

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

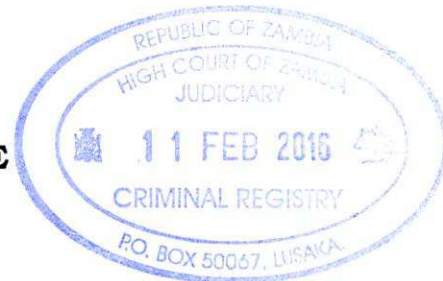
**HP/79/2008**

BETWEEN:

**THE PEOPLE**

**VERSUS**

**SEKELANI NGULUBE**



**BEFORE** : **HON. G.C. CHAWATAMA - IN OPEN COURT**

*For the State* : *Mr. Chipola Bako – National Prosecutions Authority*

*For the Defence* : *Mr. Makebi Zulu - Makebi Zulu & Advocates*

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

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CASES REFERRED TO:

1. *The People V Njobvu (1968) ZR at page 133*
2. *Ticky V The People (1968) ZR 21 (IHC)*
3. *Mbomena V The People (1967) ZR 89*
4. *Kahindu V The People (1967) ZR 181 (a)*
5. *Tembo v The People (1976) ZR 332(SC)*
6. *Herman Mvula v The People (1991) SJ SC SCZ Judgment No. 6 of (1991).*
7. *The People V Mupota SCZ Judgment no.27 of (1978)*
8. *Chibeka V The People (1970) 1QB 154*

AUTHORITIES REFERRED TO:

1. *Section 13(2), 13(3), 13(4), 167(1), 200 and 204, 201 (1), 201 (20 (a), 205 (1) of the Penal Code Cap 87 of the Laws of Zambia*
2. *Lord Diplock*

The accused person **SEKELANI NGULUBE** stands charged with Murder *Contrary to Section 200 of the Penal Code Cap 87 of the Laws of Zambia.*

The particulars of the offence are that **SEKELANI NGULUBE** on 4<sup>th</sup> November, 2007 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia did Murder **GEORGE SINYAMA.**

The accused stand charged on an amended information containing two counts. The first count is that of murder contrary to Section 200 of the Penal Code Cap 87 of the Laws of Zambia. The particulars of the offence alleged that **Sekelani Ngulube** on the 4<sup>th</sup> day of November, 2007 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, did **murder** one **George Sinyama.**

Count 2 is that of Attempted murder contrary to *Section 215 (a) of the Penal Code Cap 87 of the Laws of Zambia.*

The particulars of the offence are that **Sekelani Ngulube** on the 4<sup>th</sup> day of November, 2007 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, unlawfully did attempt to **murder** one **Finola Sinayma.**

The prosecution called 12 witnesses. The accused gave evidence on oath and called no witnesses.

**PW1** was Alice **Mundia Sinyama** the wife to the deceased and mother-in-law to the accused. On the 3<sup>rd</sup> November, 2007, she was woken by her niece who informed her that her husband Mr. George Sinyama had gone to the home of their daughter and son-in-law. Their daughter's name was Finola Sinyama Ngulube and is **PW4**.

Based on what **PW1** knew about her Daughter and Son-in-Law's marital problems, she left home in the company of her eight year old niece and proceeded to the house of her daughter and son-in-law. It was her testimony that she met her husband on his way back who informed her that it was not well where he had come from and encouraged her to go and see for herself.

When she got to the couple's home she found that her daughter's property and the property she had given her daughter for safe keeping outside. The accused was at home, his wife had run next door. The couple was given an opportunity to say what had happened. **PW1** and her husband were concerned about what was happening in the couple's home especially since their daughter was pregnant. The family decided to go to the Victim Support Unit. However, Mr. Ngulube did not accompany them. An attempt was made to go to the accused's Uncle's house however, he was not at home. **PW1** recalled taking her daughter back to her home to collect some clothes. After that **PW1** took her daughter back to their home.

On the 4<sup>th</sup> November around 10:00 hours, Finola got a call from the accused. At 14:00 hours **PW1** and her husband (the deceased) went to Olympia Park where marriage counseling was taking place. They went back to their home at 16:00 hours. **PW1** informed the Court that she prepared dinner for the family. The deceased was in the house, Finola was sitting outside by the door. **PW1** recalled that whilst she was at the tap outside, Finola called her and asked her to look towards the road. She saw the accused, she was able to describe what he wore. She saw him take out a gun and cock it. He shot in her direction. She fell down, he fired again, she screamed and he began to go towards Finola who crawled behind a broken vehicle after which he began to run to the main house where a tenant occupied their house. According to **PW1** she heard five gun shots. She entered the main house and peeped through the window. She saw the deceased lying down and concluded that he was dead. **PW1** recalled running to where her husband was and when she lifted him she saw that his face was split in two. She found the children in the wardrobe crying, she could not see Finola, her child Mundia and children from the main house helped put the deceased in a van and drove him to U.T.H. The last time **PW1** saw her husband was on a stretcher with his body covered. At this point she knew that her husband was dead.

**PW1** recalled her neighbour asking her to go and see Finola who was in another room. She found Finola who had been shot in

the stomach and was bleeding. Finola was taken to theatre. She described the gun she saw with Mr. Ngulube as a long one.

When cross-examined **PW1** informed the Court that her daughter had been married to the accused for thirteen years. She stated that she enjoyed a good relationship with the accused that she took him as her son and advised him. It was her testimony that the couple had marital problems. She denied knowing about whether or not her daughter was cheating on her husband. **PW1** denied knowing that the reason for the problems in the home of her daughter and the accused was because of an alleged affair. She further denied knowing that her daughter had slept out. **PW1** informed the Court that her daughter had told her that the accused beat her on that day. She denied knowing that her daughter had stopped cooking in the home.

**PW2** was **Fraciana Makando**. She was a tenant of **PW1** and the deceased and lived in the main house. On the 4<sup>th</sup> November, 2007 around 19:00 hours she recalled being in the sitting room. She heard a bang from the servant's quarter where her landlord lived with his family. After the second bang, she decided to peep through the window. She saw a man with a gun going towards the door of the servant's quarter. She asked the boys who were in the house with her to switch off the lights. She saw the person with the gun going towards the gate. She later realized it

was the son-in-law to her Landlord. She recalled how she heard **PW1** wailing and coming to the main house where she was.

**PW2** recalled opening the door to allow her to enter. When they were sure that the man had left they went outside and found Mr. Sinyama on the ground groaning, everyone else seemed okay. She observed that Mr. Sinyama's face was covered in blood and was shattered. **PW2** got her van and asked those present to put Mr. Sinyama in the van she drove to U.T.H. **PW2** was the one called by those attending to Sinyama who informed her that he had passed on. When **PW2** went to the emergency room she found her being attended to. She noticed that she had blood on her abdomen. It was her testimony that she knew the accused, she had seen him on three occasions.

**PW3** was **Terrence Makando**. It was his testimony that on the 4<sup>th</sup> November, 2007 between 19:00 and 20:00 hours, he was in the kitchen cooking. He heard the three bangs followed by a scream. He looked through the kitchen window towards the servants' quarters where the Sinyamas lived. He saw someone carrying a gun. After the shooting he saw the same person walk away using his own words majestically.

He recalled Mrs Sinyama entering the main house screaming and in a panic. **PW3** called the Police after he heard what Mrs. Sinyama had to say. **PW3** joined his family and neighbours

outside the cottage where the Sinyamas lived. He saw Mr. Sinyama lying on the ground in a pool of blood. He remained at home while his mother rushed Mr. Sinyama to the hospital. The Police arrived at the scene after thirty minutes.

**PW4** was **Finola Sinyama Ngulube**. It was her testimony that her husband the accused did not go to work on the 3<sup>rd</sup> November, 2007 the reason he gave was that he had no transport. He later left home and returned in the evening drunk. He called their son George and asked him where his mother had gone. According to **PW4**, George appeared scared. **PW4** recalled asking the accused to go to bed, instead of bringing up stories of what happened a long time ago. **PW4** asked her son George to go and call her Father. She went to the neighbours when she returned she found that her belongings were thrown outside. When **PW4**'s Father arrived and heard what had happened he suggested that they go to the Victim Support Unit. Although the unit was closed the Police at the station advised that **PW4** should not be allowed to go back to the matrimonial home. She spent the night at her parents' house.

The following morning, **PW4** was asked by her husband to go back home. At 10:00 hours he is said to have called her and asked her that supposing she were to die what would she do? **PW4** shared with her mother what the accused said. Around 19:00 hours she was sitting on the door step when she saw the

accused coming towards the house. She recalled hearing a sound of a gun being cocked. She took her children with her and ran into the house and locked them in the wardrobe.

At this point her Father was coming out of the house, when she came out of the house she saw her Father lying down he was shot in the head. **PW4** was taken to U.T.H. There she was examined and told that the baby was fine. **PW4** was later taken to the theatre. The Court was informed that she was in hospital for two weeks and four days. It was her testimony that she had been shot in her stomach. She stated that she had been married to the accused for fifteen years. She identified the accused as the person who had shot and wounded her.

When cross-examined **PW4** informed the Court that she was still married to the accused. It was her testimony that problems arose in their marriage when the accused consumed beer. She stated that the accused suspected her of having an affair. According to **PW4** the information of the affair was told to the accused by the children. **PW4** informed the Court that a meeting was held to discuss the issue of the affair. She admitted that even after the meeting, the accused kept bringing up the subject whenever he was drunk.

**PW4** was aware that there was a time when accused was detained at Simon Mwansa Kapwepwe Police Post, although she



was not aware of the reason why. **PW4** stated that she did not know the name of the man who had him detained. **PW4** was aware that the accused appeared in a Local Court. Summons were served on the accused by a female neighbour. She denied that the neighbour was the one the accused suspected of calling her to meet another man at her house. **PW4** stated that the accused used to say that the child she was carrying was not his. **PW4** admitted that there was a time a man answered her phone but that this person was her Uncle at Ziku camp. It was her evidence that her Uncle told her that her husband called not that he shouted.

**PW5** was **Owen Banda** a Sergeant based at Chelstone Police. He received a message via a radio that there was a shooting incident at house number 6 great east road. He assigned two Officers Constable Chanda and Monzwe to visit the scene. He later learnt that a fellow officer called Inspector Sekelani Ngulube was responsible for the shooting. Accused is said to have gone to the Police Station, he was holding a gun. He said he had gone to hand over the weapon and to be put in cells.

**PW5** informed the Court that the accused was covered in blood. He got the gun from the accused. He did not put him in cells because he described him as being in a very bad state. **PW5** made the accused lie down. He secured the riffle then called for an ambulance. The accused was rushed to the University

Teaching Hospital and an Officer was assigned to guard him. **PW5** had worked with the accused for fourteen years. **PW5** identified the rifle the accused had handed over to him that day.

When cross-examined, **PW5** informed the Court that the accused was in a confused state when he entered the Police Post. He further stated that he was conscious of the fact that the accused had a gun when he dealt with him.

**PW6** was **Ruth Nalungwe** a Detective Woman Inspector. Her role was to attend the postmortem conducted on the body of the deceased George Sinyama at the University Teaching Hospital. Present at the postmortem was Julius Wanki the brother to the deceased who identified the body. **PW6** informed the Court that she observed that the deceased had a deep wound on the eye, the chest and the jaw. The projector was removed and given to the dealing Officer. **PW6** identified the same in Court.

**PW7** was a **Detective Inspector** based at Chelstone Police Station. He is a Crime Scene Investigator. His duties included attending to major scenes where he is supposed to collect exhibits. At the time of this incident he had been doing this work for six years. He proceeded to the Crime Scene. He first noted three holes one on the wall of the servants quarter, at the entrance and the other two were six meters north of the servants'

quarter. He picked up five empty cartridges of an AK47. He also picked up one live ammunition.

**PW7** extracted one projector from the wall of the servants quarter. He drew a sketch plan of the Crime Scene. **PW7** identified all the exhibits which he found at the Crime Scene.

When cross-examined, **PW7** informed the Court that he visited the Scene on the night of the 4<sup>th</sup> November, 2007.

**PW8** was **Matildah Busiku** a Detective Woman Inspector, a Forensic Ballistic Expert. It was her testimony that Detective Ngululu of Chelstone Police Station submitted one AK47, 8 cartridges, six empty cartridges and two projectors for forensic ballistic examinations. She examined the AK47 and found it was capable of loading cartridges. She ascertained its working condition and tested two cartridges for microscopic analysis. Eight cartridges were examined. When **PW8** examined the exhibits picked from the scene, she identified individual characters marked from the six empty exhibits and two test cartridges. **PW8** established that the six empty exhibits cartridges were fired from a firearm of the origin.

**PW9** was **Tom Ngululu** a Detective Inspector based at Chelstone Police Station. He was assigned to investigate a case of murder. The deceased was the late George Sinyama. He visited the scene

and spoke to witnesses. At the scene he made the same observations as **PW8**. He picked one empty cartridge that had been left. **PW9** interviewed a Sergeant Owen Mbewe who detained the suspect and had removed the firearm from him. **PW9** interviewed the suspect after the 8<sup>th</sup> November, 2007 after he was discharged from the hospital.

The witness was denied access to the suspect whilst he was in hospital. He interviewed the suspect on the 9<sup>th</sup> November, 2007. The accused told him that when he withdrew the firearm his intention was to scare his wife and father-in-law so that his wife is released back to him. The witness took the AK47 rifle to ballistic department to ascertain if the same could discharge or not. He was the one who interviewed Finola Sinyama and issued her with a medical report. The medical report was not signed there and then but was signed much later.

The witness was the one who effected the arrest. He identified and produced the different exhibits that had been in his custody. When cross examined the witness informed the Court that he interviewed the accused he noticed that he had a bruise on his left cheek. It was his evidence that the accused had said he had attempted to shoot himself.

The witness informed the Court that the accused had told him of marital misunderstandings in his home. He further said he

suspected his wife of having an affair. It was his evidence that the accused informed him that his children had informed him that an Uncle slept in their bedroom with Mum when he was away. The witness stated that he did not find it necessary to speak to the children. The accused according to the witness told him that his children took him to the home of the Uncle and that he (the accused) spoke to the man's wife. The witness did not visit this home. The witness denied knowing whether or not the accused was detained at Simon Mwansa Kapwepwe Police Post.

**DW1** was **Sekelani Ngulube** who gave evidence on oath on his own behalf. **DW1** a Police Officer graduated from Lilayi in 1992. He married Finola Sinyama Ngulube in 1994. In 2006 Prisca Namuyambe called on his wife's phone. Prisca was their neighbour. His wife denied knowing her. **DW1** informed the court that he began to see a change in his wife's behaviour. She began to spend every weekend at NIPA with her aunty and sometimes at Kasisi with her half brother. Often his wife would leave home without notifying him. **DW1** was concerned with his wife's behaviour and reported this to his in-laws.

In 2007 he recalls one day when he went home and found his wife and her brother laughing and one told the other to share with him what they were talking about. **DW1** informed the court that he went into the bedroom. His wife followed him into the bedroom and announced that she was pregnant. **DW1** reminded

his wife that they had agreed not to have another child until their last born had completed school. Her response was that he should not worry if he was unable to handle the fact that she was pregnant she would leave home. Although his wife said she did not want him to contribute towards the maintenance of the child he did so.

In July, 2007 the situation at home changed often he would knock off from work and his wife was nowhere to be seen. He was the one who assisted the children with home work. It was his testimony that there was a day she slapped him at the club for wearing her slippers. **DW1** recalls confiding in his Officer-in-Charge, Assistant Superintendent Bwalya on his problems at home. In September, 2007 **DW1** lost his brother and so he travelled to Petauke for the funeral. He returned on the 4<sup>th</sup> September to an empty house. His wife returned home. At 20:30 he went to bed. **DW1** informed the court that he got his wife's sim card to put it in his phone. A call came through from Mrs. Nyamuyamba. The phone was given to a man who asked if he could speak to his wife. He recalled telling the man that he had called a wrong number however the man insisted that he had the right number. The man mentioned the house number where the accused lived and the accused's children. **DW1** woke up his wife and together called the man who again asked to speak to his wife. **DW1** gave the phone to his wife and told the man that this was not his wife. **DW1** informed the court that his

wife packed and left their home. **DW1** went to his-in-laws' house and told them what happened, they told him to go and look for his wife.

He called relatives but could not find her. He managed to speak to their brother who told him that she was at NIPA. **DW1** recalled that the brother to his wife told him where she might be found. This was at a relative's house someone he had known for 17 years by the name of Mr. Inambao. He went to Mr. Inambao's house. He introduced himself to the person he found at the gate. He asked to see his wife. It was now around 01:00 hours. He asked the man who responded to his knock to ask his wife to come to the window. The man refused. **DW1** informed the court that he was broken. He phoned his wife who told him that she was in Zingalume. It was his testimony that his wife gave her phone to a man who insulted him. **DW1** informed the court that he went back home and wept and the children joined him in weeping. It was at this point that the children told him that they had another father. Further that they used to go to this other father's house. The children told him that the man was married and that his wife was a business woman. The children told him that the couple had a child called Presence and that they could not forget a house they visited often.

**DW1** informed the court that he told his Officer-in-charge what had transpired. He asked for time so that he could go and see

the house the children told him about. It was **DW1**'s testimony that he went with the children early in the morning to the house near Avondale complex. According to **DW1** he later took the children back home. He went back to the house of the unnamed man. He spoke to the garden boy who according to him knew his children and his wife. He described his wife as one of the many women his boss had. His wife eventually returned home. He informed the court that none of the family meetings yielded a solution to their marriage.

It was his testimony that there was a time he was picked up and put in cells at Simon Mwansa Kapwepwe Police Post on the orders of a man he believed went out with his wife whose name was Mr. Mulili. He also informed the court that there was a time he was summoned to appear before the local court by a woman who said he had accused her of knowing his wife's movements. **DW1** said he was stressed, depressed and a broken man. On the 3<sup>rd</sup> November when he knocked off from work he went home. He found his wife at home. He touched her stomach and asked how the baby was. His wife is said to have hit him with a stool and went to her parents' house. On the 4<sup>th</sup> when he knocked off from work a man called him asking that they meet. The man whom he met is the one who had taken him to the Police. This man informed him that he was the owner of his wife's pregnancy.



**DW1** had an AK 47 on him which he said he was supposed to take to Chelstone Police. He felt something he described felt like a whirlwind. He recalled that he did not think life was worth living. He entered his in-laws' yard with the parcel he had for the children. Next he found himself handcuffed to a bed at U.T.H. He could not remember how he found himself at the hospital. He wanted to kill himself but he had killed another person. **DW1** said he had a wound on the left side of his head.

When cross examined **DW1** informed the court when asked if he was aware that he shot the deceased and wounded his wife, he replied that he was drunk on that day. He denied being drunk on duty. He informed the court that he drunk at Chinika. He returned to the office at 17:00 hours. He did not deposit the gun he had because according to him the station where he was to deposit the same was further. It was his testimony that he did nothing to the man who claimed he had made his wife pregnant. It was his testimony that he could not remember anything that happened after this man's claim.

For the offence of murder to be proven the court must be satisfied beyond all reasonable doubt that the accused caused the death of the deceased and that the homicide falls within the ambit of **Section 200 of the Penal Code Cap 87 of the Laws of Zambia** and further Section 204 of the same act, that is the act was done with malice aforethought. The Penal provision state as follows:

Section 200

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

Section 204

*Malice aforethought shall be deemed to be established by evidence proving any of one 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 a 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 or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.**

*Or as summoned up by Blagden CJ in **The People V Njobvu (1968) ZR at page 133<sup>1</sup>** it must be proved that:*

- 1. The accused caused the death**
- 2. By an unlawful act, with**

**3. Malice aforethought.**

For the offence of attempted murder to be proven it must be proven that there was an attempt on the victim's life to murder her and that the attempt falls within the ambit of **Section 215 (a) of the Penal Code**. The provision states as follows:

Any person who;

- a) *Attempts unlawfully to cause the death of another; or*
- b) *With intent unlawfully to cause the death of another does any act, or omits to do any act which it is his duty to do, such act or omission being of such a nature as to be likely to endanger human life is guilty of a felony and is liable to imprisonment for seven years.*

It is not in dispute that on the 4<sup>th</sup> November, 2007 at Lusaka Mr. George Sinyama lost his life. I accept the fact that the deceased's death was caused by multiple injuries due to gunshot as per the postmortem report.

It is not disputed that on that fateful day the accused went to the house of the deceased who was his father-in-law. Further it is not disputed that at the time he had a firearm with him. This is as per evidence of the prosecution witnesses and the accused himself. The evidence of **PW9** was that when the accused handed himself over to the police he also handed over an AK47

Rifle to the officer whom he found on duty. Apart from the deceased the accused shot at and injured his wife **PW4**.

It is trite law that a defence raised by an accused must be shown to have been considered. In the case of *Ticky V The People (1968) ZR 27 IHC*,<sup>2</sup> it was held that:

*“The Magistrate must consider the accused’s defence and it must be evident from his judgment that he did so.”*

This also applies to a Judge in order to be sure that the accused has received a proper and fair trial.

In another case *Mbomena V The People (1967) ZR 89*<sup>3</sup> the court of Appeal held that:

*“Where there is evidence supporting a defence not raised by the accused that defence must be considered by the trial court. The facts related in the story of abuse and assault would if believed would have been capable of amounting to provocation, both grave and sudden. If the learned trial Judge had believed the Appellant’s story of abuse and assault or if it had raised a reasonable doubt; he might well have found a verdict of manslaughter. In this case the Appeal was allowed, verdict of murder quashed and substituted with a verdict of manslaughter.”*

In another case of *Kahindu V The People (1967) ZR 181 (a)*<sup>4</sup>

*The Appellant was convicted of rape in a Magistrate Court. At the trial the Appellant raised the defence of intoxication under section 14 of the Penal Code. The Learned trial Magistrate stated that:*

*“In order to bring himself within the defence laid down section 14(1) of the penal code. It was for the Appellant to show that either at the time of the act he did not know that it was wrong or that he did not know what he was doing and that the state of intoxication was caused without his consent, or that he was doing and that the state of intoxication was caused without or his consent or that he was temporary or otherwise insane by reason of his intoxication. The Magistrate proceeded to say that “the accused must show this on the balance of probabilities; and had failed on this onus.”*

It was held that:

*“Where there is evidence of intoxication whether it is raised as a defence or not the court must examine and evaluate that evidence. If having done so the court is satisfied beyond reasonable doubt that the accused was not intoxicated then that is the end of the defence of intoxication.”*

Two defences have been raised by the accused. He informed the court that on the day he shot and killed his father-in-law and shot and injured his wife he had been consuming alcohol. Secondly the accused informed the court that his wife and himself were having marital problems this was confirmed by his wife (**PW4**) and his wife’s mother (**PW1**). The accused attributed his marital problems to the fact that his wife often left their home without any explanation given and he also suspected that his wife was having an affair(s). The defences raised were intoxication and provocation.

The accused having claimed that the commission of the offences with which he is charged came about as a result of intoxication; is arguing that although he committed the actus reus (the guilty act) of the offence he did not have the mens rea (guilty mind) necessary for liability for the offence. Two situations exist either the state of intoxication caused the accused to give way more readily to some violent passion; then there is clearly no defence. Secondly if the state of intoxication was involuntary – i.e within the terms of Section 13(2) of the Penal Code this constitutes a complete defence.

**Section 13(2)** states that:

***Intoxication shall be a defence to any criminal charge if, by reason thereof, the person charged at the time of the act or omission complained of and not know that such act or omission was wrong or did not know what he was doing and***

- a) The state of intoxication was caused without his consent by the malicious or negligent act of another person; or***
- b) The person charged was by reason of intoxication insane, temporarily or otherwise at the time of such act or omission.***

The successful finding in such circumstances leads to a discharge rather than an acquittal.

**Section 13(3) of the Penal Code** states that:

***“Where the defence under subsection (2) is established then in a case falling under paragraph (a) thereof the accused person shall be***

*discharged and in a case falling under paragraph (b) the provisions of Section One Hundred and Sixty-Seven of the Criminal Procedure Code relating to insanity shall apply.”*

**Section 167(1) of the Criminal Procedure Code** states as follows:

*“Where an act or omission is charged against any person as an offence, and it gives in evidence on the trial of such person for that offence that he was insane so as not to be responsible for his actions at the time when the act was done or omission made, then, if it appears to the court before which such person is tried that he did the act or made the omission charged but was insane as aforesaid at the time when he did or made the same, the court shall make a special finding to the effect that the accused was not guilty by reason of insanity.”*

What I am called to consider is whether the accused was capable of forming this intent and so long as it is established that he was so capable there is no defence of intoxication- regardless of whether or not he actually had the actual intent. **Section 13(4)** states as follows:-

*“Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise in the absence of which he would not be guilty of the offence.”*

The case of *Tembo v The People (1976) ZR 332(SC)*<sup>5</sup> is instructive on drunkenness regarding intent and the provision of **Section 13(4) of the Penal Code.**

*“In this case the appellant was convicted of the murder of a woman and her baby, who died of stab wounds inflicted by the appellant. The appellant was at a public house drinking beer in the company of the deceased woman and others, the stabbing took place while the parties and another man were on their way home. The appellant’s defence was that through drunkenness he did not have the necessary intent; alternatively that he was provoked.”*

It was held that:

*“Evidence of drinking even heavy drinking is not sufficient for intoxication to provide a defence under Section 13(4) of the Penal Code; the evidence as a whole, including that of intoxication must be such as to leave the court in no doubt as to whether the accused actually had the necessary intent.”*

Another case that the court found instructive is the case of *Herman Mvula v The People (1991) SJ SC SCZ Judgment No. 6 of (1991)*.<sup>6</sup>

*“In this case the appellant was charged with two counts of murder and two counts of attempted murder. He allegedly shot dead his ex-wife’s mother and sister and further attempted to kill his ex-wife together with a three year old toddler. The appellant, a Corporal in the army, used an AK47 he had stolen from the army barracks to commit the crimes. He appealed against the lower court’s convictions. The decision of the lower court to convict him was upheld.”*

The first point I wish to consider is the state of mind of the accused at the time of the commission of the offence. The evidence before this court as to his state came from him. It was his evidence that he had been consuming alcohol. He did not say



how much and for how long he consumed it. He also informed the court that he was on duty as a Police Officer on that fateful day. He also described his state as being stressed, depressed and a broken man. There was no application made for the accused to be medically examined in terms of **Section 17 of the Criminal Procedure Code Cap 88** in order to establish his state of mind at the time that the offences charged were committed.

The evidence on which I relied on arriving at my decision was the evidence of the prosecution witnesses and the accused himself. On the day in question **PW2, 3, 4, 5** and **9** shed some light on what they saw and what came to their knowledge.

**PW1, 2, 3, 4** were present at the house where the shooting took place. **PW1** and **PW4** saw the accused approach the yard where they lived holding a gun. **PW2** and **PW3** saw accused with the gun and both heard gun shots. **PW2** saw accused walk out through the gate after the shooting. **PW3** informed the court that the accused walked away majestically after the shooting. **PW1** informed the court that the accused first shot at her. When she fell he again shot in her direction. She saw him go towards **PW4**. **PW4** at 10:00 hours of that day had received a phone call from the accused who asked her that supposing she were to die what would she do. Around 19:00 hours of the same day the accused shot and killed her father and shot at her injuring her in her pregnant state.

**PW5** informed the court that accused went to the Police Station according to him to hand over the gun and be put in cells, clearly this is a man who knew that he had done wrong. The evidence of **PW9** was that the accused had informed him that when he withdrew the firearm that it was meant to be used to scare his wife and his father-in-law in order to have his wife come back to their home. The accused informed the court that he had consumed beer on that day. That he met a man not far from his father-in-law's house who informed him that he was the father of the child his wife was carrying. He also described himself as being stressed, distressed and broken. When **PW5** saw him at the station he appeared confused.

**PW4** informed the court that she was aware that accused was once detained at Simon Mwansa Kapwepwe Police Post but did not know why. Accused informed the court that he was detained at the instance of a Senior Police Officer who was having an affair with his wife. **PW4** was also aware that there was a time their female neighbour served the accused with summons to appear before the local court. **PW4** was further aware that the accused informed her of his suspicions that the child she was carrying was not his.

Although the accused says that he was stressed and a broken man the evidence before me suggests that the accused knew what he was doing at the material time. It was not in dispute

that the accused phoned his wife at 10:00 hours asking supposing she were to die what would she do? When he went to his father-in-law's house he opened fire at his mother-in-law, his wife and his father-in-law. As a direct result of the accused's conduct, one human life was lost and an attempt was made on the life of the other two.

The accused had taken the gun not for the purposes of scaring his wife and father-in-law nor was it to end his own life which he informed the court was not worth living nor on his way to his father-in-law's house did he shoot the man who confessed to being the owner of the child his wife was carrying. The accused instead of taking the gun and handing it in at the Station decided to use it against his wife's family. The All important question is as to whether the accused was capable of forming the intent. From the evidence it has been established that he was capable thus there is no defence of intoxication. My considered stand point is that the whole scenario was in itself a clear manifestation of premeditation that is malice aforethought on the part of the accused.

Conscious of the fact that the role played by the victim in a killing can be of great importance. Accepting that the majority of killings are committed in a domestic setting where the killer and the victim are related, married or acquaintances, the words or acts of the victim may well be of vital significance in leading to

the subsequent killing. In such circumstances the law views the killer as potentially having a partial defence to a murder charge if the conduct of the victim led him to kill due to provocation.

The law on provocation is to be found in **Section 205 (1)** and is as follows:-

***“When a person who unlawfully kills another under circumstances which, but for the provision of this section; would constitute murder does the act that causes death in the heat of passion; caused by sudden provocation as here in after defined; and before there is time for his passion to cool, is guilty of manslaughter only.***

***(2) The provision of this section shall not apply unless the court is satisfied that the act which causes death bears a reasonable relationship to the provocation.”***

If there is evidence of a provocative act the killing must be committed in the heat of passion and before there is time for this passion to cool (**Section 205 (1)**).

**The People V Mupota SCZ Judgment no.27 of (1978)** facts were as follows:-

***“The accused claimed that he had been taunted over a period of years by his wife concerning his impotence and was taunted again by her on the day of the killing. The accused became angry, went and collected his spear and threw it at her from four yards killing her. The Supreme Court held that even on the facts given by the accused there was clearly time for passion to cool and thus could be no provocation. However, the provocative conduct need not be new.”***

In the case of *Chibeka V The People (1970) CA 154<sup>s</sup>* facts were as follows:-

*“The accused’s wife had been for some time comparing him unfavourably with one B and indeed an award of seven pounds had been made to the accused in the chief’s court in connection with her adultery with B. On the day of the killing, she taunted the accused again and said she was going to leave him and marry the other man. Thereupon the accused completely lost his temper and killed her with an axe. The trial Judge found that the remarks of the wife were no new matter such as would be likely to arouse a sudden passion in him. On appeal the Federal Supreme Court (by a majority) held that the words of the deceased could have had the effect of breaking the accused’s control over his temper, and therefore the Judge did not give proper instructions to the Assessors in this regard.*

*It will be a question of fact in each case therefore, to whether the killing was in the heat of passion or committed after there was time for passion to cool. The longer the time between the provocative act and the killing the more the chance that the court will find that there was time for passion to cool and that the killing was committed intentionally, thus amounting to murder. It may be difficult to distinguish between a killing caused by sudden provocation and one committed in revenge for a wrongful act or insult it is a distinction which must be made by the courts for public policy cannot allow individuals to take the law into their own hands.”*

From the evidence on record it is not in dispute that the accused and his wife were having marital problems. From the evidence things came to a head in 2006 (the court was not informed the month). In May, 2007 evidence from accused suggests that problems in his marriage worsened, this resulted in the killing of

his father-in-law on the 4<sup>th</sup> November, 2007 and injuring his pregnant wife.

The evidence on record does not support the fact that the deceased nor **PW4** provoked the accused on that fateful day. His wife was not even at their home, she was with her parents. His wife announced in July, 2007 that she was pregnant a pregnancy he suspected was not his. The incident took place on the 4<sup>th</sup> November, 2007 four months later. Despite this he testified that he gave his wife money to buy the unborn child it's needs. It is not in dispute that the accused asked his wife what she would do if she were to die, on the morning of the shooting. It is clear that he had planned to cause her harm and did cause her harm as she was taken to the hospital where she was admitted for treatment. Shooting at someone with an AK 47 can only mean that person who does so either intends to kill or attempts to kill both being crimes in Zambia.

I have considered the standard of behaviour of an ordinary person of a class of the community to which the accused belongs.

**Lord Diplock** stated that:

*“The trial Judge should explain to the jury that the reasonable man.....is a person having the power of self control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused’s characteristics as they think would effect the gravity of the provocation to him and that the*

*question is not merely whether such a person would in that like circumstances be provoked to lose his self control but however, react to the provocation as the accused did.”*

The accused is a Police Officer who is expected to exhibit a higher power of self control especially taking into consideration according to him that this was not the first time his wife had left their home to go to her parents and further that he suspected her of being pregnant by another man in July, 2007 and the incident took place four months later.

At the time the killing of the deceased and the injuring of **PW4** occurred there were no circumstances which can be said to have deprived the accused temporarily of the power of his self control. Sufficient provocation which must have been sudden and had been acted upon in the heat of passion and without time for cooling was not present.

There was no evidence to support the plea of provocation.

I thus find the accused guilty of count 1 the murder of his father-in-law and count 2 the attempted murder of his wife and convict him accordingly.

**Section 201 (2) (a) of the Penal Code** defines extenuating circumstances. There are no facts that would diminish morally the degree of the convicted person guilt.

In my judgment I have ruled out the possibility of drunkenness as a defence available to the convicted person. I have also ruled out the defence of provocation. Thus there are no extenuating circumstances.

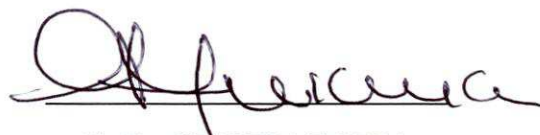
In accordance with **Section 201 (1)** which states that:

***“Any person convicted of murder shall be sentenced to death.”***

I hereby sentence you to death. In accordance with the provisions of **Section 303 of the Criminal Procedure Code**. I direct that you shall be hanged by the neck till you are dead. May the Lord have mercy on your soul.

In respect of count 2, I sentence you to imprisonment for life with effect from the date of your arrest. You have a right to appeal to the Supreme Court if you are unhappy with my decision.

**DELIVERED AT LUSAKA THIS 11<sup>TH</sup> DAY OF FEBRUARY, 2016.**



**G.C. CHAWATAMA  
JUDGE**