

**IN THE HIGH COURT OF ZAMBIA  
HOLDEN AT LUSAKA**  
(Criminal Jurisdiction)

**HP/42/2017**

**THE PEOPLE  
V  
RICHARD MUKWAMBA  
JONES CHISULO  
JOHN NJOBVU,  
COSMAS TEMBO  
BINACK KASOSA**



**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 6<sup>th</sup> DAY OF  
OCTOBER, 2017**

*For the State* : Mrs P. Mulenga, Principal State Advocate, NPA

*For the Accused persons* : Mr I Nyambe and Mr C. Siatwinda Legal Aid  
Counsel, Legal Aid Board

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

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CASES REFERRED TO:

1. *Mutambo and Others V The People* 1976 ZR 160
2. *Liswaniso V The People* 1976 ZR 277
3. *John Mkandawire and Others V The People* 1978 ZR 46.
4. *Jack Maulla and Asukiwe Mwapaki V The People* 1980 ZR 119
5. *The People V Dimeni* 1980 ZR 234
6. *Sakala V The People* 1987 ZR 23
7. *George Nswana V The People* 1988-1989 ZR 174
8. *Kenneth Mtonga and Victor Kaonga V The People* SCZ No 5 of 2000
9. *Martin Mupeta and John chanda V The People* SCZ/137/2012
10. *John Mwansa and Samuel Mwansa V The People* SCZ/APP/170/171/2014

LEGISLATION REFERRED TO:

1. *The Penal Code, Chapter 87 of the Laws of Zambia*

The accused persons in this matter stand charged with two counts. In the first count the offence is murder contrary to Section 200 of the Penal Code, Chapter 87 of the Laws of Zambia. The particulars of the offence allege that Richard Mukwamba, Jones Chisulo, John Njobvu, Cosmas Tembo and Binack Kasosa on 11<sup>th</sup> April, 2016, at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown did murder Justin Kameya.

In count two the offence is aggravated robbery contrary to Section 294 of the Penal Code, Chapter 87 of the Laws of Zambia.

The particulars of the offence allege that Richard Mukwamba, Jones Chisulo, John Njobvu, Cosmas Tembo and Binack Kasosa on 11<sup>th</sup> April, 2016 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together did steal from Justin Kameya, one motor vehicle namely Toyota Spacio registration number ACP 4826, the property of Ntakuritimana Theogene, 1 Nokia cell phone valued at K900.00, the property of Justin Kameya, 1 MTN cell phone the property of Daniel Kameya, and at or immediately before the time of such stealing did use or threaten to use actual violence to the said Justin Kameya and Daniel Kameya in order to obtain or retain, or prevent or overcome resistance from the items being stolen.

All the accused persons denied both counts, and the matter proceeded to trial. The prosecution called eight witnesses, while all the accused persons testified on oath, and called no witnesses. The onus is upon the prosecution to prove all the charges against the accused persons, beyond all reasonable doubt.

The first prosecution witness was Daniel Kameya. He testified that he used to work as a taxi driver for about five months between 2015 and 2016. He recalled that on 11<sup>th</sup> April, 2016 between 19:00 and 20:00 hours he was at the taxi rank at Kuomboka bus station with his cousin Justin Kameya, whom he was working with as a co-driver. That three men had approached them and had booked their taxi, saying that they were going beyond Sandy's Creation, and

they were charged K40.00. It was stated that one of the men told them that they were going to Pick n Pay at Makeni Mall, and that they would go and return to book them.

PW1 told the court that he had told the men that as Makeni mall is on the road to Sandy's Creation, they could start off, and stop there. That is how they had started off. He stated that during the negotiations he was able to see the men as there was light from a shop where they had parked. That at Pick n Pay they had parked directly in front of the entrance to Pick n Pay, and there were lights there. His testimony was that he had remained in the vehicle, and Justin and the men had gone into Pick n Pay, and they had returned with food and they proceeded to Sandy's Creation.

PW1 stated that when they reached the Lilayi turnoff, they turned into the road that the men had directed them to use, and eventually turned left where Sandy's Creation is, and right at Sandy's Lodge. That they drove past Sandy's Creation until they reached a wire fence, and just after that the men told them that had passed where they were going but that it was okay they would walk back, as they had reached. That at that point Justin had switched on the light in the vehicle, after PW1 and two of the men had disembarked from the vehicle and were outside, but the one who sat in front had remained inside.

PW1 saw the men remove K100.00, and Justin told them that he did not have change for K100.00. That the one who was inside had asked his friends if they had change, and that is how the two who were outside had put together some money amounting to K37.50. The men then thanked PW1 for accepting less money than was charged, and just then one of the men who was outside grabbed PW1 by the waist, and the one who was in the vehicle jumped onto Justin and got hold of him.

He testified that he moved away from the vehicle into the grass, and he was squeezed until he lost strength, and one of the two who were holding him let go of him, and went to help the one who had grabbed Justin. PW1 told the court

that he tried to get both his phone and Justin's which were in his pocket, but he was directed to stop, otherwise he would be stabbed. Then he was squeezed on his neck until he fainted, and when he woke up he found himself in the boot of the car. He could hear the men shouting at him to keep quiet, as he was making noise. That he discovered that he was tied on both his hands and legs, and his mouth was gagged with masking tape. He was coughing blood which came out of his mouth and nose.

He further testified that the vehicle sped off with the volume on the radio at full blast, and it was his evidence that after sometime the vehicle stopped, and the boot was opened. He was taken out of the vehicle, after he was grabbed by one of the men on his legs, and the other one grabbed him by the head. That the men lifted him up, then threw him down on the gravel road, and the one who had grabbed him by the legs told the friend to release PW1's head so that it drops first. However the colleague failed to do so. At this point PW1 broke down in court and cried.

On gaining his composure he testified that he was hit the second time and fell down on the ground on his back, and the act was repeated once more, and he was thereafter thrown into the grass where he stayed until it started raining, and by that time the men had driven off with the vehicle. PW1 told the court that upon gaining some strength, he had sat up and struggled to remove the masking tape on his hands. That he managed to remove all the tape on his hands, and that is how he removed the one that was on his mouth.

He then stood up and walked to the road, and he called for Justin, but there was no response. When he put his hands in his pocket so that he could get the phone and light the torch on it, he found that it was not there. PW1 in his evidence continued stating that when he looked back he saw a person walking by the fence, and he followed him, and saw him enter at a gate. He knocked at the said gate, and two people opened part of the gate, and he noticed that they were guards. PW1 told the court that he slept at the gate vomiting blood, and

the guards had asked him what the matter was. That when he had explained what had happened, and that he did not know where his cousin was, the guards told him that he was also a thief, and did not help him.

He went on to testify that he stood up and walked towards the light that he saw in front of him, and there he found a gate. That the guard there came out, and he had again explained what had transpired, but the guard said that he did not have a phone to call the police or PW1's relatives, and directed him to the guard at the next gate. When PW1 went to the next gate, a female guard came out, and upon explaining what had happened, she too said that she did not have a phone, but told him that if he went back where he had come from, he would find Sandy's Creation, where the company that she worked for was based, and they would help him.

It was explained that PW1 walked back until he reached Sandy's Creation where he found three guards to whom he explained his story once more, and they called guards for the company. One of the guards had stated that they had seen a vehicle by the fields that had the hazard lights on, and they went to check it. He testified that Chilanga police were called, and before they arrived, the guards who had gone to the fields returned, and stated that they did not find the vehicle.

PW1's testimony was that he was taken to Chilanga clinic by Chilanga police officers, and he had told them that he and Justin had been driving a black Toyota Spacio registration number ACP 4826. That the police officers had left after dropping him off at clinic, and when they returned about two to three hours later, they had asked him about the vehicle they had been driving, and he gave them details again. On being asked if he had a driver's licence, he had explained that he had a temporal one, but that Justin had one. He was then asked to identify Justin's licence, which he did, and the police officers left.

Further in his testimony PW1 testified that a nurse asked him if he could recall anyone's phone number, and he gave her his friend's number. Thereafter the

nurse had called that number and informed them that PW1 was admitted at the clinic, and his aunt then went to the clinic to see him. PW1 stated that he was taken to Chilanga police by his aunt, and he had reported the matter. There he was issued a medical report and Chilanga police also gave him a document to take to the University teaching Hospital (UTH).

However the police had asked him to take them to the scene before going to the hospital, and after doing so he proceeded to UTH where x-rays were taken which revealed that he had no fractures but internal injuries. That after a week and some days, police officers of Chilanga police had called him asking him to go there. That there he was informed that an identification parade would be conducted, and he was taken outside the police station where he found about 15-20 suspects standing on a parade. He was asked to identify any of the persons on the parade that had booked him and Justin. His evidence was that he identified three of them, and that after each identification, photographs were taken.

He told the court that the identification was repeated twice, after he was taken back to the office and taken out again, and upon his identification of each suspect by touching them on the shoulder, photographs were taken. That he identified the same three suspects on each identification. He also stated that the Criminal Investigations Officer (CIO) had told him that the suspects were found with his phone, which he described to the officers, stating his phone as an MTN one, which had his name written on in the inside cover of the phone, and had two names saved on the phone, and not on the sim card, for Winnie and his friend Monica. Further that it had sms messages sent by Monica.

PW1 also told the court that Justin's phone was Nokia with a double sim, and had a crack on the cover at the camera. He identified the Nokia phone before court, and it was marked 'ID1', as well as the MTN phone, and it was marked 'ID2'.

He also identified the medical report that was issued to him, and it was marked 'ID3', and the referral document from Chilanga police was also identified and marked 'ID4'. PW1 further identified A1 as the person who had booked the vehicle on behalf of his friends, and had sat in the front passenger's seat in the vehicle, had produced the K100.00 to pay the fare, and grabbed Justin.

That A2 had sat in the right hand side of the vehicle, and had grabbed him by the neck, and told him not to get the phones from his pocket, while A3 sat in the middle of the back seat in the car, and had grabbed him by the waist, and later left to assist A1 hold Justin. He further testified that A2 was wearing shorts, while the other two wore trousers. In conclusion this witness told the court that Justin died, and he broke down again and cried.

In cross examination PW1 testified that he only knew A4 and A5 at the police station, but that police did not tell him that they were involved in the matter. He stated that A4 and A5 did not book him and Justin, or attack them. He told the court that Justin had been driving for three years, and he had been operating from Kuomboka station, opposite Chokocha road. PW1 stated that Chokocha road has no street lights, but a nearby shop has bulbs which lit the whole area.

He maintained that Justin had spoken with the men for about five minutes before they started off, and that he had joined in the conversation, and agreed that once they drove off, the lights in the vehicle were off. It was also stated that the lights in the vehicle lit when he and two of the men got out of the vehicle, and that the vehicle had tinted windows. He further agreed that the attack was brutal and ruthless, and as it was sudden he became confused, but he saw the person who had sat near him in the vehicle, grab him.

It was his testimony that he fainted after he was attacked, and did not see anything after that. That he was thrown in the boot of the car and later his attackers lifted him out of there. However it was dark, so he did not see who lifted him. He agreed that he did not in his examination in chief describe his

attackers, but only what they did to him. He however maintained that he had seen them when they booked them, and he was able to identify them at the identification parade.

He told the court that A1 and A2 had cuts called "*modise*" at the time, and that A2 was lighter in complexion than the other two. Whilst agreeing that he had tried to get the phones from his pockets during the attack, he stated that when he woke up he did not find them. His evidence was that he did not see his attackers get the phones. He disagreed that the phones could have fallen from his pockets, after he was thrown up and down, as police informed him that they were found with his attackers.

PW1 could not recall the colours of the trousers that the two wore, but maintained that A2 wore a short with a cream white or yellow shirt. His testimony was that he did not pay attention to what his attackers wore, as he was on business. He also stated that at the identification parade A3 wore red socks and a pair of trousers though, he could not recall the colour of the trousers. He stated that at the identification parade the three wore different clothes from those that they wore on the day of the attack.

In re-examination it was stated that if the phones had fallen during the attack, he would have found them when he took police there, as the attack happened on the road. He also stated that when the three had spoken with Justin at the rank, he had joined in the discussion, suggesting that they proceed to Pick n Pay on the same charge of K40.00.

PW2 was Evelyn Piyala. Her evidence was that on 12<sup>th</sup> April, 2016 she was at the market in the morning when Winfreda her daughter went and told her that Justin and Danny had been attacked. That Justin was her son, and PW1 her nephew. That that is how she went to see the owner of the vehicle that Justin used to drive, called Manase's father, and that his other name is difficult to pronounce.



She testified that she went with him to Chilanga clinic where they found PW1, and took him to Chilanga police, where they found two handcuffed men. That from there she called her brother to take PW1 to UTH, and that on 14<sup>th</sup> April, 2016 her son in law told her that he was phoned, and informed that Justin was dead, and that his body was at UTH. It was stated that Jerry Tembo her son in law identified Justin's body at the mortuary. She was not cross examined.

The third witness was Dr Victor Telendiy, a forensic pathologist. He began his testimony by taking the court through his qualifications, stating that he graduated from medical university in Ukraine in 1995, and thereafter did internship as a pathologist. Then from 1997 to 2010 he worked in the Ukraine as a pathologist, and had been working for the Zambia Police Service as a forensic pathologist from 2011 to date.

With regard to his duties, his testimony was that he does post-mortem examinations, prepares reports for post-mortems done, and draws conclusions on the causes and manner of death. In relation to this matter it was PW3's testimony that on 15<sup>th</sup> April, 2016, he had conducted a post-mortem examination at the UTH on the body of Justin Kameya who was aged twenty one years. He stated that he had made conclusions on the manner and cause of his death, and he had compiled a report in respect of the same. He identified the post-mortem report, and thereafter produced it, and it was marked 'P5'.

PW3 further told the court that Justin died on 11<sup>th</sup> April, 2016, and the post-mortem was done four days later. He stated that he had observed that on externally examining the body, it was in a significant stage of decomposition. That the hands on the body had been tied behind with cello tape, and that the body had abrasions on the face, neck, and shoulders, which were superficial, and could not have caused death.

That an internal examination of the body showed that the brain was congested with subarachnoidal haemorrhages, and there were petechial haemorrhages in the mucus of the trachea. Further that both lungs were congested, meaning

they had blood, and that there was also a lot of air in the lungs. He stated that the heart was also congested with petechial haemorrhages, which are all signs of asphyxia. His conclusion was that Justin died due to asphyxia, caused by suffocation.

PW3 went on to explain that suffocation is a type of asphyxia where the nose and mouth are closed, resulting in a person failing to breathe. That in this case Justin's mouth was tied with cello tape, and that although his nostrils were open, the trauma on his face had caused the mucus of the nostrils to be swollen, which blocked his nostrils, and he could not breathe. Whilst stating that Justin died due to suffocation, the manner of death was a homicide. PW3 further testified that all the bruises on the body were caused ante-mortem, or prior to the death, and repeated that they were superficial, and therefore could not have caused his death. In conclusion, he stated that he handed over the cello tape recovered from the body to the police.

He was also not cross examined.

Jerry Tembo was PW4. The role that this witness played in this matter was to identify the body of Justin Kameya, after the police had phoned him on 14<sup>th</sup> April, 2016 around 06:30 hours, and had informed him that Justin's body had been recovered. He testified that he had gone to the UTH mortuary, where he had identified the body, noting that Justin had worn the jersey that he had given him on 10<sup>th</sup> April, 2016. He told the court that he had identified the body despite it being swollen, as he had known Justin for a long time. That he had identified the forehead and his sides. That he had last seen him on 10<sup>th</sup> April, 2016, when Justin had escorted him to the plot, and he was healthy. PW4 also told the court that he was present at the post-mortem conducted on the body on 15<sup>th</sup> April, 2016, and he had again identified the body.

PW5 was Theogene Ntakuritimana. PW5 testified that he is a businessman who sells groceries, and runs a taxi business. He described his taxi as a Toyota Spacio black in colour, registration number ACP 4826. He explained that he

bought the said taxi on 24<sup>th</sup> December, 2015, and that the late Justin Kameya used to drive it, after he had employed him a date he could not recall in 2016. It was also stated that after PW5 had bought the vehicle from Sylvia Nambaya on 24<sup>th</sup> December, 2015 he did not change ownership of the vehicle, and therefore the white book for the said vehicle, was in Sylvia Nambaya's name. He identified the said white book, as well the letter of sale for the vehicle, and they were produced and marked 'P6', and 'P7' respectively.

PW5 also in his testimony told the court that on 12<sup>th</sup> April, 2016 he was at the shop when he met Willie, who was crying, and on being asked why, had told him that Justin had been attacked. That he went and saw Justin's mother at Kuomboka market where she sells, and together they had gone to Chilanga clinic where they found a gentleman he does not know, who was vomiting blood. That Justin's mother knew the man.

He stated that from there they were directed to go to Chilanga police station where he found his taxi parked, and he was asked to confirm if it was his, which he did, and he gave the documents for the vehicle to the police. He was not cross examined.

Detective Patron Kazhimoto was PW6. His testimony was that he is based at Chilanga police station. That on 11<sup>th</sup> April, 2016 around 22:40 hours he was at home when he received a phone call from Sandy's Creation to the effect that there was a male person who had been beaten, and needed police assistance. PW6 stated that acting on that information he had called the office, and directed officers to go there and attend to the problem, and that shortly thereafter the Criminal Investigations Officer (CIO) had called him, telling him that there was an emergency.

It was his testimony that he had rushed to the office where he found two male suspects had been apprehended by the police, and a Toyota Spacio registration number ACP 4826 had been impounded. He came to know the suspects as

Cosmas Tembo and Binack Kasosa, and he also learnt that a male victim Daniel Kameya was at Chilanga clinic, obtaining medical treatment.

PW6 told the court that whilst in the company of his colleagues, he had gone to Chilanga clinic, and had seen Daniel Kameya who was in pain and had blood on his lips. Daniel had explained that he was with his cousin Justin Kameya who was driving a taxi when they were booked by three men from Kuomboka to Makeni Pick n Pay, and from there proceeded to Chilanga. That in Chilanga the clients had told them that they had reached where they were going at a place that had a black gate. Daniel had also told them that after the three men had contributed the fare, as he stood outside the vehicle with two of the men, and his cousin who was driving the taxi was inside, the two men who were outside had grabbed him, and thrown him down. That his cousin had wrestled with the man who had remained in the vehicle, until both of them were overpowered and tied. That Daniel was tied with cello tape, and put in the boot of the vehicle, while Justin remained in the vehicle.

He continued stating that Daniel had added that were driven to a certain distance, and then the car stopped, and the boot was opened, and he was removed from there, and dumped in the bush. That the vehicle had taken off with his cousin to an unknown destination, and Daniel had struggled and managed to remove the cello tape from his legs, and he had walked to Sandy's Creation.

PW6 testified that he then went back to the office in the early hours of 12<sup>th</sup> April, 2016, where he interviewed Cosmas Tembo and Binack Kasosa. He stated that Cosmas Tembo, after being warned and cautioned verbally had stated that he knew the three men who had given him the vehicle, and that they were residents of Chibolya Township.

Further in his testimony PW6 told the court that they had logistical problems in terms of transport, so they could not go to Chibolya. Then on 14<sup>th</sup> April, 2016 around 03:00 hours, Cosmas Tembo had led him to Chibolya where the

three men were apprehended. That he took the three suspects to Chilanga police where he verbally warned and cautioned them in relation to the offence of aggravated robbery. Then around 06:00 hours, A1 and his colleagues led him to a scene.

At that point objection was raised to the evidence of leading on the basis that it was involuntary, and that the said evidence of leading amounts to a confession. A trial within trial was held to determine the voluntariness of the leading, after which I delivered a ruling to the effect that the evidence of the leading with regard to A1 and A2 would not form part of the record, as even though it was done voluntarily after they were warned and cautioned, and there was no proof that they were beaten, but they are juvenile offenders, whose parents or guardians ought to have been present at the time of the interview.

This was on account of the fact that the age determination done at the hospital established that they are juveniles, as they are aged below the age of nineteen years. With regard to A3, I admitted the evidence of leading against him, as the prosecution had shown that he warned and cautioned before the leading, and he freely and voluntarily led the police to the scene, and he was equally not beaten.

PW6 continued with his evidence stating that a body was found about thirteen metres from the road, and as it was still fresh, he had taken it to the UTH mortuary, awaiting post-mortem. He told the court that the body of the deceased lay face down, and that the deceased wore a blue jeans, which had been pulled down to the knees, and purple underwear. That there was half a pair of canvas on the feet, and he wore a grey jersey, and his hands were tied behind with cello tape. PW6 has also observed that the genitals on the body were swollen, as was the face, and the mouth was covered with cello tape. He stated that the other half of the pair of canvas was found in a space between the body and the road, and that the body was about five metres from some ZESCO poles.

It was further stated that PW6 had taken photographs of the leading, and that the doctor on conducting the post-mortem had sent the cello tape that was used to tie the deceased hands behind and his mouth, to the police. That a roll of cello tape was also recovered from the vehicle, which had only a little remaining. He identified both the cello tape recovered from the body as well as that found in the vehicle, and the unused cello tape was marked 'ID8', while the one recovered from the body was marked 'ID9'.

That from there on 20<sup>th</sup> April, 2016 an identification parade was conducted. PW6 explained that as a Scenes of Crime Officer he had organised a camera to take photographs of the parade. That at 11:45 hours the parade was mounted with twelve men on it, and he had explained the rights that the men on the parade had, that is liberty to swap position on the parade, change clothes and to choose a certain pattern for the conduct of the parade.

That thereafter the witness Daniel Kameya was taken to the parade, after having been kept in a room far away from the parade. PW6 stated that Daniel identified A1 who was in the second position from left to right, A2 who was in position 4 from left to right, and A3 who was in position 6 from left to right, and he left. Then PW6 had asked the suspects if they were willing to change positions on the parade, and change clothes, to which they agreed. That on that being done, a general view picture of the parade was taken, and Daniel was called in to identify the suspects. He identified A1 in position 10 from left to right, A2 in position 6 from left to right and A3 in position 2 from left to right.

PW6 further stated that the suspects had again agreed to change positions and clothes on the parade after Daniel had left, and when they did so, Daniel was called back in to identify them again. That he had identified A3 in position 12 from left to right, A1 in position 5 from left to right, and A2 in position 1 from left to right. That the suspects declined the offer for a fourth identification parade to be conducted.

It was PW6's evidence that no issues were raised over the manner in which the identification parade was conducted, and it was dismissed at 12:20 hours. He explained that a general view photograph is taken before witnesses are called to identify the suspects, and that during each identification, the witness touches the suspect identified, and a short range photograph is taken. That thereafter a long range photo of the identification is taken.

He told the court that he took photographs of the entire parade as described, using a canon digital camera owned by the Zambia Police Service, which was in very good working condition, and could take photographs under any weather conditions. Further that the camera is supported by infrared so that at night it captures very clear photos. It was stated that the same camera was used during the leading to the secondary scene, and that PW6 is trained in the field of taking photographs and videos. This witness identified the photographic album that was compiled after the photographs were taken, and he produced it and it was marked 'P10'.

He stated that the picture on page 1 shows the scene behind Sandy's Creation where they suspected the body was, while page 5 shows A1, A2, and A3 being apprehended, and the three of them being handcuffed on pages 6 and 7. That on pages 8, 9 and 10 the three are shown standing in a police vehicle, and on page 11 is the photograph of the actual leading to the body.

Further that page 13 shows the body in the grass, while the photographs on pages 14, 15 and 16 are a close view of the body, while page 22 shows the swollen genitals and bruises on the deceased, and page 24, the body with cello tape on the mouth. That pages 29 and 30 show a closer view of how the cello tape covered the mouth, and shows the black spot on the eye. He also testified page 31 is a general picture of the identification parade, while page 32 is a long range photo of Daniel identifying A1, then page 33 is a close range photo of A1 being identified.

That on page 34 is a long range photo of A2 being identified, page 35 a close range photo of the same identification, page 36 a long range photo of the identification of A3, and page 37 a short range photo of the same identification. The second identification pictures are shown on page 38, which is a general view picture, while on pages 39 and 40 are long and short range photos of A1's identification, and on pages 41 and 42 long and short range photos of A2's identification. The long and short range photos of A3's identification are on pages 43 and 44 respectively, while page 45 is a general view picture of the third identification parade.

Pages 46 and 47 are long and short range photos identifying A3, while pages 48 and 49 are long and short range photographs identifying A1, and the ones on pages 50 and 51 are long and short range photos identifying A2.

When cross examined PW6 stated that the photograph on page 9 of 'P10' shows the body of Justin Kameya with the hands tied behind his back with cello tape. Whilst admitting that fingerprints can be lifted from cello tape, he testified that he did lift any in this case. That the unused cello tape was found in the car when it was impounded, together with a temporal driving licence for the deceased, and a red cap.

He stated that A1, A2 and A3 were apprehended on 14<sup>th</sup> April, 2016, while A4 and A5 were apprehended on 11<sup>th</sup> April, 2016. That A1, A2, and A3 were in custody from 14<sup>th</sup> April 2016 until 20<sup>th</sup> April, 2016, when the identification parade was conducted. PW6 denied that when PW1 was discharged from the clinic he would frequent the police station, and he was shown A1, A2, and A3, and that is why he was able to identify them on the identification parade.

He agreed that the parents or guardians for A1 and A2 were not present during the identification parade. PW6 also agreed that he was not present when A4 and A5 were apprehended, and that he only met them at the office around 23:30 hours on 11<sup>th</sup> April, 2016.



In re-examination, PW6 told the court that A1 and A2's parents were not present during the identification parade as the two had told the police that they were above eighteen years, and they were therefore not juvenile offenders. He also stated that the cello tape recovered from Justin Kameya's body would not have revealed fingerprints of the people that had tied him up, as in the tying process, the impression of fingerprints is done repeatedly in a freaky way, and further that the cello tape was found with moisture content, which does not allow the lifting of fingerprints from it, especially that the cello tape was still on the body of the deceased, and was taken to the mortuary.

That in view of the moisture content, and the state of the cello tape, it would have been impossible to lift fingerprints from there, as the chemical used to dust off fingerprints, is powder.

PW7 was Constable Brian Muwo, also based at Chilanga police station. His evidence was that on 11<sup>th</sup> April, 2016, he was on duty as a call driver, and he received a report from security guards at Sandy's Creation that there was a person who was lying on the ground, badly beaten by unknown people. Acting on the report PW7 had rushed to the scene with the patrol team, where they found a person who identified himself as Daniel Kameya. That the person was in bad shape, and that although he was able to talk, could not walk on his own, and had a lot of visible injuries, and had to be helped onto the vehicle.

He stated that they rushed Daniel to Chilanga clinic for treatment, where he told him that three men who had booked him and his cousin Justin Kameya had attacked them behind Sandy's Creation, and had stolen the Toyota Spacio registration number ACP 4826 that Justin was driving, as well as Nokia and MTN cell phones. That they left Daniel at the clinic and continued with the patrol along Kafue Road, and that at some point near Helpers police post they spotted a Toyota Spacio fitting the description given by Daniel as having been stolen. The said police post is located about fifteen kilometres from Sandy's Creation.

It was his evidence that he intercepted the vehicle, and challenged it with the help of the patrol team, and the two occupants of the vehicle were apprehended. That upon interrogation the two identified themselves as Cosmas Tembo of Chibolya Compound, and Binack Kasosa of Siavonga, and when they were asked for documentation for the vehicle, they failed to produce any. PW7 stated that he found a temporal driver's licence in the names of Justin Kameya on the dashboard, and he then took the two to the police station, and handed them over to the criminal investigations department, together with the vehicle and temporal driver's licence. He identified A4 as Cosmas Tembo, and A5 as Binack Kasosa.

PW7 when cross examined agreed that A4 and A5 explained how they were found in possession of the motor vehicle, when he apprehended them. However he was not satisfied with their explanation as the vehicle had been reported stolen. It was also PW7's evidence that A4 had explained that his sister was coming from Siavonga, and had disembarked at Kafue where he was going to pick her up from. PW7 denied that the two were agents who were going to Siavonga to sell the car, although he agreed that Kafue road does go to Siavonga.

In re-examination PW7 testified that he was not satisfied with the explanation given by A4 and A5 that they were going to Kafue to pick up A4's sister, as one coming to Lusaka from Siavonga would not disembark at Kafue, which is on the route to Lusaka, and then someone drives to Kafue from Lusaka to pick them, as the bus coming from Siavonga will reach Lusaka.

The last state witness was Joseph Manda the arresting officer. His evidence was that on 13<sup>th</sup> April, 2016, he had reported for work in the morning, when he was allocated a docket of aggravated robbery, in which Daniel Kameya of Chawama compound reported that whilst he was pirating at the taxi rank with his cousin Justin Kameya in Kuomboka around 19:00 hours, they were booked by three young men to go to Sandy's Creation in Chilanga.

That they had stopped over at Pick n Pay at Makeni mall, and thereafter proceeded to their destination, and that upon reaching there, Justin and Daniel were attacked by the three men, beaten, tied up on their hands until they were unconscious, and bundled in the boot of the car. That Daniel Kameya had told him that he was dropped in the bush, and when he re-gained consciousness, he had found that his MTN cell phone together with Justin's Nokia phone, and the vehicle were not there. That he had called out for Justin, but there was no response.

PW8 told the court that he instituted investigations into the matter, and learnt that the vehicle had been impounded by Constable Muwo (PW7), along Kafue road near Helper's police post in Shimabala, and its occupants were in police custody. He came to know the two who were found with the vehicle as Cosmas Tembo and Binack Kasosa.

He continued testifying that he had verbally warned and cautioned the two, and then interviewed them in connection with the aggravated robbery, and the whereabouts of Justin Kameya, and conducted a search of the vehicle. That Cosmas Tembo failed to produce any documents regarding ownership of the vehicle, and told PW8 that the vehicle belonged to his friend John Njobvu, and that he was ready to take the police to his house. Further that Cosmas Tembo had stated that he had borrowed the vehicle from John Njobvu so that he could go and pick up his girlfriend from Shikoswe in Kafue, who was coming from Siavonga.

That when PW8 searched the vehicle he found brown cello tape, and he testified that PW7, had handed him a temporal driving licence for Justin Kameya, which he identified and produced as 'P11'. He also produced the cello tape found in the vehicle which had been marked as 'ID8', and it was marked 'P8'.

Further in his testimony PW8 testified that on 14<sup>th</sup> April, 2016, around 02:00 hours Cosmas Tembo had led him to John Njobvu's house. However the

defence had objected to the evidence of leading on the ground that it was done involuntarily, and the State dispensed with that evidence. PW8 testified that A3 was apprehended, and he led police to the house where A1 and A2 were apprehended within the same compound. That at that house they recovered the Nokia and MTN cell phones, that Daniel Kameya identified as belonging to him and Justin.

It was stated that the suspects were taken to Chilanga police where they were interviewed, and they stated that they could lead police to the scene. That around 06:00 hours that day A1, A2, and A3 led them to Sandy's Creation where the body of Justin Kameya was discovered a few metres from the tarred road in some long grass lying face down, with his hands tied behind his back with cello tape. That PW6 had taken photographs of the scene, and the body was taken to UTH mortuary, awaiting post-mortem. He stated that the body was in a semi decomposed state.

PW8 also testified that during further interviews, A1 had revealed that he was twenty years, while A2 had stated that he was nineteen years, and that is why only police officers were present when they were interviewed. That he made up his mind to charge and arrest all the accused persons for the subject offences. Under warn and caution in Nyanja language which they understood better, they all gave free and voluntary replies, denying the charges.

He explained the basis of charging A4 and A5 for the offences as being that they were found with the vehicle about three hours after the robbery. PW8 identified the stolen Toyota Spacio, and it was marked 'ID12'. 'ID1', 'ID2', 'ID3', 'ID4', 'ID9', and 'ID12' were produced and marked 'P1', 'P2', 'P3', 'P4', 'P5', 'P9' and 'P12'.

In cross examination he told the court that the two people from whom the stolen vehicle was recovered from were not identified by the eye witness as being among his and Justin's assailants. He denied that A4 and A5 had told him that they got the vehicle from Clever so that they could go to Siavonga with

it to show a buyer. He agreed that the two were apprehended along Kafue road which goes south in the direction of Siavonga, but disagreed that the story about going to Siavonga was satisfactory.

He stated that the aggravated robbery was committed between 19:00 and 20:00 hours, and agreed that at that time, visibility was not clear. He however stated that Daniel had been able to tell them that one of the assailants was a bit slim, the other a bit fat and muscular, and that the other was also muscular and wore a red cap. Whilst agreeing that the said features given by PW1 describing the assailants are general, he did not agree that they were given because it was dark, and PW1 was not able to see clearly.

He maintained that A4 and A5 did not mention Clever, stating that the person he was told of is someone that he found. That there was no need to subject the cello tape to forensic examination as no fingerprints were lifted from there, though it is standard to do so. He stated that PW1 identified the cell phones that were recovered as belonging to him and Justin. When referred to the statement that PW1 gave to the police, PW8 stated that it does not make reference to the identification of the cell phones.

He denied that the two cell phones were planted on A1 and A2 when police were searching them. He also denied that A3 was severely beaten when apprehended, and stated that he did not ask to be issued a medical report so that he could access medical treatment. When referred to page 5 of 'P10', PW8 explained that the dust on A3's body could have been the texture of the picture, and while admitting that there was a swelling on his forehead, he denied that it was a result of having been beaten by the police.

He agreed that the body of Justin Kameya was recovered on the same day that the picture was taken, with the photograph having been taken between 03:00 to 04:00 hours, and the body having been discovered at about 07:00 hours. Whilst agreeing that A3 was at the back of the van when he led police to where

the body was recovered, PW8 maintained that he led police there, as he gave them directions, and denied that he was beaten.

It was also PW8's evidence that when A1 and A2 were apprehended they told police that they were aged twenty years, although he did not record their ages on the statements he recorded from them. He agreed that reports from the hospital show that the two are juveniles. He also stated that the vehicle was recovered around 23:45 hours, about three hours after it was stolen, and that this time was sufficient for it to be given to another person.

In re-examination PW8 stated that he did not neglect to follow up Clever, as he was not in the picture, and there was no need to look for him, as A4 and A5 had mentioned John Njobvu, and not Clever. He denied that the cell phones that were recovered were planted on A1 and A2. That A3 had hidden under the bed on being apprehended, and was pulled from there, so he could have sustained the swelling in that process. That when being handcuffed, he was made to lie down, and he sustained the white dust on his body. As to why he did not state A1 and A2's ages in the report, he told the court that it was not contentious, as they told him that they were adults, and police does not verify the ages given by suspects.

In defence A1 testified he is a grade nine pupil at Parklands Secondary School in Chilanga. That on 14<sup>th</sup> April, 2016 he went into town around 15:00 hours to buy clothes, when he met his school mate Patrick Kunda, who told him that his father had died. That Patrick had not informed Jones of Linda compound, and A1 then phoned Jones Chisulo (A2) and told him of the death, and the two had agreed to meet. That they met thirty minutes later, and proceeded to the funeral house around 18:00 hours.

He stated that they stayed there for about three hours and it started raining, and they went to his house and decided to sleep. That whilst asleep around 02:00 hours, he heard a knock at the door, and when the knocking persisted and the people knocking said that they were police officers, A1 got up and

peeped at the window. He saw ten to fifteen police officers with two people lying down.

When he opened the door, police threw tear gas into the house, and he went out without his shirt, and police ordered him to proceed where there was light, and put his hands in the air. That he was searched and nothing was found on him. That A2 then came out of the house and was told to join him, and he knelt down, and was handcuffed. It was further his evidence that they were beaten with short buttons, and he observed that one of the men who was lying down was tied with chains, and he was asked if he knew A1 and A2, but he denied.

A1 told the court that he also denied knowing that person, when asked. That even the other man who wore a black shirt was asked if he knew A1 and A2 but he too denied. He went on stating that they were photographed and put in a police land cruiser, whilst being stepped on with boots on their heads and taken to Chibolya police where a person he did not know was picked up, and they proceeded to Chilanga police.

He explained that there he was taken into the CIO's office with A2 and A3, and they were again beaten. Then around 06:30 hours they were put in the police vehicle and photographed whilst standing. A1 testified that they were thereafter made to lie down, and they were stepped on their heads, and driven to a place that they did not know, whilst lying face down. That when the vehicle stopped, they were told to get out, as two officers stood a few metres from the vehicle, and all three of them were handcuffed together.

He stated that when they reached where the police officers were standing, they found a dead body, and were ordered to carry it, as they had killed the man. That as police fired in the air, they were scared, and knelt down to pick the body, and they were photographed. Thereafter they carried the body and put it in the vehicle. Further in his defence A1 stated that they were driven back to the police station, and placed in custody with A4 and A5. That while they were

in cells a person went to the cells, and stood at the burglar bars where they were only five of them, and left. Then three days later an identification parade was conducted, and that the person that they had seen at the cells went and identified them.

That he did not identify anyone of them at the first identification, and the police officer that had the camera showed them to him stating that one was wearing red socks, the other a blue Chelsea shirt, and the other a black bomber. A1 also testified that police had gone with the two cell phones to the cells with PW1, and told him that the phones were recovered from A1's house. He challenged the police to state which of the two accused persons had the cell phones on being apprehended, as the photographs taken do not show the phones.

He denied having booked PW1, and the late Justin Kameya on 11<sup>th</sup> April, 2016, as he was home alone that day.

In cross examination A1 repeated that he met Patrick on 14<sup>th</sup> April, 2016 who informed him that his father had died. He stated that he goes to the same school as Patrick, while A2 goes to the open community school. That A2 used to go to school at Parklands school before going to the community school. A1 denied any knowledge of Justin Kameya's death. Whilst agreeing that PW1 had identified him at the identification parade, he told the court that this was because he had been exposed to them before the parade was conducted. He agreed that PW1 identified him thrice, despite having changed clothes and position on the parade.

A1 also agreed that it would be sensible to implicate the persons who were found with the vehicle than anyone else, and that he did not challenge PW6 and PW8's evidence that he was found with the phones. He further agreed that they were taken to a place on 14<sup>th</sup> April, 2016, where a body that was in the process of decomposition was found.



DW2 was A2. He told the court that he is a grade 10 pupil at the Zambia Open Community School. His defence was that on 14<sup>th</sup> April, 2016 he had received a phone call from A1 who informed him that their friend Patrick's father had died. He like A1 stated that the two had agreed to meet in town so that they go to the funeral, and that when they did, it had started raining, and they had gone to A1's house which was near for shelter.

That the two had slept and later there was a knock at the door, and A1 had opened the door, and screamed as he was beaten by the police officers who had gone to the house. He further testified that he also went out and they were made to lie down, and that there were two other people there who were also lying down. A2 told the court that they were put in a police land cruiser and taken to Chilanga police after they picked up another person from a police post.

His evidence was that there they were beaten and asked to take police to the person they had killed. That his front tooth was removed in the process, and they were again put in the land cruiser and made to lie down, after they had been photographed whilst standing. A2 further testified that they reached a place that he does not know where two police officers had disembarked, and went to some tall grass, and they were asked to join the officers.

Like A1 he stated that they found a dead body in the grass, and they were ordered to pick it up, which they did, as they were scared as the police officers had shot in the air, threatening to kill them. That when they lifted the body, they were photographed, and taken back to Chilanga police.

Further in his testimony A2 gave evidence like A1, telling the court that whilst they were in cells, a man went there and police had told him, that the accused persons had killed his relative, and this person identified them at the identification parade some days later, and that he was PW1 in this matter. He denied having attacked PW1 and the late Justin Kameya on 11<sup>th</sup> April, 2016, stating that he was at home with his parents and siblings.

It was also his testimony that when he was apprehended from A1's house by the police, he did not see the police recover the two cell phones. That he only saw them at the police when PW1 was taken to the cells by the police to see the accused persons. He asserted that he had complained to the police on the unfairness of the identification parade, as PW1 had been exposed to them at the cells, and on the basis that he had failed to identify them during the first parade. He denied having booked PW1 and the late Daniel Kameya on 11<sup>th</sup> April, 2016.

A2 in cross examination stated that even though police had stated that five people were apprehended in connection with the offence, to his knowledge there were six. That he does not know the sixth person that was apprehended, but that police were with him when apprehending him. He agreed that only him, A1 and A3 were taken to the place where Justin's body was found. He maintained that PW1 was taken to the cells where the accused persons in this matter were being kept a few days before the identification parade was conducted.

That all the five accused persons were on the identification parade, but not the sixth person. However only the first three accused persons were identified, and this he attributed to the fact that PW1 was told to identify only the three of them.

A2 stated that he had raised the issue of the fairness of the identification parade when Detective Kazhimoto (PW6) testified. He agreed that a dead body was found where police took them, but he could not tell if it was in a state of decomposition. He did however agree that the skin on the body did not look normal.

A3 was DW3. He testified that on 14<sup>th</sup> April, 2016 around 02:00 hours he was at home sleeping with his wife and two year old child, when he heard a knock on the door. When he asked who was there he was told that it was the police, and when he opened the door, he was pepper sprayed and ordered to lie down.

That he was beaten and tied with a chain that was in his house and taken outside into a police vehicle that had someone he did not know. He added that the person is not among the accused persons in this matter.

He further testified that they were driven whilst lying down to a place that he does not know which had a black gate, and police had knocked there, and jumped over the gate. A3 stated that he and the other person he does not know were thrown over the gate, and told to lie down, while the officers knocked on a door, and two young men out when it was opened. That the two men were beaten, and made to lie down where A3 and the other man was, and they were all beaten.

Further in his testimony A3 told the court that they were taken to Chibolya police where another person whom he came to know as A4 was picked up and put in the vehicle, and they were taken to Chilanga police. He like A1 and A2 testified that around 06:00 hours they were taken to a place where a dead body was found, after they were photographed whilst standing in the vehicle. He continued stating that they were also photographed after they were threatened and ordered to lift the dead body.

A3 also repeated A1 and A2's evidence that PW1 was taken to the cells and shown to them as the people who had killed his cousin after they were attacked, and that he identified them on the identification parade some days later. A3 stated that they had complained to the police over the identification parade. He denied any knowledge about booking PW1 and his late cousin Justin Kameya or attacking them at Sandy's Creation, as he was at home with his wife and child.

When cross examined he stated that a person he does not know was thrown into the vehicle. That when police picked him up they were in the company of a person he does not know, and that the person was not A4. He denied having led police to A1 and A2's house. He agreed that he was identified three times at

the identification parade after he changed clothes and position on the parade, and that A4 and A5 were not identified as the assailants.

DW4 was A4. His testimony was that works a technician at Liquid Telecoms, and on 11<sup>th</sup> April, 2016 he had knocked off from work around 18:00 hours, and went to watch a football match at Chibolya complex, with his worker A5, who was supervising a project in Siavonga. That A5 had gone to get his pay. A4 stated that as he was at the complex a friend of his Cleverson, nicknamed ba Malawi, who is a mechanic, had phoned him around 20:00 hours and told him that a client had taken a vehicle to him, and he asked A4 to park the vehicle in his yard, and take it to the workshop at Soweto, the next day.

He stated that after watching the match he and A5 got the vehicle, and A4 drove it, and they headed home, leaving Cleverson at the complex. That he had phoned his girlfriend in Kafue who told him that she was waiting for him, and after changing his clothes at home, he started off for Kafue with A5. It was his testimony that after they passed Chilanga police, they saw a vehicle parked by the road, and he parked near the said vehicle, so that he could answer the call of nature.

That as he was doing so some police officers approached them, and parked their vehicle behind the one A4 was driving, and asked A4 where they were going. He told the court that he had explained that he was going to get his girlfriend from Kafue, but the police instead told him to stand where there was light, and lift his hands up. A4 went to explain that the police officers then sent a radio message giving the number plate of the vehicle that A4 was driving, and the two of them were ordered to lie down, with the police alleging that they had stolen the vehicle.

It was stated that the two of them were ordered to get into the police land cruiser, and they were taken to Chilanga police. There A4 was asked who the owner of the vehicle was, and he had told them that it was for Cleverson, and they were detained. That two days later PW1 was taken to the cells, and police

told him that they were found with the vehicle, but he denied that A4 had booked him.

Then on 14<sup>th</sup> April, 2016 police got him from the cells and asked him to lead them to the person who had given him the vehicle, and he had led police to Cleverson in Chibolya, and he was left in custody there, while police went with Cleverson. He stated that he was only picked up around 04:00 hours, and taken back to Chilanga police, where he found three people, whom he came to know as A1, A2, and A3, who were lying down in the van, when he was picked up.

He denied committing the offences with which he is charged, stating that when PW1 was asked to identify his attackers for the first time at the identification parade he failed to do so, and he only did so after he went and spoke with the police.

It was A4's evidence in cross examination that the police vehicle went and parked behind them at a place near Helpers police post on Kafue road. He denied that the police stopped them. He agreed that he heard Constable Muwo's (PW7) evidence that he did not tell him about Cleverson. He denied having told PW7 that the vehicle was for John Njobvu (PW3), and having led police to A3's house.

He did however agree that he was found with the vehicle around 23:30 hours, which was stolen from PW1 and the late Justin Kameya between 19:00 and 20:00 hours, a period of about four to five hours later. He also agreed that he did not produce documentation for the vehicle when asked to do so. His explanation for being on the road, was that he was going to pick up his girlfriend from Kafue, but he denied that he had earlier told her that he would pick up, as he knew that Cleverson would give him the vehicle.

The last defence witness was A5. A5 in his defence testified that his boss A4 had gone to Siavonga and had asked him to find some people to slash grass

where Liquid had put cables. That thereafter A5 had come to Lusaka with A4 and upon knocking off from work they had gone to a bar where A4 was drinking beer. That whilst there A4 would go to the toilet and return. Then between 20:00 and 21 hours, A4 had returned from outside, and told him that they should go home. He stated that after they had walked some distance, they saw a black Toyota Spacio, and A4 got into that vehicle, and asked A5 to also get in.

He told the court that there were three people in the vehicle whom he does not know, and they proceeded to A4's house, where A4 went to change his clothes, after leaving the three men who they had found with the vehicle. That thereafter they left in the vehicle as A4 looked for fuel, and that A4 was driving the vehicle. When they refuelled they went and stopped at a place where A4 and the other three people had disembarked leaving A5 in the vehicle, and later they drove to a night club where the three men got off, and booked a taxi and left.

A5's continued defence was that A4 told him that they were going to Kafue to pick up his girlfriend, and as they drove to Kafue, A5 had asked to stop so that he could use the toilet, and they parked the vehicle. As he returned to the vehicle a speeding vehicle had approached them, and a person with a gun came out and pointed it at them, and ordered them to lie down.

That they were searched, and thereafter the people phoned others asking the description of the vehicle, and were told it was a black Toyota Spacio, and A4 and A5 were thereafter told that they were thieves, and were asked where they were taking the vehicle. He testified that they were taken to Chilanga police, where they were beaten, and the next day he was taken Musamba police where he was again beaten, and asked to lead police to the person that they had killed. That police had continued torturing him even when they took him back to Chilanga police, but he told them that he knew nothing.

Later he, A4, and three others were beaten and statements recorded from them, and an identification parade was conducted where some people were identified as having booked the witness. He stated that the three men who were in the vehicle when it was given to A4 were not in court.

A5 when cross examined agreed that he was found with the vehicle around 23:30 hours. That A4 would know who the three men who took the vehicle are. He stated that he does not know if the three are A1, A2, and A3. He denied having told police that A4 was given the vehicle after he gave A1, A2 and A3 K4000.00, and stated that he remained in the vehicle when A4 went out with A1, A2, and A3.

In re-examination he stated that he does not know who A4 was with when he left the vehicle, and that he does not know A1, A2 and A3.

I have considered the evidence. It is a fact that PW1 was found beaten at Sandy's Creation by police officers on 11<sup>th</sup> April, 2016 in the night, and he reported that he and the late Justin Kameya had been booked by three men at Kuomboka rank in a black Toyota Spacio vehicle registration number ACP 4826 between 19:00 and 20:00 hours, driven by Justin. That they were attacked, and the said vehicle and a Nokia and MTN cell phone were stolen from them.

It is also a fact that on the same night A4 and A5 were apprehended by the police on Kafue road whilst driving the said Toyota Spacio vehicle around 23:30 hours, about four hours after it had been reported stolen.

It is further a fact that Justin Kameya was on 14<sup>th</sup> April, 2016 found dead in some tall grass near Sandy's Creation. The question is whether it has been proved beyond all reasonable doubt that it is the accused persons who committed the offences of aggravated robbery and murder?

In count one the offence is murder while the second offence is aggravated robbery. For purposes of proper flow of the case, I will start with the offence of aggravated robbery.

Aggravated robbery is defined in Section 294 of the Penal Code, Chapter 87 of the Laws of Zambia as;

***“(1) Any person who, being armed with any offensive weapon or instrument, or being together with one person or more, steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony of aggravated robbery and is liable on conviction to imprisonment for life, and, notwithstanding subsection (2) of section twenty-six, shall be sentenced to imprisonment for a period of not less than fifteen years”.***

Therefore in order to prove the offence it must be proved beyond all reasonable doubt that the accused persons did steal the Toyota Spacio registration number ACP 4826, the property of Theogene Ntakuritimana, and a Nokia cellphone the property of Justin Kameya, and one MTN cell phone the property of Daniel Kameya, and did threaten or use actual violence on Daniel and Justin Kameya, in order to obtain, retain or overcome resistance from the items being stolen.

The evidence as given by PW1 in this matter is that A1 to A3 booked him and the late Justin Kameya at the rank in Kuomboka township, stating that they were going to a place around Sandy's Creation. That they had on the way stopped over at Makeni mall where the three accused persons bought some food, and they thereafter proceeded to the said Sandy's Creation. PW1 had testified that upon the men paying the taxi fare when they reached their destination, the men had attacked him and Justin and tied them with cello



tape on their hands and mouths. That PW1 was put in the boot of the car, and dumped some distance away.

When he gained consciousness he had shouted out for Justin who did not respond, and he managed to find his way to Sandy's Creation where police officers of Chilanga police were called, and they picked him up and took him to Chilanga clinic. The evidence of PW6 was that A4 and A5 were apprehended with the stolen vehicle on the same night, and upon interviewing them A4 had led them to A3, who in turn led them to A1 and A2.

As regards A1, A2 and A3 the State submits that the defence alleges that the identification of these accused persons was mistaken in this matter. However their argument is that the court is competent to convict on the evidence of a single identifying witness, provided that the possibility of an honest mistake has been excluded. That in this matter, PW1 had ample time to observe the three men as they talked to Justin when they were booking him, and there was light there, and further that when they stopped over at Pick n Pay in Makeni there was also light.

That even at the place where they had stopped near Sandy's Creation, PW1 had been able to observe them from the light from the vehicle when they got out, as the three men were putting money together to pay the fare.

That that is the reason that PW1 was able to identify them thrice at the identification parade, despite them having changed clothes, and positions on the parade. On the assertion by the three accused persons that PW1 was exposed to them at the cells, and police had told him to identify them at the parade, the State submits that if anything the police would have implicated A4 and A5 who were found with the vehicle, and not the three.

I do agree that the offence occurred at night, and even though there were lights at the taxi rank where PW1 and the late Justin were booked from, as well as at Makeni mall where they stopped over, and when the vehicle was opened when

the three accused persons were paying the taxi fare, the capacity to observe under such circumstances may not be as clear as during day light. The State however argues that there is evidence that supports the evidence of identification, as it has been seen that PW1 identified the three at the identification parade.

There were assertions by the three accused persons that PW1 was taken to the cells where they were and the accused persons were shown to him, days prior to the identification parade being conducted. Both PW6 and PW8 were cross examined on this when they testified. However both denied the assertion, and the question is who is telling the truth between PW6 and PW8 on the one hand, and the accused persons on the other?

The defence just made the allegation without demonstrating the dates on which PW1 is alleged to have been taken to the cells, and shown the accused persons, and who did so. PW1 in his evidence stated that when he went to the police station to report the matter, he met A4 and A5, and this evidence is also confirmed by PW2. A4 on the other hand testified in his defence that two days after he was apprehended, PW1 was taken to the cells, and this was before A1, A2 and A3 were apprehended as they were apprehended on 14<sup>th</sup> April, 2016, whilst A4 and A5 were apprehended on 11<sup>th</sup> April, 2016. Two days after 11<sup>th</sup> April, 2016 was 13<sup>th</sup> April, 2016.

In my view the issue of PW1 having been exposed to the accused persons before the identification parade was conducted, though raised in the cross examination of PW6 and PW8 did not discredit their testimony, as it was just allegation made, without details to support it, as the evidence establishes that PW1 was only exposed to A4 and A5, whom he did not identify at the parade that was conducted as being his assailants.

I say so in view of the case of **KENNETH MTONGA AND VICTOR KAONGA V THE PEOPLE SCZ No 5 of 2000**, where the evidence of identification was attacked on the basis that the passport of the appellant was at the reception

where the identifying witness had seen it, and the Supreme Court had stated that;

***“we agree entirely with those principles and in a way we agree with Mr Chirambo that the presence of the second appellant’s passport at the very least, in the reception room, at the police station would raise suspicion especially that one witness at least admitted to having seen the passport. It follows therefore, that if this were a proper case, the identification would be very suspect and could easily be nullified. However, as the head note we have quoted states, nullification of the identification can only result in a proper case”.***

In this case there is nothing in the evidence adduced that suggests that PW1 did in fact see A1, A2 and A3 in the cells before he was called to identify them, some days later, thereby qualifying the case as one in which the evidence of identification, could be properly disqualified. Therefore the evidence of PW6 and PW8 is to be believed, and not that given by the accused persons. The defence raised on this aspect is unsuccessful on that basis.

Moreover PW1 when cross examined stated that both A1 and A2 had particular haircuts which he called “*modise*”, and this in my view establishes that he had observed them, a fact not disputed by them. It is therefore my finding that PW1 properly identified the accused persons at the identification parade, and he was not exposed to them earlier.

The State also submits that if the identification of the accused persons was mistaken, the evidence of PW1 and Justin Kameya’s phones having been recovered from A1 and A2 supports the evidence of identification made by PW1. That the two were found with the phones about seventy two hours after they were stolen, and that the evidence of possession of the stolen phone provides a connecting link of the accused persons to the commission of the offence, which renders the mistaken identity too much of a coincidence.

To this end the case of **KENNETH MTONGA AND VICTOR KAONGA V THE PEOPLE SCZ No 5 of 2000** is relied on. On the argument by the two accused persons that the police should have taken photographs as proof of possession of the phones, Counsel relies on the case of **JACK MAULLA AND ASUKIWE MWAPAKI V THE PEOPLE 1980 ZR 119** where the Supreme Court held that there are no hard and fast rules that the police should have the scene of crime, and the incriminating objects photographed. That even the evidence of association by the two accused persons also supports the evidence of identification, as was held in the case of **JOHN MKANDAWIRE AND OTHERS V THE PEOPLE 1978 ZR 46**.

The above being the position of the law, the issue is whether there is reason that PW6's evidence with regard to A1 and A2 being found in possession of the phones should be disbelieved? He was not cross examined on the issue of whether indeed the two cell phones belonging to PW1 and the late Justin Kameya were recovered from the house where A1 and A2 were apprehended from.

The purpose of cross examination is to discredit the evidence of a witness, and if indeed the two phones were not found with A1 and A2 when they were apprehended, PW6 would have been cross examined on this aspect, so that the veracity of his evidence would have been established. As his evidence was not discredited by cross examination, it is therefore credible, and the assertion by the accused persons, was just an afterthought.

I therefore find that A1 and A2 were found in possession of the two cell phones, and there is nothing in the evidence to suggest that they came into possession of the said phones innocently. This evidence together with the evidence of identification establishes that they were part of the people that booked PW1 and Justin Kameya and attacked them, and stole the vehicle and cell phones from them.

Violence was used to obtain, retain and overcome resistance from the items being stolen as the medical reports 'P3' and 'P4' show the injuries that PW1 sustained, and even the photographs in 'P10' of Justin Kameya's body also reflect so. There was more than one attacker as testified by PW1, and the State has accordingly proved the case against the two beyond all reasonable doubt, and I find both A1 and A2 **GUILTY** as charged on count two, and I **CONVICT** them accordingly.

As regards A3, the evidence against him is that he was identified by PW1 at the identification parade. This evidence of identification has been found to be credible. The other evidence against him is that he led police to apprehension of A1 and A2, which he denied. He did not cross examine PW6 on his evidence that he led police to A1 and A2, and again this evidence is credible, as it was not shaken. It was only in his defence that he asserted that police took him and another person that he does not know to the house where A1 and A2 were apprehended from. This evidence if it is to be credible should have been put to PW6 when he was cross examined, as he is the person who alleged that A3 led him there, so that its truth could be tested.

There is overwhelming evidence that A3 had acted in concert with A1 and A2 when stealing from Justin and Daniel Kameya, and that they used violence on the two, as can be seen from the injuries that PW1 and late Justin sustained. The State has therefore proved its case beyond all reasonable doubt against A3 and I find him **GUILTY** as charged, and I **CONVICT** him accordingly on count two.

As for A4 and A5 it is not in dispute that they were found in possession of the vehicle within four hours of its having been stolen. The explanation offered by A4 in his defence for being in possession of the said vehicle was that his friend Cleverson had given him the vehicle to keep until the next day, when he would take it to the workshop. However he decided to go to Kafue to pick up his

girlfriend, and that is how he was apprehended with it. A5's defence was that his boss A4 had merely asked him to escort him to Kafue.

The submissions by the State refer to the case of **GEORGE NSWANA V THE PEOPLE 1988-1989 ZR 174** where the Supreme Court stated that *“the inference of guilt based on recent possession particularly where no explanation is offered which might reasonable be true, rests on the absence of any reasonable likelihood that the goods might have changed hands in the meantime, and the consequent high degree of probability that the person in recent possession himself obtained them and committed the offence. Where suspicious features surround the case that indicate that the applicant cannot reasonably claim to have been in innocent possession, the question remains whether the applicant, not being in innocent possession, was the thief or a guilty receiver or retainer”*.

Further that the case of **MARTIN MUPETA AND JOHN CHANDA V THE PEOPLE SCZ/137/2012** held that *“the period within which the presumption can operate varies according to the nature of the article stolen. Three months would be sufficiently recent for a motor vehicle. But for such articles as pass from hand to hand readily like a cell phone, one month would be a long time, but seven days would be sufficiently recent”*.

The question that I therefore ask is whether the explanation by A4 over how he came to possess the vehicle is reasonably true, so that I can infer that he was in innocent possession of the vehicle, and not a thief or a guilty receiver?

On the face of it, his explanation could be reasonably true. However the evidence of PW7, who apprehended him on Kafue road was that A4 did not mention that Cleverson gave him the vehicle to keep, but rather stated that the vehicle belonged to John Njobvu (A3), and that he could lead him there. A4 in his defence denied having led police to A3, stating that he led them to

Cleverson. PW7 when cross examined further was not asked on whether A4 had told him that Cleverson had given him the vehicle, but was only cross examined on the story given by the two accused persons for being on the road at night.

This story which PW7 did not believe was that A4's sister who was coming from Siavonga on a bus had disembarked at Kafue, and they were going to pick her up from there, from Lusaka. That he did not believe the story, as there was no need for her to disembark at Kafue when the bus would reach Lusaka, her final destination.

Further PW7 was cross examined on whether the two were agents who were going to sell the vehicle, and not that Cleverson had asked A4 to keep the vehicle until the next day. PW7's evidence on the explanation that he was given by A4 as to how he came to be in possession of the vehicle was therefore not discredited in any way. Further A4 in his defence testified that when asked by the police where he was going when he was apprehended with A5 whilst driving the vehicle had told them that he was going to Kafue to pick up his girlfriend.

He did however state that when they were apprehended and taken to Chilanga police he had told police that the vehicle belonged to Cleverson. PW7 who is the witness that A4 gave an explanation to for being in possession of the vehicle, was not cross examined on the fact that A4 told him that the vehicle belonged to Cleverson. This witness stated that A4 told him that the vehicle belonged to A3, and this evidence is unshaken.

I therefore find that the explanation that A4 gave for being in possession of the vehicle, is that it belonged to A3, and that he was going to Kafue to pick up his sister who had disembarked there when she was coming to Lusaka, is not reasonably true, as his sister would have been picked from within Lusaka when the bus arrived, instead of driving to Kafue to get her. Further if Cleverson is the person who indeed gave A4 the vehicle to keep, A4 would have mentioned him to PW7 in the first place.

Therefore A4 was not in innocent possession of the vehicle, and the question is whether he was a thief or a guilty receiver of the vehicle? As already seen, the evidence given by A5 in his defence is that when he left the bar with A4, they had found the vehicle in issue with three male occupants. Whilst A5 had initially denied that these three male occupants of the vehicle were the first three accused persons, when asked where he had remained when the said first three accused persons had left the vehicle with A4, he had answered that he had remained in the vehicle.

A5 while retracting this statement in re-examination, did so in my view, upon the realisation that he had incriminated his co-accused persons. By making the statement in cross examination, A5 provided the connecting link between A4 and the first three accused persons, thereby establishing the joint intent, among the four. A5 further testified that A4 took charge of the vehicle after the three men took it him, and he started looking for fuel for the vehicle.

There is also evidence on record from the accused persons suggesting that there was another person involved, possibly the said Cleverson, but the evidence does not establish that he is the person who gave the vehicle to A4. As seen, the testimony given by A5 was that the first three accused persons took the vehicle to A4, and they discussed with him leaving A5 in the vehicle.

Therefore A4 acted in concert with the first three accused persons in stealing the vehicle from Justin and Daniel Kameya, and he was not an innocent possessor or receiver of the vehicle but a thief. I accordingly find that while A4 denied having led police to A3, who in turn led them to A1 and A2, this is what had happened. The State has therefore proved that A4 formed a joint intent to steal the vehicle from Justin Kameya, and he therefore agreed that violence would be used to commit the offence. He is a principal offender on that basis, and I accordingly find him **GUILTY** as charged on count two, and I **CONVICT** him accordingly.



As for A5 the only evidence against him is that he was in the company of A4 who had control and possession of the stolen vehicle. There is no evidence pointing to him having formed a joint intent to commit the offence. I accordingly find that there is insufficient evidence, linking him to the offence, and I find him **NOT GUILTY** and I **ACQUIT** him forthwith.

In count 1 the offence is murder. It is defined in Section 200 of the Code, Chapter 87 of the Laws of Zambia as;

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

Malice aforethought is deemed to have been established as provided in section 204 of the Penal Code which states that;

***“Malice aforethought shall be deemed to be established by evidence proving any one 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 not be caused;***

***(c) an intent 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”.***

PW1 testified that after he re-gained consciousness, after he and Justin had been beaten, he had called out to Justin, who did not respond. That he had

managed to walk to Sandy's Creation where the matter was reported to the police.

The State in the submissions state that the death was caused as a result of the assailants acts committed in the course of a felony. They also submit that the evidence of A3 leading police to the secondary scene, supports the evidence of identification. That while A3 denied having led police to the scene, asserting that police led him there, he only asserted this as afterthought, as his objection to the leading on the ground of involuntariness had failed.

That the body was found in state of decomposition is evidence that the police had no prior knowledge that it was there, and this is confirmed by the evidence of PW2 and PW4 who were only informed of the death on 14<sup>th</sup> April, 2016, when the body was discovered.

The evidence against A1 and A2 is on the basis that they and A3 led police to the body. Objection was raised by the defence to the evidence of the said leading on the basis that it was involuntary, as the three accused persons were beaten. As seen from the evidence on record, a trial within trial was held to determine the voluntariness of the alleged confessions. In the ruling after the trial within trial, I had held that the evidence of the leading though voluntarily done by A1 and A2, would be excluded as they are juvenile offenders, whose parents or guardians were not present when they were being interviewed. In respect of A3, I held that the leading was voluntarily done, and it would form part of the evidence.

The law as it stands in this country, is that while a confession statement may be excluded on the ground of involuntariness, this can also be on the basis of the absence of parents or guardians when the offender is a juvenile, as is the case for A1 and A2 in this matter. The case of **THE PEOPLE V DIMENI 1980 ZR 234** is authority for this. However any evidence obtained as a result of an illegal or excluded confession is admissible as per the case of **LISWANISO V THE PEOPLE 1976 ZR 277** which held that;

***“apart from the rule of law relating to the admissibility of in voluntary confessions, evidence illegally obtained, e.g. as a result of an illegal search and seizure or as a result of an in admissible confession is, if relevant, admissible on the ground that such evidence is a fact regardless of whether or not it violates a provision of the Constitution (or some other law)”.***

Therefore even if the evidence of leading as it relates to A1 and A2 was excluded, the proceeds of such leading, being the discovery of the body of Justin Kameya is admissible, as it is relevant. A1 and A2 therefore had the guilty knowledge of where the body was, as after they had beaten Justin, they had tied him up and dumped him in the grass where according to the medical findings, he suffocated to death.

PW6 who is a crimes scene officer testified that he took photographs of the body upon its recovery, which are contained 'P10', the photographic album. The photograph on pages 29 and 30 of 'P10' are close up pictures showing that the deceased's mouth was covered with cello tape, which was also used to tie his hands behind.

PW3 the forensic pathologist testified that although the deceased was beaten and bruised as a result before his death, the injuries were superficial, and could not have caused death. However the deceased was swollen as a result of the beating, which produced mucus, which blocked his nose resulting in his failure to breathe, causing asphyxia due to suffocation. Further as his mouth was covered, he could not breathe.

This evidence establishes that Justin died as a result of the acts of the accused persons committed during a felony. When one goes to Section 204 of the Penal Code, malice aforethought may be deemed where there is an intention to commit a felony. It has been seen from the evidence that A1 and A2 beat Justin, and having the guilty knowledge they led PW6 to the body. The offence

is complete against them. I accordingly find both of them **GUILTY** as charged, and I **CONVICT** them accordingly.

As for A3 he equally led police to the discovery of the body, entailing that he had the guilty knowledge. Whilst he argued in his defence that he was beaten, hence the leading, I did make a finding during the ruling on the trial within trial that the bruise on his forehead could have been occasioned by him having been made to lie down during apprehension. Further PW8 had testified that he had hidden under the bed when being apprehended, and had to be pulled out of there. This could have resulted in the bruising.

When one looks at the photographs in 'P10', they will note that A3 does not have any bruising on his body, despite alleging that police beat him with short buttons, and slashers, being instruments that could have inflicted harm on him. Moreover he was made to lie down when A1 and A2 were apprehended hence the white dust like soot on his body.

There is overwhelming evidence that A3 was with A1 and A2 when they beat Justin Kameya and tied him, dumped and left him to die in the grass. A3 had intention to commit a felony, and the offence of murder is complete. I find him **GUILTY** as charged and I **CONVICT** him accordingly.

In respect of A4 the evidence linking him to the offence of murder is that although he was not present when Justin was beaten and left for the dead, he had formed a joint intention with A1 to A3 to steal the vehicle that the late Justin was driving.

In the case of **JOHN MWANSA AND SAMUEL MWANSA V THE PEOPLE SCZ/APP/ 170/171/2014**, where it was argued that the appellants had not formed a joint intention with their fellow accused persons to kill the victim when stealing the vehicle, the Supreme Court had referred to the case of **MUTAMBO AND OTHERS V THE PEOPLE 1976 ZR 160**, where they had pointed out that "**the formation of 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 other or others and each does so with the intention of participating in that prosecution with the other or others. Secondly 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."***

The Supreme Court in the **JOHN MWANSA** case had also made reference to the case of **SAKALA V THE PEOPLE 1987 ZR 23** we held that "**section 22 of the Penal Code contemplates that liability will attach to a person for the criminal acts of his confederates which will be considered his act also, if what those confederates have done is a probable consequence of the prosecution of the unlawful common purpose or design."**

Based on those cases, the Supreme Court had found that the only conclusion to be drawn from the evidence relied upon by the lower court as to the circumstances in which the deceased met his death, and how the vehicle was stolen, was that the appellants joined in the prosecution of an unlawful common purpose to strangle the deceased to his death, in order to steal the vehicle.

Applying the principles above to this case, the only conclusion I can draw is that A4 had joined in the prosecution of a common unlawful purpose to steal the vehicle, and in the process beat Justin, and used any means whatsoever to restrain him from resisting the attack, as he was tied with cello tape on the hands, and also on his mouth, which prevented him from breathing thereby causing his death. Further that his nose was swollen as a result of the beating, and produced mucus which blocked his nose, thereby preventing him from breathing.

A4 whilst acting together with A1, A2, and A3 had formed a joint intention to use violence to steal the vehicle, and the resulting death of Justin was a probable consequence of the use of such violence. He is therefore guilty of the offence of murder, and I find him **GUILTY** as charged, and I **CONVICT** him accordingly.

A5's involvement in this matter has not been ascertained, as there is no evidence showing that he had formed a joint intent with the rest of the accused persons to commit the offence, and there is insufficient evidence against him. I accordingly find him **NOT GUILTY** of the offence of murder, and I **ACQUIT** him forthwith.

**DATED THE 6<sup>th</sup> DAY OF OCTOBER, 2017**

S. Kaunda

**S. KAUNDA NEWA  
HIGH COURT JUDGE**