

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

HP/150/2015



BETWEEN:

THE PEOPLE

VERSUS

MWEWA YAPANSHI

BILLY SEMANI KANSEYA

MOSES LUNGU

MAXON PHIRI

DANIEL TEMBO

BEFORE : HON. JUSTICE G. C. M. CHAWATAMA

For the State : Mr. Mutale and Ms. C. Mhango (National Prosecution Authority)

For the Accused : ✓ Mr. S. I. Imasiku (Messrs Imasiku & Company)

JUDGMENT

CASES REFERRED TO:

1. *The People V Njobvu 1968 at Page 133*
2. *Mutambo and Others V The People (1965) ZR 15*
3. *Martin Mupeta and John Musonda Chola V The People (SCZ/137/2012)*

AUTHORITIES REFERRED TO:

1. Section 21 (1), 22, 200, 204, 204 (d) of the Penal Code Chapter 87 of the laws of Zambia.

The accused persons were charged on information containing one count of **MURDER** *Contrary to Section 200 of the Penal Code Cap 87 of the laws of Zambia.*

The particulars of the offence were that **Mwewa Yapanshi, Billy Semani Kanseya, Moses Lungu, Maxson Phiri** and **Denial Tembo** on 23rd February, 2015 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together did murder one **Grayzer Matapa**.

The Prosecution called 12 witnesses in support of their evidence.

PW1 was **Paul Ng'andwe**. On the 22nd February 2015 he was in the company of Grayzer, Tembo and a woman whose name was unknown to him. **PW1** drove to a place near the plots at Natural Resources Development College (NRDC). There they parked and began to consume alcohol. He recognized a number of people he had known for over five years. He stated that he saw Mwewa, Billy, Ralph, Jojo, Mabvuto and Smalls. It was his testimony that the people he saw belonged to the Patriotic Front Party (PF).

A certain lady approached Grayzer. The two stood at a distance and spoke. Upon returning to the group Grayzer informed him

that he should start the car reason being that the lady he was speaking to had informed him that there was a plan to organize people to apprehend them.

It was his testimony that before he could get off the bonnet of the car where he was seated they were approached by two gentlemen whose names were Danny and Barnabas. One of these gentlemen told them that where they were, was not a play ground and that they should go and play at Kalale. Danny then slapped Grayzer. **PW1** grabbed Barnabas, at this point the group they had found occupying the veranda came to where they were. Grayzer got up and got in the car. **PW1** managed to give Grayzer the car keys and got into the car himself. **PW1** had blood on the side of his face where he had been beaten with a bottle by Barnabas. As Grayzer tried to put the key in the ignition the keys were grabbed. Two other people came from the direction of the station, these were Moses and Phiri. Moses shouted that **PW1** should not run away. **PW1** recalled getting out of the vehicle and addressing Billy. Billy was telling the deceased's group that where they were was their home. He then ran from there and stood five to six meters away. **PW1** was scared, he jumped a short wall and ran away. He later went back to the scene and stood at a distance. He recalled seeing about four buses. Some people from the bus began stepping on the vehicle. When he returned to the scene Grayzer was still in the car.

When he saw what was happening he decided to go and call Grayzer's friend in Kalale.

After 25 minutes of leaving the scene he went to Mazhito's house to inform him what was happening. Mazhito told him there was nothing that could be done at that late hour. **PW1** was advised to go and with the assurance that the matter would be reported in the morning. **PW1** went to the Guest house where he slept; he asked his friends Boy and Daka to accompany him to the scene. When **PW1** got there he saw that the car was damaged. He saw Mabvuto and Small. He later learnt that Grayzer had been killed. **PW1** identified all the accused persons as the people who attacked them. He reiterated that they were all there during the attack.

When cross examined **PW1** informed the court that this group belonged to the United Party for National Development (UPND) Party. It was his testimony that they were attacked by at least nearly seven persons. He denied seeing anyone kill the deceased.

PW2 was **Natasha Mulenga**. It was her testimony that her friends had picked her up so that they could go out for a drink. They went to a bar called Joe Blaster. There was a time she went outside to answer her phone. She found Juve, Smalls, Billy, Jojo and Mabvuto, people who lived in the same area as her and she met often outside with others whose names she did not

know. She overheard Juve on the phone asking a person to come as the people they were looking for were there. It was her testimony that the visibility was good as lights were on.

When **PW2** went outside a second time she again heard Juve on the phone this time she heard him say Bashi Bwalya was there and he urged the person he was talking to, to hurry before they left. **PW2** saw the Bashi Bwalya referred to in the company of a certain lady and a man called Paul. She informed the court that Bashi Bwalya's other name was Grayzer. It was her testimony that she knew Grayzer was the person Juve was referring to following his description to the person he was talking to.

PW2 informed the court that she went to a certain lady's (amake Barbara) house and informed her that she was afraid after what she heard Juve say over the phone. Amake Barbara later spoke to Juve. Later **PW2** saw a bus driven by Moses who was talking to Juve. She was aware that Amaka Barbara called Grayzer and spoke to him. She witnessed two people going towards the vehicle Grayzer was in. She identified Barnabas as one of those people with a friend of his. She heard Juve call out the name Barnabas. She witnessed the beating of Grayzer after he was removed from the car. She witnessed the damaging of the vehicle. She also witnessed Paul being beaten. It was her evidence that the fighting grew worse. She witnessed Grayzer's

clothes being torn leaving him in boxers. She witnessed Paul running away.

PW2 heard Grayzer beg for his life and asking those beating him if they wanted money. **PW2** witnessed Grayzer being dragged and beaten. It was her testimony that he was beaten with fists and kicked. She saw a car and the bus she had seen earlier parked at the station. She saw Barnabas and his friends go in the car with Grayzer. Other people got onto the bus. The two vehicles drove off. She identified accused three, accused two and accused one whom she said was Juve and that his name was Mwelwa. When cross examined **PW2** testified that Barnabas was the one who started the fight, she also witnessed Juve beat the deceased. Grayzer was alive the last time she saw him.

PW3 was **Clementina Chitundu**. It was her testimony that on the 22nd February, 2015 between 21:00 hours and 22:00 hours she was at home. A young lady called Natasha knocked on her door and asked her if she knew Bashi Bwalya. She informed the court that Bashi Bwalya was a person she knew and that his name was Grayzer. After **PW2** informed her what she had heard. **PW3** assured her that she would look into it. She found Juve whom she described as one who was like a son to her. She found him on the phone. She heard Juve tell the person at the other end of the phone to hurry up as these people would go. She had a conversation with Juve about what he was doing. Juve knelt

down and assured her that he had heard what she said. She then decided to speak to Grayzer. She warned him and told him to leave as it was not safe for him to remain where he was. She went back to the house after Grayzer assured her that he had heard.

After ten minutes there was a knock at the door. A girl who identified herself as the one who was with Grayzer asked her to open the door. The girl informed her that Grayzer was being beaten. She allowed this young lady in her house and they slept. Around 05:00 hours **PW3** woke up the young lady and asked her to go and check on the vehicle. The young lady later came back and asked **PW3** to also go and see the state of the vehicle. The vehicle was damaged and she saw blood in it.

Around 07:00 hours she heard noise outside as though there was a fight taking place. She went out and found Moses who was a friend to her brother. It was Moses who informed her of the death of Grayzer. She said Juve and his friends had done wrong. She was stopped from going to the police by her husband. **PW3** identified accused three and accused one. When cross examined **PW3** informed the court that she did not know whom Juve was talking to on the phone. She said her evidence was based on what Natasha had told her.

PW4 was **Joseph Chongomena**. He was the owner of the bar where on that day around 16:00 – 17:00 hours Mwewa, Raphael Smalls and Jojo were. They sat outside and bought beer from him. Between 21:00 – 22:00 hours he had occasion to go outside where he found Grayzer, Paul and a lady whom did not know. He witnessed a fight between Noah and Mwewa's group which fight was referred to by **PW1**. It was his testimony that Grayzer, Paul and the lady were seated on the bonnet of a car opposite his bar. He closed the bar because of the fight. Whilst in the bar he heard noise outside. He peeped through the window and saw Barnabas and his friend. The two were fighting with Grayzer. Mwewa's group joined in the fight against Grayzer. **PW4** saw Paul run away.

PW4 witnessed the lady who was with Grayzer and Paul ran behind his shop. According to **PW4** a woman she knew facially tried to separate those fighting. He saw Barnabas and his friends take Grayzer and begun to go towards the station. He saw Mwewa and his group wrecking the vehicle. In terms of how long he has known the people he saw that night **PW4** informed the court that he had known Grayzer for at least six years. It was his testimony that he has known Mwewa for about five years, Raphael he has known for six years, Smalls for 3 years and Jojo for four months. Of the people in the dock **PW4** identified Mwewa.

When cross examined **PW4** informed the court that Mwewa and his friends begun consuming alcohol from 16:00 – 17:00 hours to around 21 – 22:00 hours. He described the people as being drunk.

PW5 was **Moses Lungu**. It was his testimony that on the 27th February 2015 he was woken up by a knock on the door. He peeped through the window and saw a person he knew called Paul. Paul's head was covered in blood. Paul wanted his help to go to police station to report a fight. Paul informed him that he had been beaten by Juve and his friends. **PW5** was informed by Paul that he was with Grayzer when the fight took place. **PW5** testified that he was afraid to go with him to the police station that night. He informed Paul that he could take him in the morning. After Paul had departed he heard the sound of vehicles passing. He heard the banging of car door. When he peeped through the window he saw a bus being driven off. It was his testimony that the light on his veranda was on so he was able to see what was happening outside.

PW5 informed the court that he heard someone shouting. When he went outside he identified the person shouting as mother to Bulu. She asked for help to attend to Grayzer whom she found lying along the road. **PW5** did as he was asked. He informed the court that Grayzer was in a terrible condition and could not walk. **PW5** with the help of another neighbour lifted Grayzer and took

him to his house. **PW5** testified that Grayzer informed him that Barnabas and Moses from PF are the ones who had injured him. Grayzer's children came out. After carrying the deceased to the veranda **PW5** went to get a vehicle to take Grayzer to the Police Station.

On the way to the police station Grayzer died. At the police station they were told to go to the hospital. **PW5** knew Moses and Barnabas as they lived with him in the compound. **PW5** identified accused 3 as Moses Lungu. When cross examined **PW5** informed the court that he did not know who left the deceased near his house.

PW6 was **Victor Telendiy** a Pathologist. He conducted the post mortem and thereafter established the cause of death. Apart from the post mortem report the witness also produced a photo album. **PW6** described the injuries he observed on the body of Grayzer. He informed the court that the cause of the death was traumatic shock due to multiple injuries of the trunk and head.

PW7 was **Bwalya Matapa** a son to the deceased Grayzer. It was his testimony that on the 22nd February 2015 woken up between 01:00 – 02:00 hours. He found his father lying on the veranda. He found the father with his friend Moses. He described his father's condition as being powerless and having difficulties talking. He saw cuts on his body and head. His father informed

him that Moses, Mwewa, Barnabas, Danny Phiri and Billy were the ones who injured him. **PW6** informed the court that he knew the people that his father referred to. His father was taken in a vehicle. He later learnt that his father had passed away. It was his testimony that the people he identified in the dock accused one, two, three, four, and five were people who had campaigned together with his father for Movement for Multiparty Democracy (MMD). Later his father joined UPND and the accused joined PF.

PW8 was **Saliya Matapa** a daughter to the deceased. She was with **PW7** on the night they found their injured father on the veranda. She was the one collected clothes for her father to be dressed in. According to **PW8** her father had deep cuts all over his body. She was a witness to the fact that a vehicle was found to take her father. She was also a witness who heard her father say that Moses, Phiri, Billy, Brian, Danny and Barnabas are the ones who had injured him. It was her testimony that of all the people mentioned by her father she only knew Moses.

PW9 was **Rehema Phiri** a girlfriend to accused one Mwewa Juve. **PW9** recalled receiving a phone call from a lady he knew called Agness asking her if she had heard that her boyfriend Mwewa had killed somebody. She in turn called Mwewa who denied killing a person. Mwewa asked that they meet. They met in Ngombe. Mwewa was with his friend Raphael. **PW9** recalled going to Mwewa's brother's house. The following day **PW9** in the

company of Mwewa and Albert went to Chisamba. It was her testimony that she witnessed Albert giving Mwewa One Thousand Kwacha (K1,000.00).

Mwewa was dropped off at a station in Chisamba. She saw Mwewa and Raphael get on a bus heading towards the direction going to Ndola. The next morning **PW9** was picked by the police. Her apprehension led to the apprehension of Albert (the brother to Mwewa). Albert's apprehension led to the apprehension of Mwewa in Kitwe. However Raphael ran away. When cross examined the witness informed the court that some aspects of what she told the police was different to what she told the court such as going to an Automated Teller Machine (ATM) in Chisamba to get money and being left in town as opposed to being left at home. According to her statement she left out the fact that she went with the Police to Kitwe.

PW10 was **Muwela Akafuma** a police officer based at Kalikiliki Woodlands. He was part of the team of police officers who were investigating the case of the murder of Grayzer Matapa. He was present when **PW9** Rehema Phiri was being interrogated. He was present when Albert was picked up. **PW10** was part of the team that travelled to the Copperbelt after it was known that that was where Mwewa and Raphael had fled. He and other officers went to Kitwe after information gathered through Mwewa's mother of his possible whereabouts. **PW10** was present when two young

men came out of the house where they were hiding. When Albert pointed at one of the young men and said that was Mwewa the two young men dropped what they were carrying and ran away. A chase ensued. **PW10** and another officer called Mwila apprehended Mwewa, Raphael managed to escape.

PW11 was **Oliver Daka** an inspector and officer-in-Charge based at Longacres Police Post. It was his testimony that he was instructed by the CID Woodlands police together with Constable Malama to accompany him to Bauleni market where a person suspected to be one of these who took part in the murder of Grayzer Matapa was spotted. When the team got to Bauleni market they found that Billy Kanseya had been apprehended by members of the public. Billy was handed over to the police and taken to woodlands police. He was detained and handed over to Mwila the dealing officer in this matter.

PW12 was **Benson Mwila** a Detective Sergeant based at Kalikiliki Police post and the dealing officer in this matter. It was his testimony that at the time he was handed over the docket to look into the murder of Grayzer Matapa there was already a suspect in custody called Moses Lungu. **PW12** was part of the team that travelled to Kitwe and apprehended Mwewa. Mwewa's whereabouts were established after the apprehension of Rehema Phiri and Albert. He established that the person who had run away was Raphael. He confirmed that Billy Kanseya was handed

over to him by **PW11**. Investigations led to the apprehension of Daniel Tembo. It was his testimony that Tembo had put up his house for sale. Another suspect called Moses Phiri handed himself in after having been on the run. **PW12** informed the court that his investigation revealed that the deceased was attacked, put in a white bus with an orange band and taken to an unknown place.

According to **PW12** this was done in full view of members of the public. **PW12** stated that his investigation further revealed that a few minutes after the deceased was taken he was found dumped near his home with multiple wounds. When cross examined **PW12** informed the court that there was a vehicle which was damaged in the process and that the vehicle belonged to the deceased. **PW12** informed the court that he was not aware who dropped off the deceased near his house. **PW12** stated that according to his investigations the deceased had injuries before he was put on the bus. **PW12** informed the court that accused one and accused two were charged with malicious damage to property at first. He denied that the matter fell by the way side because of the vehicle. He stated that Chief Investigation Officer was not aware of any report by accused five of his house being broken into. He denied that accused four was detained because of tension in Mutendere compound. It was his testimony that he was not aware that accused five was apprehended at a newspaper stand. As far as he was aware he was apprehended

by members of the public. **PW12** informed the court that the homes of all suspects were visited on several occasions some were apprehended whilst others gave themselves up.

DW1 was **Mwewa Yapanshi**. It was his testimony that on the 23rd February, 2015 around 15:00 hours he went to the bus station in Mtendere East. **DW1** was with his conductor and other conductors whose names were Jojo, Musonda, Mabvuto and Rapheal. They went to the market to a bar belonging to Joe Blast. According to **DW1** they consumed alcohol until 21:00 hours. They were sitting outside. **DW1** recalled seeing a Toyota Corolla green in colour. He saw Grayzer come out of the vehicle with Paul and a lady and other people he did not know. The group sat on the vehicle. Paul went inside the bar to buy beer. **DW1** informed the court that a person called Noah came to where they were sitting. Noah addressed **DW1** conductor Rapheal that he had become stupid. **DW1** tried to ask him to leave and not make trouble. Noah is said to have told **DW1** that he had back up pointing in Grayzer's direction.

An argument ensued and the two began to pull at each other. **DW1** informed the court that Grayzer came to where they were and began to push the boys around. Grayzer is said to have threatened the group. It was his testimony that because he knew Grayzer as a violent man he asked the people he was with to go

and sit down. Raphael told him that he had spoken to their chairman a Mr. Zimba who said he would come and fetch them.

Grayzer was approached by Barnabas and Chibebe who asked him why he was troubling the people with **DW1**. A fight broke out. Afterwards Chibebe said everyone should go home. DW1 testified that Chibebe said he would take Grayzer to the Police Station. **DW1** went home around 22:30 hours. In the morning he received a call, the caller asked him if he had heard that Grayzer was dead. His conductor Rapheal also called him telling him the same news. **DW1** was unable to reach Barnabas and Chibebe. **DW1** testified that he went to Ngombe Police Post hoping that he could report the matter there and was informed to go to Kalikiliki or Mtendere Police Stations.

DW1 informed the court that with all that was going on beatings and breaking into homes because of the death of Grayzer he decided to go to Kitwe. It was there that the Police found him. He denied being apprehended. It was his testimony that after a warning shot was fired he stopped.

When cross examined **DW1** informed the court that he had known Grayzer and Paul for 3 to 4 years. He admitted to being a PF cadre. He testified that it was Barnabas who started the fight. He admitted that when he went to the bar, Barnabas was not there. He denied phoning him asking him to come. He admitted

to being well known. He denied being approached by **PW3** to stop what he was doing however, he admitted knowing **PW3**. **DW1** denied seeing Chibebe who is Danny Tembo slap the deceased. It was his testimony that between Barnabas and Chibebe one of them informed Grayzer that this was their time and he should stay in Kalale as where he was not a play ground. He admitted seeing the shattered windows of the car Grayzer came in. **DW1** denied getting on the same bus in which the deceased was put.

DW2 was **Billy Semani Kanseya**. It was his testimony that on the 23rd February, 2015 around 20:00 hours he went to Joe Blaster's bar. There he found Mabvuto, Raphael, Musonda and Mwewa. He joined them in drinking alcohol. He recalled seeing a vehicle grey in colour drive up. It was his testimony that four men came out from the car, of the four he knew two of the men. One of them was Paul who greeted him. He recalled that a quarrel took place between Noah and Raphael. It was his testimony that two people whom he did not know came in a white taxi. A man who was with Paul was grabbed by one of the men who had driven up in a white taxi. He heard those who had come in a taxi tell the man who was grabbed that they were looking for him in order to take him to the Police Station. The man who was grabbed was put in a vehicle and taken. **DW2** noticed that the man's shirt was torn.

DW2 informed the court that, four days later he was approached by Paul who asked him the whereabouts of Barnabas and Chibebe. **DW1** denied knowing them and where they were. Paul phoned the Police in his presence. The Police came and took him (**DW2**) away. He recalled being charged firstly with malicious damage to property then later with murder. He denied being involved in a fight.

When cross examined **DW2** informed the court that he was not a PF cadre. He admitted to sitting next to **DW1** and his group and not that he was with them. It was his testimony that it was the first time he met Grayzer. He however, admitted knowing Paul for the last two years. He denied uttering any provocative words. It was his testimony that **PW1**, **PW2** and the deceased a few minutes before his death mentioned him because they saw him at the bar. He denied being with the deceased as he was taken away.

DW3 was **Moses Lungu**. It was his testimony that on the 23rd February, 2015 he did not assault the deceased. He stated that he was at a neighbour's house who had a bereavement and that he hosted the funeral. **DW3** informed the court that he learnt of the death of Grayzer through the ward chairman a Mr. Watson Phiri. He admitted that he spoke to Barnabas informing him that he had heard of the death. He was advised not to say much but to just keep quiet. Barnabas latter called him and he advised

him not to call him again as he was not there when the fighting took place and did not want to be involved.

DW3 saw a damaged vehicle which belonged to Grayzer. He inquired from Christine Chitundu what had happened and if she knew who had been present when the beating took place. Christine admitted being present. **DW3** decided that he would take her to the Police Station to give a statement, however, her husband did not want her to report. Two people he only identified as belonging to the UPND apprehended him and took him to Kalikiliki Police Station and later to woodlands Police Station. As far as **DW3** was concerned he was not in cells for his safety. After spending eight days in police custody, he was charged with murder.

When cross examined **DW3** informed the court that he was a chairman in the PF Party. He admitted to knowing Paul for three years. He admitted to knowing **DW2**. He admitted to knowing Grayzer since 2010 that they had dealt in illegal land together. He denied being at the scene where the fight took place. He informed the court that he was surprised that the deceased mentioned his name before he died. He admitted knowing all the accused as they were in the PF Party together. He denied driving a bus that night. **DW3** admitted that he had known Natasha for a long time. He disputed her evidence that she saw him driving a mini bus. **DW3** confirmed hearing the testimony of **PW3**. He

admitted to hearing her tell the court that he **DW3** told her that Grayzer had been killed by some young men.

DW4 was **Maxon Phiri**. It was his testimony that he received a phone call from the branch Chair lady informing him that Grayzer was dead that he had died on the way to the hospital. He in turn informed Moses Lungu the youth Chairman. He later learnt that Moses had been apprehended. **DW4** informed the court that he was living in fear after cadres went to his office and made noise. Secondly that his house was broken into and items stolen. It was his testimony that he was detained by the Police when he went to report the break in for his own safety. He suggested that those who were a threat to his life were UPND cadres. He was later charged with murder.

When cross examined **DW4** told the court that he has known Grayzer for 3 to 4 years. That he lived in the area where he was branch Chairman. He disputed Paul's evidence that he was present when Grayzer was being beaten. He denied arriving at the scene with Moses. **DW4** expressed surprise that the deceased mentioned him as being among those who beat him before his death. He denied the evidence by **PW12** that he had been in hiding after the death of Grayzer.

DW5 was **Daniel Tembo**. It was his testimony that he learnt about the death of Grayzer on his way to the station to get the

bus which he drove. He testified that he heard that it was people belonging to the PF Party who had killed him. **DW5** informed the court that on the 8th May he went to Mtendere market whilst there he was approached by four people he recognised as belonging to the UPND. One of the people called Peter Phiri informed him that he was wanted by the Police. At woodlands Police Station he was charged with murder. He learnt that a witness had come forward and informed the Police that he had assaulted Grayzer.

When cross examined **DW5** informed the court that he was a youth Treasurer Mtendere ward. He stated that he belonged to the PF Party. It was his testimony that on the day in question he was at home from 20:30 with his wife and children. He informed the court that although he gave this information to the Police they did not go to his home to confirm it. **DW5** admitted that he had known Paul for two years. **DW5** denied slapping the deceased and uttering the words that it was their time and that the deceased should stay in Kalale. **DW5** informed the court that the children of the deceased informed the court that their late father mentioned his name as one of the people who attacked him.

For the offence of murder to be proven, the court must be satisfied beyond all reasonable doubt that the accused persons caused the death of the deceased and that the homicide falls

within the ambit of **Section 200 and Section 204 of the Penal Code cap 87 of the Laws of Zambia** and further that the act was done with malice aforethought. These Penal provisions state as follows:

Section 200

“Any person who with malice aforethought causes the death of another person is guilty of murder.”

Section 204 defines malice aforethought and states that malice aforethought shall be deemed to be established by evidence proving any of one or more of the following circumstances:

- a) *An intention to cause the death or to do grievous harm to any person whether such a person is the person actually killed or not.*
- b) *Knowledge that the act or omission causing death will probably cause the death 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 intention to commit a felony*
- d) *An intention by the Act of Omission to facilitate the flight or escape from custody of a person who had committed or attempted to commit a felony.*

As was summed up by Blagden CJ in ***The People V Njobvu (1968) at Page 133¹*** it must be proved that:

1. *The accused caused the death*
2. *By an unlawful act, and with*
3. *Malice aforethought*

It is not in dispute that on the 23rd day of February, 2015 at Lusaka a murder took place. The victim was Grayzer Matapa who according to the Post mortem report cause of death was traumatic shock due to multiple injuries of trunk and head.

The Prosecution wants the court to find that it was the accused persons before court who caused the multiple injuries of the trunk and head of the deceased that led to this death, a fact that all the accused persons deny.

The evidence upon which the prosecution wants this court to make such a finding is that of **PW1** who on that fateful day was with the deceased. He identified Mwewa, Billy, Raphael, Jojo, Mabvuto and Smalls, as people whom he had known for over five years and who were present at the bar where he and the deceased went. He was present when a certain lady whom he did not name approached the deceased and later learnt from the deceased that there was a plan to organize people to apprehend them. He witnessed Danny and Barnabas approach the deceased and Danny slapped the deceased. He was bleeding on one side of his face where he had been beaten by Barnabas using a bottle. He was a witness to the removal of the deceased from the vehicle by those who attacked him. He saw four buses and

people from those buses stepping/jumping on the vehicle of the deceased. **PW2** confirmed the evidence of **PW1**. She also knew the people named by **PW1**. She was a witness to a phone call made by Juve (accused one) who informed people at the other end that the people they were looking for were there, further she was a witness to a second call by Juve who informed the person on the other end that bashi Bwalya was there and urged the person to hurry before they left. **PW2** is the one who alerted **PW3** on what was being phoned in turn **PW3** spoke to Juve and Grayzer.

Like **PW1**, **PW2** witnessed the deceased being beaten by people who lived in the same area she did. She witnessed the deceased being dragged and kicked. She recalled seeing a car and bus. She also witnessed the deceased being put in a vehicle and taken by his attackers. She identified accused one, two and three as being present and that Barnabas was the one who started the fight.

PW3 was the one **PW2** reported the telephone conversation to. She approached Juve whom she found on the phone urging the person on the other end to hurry up as those people would go. She warned the deceased to leave. She learnt of the deceased being beaten. She was a witness to the state of the damaged vehicle and the blood found in the vehicle. She identified accused one and three.

PW4 was the owner of the bar where the incident took place. He witnessed a fight between Noah and Mwewa's group. He witnessed Barnabas and his friend fight Grayzer and how Mwewa's group joined in to fight Grayzer. He was a witness to Barnabas and his friends taking Grayzer towards the station. He was also a witness to the damage caused to the deceased's vehicle. He was a witness to Mwewa's group consuming alcohol at his premises from 16-1700 hours to 21-22:00 hours. **PW5** learnt of the beating of the deceased from **PW1**. He was a witness who heard the banging of a car door and seeing a bus being driven off. He was the second person to arrive at the roadside where the deceased had been left. He is the one whom the deceased informed that he had been injured by Barnabas and Moses from PF. **PW6** was the Pathologist who conducted the postmortem.

PW7 and **PW8** were the son and daughter of the deceased. They described their father's condition when they found him on the veranda. Both were present when their father informed them that he was beaten by Moses, Mwewa, Barnabas, Danny Phiri and Billy. **PW7** identified accused one, two, three and four and five as people who had campaigned with their father when they all belonged to the Movement for Multi Party Democracy. He informed the court that later his father joined UPND and the accused joined PF. **PW8** only knew Moses whom she identified. **PW9** witnessed Albert a brother to accused one give him one

thousand kwacha (K1,000.00). She was present when Mwewa and Raphael got on a bus that was going in the direction of Ndola. **PW10** confirmed that **PW9** assisted the Police with information that led to the apprehension of accused one. **PW11** was the one who apprehended Billy accused two after he was identified and apprehended by members of the public that he was among those who murdered the deceased.

PW12 was the arresting Officer who confirmed the evidence of all the witnesses on the events that lead to the death of Grayzer and the apprehension of those in court. He pointed out that there were others who were on the run. **DW1** admitted that he knew the deceased and Paul for 3-4 years. He admitted to being a PF Cadre. He confirmed the evidence of the Prosecution witnesses that a fight took place. He confirmed that Grayzer's car was damaged. He put up a defence that Grayzer is the one who pushed some boys and threatened his group. He also stated that he knew Grayzer as a man prone to violence. He admitted that some of the people in his group beat up the deceased but not him. He confirmed going to the Copperbelt after the incident but not because of the death of Grayzer but because of the fighting and house breakings that followed. **DW2** confirmed the evidence of the prosecution witnesses that he was at the bar on the date and that a quarrel took place. He admitted being in the company of Mabvuto, Raphael, Musonda and Mwewa, the fact that they were consuming alcohol. He also confirmed that the deceased

and Paul drove to the same bar where he and his friends were. It was his testimony that the deceased whom he did not know mentioned his name to the prosecution witnesses because he had seen him at the bar.

DW3 denied ever being at the bar where the murder took place. He however, knew the deceased and Paul. He admitted that he saw Grayzer's damaged car. He was unable to tell the court why he was kept in Police custody for eight days for his safety. He admitted to being a Chairman of the Patriotic Front Party. **DW4** denied being present at the crime scene on the day of the fight. The deceased was someone he had known for 3 to 4 years and could not understand why he presented him as one of those who beat him.

DW5 belonged to the Patriotic Front Party and was a Treasurer Mtendere Ward. He denied beating the deceased. He informed the court that on the day in question he was at home with his family.

This case falls under common purpose offences.

In the case of *Mutambo and Others v The People (1965) ZR 15²* citing *Section 22 of the Penal Code* the court stated that:

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the

prosecution of such purpose an offence is committed of such a nature that its commission was the probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

The court stated that:

“Under section 22 of the Penal Code the ‘common purpose’ need not be by express agreement or otherwise pre-meditated.”

Further that:

“For the purposes of section 22 of the Penal Code a ‘probable consequence’ is that which a person of average competence and knowledge might be expected to foresee as likely to follow from a given course of action.”

The court went on to explain that:

Two points affecting the application of the section need to be noted.

- 1. The formation of the common purpose does not have to be by express agreement or otherwise premeditated; it is sufficient if two or more persons join together in the prosecution of a purpose which is common to him and the other or others, and each does so with the intention of participation in that prosecution with the other or others.*
- 2. It is the offence which was actually committed in the course of prosecuting the common purpose which must be a probable consequence of the prosecution of the common purpose. If a different offence to that committed was a probable consequence and accused cannot be convicted under the section. Thus, if the offence actually committed was murder but the offence which was probable consequence was manslaughter, the section does not*

apply. Stated another way, if the offence charged is murder and that offence is proved to have been committed, but it was not a probable consequence of the common purpose, the section does not operate to enable any one to be convicted of any offence, though, of course, those proved to be guilty of murder or manslaughter by reason of section 21 of the Penal Code may be convicted. If on the other hand, the offence proved to have been committed on the charge of murder was manslaughter, and manslaughter was probable consequence of the unlawful common purpose, all participants in the unlawful common purpose are liable to conviction of manslaughter under section 22.

This principle was re-stated in the case of ***Martin Mupeta and John Musonda Chola v The People (SCZ/137/2012)***³ as follows:

“In criminal law, the doctrine of common purpose, common design or joint enterprise refers to the situation where two or more people embark on a project with a common purpose which results in the commission of a crime. In this situation the participants are jointly liable for all the results from the acts occurring within the scope of their agreement. Each of the parties to an arrangement or understanding is guilty of any crime falling within the scope of the common purpose which is committed in carrying out that purpose.”

Therefore, the accused persons are deemed to be prosecuting a common offence if they fall in the following categories:

- 1) *Participants in the crime charged, either as principals or accessories*
- 2) *Receivers of stolen property in respect of the trial of the thieves from whom they received the property.*
- 3) *Parties to crimes which are admissible as similar facts.*

Particulars include procurers, aiders and abettors – **Section 21 (1) of the Penal Code states that:**

“When an offence is committed, each of the following persons is deemed to have taken part in committing the offence to be guilty of the offence, and may be charged with actually committing it, that is to say:-

- a) Every person who actually does the act or makes the omission which constitutes the offence.*
- b) Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence*
- c) Every person who aids or abets another person in committing the offence.*
- d) Any person who counsels or procures any other person to commit the offence.”*

According to Black’s Law Dictionary an Aider and Abettor is one who assists another in the accomplishment of a caution design or purpose. He must be aware of and consent to such design or purpose.

From the foregoing evidence, it not in dispute that Grayzer Matapa, the deceased herein was beaten to death. From the evidence of **PW1**, **PW2** and **PW3**, those who beat up Grayzer were people who were in the company of accused one, and others who allegedly came on the scene upon being alerted by accused one that the person that they had been looking for was there. This was in accordance with the evidence of **PW2** who overhead

accused one talking on the phone that the deceased should be there and the people he was calling should hurry.

PW2 also saw the deceased being beaten and it was her testimony that accused one took part in the beating. **PW2's** evidence corroborated the evidence of **PW1** when he stated that other people came from the direction of the station when the fight started. The undisputed evidence of **PW3** also speaks to the fact that accused one was on the phone calling for people to come and beat the deceased. When **PW2** informed **PW3** about the phone call allegedly made by accused one, **PW3** confronted accused one and he apologized.

It was also the undisputed evidence of **PW4**, the owner of the bar where the fight is said to have started from that he witnessed the fight at his bar which was said to be between accused one's group and the deceased. He saw the deceased's car being damaged. **PW4** also identified the same people who were in accused one's group as **PW1** and **PW2**.

I have no doubt in my mind that the accused persons together with other people who have not been apprehended beat up the deceased and **PW1**. Apart from **PW1**, all the witnesses who witnessed the fight were independent. **PW2** is a person who just knows the accused persons as she lived in the same compound with them. She did not strike me as a person who would have an

interest to save by testifying against the accused persons. Similarly, **PW3** from her testimony and the fact that **PW2** went to ask her to talk to the accused against his plan to attack the deceased, was a person who was well known and respected by both accused one and the deceased. I cannot imagine why she would concoct a story to implicate accused one. As for **PW4**, the two rival groups were both his customers, I have no reason to think that he would have any interest to save.

Murder occurs when a person who of malice aforethought kills another human being. In this case it has been established that the deceased was killed by the accused persons in the prosecution of their common intent to beat up the accused. To establish whether there was malice aforethought in the actions by the accused, I am guided by **Section 204 (d) of the Penal Code** which provides that the accused should have possessed

'Knowledge that the act or omission causing death will probably cause the death 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.'

I have seen the photos in an album compiled by Dr. Telendiy showing the injuries inflicted on the deceased. I have also examined the post mortem report which shows that the deceased died from traumatic shock due to multiple injuries of trunk and

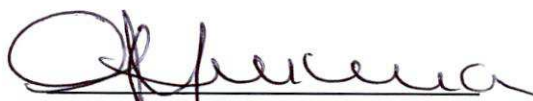
head. The internal examination shows that the deceased had a chop wound in the skull, subarachnoid haemorrhage and fractured of right ribs. I am convinced that the accused knew that beating a person to cause such injuries would result into death or grievous harm or were indifferent as to whether death or grievous bodily harm would be occasioned.

I find that the accused persons while acting together did form a common purpose to either cause the death or grievous bodily harm to the deceased and in prosecuting that purpose, the death occurred.

It is my finding that the prosecution have proved their case beyond a reasonable doubt. I find the accused one, two, three, four and five guilty as charged and convict them accordingly.

You have a right to appeal to the Supreme Court if you are not happy with my decision.

DELIVERED AT LUSAKA THIS 4TH DAY OF FEBRUARY, 2016.



**G.C.M. CHAWATAMA
JUDGE**