

**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA  
(Criminal Jurisdiction)**

**HP/23/2014**



**BETWEEN:**

**THE PEOPLE  
AND  
ISAAC NJOVU**

**Before the Hon. Mr. Justice D.Y. Sichinga, SC in Open Court at Lusaka on  
the 27<sup>th</sup> day of June, 2014**

**For the People : Mr. B. Mpalo, State Advocate**

**For the Accused : Mr. G. Phiri of Messrs PNP Advocates**

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**JUDGMENT**

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**Authorities referred to;**

1. *Kambaraghe Mpundu Kaunda v. The People* (1992) ZR. 215
2. *Mutale and Phiri v. The People* (1995/1997) ZR. 227
3. *Muchabi v. The People* (1973) ZR. 193
4. *Phiri and Others v. The People* (1973) ZR. 49
5. *R v. Abbott* (1955) 2 ALLER 901
6. *R v. Richardson* (1785) 1 Learch 388
7. *Charles Lukolongo and Others v. The People* (1986) ZR. 115
8. *The People v. Njobvu* (1968) ZR. 132

The Accused, ISAAC NJOBVU stands charged with the offence of Murder contrary to section 200 of the Penal Code, Chapter 87 of the Laws of Zambia.

The particulars of the offence allege that on the 22<sup>nd</sup> day of May, 2013, at Lusaka in the Lusaka District of Zambia, the accused did murder one CORDIARY HATYOKA. The accused denied the charge.

Upon hearing the prosecution witnesses, hereinafter referred to as PW1 – 5, I found the accused with a case to answer and put him on his defence. The accused opted to give evidence on oath and called three other witnesses.

The evidence on record is as follows:

PW1, REFECT MWEETE, 35 year old farmer of Jamu Village, Shibuyanji District testified that on 21<sup>st</sup> May, 2013 one Jabalani Njobvu and one Cephas Njobvu asked him to accompany them to Jabulani Njobvu's house. He said he was then taken to the Headman's house and questioned him about some missing cattle. The Headman advised that he should be taken to the Police since he was a suspect. PW1 said he was not taken to the Police but put in a vehicle and driven to the said Jabulani Njobvu's house where he was tied by the hands, hang on a pole and beaten in succession by about eight (8) people, including Jabulani Njobvu, Cephas Njobvu, Robson Njobvu, Robert Njobvu, Jeremiah Njobvu, Kelvin Moonga, and Gift Hamanje for approximately five hours from 09:00 hours to 14:00 hours. PW1 said he fell in and out of consciousness as the men forced him to confess that he had stolen a cow in the company of a notorious criminal. PW1 said that his sister advised him to admit if he had indeed stolen the animal.

PW1 testified that he then admitted to the men that the person they described was one Cordiary Hatyoka. He said he was removed from the pole and placed on the ground. PW1 said he then gained consciousness and informed the men that he did not steal the animal. He said he pleaded with them three times but they refused to listen to him. The men then went to fetch the said Cordiary Hatyoka from a spot he had been drinking from. They then hang him in a

similar manner as they did to PW1 and beat him. Hatyoka pleaded with them and asked them to show him his accuser, but the men declined to do so. PW1 said Hatyoka was beaten till he fell unconscious. PW1 said Hatyoka and himself were then placed in Jabulani Njobvu's vehicle and driven to Central Police Station. PW1 said those present at Central Police were Jabulani Njobvu, Cephas Njobvu, Robert Njobvu and Gift Hamanje.

PW1 said the Police Officers at the Station refused to admit Hatyoka and himself saying the Police Station was not a hospital. PW1 said they were then driven to the University Teaching Hospital (UTH) where they were admitted. He said the Hospital was informed that they were beaten by a mob. PW1 said they were given some medication and thereafter driven back to Central Police Station. Police Officers still refused to accept them in the state they were in. They were then taken back to Jabulani Njobvu's house, where upon arrival Hatyoka begun gasping for air and subsequently died.

PW1's testimony was that he witnessed Kelvin Moonga and Robert Njobvu torturing Hatyoka. PW1 said he recalled that the accused was one of the Njobvu family members accusing him of stealing cattle. PW1 said after Hatyoka died the men took his body to a place he did not know and left him locked in a house. The following morning the men took him to West wood Police Station and pleaded with him to admit to the theft, telling him that Hatyoka had admitted to the theft. PW1 said he had known members of the Njobvu family before this incident.

Under cross-examination, PW1 said he saw two people beating Hatyoka. He said he lost consciousness when Hatyoka was being beaten. He said he did not see anyone else beating Cordiary Hatyoka.

In re-examination, PW1 reiterated he saw two people at the time he was placed in a vehicle.

PW2 said he had known the accused since the 1980s.

Under cross-examination, PW2 said he was present at the Headwoman's village when the meeting took place which ended around 11:00 hours. He said after the meeting ended he went to a school less than a kilo metre away, where he stayed until 16:00 hours. He said he did not have a watch but he could tell the time. He said he was in the company of one Harold Kachengwe and other people. PW2 said he did not go to Kamanti village but his brother was there. He denied that he lied about Misheck Munyamani coming to the school. He said the deceased was taken to Jabulani Njobvu's house. He said when the men came to collect Cordiary they had parked the motor vehicle at the school. PW2 said he was present from the beginning, at the time Cordiary was being beaten.

In re-examination, PW2 said there were about 60 people present but 7 people were beating the deceased in turns. He said they were all members of the same family.

PW3 RICHARD HATYOKA, 36 year old brother to the deceased testified that on 21<sup>st</sup> May, 2013 around 10:00 hours he set off for Kamuti village in the company of his brother, the deceased, and one Alfred Mwachiluka to drink beer. He said whilst there they saw a group of people approaching them. They got hold of Cordiary Hatyoka by the shoulders. PW3 said he did not know them. Then Misheck Munyamani, whom he knew came and Cordiary asked where he was being taken. MUYAMANI's response was that Jabulani Njobvu had sent for him. He was then placed in a vehicle and driven to Jabulani Njobvu's house. PW3 said he followed. He said he observed a lot of people near Jabulani's house. When he got to Jabulani's house, he found that the deceased had been tied up by his legs and hands and placed on a swing. PW3 said he saw three people beating his brother namely Robert Njobvu, Kelvin Moonga and Gift Hamanje. He said his brother could not speak, so he rushed to the field to inform his parents so they could come along to see what was happening.

PW3 said he recognized other people present including Coniace Hamainza, Lenford Lilanda, Hebson Lwiindi. PW3 said his parents rushed to the scene and he remained behind. He learnt that his brother died on 22<sup>nd</sup> May, 2013.

Under cross-examination, PW3 said Dacy Hatyoka, PW2 was his brother. He said he had been drinking from 10:00 hours to 14:00 hours. He said he went to Jabulani's house around 16:00 hours. PW3 said when he got there he found his brother had been beaten. He admitted that Dacy, PW2 had followed him to the scene and joined him. PW3 said three people were beating his brother. He said he had gone to inform his father about the beating but he never returned to the scene.

In re-examination, PW3 said he left his brother at the scene of the beating.

PW4, JOHN HATYOKA, 66 year old father to the deceased testified that on 21<sup>st</sup> May, 2013 he had been tending his field when his son, Richard Hatyoka, PW3 came to inform him about Cordiary being beaten. PW4 narrated that he rushed to Jabulani Njobvu's home and found that the beating had stopped and the deceased had been placed in a vehicle. He said he met them along the road heading to the main road.

PW4 said he saw the accused with a stick in his hands. He got into the vehicle and placed the deceased between his legs. PW4 said he shook the deceased and called out his name but he did not respond and his eyes were shut.

PW4 said Muyamani was driving the vehicle. He said the accused was in the same vehicle including the deceased and himself. Jabulani Njobvu was in another vehicle trailing behind. PW4 said when they got to the main tarmac road the accused and his friend took the deceased and placed him in Jabulani's vehicle in the back seat. PW4 said Cephas Njobvu and Jabulani Njobvu sat in the front seat and other people were with his son in the back

seat. PW4 said since the vehicle was small, he was left behind as they took his son to West wood Police. PW4 said before he parted with them the accused informed him that they had beaten his son. He asked him not to worry as he would return.

PW4 said on 22<sup>nd</sup> May, 2013, his son Dacy Hatyoka, PW2 informed him that his other son, Cordiary Hatyoka had died. PW4 said he wanted to see where his son was. He sent his other son to go.

PW4 said he had known the accused for 34 years.

Under cross-examination PW4 said when he first saw his son, the deceased, in the vehicle, he was squirming, showing signs that he was in agony. He said he observed that his son had no life in him and was in a hopeless state. He said the deceased was dead according to his observations. PW4 said when he got into the vehicle the accused struck him twice with a stick. He admitted that the accused was beating a dead body. He said these were the only beatings he witnessed.

PW4 said he gave a statement to the Police and mentioned these beatings. PW4 said he also informed the Police that he placed his son between his legs in the back seat of the car. He said at the tarmac his son was placed in the back seat of the small car with five occupants, namely, Robert Njobvu, Gift Hamanje, Refect Mweete, his son, and a fifth person he could not recall. He said Cephas Njobvu and Jabulani Njobvu sat in front. PW4 said Dacy, PW2 was not there.

In re-examination, PW4 said that when he got into the vehicle he found his son was helpless and in agony. He said he was not able to open his eyes.

PW5 DETECTIVE CONSTABLE MWANZA, 33 testified that on 9<sup>th</sup> August, 2013 on 9<sup>th</sup> August, 2013 he was assigned to investigate the murder of Cordiary

Hatyoka. He said at the time the accused was in custody. The other suspects included Gift Hamanje, Kelvin Moonga, Cephas Njovu, Robert Njobvu and Jabulani Njobvu who were on the ran.

PW5 said he interviewed the accused who did not give him a satisfactory response. He then made up his mind and charged him with murder. PW5 said he established that the deceased died on 22<sup>nd</sup> May, 2013 on his way to hospital. He said this was confirmed by a Brought In Dead Certificate, P1, and signed for by Jabulani Njobvu. PW5 said a Post mortem report was conducted on 27<sup>th</sup> May, 2013 by one Dr. V. Telendiy. The deceased father, PW4 was in attendance. PW5 said he attended the Postmortem and produced exhibit P2.

Under cross-examination, PW5 said his investigations revealed that the deceased died on 22<sup>nd</sup> May, 2014. He said PW1 had informed him that he was taken to UTH with the deceased and they were returned to a certain house. He said the deceased was taken to UTH twice. On the second occasion he was brought in dead. He said he was not sure of anything regarding time but believed this is what transpired. PW5 said according to Dr. Telendiy, the deceased died on 21<sup>st</sup> May, 2013. PW5 said he was not present at the time the body was taken to UTH but the certificate stated the body was brought in dead around 01:47 on 22<sup>nd</sup> May, 2013. PW5 said he interviewed several people including the accused, the deceased's father and deceased's family members.

In re-examination, PW5 said the Post Mortem Report P2 was prepared on 27<sup>th</sup> May, 2013 but stamped on 5<sup>th</sup> July, 2013.

At the close of the prosecution's case, I found the accused with a case to answer and I accordingly put him on his defence.

In his own defence, the accused ISAAC MIKE NJOBVU, 39 testified on oath that on 21<sup>st</sup> May, 2013 around 10:00 hours some suspected cattle thieves were

apprehended and taken before the village Headwoman. He narrated that they had allegedly stolen cattle belonging to Jabulani Njobvu. He said he attended the meeting at the Headwoman's place and saw the three suspects namely Refect Mweete, Robin Njobvu aka Mugabe, and Gift Hamanje. DW1 said the village committee inquired from Jabulani Njobvu about the theft and resolved that the matter be reported to the Police.

DW1 said that Jabulani Njobvu then decided to take the suspects to the Police in his vehicle. He said other people jumped on to Jabulani's canter vehicle to see what would happen to the suspects. He said they were more than 60 people present at the Headwoman's place. DW1 said Jabulani did not immediately go to the Police but drove the suspects to his house where members of his family began beating the suspects namely Mugabe, Gift Hamanje and Refect Mweete. DW1 said the suspects were beaten by Jabulani, Kelvin "Kelo" Moonga, Cephas Njobvu and Jeremiah Njobvu, all members of the same family.

DW1 said he went to Jabulani's home to advise him not to do the opposite of what was advised by the Headwoman. He said Jabulani and his relatives did not listen to him, so he moved away from them and sat somewhere else. DW1 said after beating the said suspects, the men got hold of Refect Mweete, PW1 and beat him. He said Mugabe and Gift Hamanje also joined in the beating. DW1 said many other people also joined in the beating. He said Refect Mweete, PW1 was tied by the hands and hang on a tree as they beat him for at least 5 minutes. DW1 said Refect then admitted to stealing the cattle with Cordiary Hatyoka. DW1 said he questioned the men as to why they continued beating PW1 after he had admitted. He said after they stopped beating him, they asked for volunteers to apprehend Cordiary Hatyoka. DW1 denied being one of the volunteers. He said Jabulani organized the apprehension of the deceased and the men went in search of Cordiary using Misheck Munyamani's van. DW1 said he remained seated at Jabulani's village. He said he spoke with Refect Mweete,



PW1 and the latter informed him that Cordiary would kill him, PW1. He said PW1 did not state a reason for saying this.

DW1 said after 45 minutes, from where he sat he heard someone being beaten. He said he went to see what was happening and saw that Cordiary Hatyoka was being beaten by Jabulani Njobvu, Gift Hamanje, Mugabe, Cephass Njobvu, Jeremiah Njobvu and Kelvin "Kelo" Moonga. DW1 said a lot of people were present.

DW1 said he pleaded with Jabulani to stop the beatings, but in turn Jabulani insulted him. He said there was nothing else he could do but sit down till the beating ended.

DW1 said Dacy Hatyoka, PW2 did not see him beating the victim, but saw him trying to stop the deceased from being beaten. DW1 said he saw Dacy coming into Jabulani's yard. He said Dacy also tried to plead with Jabulani to stop the beating and offered to pay for the loss. Jabulani thereafter took the suspects to the Police, and he, DW1 remained behind. He said Jabulani asked Misheck Munyamani to take some people and he took the suspects. DW1 said he requested Jabulani to leave him by his home, which he did.

DW1 said in the morning between 06:00 hours and 07:00 hours he was preparing to go about his business when Kelvin Moonga came to his home and informed him that Cordiary Hatyoka had died.

DW1 said he was apprehended by Police towards the end of July, or early part of August, 2013 whilst at Radian Stores in Lusaka. He said he was conducting his business at the time. DW1 said he was identified on an identification parade by Dacy Hatyoka, PW2. DW1 said he gave a statement to the police and pleaded his innocence.

Under cross-examination, DW1 said he hailed from the Eastern Province, but he was born in Mumbwa. He denied that he shared the same father with the said Jabulani who he said was his uncle even though there were age mates. DW1 said he was a farmer and equally had cattle like his uncle Jabulani. He said they resided in the same area and were close. DW1 said he believed in Justice even for the victim. He denied that he ever told the Police the testimony he gave because they never asked him. He admitted that he was interviewed by the Police. He admitted that he was present at the Headwoman's village to discuss the theft and throughout the period when the beatings took place. He said he left Jabulani's vehicle as Jabulani went to the Police.

DW1 admitted that he was present in court when PW2, Dacy Hatyoka testified that he kicked the deceased. He said PW2 lied that he kicked the deceased. DW1 denied residing in Kanyama Township but said he had some relatives there. DW1 initially stated that he was not aware that Police were looking for him. He said he was apprehended in the town centre at Lusaka. DW1 then said he had heard that the Police were looking for him. He further denied being aware of any reconciliation between the deceased family and himself. He reiterated that Mugabe and Gift were the first suspects. He said Mugabe and Gift participated in the beating of Refect Mweete, PW1. He maintained that they were also considered suspects but participated in the beating of the deceased, as they were related to Jabulani. He said Jabulani and himself had animals. DW1 admitted that he was related to Jabulani. DW1 further said he was not happy about the theft but he did not participate in the beating of the suspects. He said he did not report the beatings to the Police. It was his testimony that Jabulani refused to take his advise to stop the beating. He stated that he was beaten too for trying to stop the torture. He admitted that he was present throughout the beating.

In re-examination, DW1 said he was present because he was a subject of the village. DW1 said he recalled the testimony of Dacy Hatyoka PW2, and Richard

Hatyoka, PW3. However, when he was questioned by the Police, he said he did not know anything concerning the deceased's death. DW1 said he did not see the deceased's father in court or on the day of the beating. He further denied having moved to Kanyama. He said Mugabe and Gift were beaten first. He said it was not his responsibility to report the events to the Police.

DW2, PRECIOUS MUCHOCHOMA, 44 year old farmer testified that on 21<sup>st</sup> May, 2013 she was at home when her son informed her that her neighbour, Refect Mweete, PW1 had been apprehended for stealing a cow and taken to the Headwoman's place. She said she followed to see what was happening. She heard some noise coming from Jabulani's house with people shouting for the thief to be beat.

DW2 said when she got there she found the suspect had been tied to a swing with people whipping him, namely Jabulani, Robbie, Kelo, Cephas, Gift and some children she did not know. DW2 said a lot of people were in attendance. She said they beat the suspect from about 11:00 hours, and around 17:00 hours the suspect informed them that he had stolen the animals with the deceased. She said they then untied him and placed him in Misheck's vehicle and left after a while. DW2 said she remained there with other people and after a while another suspect was brought and tied up to a swing before being tortured. She said Gift and Cephas got the suspect out of the vehicle whilst Jabulani tied him. Then Jabulani and Robbie put him on a swing. Jabulani then slapped him in the face upon which Gift, Cephas, Robbie, and Kelo beat him.

DW2 said the accused stood up to rescue the man but Jabulani told the accused that he would be beaten. She said the suspect was thereafter placed in a vehicle, a canter along with Refect Mweete, PW1. Misheck and Chitongo also got in the vehicle. DW2 said she also got in the same vehicle as she was on her

way home. She said the occupants of this vehicle were Robbie, Kelo, Refect, Cordiary, Misheck and Chitongo. She said Misheck was driving the vehicle.

DW2 said Dacy came and asked Refect Mweete, PW1 what was happening. He asked if they were the ones that had finished the cattle. DW2 said they travelled a short while then found Cordiary's father on the way. She said Dacy was not in the vehicle as he had remained behind. She said Dacy's father got on to the vehicle with his bicycle. DW2 said she got off the vehicle after a short while and went to her home. She said she had known the deceased. She further said she knew Dacy, PW2 and his father, PW4. She said she knew them well as she had lived in Jamu village all her life.

Under cross-examination, DW2 said her house was not quite close to Jabulani's house. She admitted that she went to Jabulani's house when she heard about Refect Mweete's apprehension, where she found him being beaten on a swing. DW2 said she got to Jabulani's house around 1:00 PM. She said the accused's house was quite far but she could not measure the distance. She said it took two hours to walk to Jabulani's house. DW2 denied being related to the accused by blood or marriage. She said she knew Misheck Munyamani but his wife was not her sister. DW2 further denied knowing about any negotiations with Misheck Munyamani. She denied knowing what the deceased's father, PW4 had told court as she was not in court. She further said she did not know that Richard, PW3 testified, but she knew him.

DW2 said the suspects were not beaten whilst in the vehicle. She said she arrived at Jabulani's house around 11:00 hours and found Refect, PW1 being beaten. She said apart from Kelo and Gift, the others that beat Refect were related. She said the accused was present at Jabulani's house and he was trying to protect Refect from being beaten. She said Jabulani and Robbie got angry as he attempted to do so. DW2 said she saw Jabulani and Robert tie Cordiary. She said she did not see Dacy nor Richard present, or other of

Cordiary's relatives. DW2 said there were a lot of people. She said her focus was on the suspects being beaten. DW2 said she saw Dacy come towards the end at the time they boarded the vehicle.

Further, DW2 said she recalled seeing Misheck seated on a container. She said she did not do anything but just watched. She said there were people who were urging the beating to stop. She denied that Refect Mweete, PW1 was her relative. She further said she did not know if the accused was related to the deceased. DW2 said she had two sisters, Mervis and Mayden and none of them were married into the accused's family.

In re-examination, DW2 said she did not have a wrist watch but she could tell time from the sun. She said she did not know if Dacy was there but only saw him when she was getting into the car.

DW3 ANDREW CHITONGO, 43 testified that on 21<sup>st</sup> May, 2013 as he attended to his work at his home, he heard people calling out a thief. He then went where the noise was at Refect Mweete's house and found that Refect Mweete, PW1 had been apprehended by Jabulani's family.

DW3 said he made inquiries as to whose animal he had stolen and he was informed that there were Jabulani's. He said Gift and Robert had also been accused of theft. Thus, Robert, Gift and Refect Mweete were placed in Jabulani's vehicle, and Jabulani informed him he was taking them to the Headwoman's place.

DW3 said he then returned to his work at his home. Between 10:00 hours and 11:00 hours DW3 said he went to Headwoman's place to see what was happening there. He found a meeting concluding and resolving that the suspects be taken to the Police. DW3 said he observed a lot of people there. He said the suspects were put in Jabulani's vehicle. He said Misheck had started

off with other people. DW3 said he witnessed Gift, Robert and Refect Mweete being beaten at Jabulani's house. He said they were being beaten by Cephas Njobvu, Robert Njobvu and Jabulani's children. DW3 said Refect Mweete then admitted to stealing the cattle with Cordiary Hatyoka. Others suggested they pursue him with their bicycles and others suggested they use Misheck Munyamani's vehicle. DW3 said they used Munyamani's vehicle. When they got to the school, they all came out. DW3 said he sat in the front passenger seat. He said at the school grounds they met Dacy Hatyoka who asked them where there were going. DW3 said they informed him they were in search of Cordiary who they believed stole some animals. DW3 said Misheck and himself saw that the others ahead of them had apprehended Cordiary.

DW3 testified that whilst at Mwibi school, Kelo Moonga attempted to assault the deceased, but, he was restrained by Munyamani who said he would not have him in his vehicle if he beat Cordiary. He said Kelo and others walked whilst he remained with Munyamani who he drove back with. Ahead of them they met the party of people that walked, and they asked Munyamani for a lift. Munyamani agreed to give them a lift.

When they got to Jabulani's house, they found Refect Mweete, PW1 had been hidden. Cordiary was then tied to a swing by Jabulani and Cephas Njobvu. DW3 said the deceased was then beaten by Jabulani, Cephas Njobvu, Robert Njobvu, Kelo Moonga and Jabulani's children in succession.

DW3 said the accused was present as the beatings went on and tried to rescue the deceased from the beatings. She further said Richard Hatyoka, PW3 also tried to rescue his brother from the torture but the people were upset with him telling him that he seemed happy that animals were stolen. DW3 said a lot of people beat the deceased. He said there were approximately 60 to 70 people present. He said the beating lasted about an hour and a half. She testified that when they finished beating him, PW2, Dacy Hatyoka came. He went to speak

with Refect Mweete, PW1 but he was unable to speak clearly. DW3 said PW2 asked PW1 if he was the one that stole the animals, and PW1 agreed. PW2 then told the men to stop the beatings. Misheck was then asked to place the suspects in his vehicle and he obliged. Jabulani, Cephas, Gift, Robert and the accused got into Jabulani's vehicle and started off.

DW3 said he was in Misheck MUYAMANI's vehicle which drove some odd 500 metres before they run into Cordiary's father. He said the latter asked for Refect and Cordiary then got into Misheck's vehicle. DW3 said they then drove up to the road from Mwimbi. The suspects were then removed from MUYAMANI's vehicle and put in Jabulani's vehicle. DW3 said Cordiary's father, PW4 asked to get into the vehicle but Jabulani told him there was no space, so he remained behind.

Under cross-examination, DW3 said he knew the accused quite well as he attended primary school with him and have lived in the same area since. He said he was thus close to the accused. He denied that he agreed to testify for any gain. He said infact one Brian Njobvu requested him to testify. DW3 said one of the accused's relatives had also been apprehended in connection with this matter. DW3 said he never gave a statement to the police before.

DW4, MISHECK MUYAMANI, 29 year old brother to the accused testified that on 21<sup>st</sup> May, 2013, he was tending his field when someone informed him that his uncle Refect Mweete, PW1 had been apprehended. DW4 said the person then asked for permission to see what would happen to his uncle. DW4 said he was interested to know too what would happen to PW1 since in that month, 18 animals had been stolen. They then drove to the headwoman's house where he saw a lot of people gathered. DW4 said as he drove from the Headwoman's house he saw a lot of people at Jabulani's house. He said he went there and found three suspects being beaten. Those were Refect Mweete, PW1, Robert (AKA "Mugabe") and Gift. DW4 said the suspects were being beaten by

Jabulani, Kelo, Cephas, Robert and Jabulani's children. DW4 said at this point PW1 said he knew where the animals were, and then Gift and Robert (AKA Mugabe) joined in beating PW1. DW4 said PW1 confessed that he stole the animals with Cordiary Hatyoka. DW4 testified that PW1 said one animal was slaughtered and he would pay for it. DW4 said Jabulani was afraid Cordiary would escape, so he asked him if they would use his vehicle. He said they set off and got to Mwimbi School where some people got off and walked to Kamuti village. DW4 said he was with Andrew Chitongo, DW3. He said they met Dacy who inquired about the people he saw. He said Dacy had been attending a meeting at the school. DW4 said as they got by the river, they saw Cordiary, Richard, Jabulani and some people from Kamuti village. He said they followed them behind.

DW4 said Cordiary was beaten by the school. He said the people who apprehended him wanted to get in his vehicle but he refused that they use his vehicle. He said when he drove further ahead he found the same people, and again Jabulani asked for a ride and he allowed them in his vehicle.

DW4 said at Jabulani's house, Kelo, Cephas, Gift, Robert, Jabulani and some children beat Cordiary. DW4 said he was present during the beating. DW4 said they were a lot of angry people present. He said some people tried to rescue the victims of the beatings, but the mob reacted with anger.

DW4 said the accused was his brother. He said the accused tried to rescue the suspects but people were saying these people had finished the animals. DW4 said after sometime, the owner of the animals tried to stop the beatings. He said when the beatings stopped Jabulani asked him for transport to carry Refect Mweete, PW1; Cordiary Hatyoka, the deceased and others. He said Chitongo, DW3, Precious Muchochoma, DW2 and one Josephat requested to get in the vehicle. He said he got in Jabulani's vehicle. It was DW4's evidence that before they started off Dacy came and walked up to Refect, DW1 asking



him what kind of life he wanted for himself. He said Dacy did not get in the vehicles.

DW4 said when his vehicle moved a distance of about 300 to 400 metres he saw Cordiary's father, PW4. He said he stopped the vehicle and PW4 got in. DW4 said when they got to the main road, Cordiary was placed in Jabulani's vehicle. He said Robert and Gift also got in Jabulani's vehicle. DW4 said Cephas and Jabulani were in the same vehicle. He said PW4 asked to go in the same vehicle but Jabulani told him the vehicle was full.

DW4 said the following morning, he heard Cordiary had passed on. He said after three to four days he saw the Police. He said he gave them a statement of what he saw. DW4 said he later heard Isaac Njobvu had been arrested. DW4 said a lot of people beat the deceased. He said he never saw these people again.

Under cross-examination, DW4 said he knew Precious Muchochoma, DW2 but he was not related to her.

This was the evidence for the Defence.

At the close of trial, I directed both parties to file submissions which ought to have been filed by the 23<sup>rd</sup> day of May, 2014. I am grateful for the submissions filed which I found helpful.

The Defence submits that the court takes Judicial notice of the fact that three of the five witnesses called by the State were blood-related to the deceased. Further, that the sticks used to beat the deceased were not brought to Court.

The Defence submits that PW2 evidence that he saw the accused beat the deceased is uncorroborated. PW2 also said the accused used sticks which were not brought to Court. It is submitted that PW4's testimony that the accused

whipped the deceased twice in his presence is also uncorroborated by PW1, DW1 and DW3 who were also present at the time. Ultimately, it is submitted that there was no testimony led as to who among the many assailants of the deceased delivered the fatal blow.

It is submitted that there are lingering doubts as to whether the accused murdered the deceased. Counsel submits these doubts must be resolved in the accused's favour.

The case of **Mutale and Phiri v. The People (1995/1997) ZR. 227 (Sc)** was cited which held inter alia that:

*“Where two or more inferences are possible, it has always been a cardinal principle of criminal law that the court will adopt the one that is more favourable or less favourable to an accused if there is nothing to exclude that inference. Where there are lingering doubts, the court is required to resolve such doubts in favour of the accused”.*

It is submitted that PW2 and PW4 must be treated as accomplices as they were witnesses with interests to serve. The Defence rely on the case of **Muchabi v. The People (1973) ZR 193** where the court of appeal held-

*“.....a witness with an interest to serve must be treated as an accomplice and his evidence tested to see whether it was corroborated or whether there was a reason for believing it in the absence of corroboration”.*

It is further submitted that the Police investigations did not assist the court in determining what occurred on 21<sup>st</sup> May, 2013. It is argued that there were no investigations undertaken in the community by PW5; no witnesses from the community who witnessed the beatings were brought to court to corroborate

the testimony of PW2 and PW4; and persons directly implicated in the murder by all witnesses were still at large.

It is submitted in the **Phiri and Others v. The People (1973) ZR. 49** held that the courts are not permitted to fill in gaps in evidence by making assumptions adverse to the accused.

It is further submitted that from the post mortem report it was impossible to ascertain which blow killed the deceased since this was a case of a mob of people beating the deceased. The Defence rely on the case of **R. v. Abbott (1955) 2 ALL ER 901** which held inter alia;

*“.....if two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other and there is not evidence that they were acting in concert, the jury ought to return a verdict of not guilty against both because the prosecution have not proved the case”.*

The Defence also cited the earlier case of **R. v Richardson (1985) 1 Leach 388** which had similar holding.

The Defence argued that in this case whoever beat the deceased was guilty of assault occasioning actual bodily harm, which in any event is a misdemeanor because it could not be ascertained as to which blow killed the deceased.

It is submitted that the prosecution have failed to establish a case against the accused. The Defence urge the court to acquit the accused as the prosecution has not discharged its burden of proving the guilt of the accused beyond reasonable doubt.

I have carefully considered the weight of the evidence on record by the prosecution and the defence.

In order to prove the charge of murder has been established against the accused, the prosecution must show the following;

1. That a death occurred;
2. That there was an unlawful act;
3. That an unlawful act caused the death of the deceased; and
4. That the act was accompanied by malice aforethought.

Section 200 of the Penal Code, Chapter 87 of the Laws of Zambia provides as follows:

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

The elements of what constitutes malice aforethought are provided in section 204 of the Penal Code as follows:

***“204. Malice aforethought shall be deemed to be established by evidence proving anyone or more of the following circumstances:***

- (a). an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;***
- (b). knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person: whether such person is the person actually killed or not; although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may be caused;***
- (c). an intent to commit a felony;***
- (d). an intention by the act or omission.....”***

From the facts and evidence before this Court, it is not in dispute that the death of Cordiary Hatyoka occurred on or about the 22<sup>nd</sup> day of May, 2013. "Exhibit P2 Post Mortem Report both produced by Detective Constable Mwanza, PW5 attest to that fact.

To determine whether or not there was an unlawful act, I have considered the evidence of PW2, PW3 and PW4 given that they testified that they saw the accused beating the deceased. In line with the holding in the case of *KAMBARAGHE MPUNDU KAUNDA V. THE PEOPLE* (1992) ZR. 215 I have considered the possibility of PW2, PW3 and PW4 being suspect witnesses given that they were all directly related to the deceased. PW2 and PW3 were brothers to the deceased, whilst PW4 was the father to the deceased. In my assertion, I have not discounted the possibility of PW2 and PW3 having given false testimony owing to the inconsistencies in what they allegedly witnessed at the same time. PW2, Dacy Hatyoka said he saw the accused tying the deceased. He also saw the accused and others known put the deceased in a vehicle. He said he saw eight people including the accused beating his brother, the deceased. PW2 said he witnessed the deceased being beaten from beginning to end.

PW3, Richard Hatyoka, said he saw three people namely Robert Njobvu (also known as "Mugabe") Kelvin Moonga (also known as "Kelo") and Gift Hamanje beating the deceased. PW3 said his brother, Dacy Hatyoka, PW2 followed him at the scene where the beatings were taking place and joined him there around 16:00 hours. It is thus curious that their testimonies on this aspect do not corroborate each other. In my analysis of this evidence, if PW3 had arrived at the scene of the beatings at the same time, they ordinarily would have been able to see quite similar events taking place. Further, the evidence of PW3 contradicts that of PW2 in the times they witnessed the beatings. PW3 said he had been drinking and only went to Jabulani's house where the beatings were taking place after 16:00 hours upon which PW2 joined him there. PW2 said he witnessed the beatings from beginning to end. This begs the question – How

could PW2 have witnessed the beatings from beginning to end when PW3 arrived first and found their brother had already been beaten.

As regards, John Hatyoka, PW4 the deceased's father, I have discounted the possibilities of him being a suspect witness because there was no evidence to show that he had anything to gain in giving false evidence despite the fact that his son had been assaulted. His version of evidence is corroborated by the testimony of DW2 and DW4. I therefore accept his evidence to the extent that it is corroborated by other witnesses. I find as a fact thus that PW4 did not witness the deceased being beaten but got on to the vehicle where the deceased was placed in from somewhere near Jabulani's home to the main road. PW4's testimony that he saw the accused beat the deceased twice in the motor vehicle on the way to the main road is not corroborated by any other testimony. The aspect of PW4 having seen the accused beat the deceased was equally not recorded in his statement. In the case of **Charles Lukolongo and Others v. The People (1986) ZR. 115**, Supreme Court held inter alia that **"where evidence available only to the Police is not placed before the Court, the Court must presume that, had the evidence been produced, it would have been favoured to the accused. The presumption can only be displaced by strong evidence"** In this instance case, the aspect of PW4 having seen the accused beat the deceased was an important detail for the Police to record, if in fact it occurred.

I have also carefully considered the evidence of Detective Constable Mwanza, PW5 who investigated the Murder of the deceased. He said he found the accused in custody, questioned him and upon the accused failing to give a satisfactory answer he charged him with murder. He's testimony did not show that he had investigated the matter to the extent that his investigations revealed that the accused assaulted or beat the deceased amongst others.

Given the testimony of PW1 and PW3 who did not see the accused beat the deceased; the inconsistent testimonies of PW2 and PW3; the uncorroborated testimony of PW4; and investigations of PW5; it is my finding that the prosecution has not proved the element of the accused committing an unlawful act as required by section 204 of the Penal Code.

The only other aspect for this court to consider is that of malice aforethought.

In the case of *The People v. Njobvu* (1968) ZR. 132 it was stated as follows:

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

In this case, as I have earlier found, the evidence of PW1 who was the other victim does not show that the accused beat the deceased but that he was beaten by about eight (8) known persons. The evidence of PW2 and PW3 is inconsistent as earlier found. However both witnesses named other known persons who took part in the beatings of the deceased and PW1.

The accused DW1 testified that the deceased was beaten by the same named persons that PW1 mentioned in his testimony. His version of what transpired is that he was in fact trying to stop the beating of the deceased and PW1. His version of events is largely corroborated by the testimony of DW2, Precious Muchochoma.

Her testimony is to the effect that the accused tried to restrain others from beating PW1 and the deceased. Even under a rigorous cross-examination by the Prosecution, she remained steadfast and clear in her testimony. The prosecution were not able to establish that she was related to the accused or

had family ties with him. She did tell the court that she grew up in the area where the beating took place and knew the deceased's family quite well, as well as the accused family. In my assertion, I found her to be an independent and compelling witness.


Further, I have equally considered the evidence on record of DW3 and DW4. Whilst they did have strong ties to the accused as a friend and a brother respectively, I found the testimony largely unchallenged regarding the events that transpired.

The facts highlighting the injuries sustained by the deceased as shown in exhibit P2, the Post Mortem Report in and of themselves demonstrated that the deceased was beaten by several other people besides the accused, some still at large as stated by PW5. I therefore find that malice aforethought has not been established under section 204 (b) of the Penal Code. I am left to agree with the submissions by Mr. Phiri, Defence Counsel, and accept the authorities cited.

In my assertion of the evidence on record, there is doubt that the accused person committed the offence of murder. That doubt is resolved in his favour. I therefore find that at the close of the defence's case there is reasonable doubt that the accused caused the death of the deceased, and I accordingly acquit him.

Leave to appeal is granted.

Delivered in Open Court at Lusaka this 27<sup>th</sup> day of June, 2014

  
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**D.Y. Sichinga, SC**  
**JUDGE**