further, that were the Crown to bring the prisoner to trial upon a charge which might have been found guilty by the Court, he would have been tried twice for the same offence in breach of section 128 of the Criminal Procedure Code.

It is however, instructive to note that in *Hermes v R 1961 R and N 34*, sitting in the High Court of Nyasaland, Spenser-Wilkinson, C.J., referred to the case of *Fulunete* and

observed as follows at pages 37-28: it is as a general rule for the public prosecutor to prosecute the offender upon such charges as he considers right. And if at the close of the case for the prosecution, the offence charged is not made out, but some lesser offence appears to have been proved, there is a duty on the prosecution to make the necessary application to the Court either to amend the charge or to call upon the accused for his defence upon some charge, upon which under the provisions of section 178 [section 168 of the Zambian Code] the accused can be convicted without amendment. Spenser-Wilkinson, C.J. opined that it is not the duty of a magistrate to enter into the arena too, much on his own initiative for the purposes of convicting an accused person upon some charge with which he has not been formally charged. However, Spenser-Wilkinson, C.J. observed that if it is clear on the evidence that the gist of the principal charge has been proved, but that some element is lacking which obviously makes the charge a lesser one, or that there is evidence of some lesser offence which is clearly cognate to the offence charged, it is clearly in the interest of justice that the accused person should not be acquitted, but should be convicted upon the lesser charge which is clearly proved.

In the *Kapowezya* case (supra), Ramsay, J, endorsed the preceding approach. And stressed at page 46, that it is the prosecution's duty to prove the charge which it has chosen to lay before the Court. The Court however, Ramsay J, went on, may convict the accused person on the charge as laid or on any of the visible or invisible alternatives provided it can do so without unfairness to him. This may involve adopting the procedure suggested by Bell C.J. in the case of *Mancinelli* (supra), referred to above. Ramsay J, further observed that when putting the accused on his defence, it may be necessary to follow some similar procedure at the close of the defence case, and before judgment, if it thought he might be taken by surprise. Ramsay J noted that there will however be cases where the Court can convict the accused of a minor offence without following any of this procedure if in the particular circumstances of each case, the Court can decide what action, if any, it should take so as not to be unfair to him.

I will now pass to consider the issue of *res gestae* or dying declarations. Mr. Chimembe submitted that the discussions between the deceased, DW2, and DW3 prior to his death constituted dying declarations, or *res gestae* in which the deceased clearly stated the circumstances that led to his death. It is therefore necessary to place in proper perspective the subject of *res gestae* or dying declarations.

According to Hodge M Malek, Phipson on Evidence, Seventeenth Edition, (Thomson Reuters (Legal) Limited, 2010) in paragraph 31 – 01 at page 996, *res gestae* is a Latin phrase that has no exact English translation. A literal translation means “Something deliberately undertaken or done”. The expression is used in the common law to refer to the events at issue or others contemporaneous with them.

Further, according to P.J. Richardson, in Archbold Criminal Pleading, Evidence and Practice 2010 (Thomson Reuters (Professional) UK Limited 2012) at paragraph 11-74 at 1424; and 11-75 at 1425, make the following observation regarding the doctrine of *res gestae*:

“In Ratten v R [1972] A.C. 378, Lord Wilberforce, delivering the opinion of the Privy Council said (at p. 389) that where a hearsay statement is made either by the victim of an attack or by a by-stander, indicating directly or indirectly the identity of the attacker, the admissibility of the statement is said to be dependent on whether it was made as part of the res gestae (all facts so connected with a fact in issue as to introduce it, explain its nature, or form in connection with it one continuous transaction). His Lordship said that there were two objections to such evidence. The first was that there may be uncertainty as to the exact words used because of their transmission through the evidence of another person than the speaker. The second was the risk of concoction of false evidence by persons who have been victims of assault or accident. The first matter goes to weight. The person testifying to the words used is liable to cross-examination; the accused, if was present, can give his own account, if different. There is no such difference in kind or substance between evidence of what was said and evidence of what was done (for example between evidence of what the victim said as to an attack and evidence that he was seen in a terrified state or was heard to shriek) as to require a total rejection of one and admission of the other.

His Lordship continued by saying that the possibility of concoction, where it exists, is an entirely valid reason for exclusion. It was their Lordship’s opinion that this should be recognised as the relevant test; the test should not be the uncertain one of whether the making of the statement was in some sense part of the event or transaction. This may often be difficult to establish: such external matters of the time which elapses between the events and the speaking of the words (or vice versa), and differences in location

being relevant factors but not, taken by themselves decisive criteria. As regards statements made after the event, it must be for the judge, by preliminary ruling, to satisfy himself that the statement was so clearly made in circumstance of spontaneity or involvement in the event that the possibility of concoction can be disregarded.

Conversely, if the judge considers that the statement was made by way of narrative of a detached prior event so that the speaker was so disengaged from it as to be able to construct or adapt his account, he should exclude it. The same must in principle be true of statements made before the event. If the drama leading up to the climax, has commenced and assumed such intensity and pressure that the utterance can safely be regarded as a true reflection of what was unrolling or actually happening, it ought to be received...”.

Thus the so called *res gestae* principle is a single principle, and for evidence to come within that exception to the hearsay rule it must pass the test that the trial judge is satisfied that there is no possibility of concoction or distortion.

The *locus classicus* on dying declaration or *res gestae* in Zambia is the case of the People v Nguni (1977) Z.R. 376; a decision of the High Court. The facts of the case were as follows: The accused was charged with manslaughter of Knife Rice. The accused and the deceased were in the house of one William Phiri, where drinks were being sold. Esther Mwila, the wife of William Phiri was also present in the house. At that stage the deceased who came from another village said to Esther Mwila, “*Esther you are my cousin, I will marry your daughter*”. This was apparently a reference to her daughter Inesi who was married. The accused became annoyed, caught hold of the deceased and pushed him outside the house. Some three minutes later, thereafter the deceased came back and fell outside the door way of the house crying “*look at what John Nguni has done to me*”. The deceased bore a wound on the left forearm which was bleeding profusely. He died the following morning. The accused was arrested and was charged with the offence of manslaughter. The prosecution was unable to adduce direct evidence of the wounding and relied upon the alleged utterance by the deceased. It was submitted by the State that the alleged utterance by the deceased should be admitted as it formed part of the *res gestae*.

Cullinan, J, held that evidence of a statement made by a person who is not called as a witness may be admitted as part of the *res gestae*, and can be treated as an exception to the hearsay rule provided it is made in such conditions of involvement or pressure as to exclude the possibility of concoction or distortion to the advantage of the maker or the disadvantage of the accused. The question that falls to be considered whenever a plea of *res gestae* is raised Cullinan, J, observed, is, therefore, whether or not the statement in issue was so clearly made in circumstances (of proximate but not exact contemporaneity) of spontaneity or involvement in the event or pressure to exclude the possibility of concoction or distortion to the advantage of the maker or disadvantage of the accused. It is significant to note that in the *Nguni case* (supra), only a few minutes had elapsed from the initial assault and when the deceased re-appeared seriously wounded and bleeding profusely and either collapsed or sat on the ground crying out the name of his attacker.

It is also instructive in my opinion to refer to the case of *R V Andrews* [1987] A.C. 281: a decision of the House of Lords which I cite with approval because it is comprehensive in its statement of the principle of *res gestae*. The facts in *R. v Andrews* (supra) were that shortly after a man was attacked and robbed by two men, he named his attackers to the police, referring to the co-defendant O'Neill by name and to the appellant, Donald Andrews, as "Donald" or "Donavan." The victim died before the trial. The House of Lords held that the evidence was rightly admitted as part of the *res gestae*. They accepted the accuracy and value of Lord Wilberforce's clarification of the law in *Ratten, v R* [1972] A.C. 378. Lord Ackner, with whom the remaining members of the Court agreed summarised the position which confronts the trial judge in the following terms:

- "1. The primary question which the judge must ask himself is – can the possibility of concoction or distortion be discharged?
2. To answer that question the judge must first consider the circumstance in which the particular statement was made, in order to satisfy himself that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim, so that his utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection. In such a situation the judge would be entitled to conclude that the involvement or the pressure of the event would exclude the possibility of concoction or distortion, providing that the statement was made in conditions of approximate but not exact contemporaneity.

3. In order for the statement to be sufficiently 'spontaneous' it must be so closely associated with the event which has excited the statement, that it can be fairly stated that the mind of the declarant was still dominated by the event. Thus the judge must be satisfied that the event, which provided the trigger mechanism for the statement, was still operative. The fact that the statement was made in answer to a question is but one factor to consider under this heading.

4. Quite apart from the time factor, there may be special features in the case, which relate to the possibility of concoction or distortion. In the instant appeal the defence relied upon evidence to support the contention that the deceased had a motive of his own to fabricate or concoct, namely, a malice which resided in him against O'Neill and the appellant because, so he believed, O'Neill had attacked and damaged his house and was accompanied by the appellant, who ran away on a previous occasion. The judge must be satisfied that the circumstances were such that having regard to the special feature of malice, there was no possibility of any concoction or distortion to the advantage of the maker or the disadvantage of the accused.

5. As to the possibility of error in the facts narrated in the statement, if only the ordinary fallibility of human recollection is relied upon, this goes to the weight to be attached to and not to the admissibility of the statement and is therefore a matter for the jury. However, here again there may be special features that may give rise to the possibility of error. In the instant case there was evidence that the deceased had drunk to excess, well over double the permitted limit for driving a motor car. Another example would be where the identification was made in circumstance of particular difficulty or where the declarant suffered from defective eyesight. In such circumstances the trial judge must consider whether he can exclude the possibility of error."

Thus according to the learned author of Phipson on Evidence, (supra), in paragraph 31-18, at page 985, the test therefore to be applied in deciding whether a hearsay statement made by a bystander or victim indicating the identity of the attacker is admissible can be put succinctly:

- (1) Was the identification relevant?
- (2) Was it spontaneous?
- (3) Was there an opportunity for concoction? and
- (4) What risk was there of error?

I will now at this juncture proceed to dispose of the submission relating to *res gestae*. On the facts of this case, it is obvious that quite considerable time passed between the assault and the making of the statement by the deceased. Thus the statement made by

the deceased cannot be said to have been made in circumstances of spontaneity or involvement as to exclude the possibility of concoction or fabrication. In my opinion, the statement was made by way of narrative of a detached prior event so that the deceased was so disengaged from it as to be able to construct or adapt his account. I will therefore exclude it. (See also *Murono v The People (2004) Z.R. 207 at page 214.*)

The central question that falls to be resolved in this matter however is whether or not the prosecution has proved its case beyond reasonable doubt. It is instructive to recall that the offence of murder is in terms of section 200 of the Penal code expressed in the these words:

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

What is in dispute in this matter is twofold. First, is whether or not the deceased died as a result of *“emphysema consistent with trauma”*. And second, whether the accused caused the death of the deceased. Mrs. Chipata-Mwansa maintains that the death was caused by the accused. However, she reneged the position that the death was caused with malice aforethought. Instead, she submitted that there was no intention on the part of the accused to cause the death. Hence, urged me to convict the accused of the lesser offence of manslaughter. In aid of this submission she relied on the decision of the Court of Appeal – a forerunner to the Supreme Court ___ in the *Kapowezya* case (supra).

Conversely, Mr. Chimembe argued that even to obtain a conviction of manslaughter, it must be proved that the accused caused the death of the deceased. In this case, Mr. Chimembe noted that the post mortem report shows that the cause of death was *“surgical emphysema consistent with trauma.”* Yet, Mr. Chimembe argued, PW6 was not able to show any trauma that the deceased may have suffered. Thus he went on; if it was not possible to identify any trauma, how can it be alleged to be the cause of the death.

Further, Mr. Chimembe pointed out that put at the highest, the prosecution case is that the accused slapped the deceased. And the slap caused the death. Yet, according to DW1, the slap was so slight that it did not even produce a sound. In the circumstances, Mr. Chimembe argued that the slap could not have caused "*emphysema consistent with trauma*". I accept the submission by Mr. Chemembe that on the facts of this case there is no cogent evidence to be prove that the death of the deceased was caused by the accused. That being the case, I am not able to convict the accused even of the lesser offence of manslaughter as pressed by Mrs. Chipanta-Mwansa. I accordingly, acquit the accused of the offence of murder.

Dr. P. Matibini SC
HIGH COURT JUDGE