

**IN THE HIGH COURT FOR ZAMBIA**  
**HOLDEN AT MONGU**  
(CRIMINAL JURISDICTION)

HT/77/2017

NN

**BETWEEN:**

**THE PEOPLE**

**VS**

**GEORGE WASAMUNU WASAMUNU**

**MASILISO SIMUNJI**

**SIMASIKU SIMASIKU**

Before the Hon. Mr Justice W. S. Mweemba in Open Court on the 20<sup>th</sup> day of December, 2017.

*For the State:: Mr O. M.Siankanga & Mr K. Sifali- State Advocates, National Prosecution Authority*

*For the Accused: Mr. I. Yambwa- 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. *Woolmington v the DPP (1935) ALL E.R 1.*
2. *Mutale & Phiri v the People (1995/1997) ZR 227.*
3. *Zulu V The People (1977) ZR 203*
4. *Ilunga Kabala & John Masefu V The People (1981) ZR 102 (SC)*
5. *Mutambo and Five Others V The People (165) ZR 15(CA)*

**STATUTES AND OTHER WORKS REFERRED TO:**

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

2. *The Criminal Procedure Code, Chapter 88 of the Laws of Zambia.*

The Accused persons namely, **GEORGE WASAMUNU WASAMUNU, MASILISO SIMUNJI AND SIMASIKU SIMASIKU**, A1, A2 and A3 the were charged with the offence of **Murder** Contrary to **Section 200 of the Penal Code, Cap 87 of the Laws of Zambia.**

The particulars of the offence being that A1, A2 and A3 on the 10<sup>th</sup> day of November, 2015 at Sesheke in the Sesheke District of the Western Province of the Republic of Zambia did murder **KWALELA KASHENDA** (the Deceased).

In order to prove their case, the State brought Four (4) witnesses before Court.

**PW1** was Detective Chief Inspector **VINCENT CHIBESA** a Forensic Ballistics Expert at Police Service Headquarters. He stated that he has a Certificate in ballistics which he obtained from Moscow University in Russia and other relevant certificates in the same field and has worked in the field of Ballistics for 12 years.

He stated that on 21<sup>st</sup> December 2015, Mr. Chirwa Officer Commanding for Sesheke submitted one firearm with serial # 65637003244 and two cartridges for two reasons.

First to ascertain the functionality of the firearm in its caliber and secondly to determine if the 2 cartridge cases alleged to have been picked from the crime scene were discharged by the firearm.

After this he identified the exhibits in all aspects of forensic ballistics and found that the exhibit firearm is known as Automatic

Karashimko Rifle model 1947 (AK47) and was designed to chamber cartridges of caliber 7.62 mm of model 1943.

Its firing and corking mechanism were found to be perfect which he determined after test firing the firearm by loading 2 cartridges. Thus it was capable of loading and discharging cartridges of the same kind.

He also went on to use cartridges to in a comparison analysis but began by examining the two alleged to have been picked from the crime scene which were all in caliber 7.2mm of model 1943.

According to him they had pin hole traces on their bases which was an indication that they had been loaded and fired from a firearm of the same kind.

After this he did a comparison analysis by putting the two test cartridge cases he obtained from the exhibit firearm side by side with the two exhibit cartridges using the automated ballistics identification system.

Moreover after an extensive systematic analysis he found similar characteristics of the firearm in question mark and the injector mark on both the tests and the exhibits.

This indicated that both cartridges had passed through a common origin leading him to conclude that the exhibit firearm submitted had loaded and fired the 2 exhibit cartridge cases alleged to have been picked from crime scene

**PW1** stated that the exhibit weapon was dangerous and capable of causing injury or death to any animal or human target and would cause fear to any person threatened with it.'

Consequently, it was restricted to people from the Defence and Security for use in their operations. The witness compiled a report with a photo album which he positively identified in Court and it was admitted into evidence as P1.

The Firearm was marked for identification as P2, whilst the empty exhibit cartridges were marked P3 collectively. Test cartridges were also positively identified and admitted into evidence as P4.

In his final conclusion he was categorical that this was the firearm that loaded and discharged the empty exhibit cartridges he had been given for testing.

**PW2** was **NAMAKAU MUWANEI** the wife to the Deceased. She stated that on 10<sup>th</sup> November, 2015 she and her husband went to their field and on the way back home as they were about to reach home she crossed the road first and as her husband was about to cross it, she heard a gunshot and when she looked behind she heard him scream in pain.

That she also noticed that blood was oozing from his chest and when people gathered around they noticed that he had died. Whilst the people were there they heard another gunshot and people scattered till the next morning when they returned to prepare the body for burial.

That after 3 days 4 animals were missing from the kraal. Two (2) cows, one (1) bull and 1 heifer. After three days she heard that the animals were recovered from Lishili although to date she did not know where they were.

In cross examination she stated that when she was coming from the field with her husband around 19hours, whilst walking in front of him, she suddenly heard a gunshot and did not see the person that shot her husband.

There was no re-examination.

**PW3** was **KENNETH MUKUMBI** the brother in law to A2. He stated that while in the village and in the company of his wife Julia Mbambi, three people including his sister in law Masiliso (A2) visited them with 4 cattle (3 grown and one calf).

The next day they informed him that they wanted to sell three of the cattle and in the evening a potential customer came and bought one and the visitors said they would proceed to Bwina to seek medical attention and asked that their 3 remaining cattle remain with him as they would collect these on their way back.

Two or three days later, Police Officers in the company of a man that had visited with his sister in law came to their home to ask after the animals they had left behind.

So he took the animals to the police and learnt that it was his sister in laws friend who had told them to keep them and he had no idea where his sister in law was.

All the Accused persons were positively identified by **PW3** and he stated that the one that had returned with the police was A1.

In cross examination he stated that he was aware that his sister in law was a traditional healer and would move from place to place treating people.

It was also his evidence that he did not know that people would pay for her services with animals as he was not always with her.

That she had introduced the two gentlemen as one being a friend A3 and the other her husband (A1) and did not explain that A3 was her assistant whenever she conducted her work.

There was no re-examination.

**PW4** was **Detective Sergeant Mayungo Namasiku** from Muoyo Police Post. He testified that on 20<sup>th</sup> November, 2015 he got a report from Namakau Muwanei (**PW2**) who reported that her husband had been shot dead with a firearm and about 4 animals were stolen after the shooting incident.

Acting on this he booked out to Muyumina area at Kayeni village and the complainant led him to the area where her husband had been shot and when he walked around he found two cartridges from an AK47 and went back to the station.

That on 26<sup>th</sup> November, 2015 he received information from the public that there was a man who was on demand and was being

kept by a Local Court Magistrate at Bwina, called Simasiku Simasiku.

Acting on this report he went in the company of Detective Constable Chinyama to the house of Simasiku Simasiku and asked where George Wasamunu was hiding and Simasiku led **PW4** to where he was hiding in a thatched house and apprehended him.

That when A2 saw that A1 had been apprehended she requested to carry along a bag in the house which belonged to A1 and when he opened it **PW4** found an AK47 Rifle and clothes of George Wasamunu.

That he searched the house further and recovered a magazine with 10 rounds of live ammunition and arrested both A1 and A2 and took them to Sichili Police Post.

During the course of his investigations he came to discover that a third person by the name of Simasiku Simasiku (A3) was also part of the Accused persons and he heard that he was hiding at Mulobezi Secondary School.

He managed to apprehend Simasiku Simasiku A3 and was later led by George Wasamunu (A1) to Kamanga where he recovered 3 animals belonging to the Complainant and the animals were identified by the daughter to the Deceased meanwhile. The AK47 Rifle was sent to Lusaka for a Ballistic examination.

**PW4** jointly charged A1, A2 and A3 for murder and under Warn and Caution Statement, administered to them in Lozi language all accused persons denied the charge.

A Post Mortem examination of the Deceased's body was conducted and the Post Mortem Report that he positively identified before Court was admitted into evidence and marked as P5.

He also positively identified the AK47 Rifle and requested that it be admitted into evidence and it was marked P6.

**PW4** testified that he also came to know that Simasiku Simasiku (The Local Court Messenger) died in the month of April, 2016 and on the day he apprehended A1 it was he that led him to the A2 who was in the company of his wife.

That the 3 animals were recovered from Kamanga area and he recovered them from **PW3**.

**PW4** positively identified all the Accused persons.

In cross examination it was his evidence that he recovered 3 animals but did not mention their colors or brand marks. And that they were being kept at Sichili Police Post and their disposal was handled by Detective Inspector Kayombwe.

He also added that he had been informed that A2 was a visitor of Simasiku and that she was a Herbalist who moved from place to place treating people and he was unaware that some of the clients paid for her services using animals.



He further stated that she did not tell him that one of the animals he found in Vwina was a payment from a client and that she was in the area because she went to visit her patients there.

That A1 did not tell him that he got the other 2 animals from his kraal and A2 did not inform him that A3 was an assistant in her work. That A1 explained that he bought the gun from Sesheke but did not state that it was for hunting.

Moreover, that he apprehended A3 from his relatives' house and recovered 2 cartridges from the crime scene and that A1's bag had not been brought before Court.

**PW4** lastly stated that Namakau Muwanei (**PW2**) stated that the incidence that led to the death of her husband happened around 19hrs and she was walking in front of him and did not see the shooter.

There was no re-examination.

This marked the close of the Prosecution's case.

After carefully considering the evidence before me, I was satisfied that there was sufficient evidence to merit putting all the Accused persons on their defence. I accordingly did so pursuant to **Section 207(1) of the Criminal Procedure Code.**

In Defence, the Accused persons all elected to give their evidence on oath and did not call any witnesses.

**DW1** in his Defence testified that his wife A2 was a traditional healer so she went to Sonso area where he later found her and when she finished her traditional practices she was invited to Kwemba area and he accompanied her there and after about a week they reached an old man's village called Yenge where they found that his daughter was unwell and his wife treated her for about a week.

That whilst there Simasiku Simasiku (A3) the wife's brother followed them out of concern as they had been gone a long time. That A3 asked who DW1 was and A2 said he was her lover and when he asked if he had paid any dowry he told him that he could only pay it after going to the village where the animals were.

So he went with A3 to the village of Wasamunu Mukobo for about 3 days where he showed him a fairly small ox he had meant for dowry, carried it and said he would leave it with his older sister so they decided that it was better to add it to a herd of cattle in order to move it easier.

**DW1** and A3 took it to Yenge village where they found other cattle and when they returned they found that the patient his wife had treated was okay and they all decided to proceed to the home of **PW3** where they spent another week.

After this A2 developed malaria and the three of them went to Bwina Clinic and he sold one of the small animals on the way. When they arrived they stayed at Simasiku's place who was employed at Bwine local Court.

After a while A3 bade them farewell and said he was going to Mulobezi to see his older brother a teacher and after about a week Police Officers came and apprehended him and A2.

That police also got the bag he had which had a gun and took them to Sichili Police Post where officers from Sesheke came and picked them.

According to DW1 he had no idea about the offence he had been brought here for as he had already been convicted for the offence of possession of a Firearm in the Subordinate Court.

Moreover, that he had no idea about the animals PW1 said were stolen a few days after her husband was killed and did not hide at Simasiku's place but only stayed there.

He also added that he bought the firearm from an Angolan National so that he could use it for hunting and the person assured him it was a rifle that could even shoot elephants.

That since his wife was a traditional healer, clients would also pay her with their animals and the animals in question were four and one of them was small and greyish, another was a dark brown cow and the other two were brown in color.

In cross examination he stated that before going to Kwemba he came from his village and his wife's parents lived in Nalikwanda and Simasiku (A3) was also from there so he should have paid dowry there.

However, he paid it to A3 at Sonso area in Sesheke because he compelled him to do so and he was charged 2 animals by A3.

That after he paid A3 dowry the animal was taken to Yenge village with an aim to leave it at Samukumbi's village. So he got 3 more which he took to **PW3's** place.

He also added that it was not true that his animals were the same ones that were recovered by the Police.

**DW1** testified that A2's parents were deceased and he confirmed having heard the Ballistics officer say that the firearm produced before Court was dangerous and could only be used by the Defence forces and that there were two empty cartridges that were discovered by the police.

That he did not know the Deceased and after A2 treated the daughter to Yenge she was paid a calf which was killed and used for ritual purposes.

Moreover, that he and A2 had been married since 2014 and they stayed at Sesheke and he was charged two animals as dowry by A3.

That at the time A3 joined him and A2 it was his first time to see him and he was aware that in cross examination it was stated that Simasiku was her assistant.

**DW2** was **MASILISO SIMUNJI**. It was her evidence in chief that she was a traditional healer and lived in Senanga although she came from Nalikwanda.

She also added that on 5<sup>th</sup> August, 2015 she received visitors (Mwanandiwa and her son) that went to ask her to travel to Mwambule area on 15<sup>th</sup> August to go and heal a client.

So she went with the men that usually accompanied her and when they arrived she healed her client and later moved to Sonso on 15<sup>th</sup> August where A1 found her and spent the whole of August and September there.

That A1 told her he had come with some animals and after they went to Kwenda in Yenge's village where she'd been invited to heal his daughter, A3 later joined them and found her with Lifasi and Mubukwanu her assistants.

That she charged Nyembe her client an animal which she later sold and her next destination was Kamanga area and A1 asked her where her animals were and she stated that they were at Mungambwa area.

That A1 requested that she leaves his animals where hers were so they went to Kamanga area and lodged at Samukumbis (A3) place where she got sick and spent about 3 days in Bwina clinic then went to Simasiku Simasiku's place.

Thereafter, Simasiku explained that he followed her at Kwemba area. Meanwhile A1's animals remained at **PW3's** village. That she did not know that A1 had a gun in his possession.

After a while A1 asked Simasiku Simasiku to escort him to go hunting in the bush and she asked him how he was going to hunt

and he told her that he had bought a gun on his way there and he wanted to see how effective it was.

That they stayed together until she saw the gun which appeared defective and on 27<sup>th</sup> November, 2015 after A3 left for Mulobezi in the morning the police came and apprehended both her and A1.

That the officers searched the bag of A1 and found a gun and they took them to Sichili and later to Sesheke police in the evening.

That she had no idea about the animals that police found at the place of **PW3**.

In cross examination, she stated that George (A1) found them at the home of her brother in law and he told her he had come with 4 animals, 3 herds and one calf.

Moreover, that there was no way A1 could pay dowry to her young brother who she had not seen for 5 years and that he lied before Court.

That she did not know that A1 had a firearm until they arrived at Bwina and she could not see it in his bag and when she asked A1 where he kept it he told her that he kept it in the bush.

That she only saw it before they left and A1 told her that the animals he came with to Nsonso were his.

**DW3** was SIMASIKU SIMASIKU. He told the Court that on 22<sup>nd</sup> of October, 2015 he left Nalikwanda in search of his sister A2 and found her at Kwemba area on 6<sup>th</sup> November, 2015.

That when he arrived he found her with A1 who he did not know and suggested that she should take him to their parents so that they would know him as she had left the village a long time ago.

That A1 had come with his animals and she asked them to escort her to go and see their elder sister (wife of PW3) after which they would go back to the village.

That he did not know the names of PW3's wife. That A1 told them that he had nowhere to take his animals and would take them with them to their parents as dowry and he even told A1 that he was too young to charge him dowry as there were parents and elderly people back home that were capable of doing so.

That they went to Kamanga in November, 2015 and A1 said that he wanted to sell one of the animals he had come with. That when his sister fell ill they took her to Bwina Clinic and lodged at Simasiku's place and after she got better they wanted to leave and since their older brother was in Mulobezi it was suggested that they visit him as well.

That he was apprehended from there on 6<sup>th</sup> December, 2015. That he helped A1 to drive his animals since he found him with his sister and he assured him that they would return with them. **DW3** denied having been connected to the death of the Deceased.

In cross examination, he stated that he did not charge the dowry of A2 and was very surprised at the allegation because their parents were still alive and one of the people that should have charged him was even in Court.

That at no point did he go with A1 to Wasamunu – Mukobo village as he found him with 4 animals when he found his sister and these were the 4 he took to **PW3's** residence.

That he came to learn that A1 had a firearm when the police apprehended him.

There was no re examination.

At the end of the trial, both the State Advocates and the Defence Counsel filed written submissions which I have carefully considered together with all the evidence adduced by the prosecution as well as the defence in this matter.

In doing so I have been mindful of the fact that the burden of proving each and every element of the offence charged lies on the prosecution. (**WOOLMINGTON VS THE DPP (1)**).

Since the law does not impose any burden on an accused person to prove his innocence, the burden is on the prosecution to prove the guilt of the Accused persons beyond all reasonable doubt. Accordingly, should I have any lingering doubts the same must be resolved in favor of the Accused persons as set out in the case of **MUTALE AND PHIRI V THE PEOPLE (2)**.

As already alluded to the Accused herein were charged with the offence of **Murder** contrary to **Section 200 of the Penal Code, Cap 87 of the Laws of Zambia**. The Section which creates this offence states that:



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

Therefore in order to establish the offence of murder, the onus is on the prosecution to prove beyond reasonable doubt that the Accused persons with malice aforethought caused the death of the Deceased.

From the evidence adduced by the Prosecutions witnesses, there is no direct evidence as to who killed the Deceased.

There is also no direct evidence linking any one of the three (3) Accused persons to the offence as no one saw any of the Accused person killing the Deceased. Therefore the Court has to look elsewhere and that is in the direction of circumstantial evidence if any.

The evidence available at trial was mainly circumstantial evidence, as no Prosecution witness testified having seen the person who shot the Deceased. As held in the case of **DAVID ZULU V THE PEOPLE (3)** circumstantial evidence has a peculiar weakness, by its own nature. It is no direct proof of a matter at issue but rather is proof of facts not in issue but relevant to the fact in issue and from which on inference of the fact in issue may be drawn. But it is incumbent upon a trial Judge that he should guard against drawing wrong inferences from the circumstantial evidence at his disposal before he can feel safe to convict.

In *casu*, Namakau Muwanei (**PW2**) testified that on 10<sup>th</sup> November, 2015 she was walking home around 19:00 hours in the company of her husband Kwalela Kashenda (the Deceased) in this matter. She was in front of her husband when she heard a gunshot and heard a scream. When she looked behind she saw the Deceased lying down on the ground. She went closer and noticed that blood was oozing from his chest. Many people gathered at the scene and noticed that he had died but they scattered after hearing a second gunshot. Three days later she missed her four herds of cattle – 2 cows, 1 bull and 1 heifer.

**PW4** Detective Sergeant Mayungo Namasiku visited the crime scene and picked two empty cartridges which he sent for forensic ballistic examination together with the AK47 Rifle serial number 5637003744 he recovered from A1.

**PW1** was Detective Chief Inspector Vincent Chibesa, the Forensic Ballistic Expert who examined both the empty cartridges picked at the crime scene and the firearm to ascertain the serviceability of the said firearm and to ascertain whether the empty cartridge cases picked from the crime scene were loaded and discharged from the said AK47 Rifle in question. **PW1** concluded that the exhibit firearm (AK 47) serial number 5637003744 marked P2, was one and the same Rifle that loaded, discharged and ejected the two exhibit cartridge cases marked P3 which **PW4** picked from the crime scene.

A1 does not dispute having had possession of the said AK47 Rifle in question, he just distances himself from the murder of the

Deceased. However as submitted by the State it can't be possible that the two cartridge cases picked at the crime scene can be identical to the firing pin of the AK47 Rifle found in A1's possession. George Wasamunu Wasamunu (A1) states that he purchased the firearm in question from an unknown Angolan national for purposes of hunting. However, there is evidence from **PW1** that an AK47 Rifle in Zambia is restricted to the defence and security personnel.

In my view it is an odd coincidence that the two cartridge cases picked at the crime scene are the same ones that **PW1** the Forensic Ballistics Expert confirms were loaded, discharged and ejected from the AK47 Rifle which was found in A1's possession. The Bullets from the said two cartridge cases killed the Deceased.

A1 had difficulties to answer question in cross examination on how he came into possession of the four herds of cattle that he went with to **PW3** Kenneth Mukumbi. The Defence in the written submissions contended that the ownership of the animals in question was not established and that there is no sufficient proof to show that the animals belong to the Deceased particularly because A1 also alleged that he got them from his kraal.

**PW4** Detective Sergeant Mayungo testified that A1 led him to Kamanga area where he recovered three herds of cattle belonging to the Deceased. He also stated that the animals were identified by the daughter to the Deceased. I am of the considered view that if the three herds of cattle did not belong to the Deceased but to A1, A1 would not have led **PW4** to Kamanga for the purpose of

recovering them. The fact that A1 surrendered the cattle to **PW4** confirms that he has no claim to the animals in question. I therefore accept the Prosecution evidence that the cattle A1 went with to PW3 Kenneth Makumbi were gotten from the Deceased's kraal after the shooting incidence.

A1's defence was nothing more than bare denials and lies. He denied having committed the offence. He lied that A3 charged him 2 herds of cattle as dowry for marrying A2. He lied that he and A3 went to his village called Wasamunu – Mukola where he showed A3 the ox he was paying him as dowry for marrying A2. He lied that A2 and A3's parents were dead. These lies gave not only the credibility of his evidence but also his entire defence a damning complexion.

I accept the testimony of the expert witness **PW1** that A1's firearm is the one that discharged the cartridges picked at the scene where the Deceased was shot from and I find that it was A1 who shot the Deceased.

It is another odd coincidence that four herds of cattle, 3 grown and 1 calf were stolen from the Deceased and **PW2's** kraal and the same number of cattle, 3 grown and 1 calf were in the possession of A1 and they are the ones he took to **PW3** Kenneth Mukumbi. Coincidentally the 3 grown cattle are the ones that A1 surrendered to the Police when he led **PW4** to **PW3's** village to recover the Deceased's Cattle and Calf. The Calf was sold by A1 to a customer a day after A1, A2 and A3 arrived at **PW3's** village.

I am of the considered view that the odd coincidence that I have referred to above which have not been explained by the Accused person are supporting evidence that they are guilty of the offence charged. The case of **ILUNGA KABALA & JOHN MASEFU V THE PEOPLE (4)** is authority for this position. It was held in that case that:

**“It is trite law that odd coincidences, if unexplained may be supporting evidence. An explanation which cannot reasonably be true is in this connection no explanation.”**

The case of **Mutambo and Five Others V The People (5)** cited by the learned Counsel for the Accused persons is still good law and in my view all the ingredients required to establish a common design has been met with respect to A1 and A2.

Regarding A2 and A3 the Prosecution submitted that they knew that A1 was committing an offence, or will, or might commit the offence. They contend that the two Accused persons participated in the killing of the Deceased person in this matter though there may be some differences in degree only, in the role each party played in the commission of the offence herein.

They cited **Section 22 of the Penal Code** for this contention. It states that:

**“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such purpose an offence is committed of such a nature that its commission was a**

**probable consequence of the prosecution of such purpose, each of them it deemed to have committed the offence.”**

It was submitted that A2 and A3 are guilty irrespective of the actual part each one of them played. It was stated that it is trite law that when a member of an unlawful enterprise causes death, members of the joint venture can also be found guilty of murder of the joint venture even though the *actus reus* of murder could not be attributed to them.

The Court was urged to disregard the evidence of the Accused persons as the same was a rehearsed story and an afterthought.

To counter the Prosecution's contention, the Defence submitted that the Prosecution never led any evidence to show that the Accused persons acted with common purpose. The case of **MUTAMBO AND FIVE OTHERS V THE PEOPLE (5)** was brought to the Court's attention. In that case the then Court of Appeal for Zambia held that to bring the Appellants within **Section 22 of the Penal Code**, as being guilty of the offence at hand, the following facts must have been proved against him beyond reasonable doubt:

- (i) That two or more persons, of whom the appellant was one, each formed in intention to prosecute a common purpose in conjunction with the other or others.
- (ii) That the common purpose was unlawful.
- (iii) That the parties, or some of them, including the appellant, commenced or joined in the prosecution of the common purpose.

- (vi) That, in the course of prosecuting the common purpose, one or more of the participants stole the items in issue.
- (v) That the commission of the said offence was a probable consequence of the prosecution of the common purpose

It was further submitted that the prosecution has not led any evidence to show that the Accused persons were together on the 11th November, 2015. That the evidence on record shows that A1 joined A2 at Nsonso where she was conducting some divining ceremony sometime in the month of November 2015. While A3 joined later on. That there is no evidence to show that the Accused persons had formed common purpose to commit murder. That they only agreed to move together to Kamanga area where A2 wanted to visit her sister.

I do not accept the Prosecution's argument that A2 and A3 are guilty irrespective of the actual part each one of them played. I do however accept that it is indeed trite law that when a member of an unlawful enterprise causes death, members of the joint venture can also be found guilty of murder of the joint venture even though the *actus reus* of murder could not be attributed to them.

Before I can find that A2 or A3 or both of them are guilty of the offence charged. I must make a finding regarding the actual part each one of them played and or indeed whether or not both or either of them were in fact formed a common purpose to commit murder with A1. This in my view is the reason why there is need to

show that the ingredients stated in Section 22 of the Penal Code are satisfied.

I have already said that A1's defence was nothing more than bare denials and lies. I find that the evidence of A2 (Masiliso Simunji) left much to be desired. A2 testified that after healing Yenge's daughter Charity she was paid 1 herd of cattle which she sold to some gentleman. In cross-examination she changed her testimony and said Yenge paid her 2 animals that one was slaughtered for rituals and one was for payment. That she sold one animal. In her evidence in chief A2 stated that A3 found her at Yembe's Area in early November, 2015 and that she was with her assistants Mufasi and Mubukwanu but in cross examination she said that A3 found her at Nsonso Area where she was with Mufasi and others.

It was A2's evidence that on 5<sup>th</sup> August, 2015 she was in Mbulwe area at the invitation of a lady called Mwanandiwa. Thereafter she went to Nsonso area on 15<sup>th</sup> August, 2015 where she spent whole of August and September 2015. That for the whole of October she was in Lumbe area and got to Yembe's area in November, 2015.

I find that A1 and A2 lied in their testimony and deliberately concocted a story in an attempt to show that they were not together on the night of 10<sup>th</sup> November, 2015 and that they were not in Kayeni Village, Sesheke District. I reject their stories and find that they were within Kayeni Village together and they set out to kill the Deceased. Although A1 pulled the trigger A2 is equally guilty because A1 and A2 set out with a common design and are equally culpable for the offence.



Contrary to the assertion in the Defence's written submissions that A1 joined A2 at Nsonso where she was conducting divining ceremony in November, 2015 A2's own evidence is that A1 found her at Nsonso area in August 2015. The evidence on record shows that A1 and A2 were together from August 2015 until the date of their arrest on 26<sup>th</sup> November, 2016. The stories about A2 being paid in kind (with cattle) and A1 having his own cattle are in my view part of the common design between A1 and A2. A2 lied when she said that she only got to know that A1 had a firearm when it was time to go hunting. A2 testified that A1 told her that he bought a gun when he was going where she was and he wanted to test its effectiveness. I find therefore that A2 got to know about the firearms in August, 2015 when A1 joined her at Nsonso area. I do not accept her testimony that she saw the AK47 Rifle in question after she was discharged from Bwina Clinic.

A2's testimony that A1 kept the AK47 Rifle in the bush is a lie. My finding that A2 knew that A1 had an AK47 Rifle is evidenced by the fact that when on 26<sup>th</sup> November, 2016 PW4 apprehended A1, A2 asked PW4 to give her A1's red bag which had the AK47 Rifle and A1's clothes.

With respect to A3 he had a steady demeanor and was consistent in his evidence. He testified that on 6<sup>th</sup> November, 2016 he found A2 and A1 at Kwenda area. He told the Court that when A2 decided to go to PW3's village A1 volunteered to go with them because he had nowhere to leave his animals. He stated that of A1's 4 animals one was sold when they were at PW3's village.

It was his evidence that after A2 was discharged from Bwina Clinic he left A2 and A1 to go to his brother Danny Sikokolo at Mulobezi High School.

He testified that he helped drive the 4 animals belonging to A1 to Kamanga because A1 was with his sister. In cross-examination A3 stated that he came to know that A1 had a firearm when he was apprehended by the Police who told him that A2 and A1 had been found in possession of a firearm.

In my view, I find no link between A3 and the joint venture of A1 and A2. I have doubts that A3 was connected to the offence herein. As the evidence before me stands, it falls far too short to make any inference there from of A3's involvement in the commission of the offence.

In the premises, I therefore find Accused 3 Simasiku Simasiku **NOT GUILTY** of the offence of Murder contrary to Section 200 of the Penal Code and I hereby acquit him accordingly.

I find the circumstantial evidence against A1 and A2 to be quite overwhelming in terms of **DAVID ZULU V THE PEOPLE (3)**. It has taken the case out of the realm of conjecture and the case has attained a degree of cogency which can permit only an inference of guilty on the part of these two Accused persons.

I therefore find that the prosecution has discharged its burden of proving beyond reasonable doubt that the death of the Deceased was caused with malice aforethought by A1 and A2.

I accordingly find both Accused 1 George Wasamunu Wasamunu and Accused 2 Masiliso Simunji **GUILTY** of the offence of **MURDER** contrary to **Section 200 of the Penal Code, Chapter 87 of the Laws of Zambia.**

**Delivered at Mongu in open Court this 22<sup>nd</sup> day of December, 2017.**

.....  
**WILLIAM S. MWEEMBA**  
**HIGH COURT JUDGE**