

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

HP/224/2017



**THE PEOPLE**

**V**

**CHISELA KABWE  
FRASER NDHLOVU**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 6<sup>th</sup> DAY OF MARCH,  
2018**

*For the State* : Mr F. Sikazwe, State Advocate

*For the Accused* : Mrs I.M. Kunda, and Mr V Kabonga, George Kunda and  
Company

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

CASES REFERRED TO:

1. *Saluwema V The People* 1965 ZR 4
2. *Director of Public Prosecutions V Lukwosha* 1966 ZR 14
3. *Love Chimhini V The People* 1973 ZR 191
4. *Mwape V People* 1976 ZR 160
5. *R V Betty's and Ridley*

LEGISLATION AND OTHER WORKS REFERRED TO:

1. *The Penal Code, Chapter 87 of the Laws of Zambia*
2. *John Hatchard and Muna Ndulo: A Case Book on Criminal Law, 1983, 1<sup>st</sup> Edition*

The two accused persons in this matter stand charged with two counts. In the first count the offence is aggravated robbery contrary to Section 294 (1) of the Penal Code, Chapter 87 of the Laws of Zambia.

The particulars of the offence allege that Chisela Kabwe and Fraser Ndhlovu on 8<sup>th</sup> April, 2015, 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 steal 1 cell phone valued at K400.00, the property Sakha Joseph Chanda, and at or immediately before, or immediately after the time of such stealing, did use or threaten to use actual violence to the said Sakha Joseph Chanda in order to obtain or retain or prevent or overcome resistance from its being stolen or retained.

In the second 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 Chisela Kabwe and Frazer Ndhlovu on a date unknown but between 8<sup>th</sup> and 11<sup>th</sup> April, 2015 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 Sakha Joseph Chanda.

Both accused persons denied the charges, and the matter proceeded for trial. The State called thirteen witnesses, while both accused persons gave their defences on oath, and A2 called one witness. The onus is upon the State to prove their case beyond all reasonable doubt. PW1 was Kasanga Sakha Zalifi. She is the sister to the deceased. Her evidence was that on 8<sup>th</sup> April, 2015, she left home for work around 07:00 hours in the morning and left Chanda Joseph Sakha her brother at home. When she returned home in the evening around 18:00 hours, she did not find him. That he did not return home that day or the next day and by Friday he had not returned home.

PW1 testified that she tried to call his cell phone number but it was off, and when the weekend passed, and Chanda had still not returned home, she began to panic, as he had never stayed away from home that long. She stated that she contacted Chanda's girlfriend Mirriam Mbewe, and the mother to his son on Monday, but she informed PW1 that she had last seen Chanda on Tuesday 8<sup>th</sup> April, 2015, and that she had also tried to call his number but it was off. PW1 still in efforts to trace Chanda called his close friend Jonathan Lupiya who told her that he had last seen Chanda on 8<sup>th</sup> April, 2015. She then went and reported the matter to police with her husband Derrick Zilifi.

PW1 further testified that she got permission from work to look for Chanda, and asked a friend to obtain call records to find out the last three people that Chanda had called using his phone. The same revealed that the three people that Chanda had phoned on Wednesday 8<sup>th</sup> April, 2015 were Mirriam Mbewe, Jonathan and a taxi driver, Lastone. That when PW1 contacted Lastone, he had told her that Chanda had phoned him on the material day, and had asked for a lift, but Lastone could not pick him up as he had no vehicle. Further that Lastone had asked PW1 if she had asked Chisela about Chanda's whereabouts, as the two were normally found together.

It was PW1's evidence that Lastone gave her directions to Chisela's house, and she went there with Mirriam. There they found Chisela's sister and she informed them that Chisela was not at home, and when PW1 asked for Chisela's phone number, his sister said that she did not have it, but would call their mother to see if she could help PW1. PW1 told the court that Chisela's sister called their mother, and the mother directed PW1 to Jesmondine Supermarket, stating that Chisela was normally found there. That with the help of Chisela's cousin they went to

Jesmondine Supermarket and they were shown Chisela. Chisela when asked when he had last seen Chanda told PW1 that it was a long time ago, and that he would ask around to find out if anyone had seen him.

PW1 explained that Chisela even got her phone number and told her that he would call her if he heard anything. In the meantime PW1 continued looking for Chanda into Friday and went to police stations, Levy Mwanawasa Hospital and the University Teaching Hospital (UTH). Then on Saturday afternoon, they found Chanda at the Levy Mwanawasa Hospital mortuary, dead. Thereafter a postmortem was conducted, and he was buried. She identified A1 as Chisela, stating that he did not specify the last day that he had seen Chanda, saying that it was a long time.

She also testified that Chanda was not working at the time, and he would go out and return in the night, and on a few occasions he would spend the night at Jonathan Lupiya's house. That she did not try to contact Chanda earlier, as she thought that he was spending the night at his friend's house.

When cross examined, PW1 testified that she had asked a friend to obtain the last three numbers that Chanda had called. That these numbers did not belong to the two accused persons but to Mirriam Mbewe, Jonathan and the taxi driver Lastone. She agreed that Chanda was very close to Jonathan, and he was normally at Jonathan's house, though Jonathan would go to her house. She denied ever having seen the two accused persons at her house with her late brother Chanda.

The second witness was Lastone Mwansa a taxi driver. In his testimony he told the court that Chanda had phoned him on 8<sup>th</sup> April, 2015 around 07:00 hours asking him to give him a lift. PW2 stated that he had told

Chanda that his vehicle had been involved in an accident, and he could not pick him up. Later around 16:00 hours he saw Chanda with Chisela and he bypassed them at Society for Family Health in Chudleigh.

Still in his testimony, PW2 testified that Chanda's sister went to the taxi rank on a date he did not recall, and asked him if he had seen Chanda, and PW2 had told her to go and ask Chisela at the Bakery where they used to drink beer from. He then left with a customer, and on his return he saw Chanda's sister at Chisela's house and when he enquired from her, she told him that she did not find Chisela there. His evidence was that he had known Chanda for a month.

In cross examination, PW2 testified that he saw Chanda and Chisela between 16:00 and 17:00 hours on the material day, as they were walking on the left side of the road, and he was walking on the right side of the road. That he did not talk to them. He denied knowing Chisela personally, stating that Chisela would just go to greet him. He maintained that he saw Chanda and Chisela between 16:00 and 17:00 hours that day even if someone said that he was with his girlfriend Mirriam at UTH. It was also his evidence in cross examination that Chanda's sister had told him that she was looking for him.

PW3 was Ahmed Chikonde. This witness told the court that he manages a shop on Central Street in Jesmondine, and on 8<sup>th</sup> April, 2015 he was at the shop winding up the shift around 21:00 hours, when a security guard named Mr Mutale went and informed him that some boys were fighting, and one of them had been dropped in the drainage at the premises. PW3 testified that he told the security guard to remove the person from the drainage so that they could assess his condition. That when the person was removed from the drainage they took him to where there was light, and PW3 tried to call the police but there was no answer.

On the condition of the person when he was taken out of the drainage, PW3 stated that he was breathing but his eyes were closed and he was not speaking.

He stated that when he wound up his shift, he went to Manda Hill Police Post where he reported the matter. As to the distance from his shop to where the person was found in the drainage, PW3 told the court that the drainage is about 100 metres from his shop, and that the light was about six metres from the drainage. PW3 also in his testimony stated that he was given a wallet that was found on the person who was taken out of the drainage, and he directed the security guard to take it to the police the next day. He identified the wallet and it was marked 'ID1'. PW3 told the court that the said wallet had a national registration card, a bit of money, medicine and some papers.

In cross examination, PW3 testified that he did not hear any noise outside, as he was inside the bakery around 21:00 hours. However the guard went and told him that some people were arguing outside, but did not mention their names. He stated that he did not know who murdered and robbed the deceased.

Ruth Hamavhwa Mwamba was PW4. She is a Senior Human Resources Management officer at UTH. Her evidence was that in April, 2015, she was a Senior Human Resources Officer based at Levy Mwanawasa hospital, and that in March 2016 she was Acting Principal Hospital Administrator when police approached her asking about a matter that happened in 2015. That according to their records, a person was taken to Levy Mwanawasa hospital around 21:30 hours by the police with a severe head injury. She stated that the person did not have any identity on him so he was therefore unknown, but he was attended to and underwent head surgery. He died on 11<sup>th</sup> April, 2015, and the body and

file were taken to UTH for postmortem. However they were unable to retrieve the file from UTH due to certain circumstances, and she confirmed that when a patient is taken to the hospital, a file is opened. That in this case the records showed that the person was kept in the Intensive Care Unit when taken there.

PW4 in cross examination stated that the deceased was taken to the hospital by police officers, but that she was not present at the time. That she had gathered that information from the file, and that is what she had stated in the statement that she gave to the police.

Mirriam Mbewe was PW5. She testified that on 8<sup>th</sup> April, 2015, the late Chanda had called her stating that he wanted to take money for the child Dalitso Joseph Sakha whom they had together. She had told him that she was not at home and had asked him to meet her at the Ministry of Agriculture where she was taking an application letter. She further testified that she was advised to submit handwritten applications at the Ministry of Agriculture, and she met Chanda and they proceeded to Ridgeway Campus to write them, and that she left Chanda there when she went back to the Ministry of Agriculture to submit the applications. That on her return to Ridgeway Campus, she had lunch with Chanda and he gave her money for the child, and he tried to call Lastone the taxi driver. However that failed as Lastone was busy, and as it was still day time, they decided to travel by bus.

PW5 testified that at Ridgeway between 17:00 and 18:00 hours, Chanda got onto a bus, and she walked home to Kabwata as it was near. Still in her evidence, PW5 testified that she tried to call Chanda the next day, but his phone was off, and that this went on until Monday when his sister Kasanga phoned her and asked her when she had last seen Chanda. She had told Chanda's sister that she last saw him on Tuesday,

and the next day she started looking for Chanda with his sister, starting in Jesmondine at Chisela's house.

PW5 confirmed PW1's evidence that at Chisela's house they did not find Chisela, and his sister had phoned her mother who spoke with PW1, and added that Chanda's sister was given Chisela's number and that they met Chisela who said that he had not seen Chanda in a long time. She also testified that they went to different police stations and hospitals, and on 18<sup>th</sup> April, 2015, PW5 was phoned by Chanda's uncle who told her that Chanda had been found at Levy Mwanawasa hospital mortuary. It was also her evidence that she did not know Chisela earlier.

When cross examined, PW5 testified that she met Chanda between 10:00 and 11:00 hours, and that she had left him at Ridgeway Campus when she went to submit her application at the Ministry of Agriculture. That from there she went back to Ridgeway Campus around 16:00 hours and she immediately proceeded to the UTH Club to have lunch with Chanda. Her evidence was that they parted company between 17:30 hours and 18:00 hours, and that if anyone said that Chanda was in Chudleigh between 15:00 and 16:00 hours, she would say that Chanda had been with her.

That when PW5 went with PW1 Chisela's house, they did not find him, but that they found him at Jesmondine Bakery, where PW5 spoke with him for the first time. She agreed that she did not start looking for Chanda until his sister phoned her, and that she had asked his friends from UNZA Chenda Mwila, Sakani Daka and Jonathan. Her evidence was that Jonathan was a close friend of Chanda, and that he had told PW5 that he had not seen Chanda but spoke with him on the night of 8<sup>th</sup> April, 2015. When asked if she had given a statement to the police, PW5 agreed and that it was read back to her, and she signed it. She told the



court that in that statement she had told the police that Jonathan had told her that Chanda had been involved in a fight in Kaunda Square. PW5 agreed that Chanda would sometimes sleep at Jonathan's house.

Derrick Zilifi was PW6. He testified that he found the late Chanda's body at the Levy Mwanawasa Hospital on 18<sup>th</sup> April, 2015. It was his testimony that he used to live with Chanda, who was his brother in law, and that he had reported the matter to the police. PW6 told the court that a postmortem was conducted on the body, and that he identified the body to the pathologist. That he last saw Chanda alive on 8<sup>th</sup> April, 2015 and he was in high spirits. This witness was not cross examined.

The 7<sup>th</sup> witness was Moses Munyeke. In his testimony he told the court that he bought a phone in 2015 in a month he did not recall, being an Itel black in colour at K30.00, from Frazer Ndhlovu. PW7 testified that he knew Frazer before and that he used to live near PW7's school, called Tunduya. PW7 could not recall how long he used the phone, and he told the court that he sold it to Kelvin Banda.

It was PW7's evidence in cross examination that he bought an Itel phone, and that it was written so on the front of the phone. He denied that an Itel phone was the same as an MTN phone, and it was his evidence that the said phone had no sim card when he bought it. That A2 was alone when he sold him the phone, and that he had seen him once with the phone that he sold him. PW6 maintained that he could not recall for how long he used the phone before he sold it, and that he had put an Airtel sim card in the said phone when he started using it before selling it to Kelvin Banda.

The eighth witness was Kelvin Banda. This witness told the court that in early 2015 on a date he could not recall, he bought an Itel phone from

Moses Munyeke at K15.00.00 at Moses' home in Kaunda Square. That he kept it for few days before selling it to Charles Bwalya, adding that he did not use it as he was waiting to buy a sim card. He also told the court that he had known Moses Munyeke for a long time before he bought the phone from him.

When PW8 was cross examined, he testified that when he said early 2015, it could have been between January and March, 2015, but he maintained that the phone was an Itel, stating that it was written so on the front cover. He agreed that an Itel phone was like an MTN phone, and that when it was sold to him it had no sim card. He agreed that in the statement that he had given to the police he had stated that he had approached Moses Munyeke and had asked him if he had a phone for sale. That Moses repairs phones and that it was on that basis that he asked him if he had a phone for sale.

In further cross examination, whilst agreeing that he bought the phone for communication purposes, PW8 stated that he did not use the phone. That he sold it as he had money problems.

PW9 was Charles Bwalya. This witness stated that he bought an Itel phone from Kelvin Banda in Kaunda Square Stage I, in a month he did not recall in 2015 at K20.00. That Kelvin Banda was his neighbor and they had grown up together, and that a few hours after buying the phone, he sold it to Pascal Kapepula, his neighbor.

PW9 in cross examination testified that he was a pupil at Kaputi Day and Boarding school, and that he was a day scholar. He told the court that he could not recall on what day he bought the phone but that it was before he went to school in March, 2015, possibly January or February. He stated that he kept the phone for two days before selling it.

The tenth witness was Pascal Kapepula Chamfya. He confirmed having bought the phone from PW9, Charles Bwalya, stating that Charles Bwalya was found at the barbershop. That his Samsung phone was damaged, and he had asked PW9 if he could use his phone, but PW9 told him that he was selling it. PW10 explained that he was using the phone number 0978507032 whose sim card he put in the phone, and he started using it. He went on to state that he used for the phone for a long time, and that it went missing when he went to drink beer with his friends.

PW10 in cross examination stated that he did not know who got the phone when he went drinking, but that he bought it at K40.00. That PW9 did not explain to him how he bought the phone, and that PW10 bought the phone in April, 2015. On how he gave police a statement, PW10 testified that police had approached him and told him that they had found missed calls from him. That he told them that it was no possible as he did not have airtime in his phone. He went on to state that police had traced him using his friend Kalambo Siyingwa whom he had been communicating with regularly. That it was only when he was shown the phone logs that he had told police when he had bought the phone, as he had earlier told them that he did not recall when he bought the phone.

Still in cross examination, PW10 told the court that police apprehended him at the shop and that they recorded a statement from him, and that he was a suspect and he was apprehended.

The eleventh witness was Bernard Mutale. In his evidence he stated that on 8<sup>th</sup> April, 2015 he was on duty as security guard with his colleague Nawa at Jesmondine Bakery, having reported at 18:00 hours. That around 21:00 and 22:00 hours as they were patrolling the area they saw six men fighting along Jesmondine road, and that when they reached the

drainage along the road, one of the men pushed the other into the drainage. That he knew Chisela among the men, and that the men were drunk.

He told the court that he reported to the management at Jesmondine Bakery about what he had seen, and he was asked to remove the person who had been pushed into the drainage with his colleague. PW11 stated that he went into the drainage and together with his colleague they had lifted the person out. He had observed that there was saliva coming out of the mouth of the person they had lifted from the drainage, and he was not talking. PW11 explained that it was dark at the drainage but that there were lights at Jesmondine Bakery, and he saw the men move from the light to the dark fighting.

He further explained that police delayed to go and pick up the person and that when they searched him, PW11 found K52.00 in his pockets, and a phone which he handed over to management. PW11 also stated that he knew Chisela as he was a regular customer at the place, and he would drink beer there. He however did not know the person that they removed from the drainage.

In cross examination, PW11 stated that he saw six men fighting, and that they were at the bottle store across the road. That they would kick each other, fall and get up. He stated that the bakery is alone on the other side and that there are shops across the street, and that they are not guarded. It was his testimony that he did not cross the street to where the fight was, and he agreed that it was a busy night with vehicles passing. He maintained that there was light where the men came from and that he recognized one of the men among the six, being Chisela.

PW11 agreed that the area where the drainage is was dark, and the men proceeded there, but that one of the men was thrown in drainage and PW11 did not see who pushed him there. He expressed ignorance that the deceased had been involved in a fight in Kaunda Square where he was beaten up, but his evidence was that Chisela normally drank beer from there. PW11 also stated that Chisela had been drinking that evening but he even though that was the position, he could still fight. He agreed that as a security guard he had a duty to stop the fight, but that he did not so in this matter as the men were on the other side. That the men fought as they were running.

He also stated that the men ran in different directions, and they were aged up to about twenty seven years. When asked how old A1 was, PW11 stated that he was past twenty seven years. He could not recall what A1 wore that day, but stated that he had a bald head. When cross examined further, PW11 told the court that a lot of people are bald, but that he knew A1 as he was a regular customer. He denied that he was coached to testify or that he had imagined seeing Chisela.

The arresting officer Aubrey Hamweene was PW12. He was allocated the docket for the case on 9<sup>th</sup> February, 2016. It was his testimony that he interviewed PW1, the deceased's sister who told him that the deceased was using phone number 0978996194 which was unreachable. She had also told him that she was handed over a black wallet with K52.00 and the deceased's national registration card number 413429/67/1, which were taken to the police by PW3, after PW11 saw the deceased being pushed into the drainage. PW12 stated that he instituted investigations and went to the scene of crime where he interviewed PW11, a security guard. PW11 had told him that he saw a group of people beating a person and they pushed him in the drainage, and then they had

scampered in different directions. That he had recognized A1 among the men.

PW12 also interviewed PW2 the taxi driver who told him that he saw the deceased with A1 around 16:30 hours that day, and they had waved at each other. Further PW12 gave the deceased's phone number to Airtel, and the serial number 357831062828500 of the phone was retrieved, and that the phone was an Itel. He was given a printout of call records for the phone which revealed that the deceased last used the phone on 8<sup>th</sup> April, 2015 using phone number 0978996194. That the phone records revealed that on 10<sup>th</sup> April, 2015, the phone number 0974273920 used the hand set and on 11<sup>th</sup> April, 2015, 0978507032 used the hand set.

He went on to testify that they traced the phone numbers through Airtel and he was given the bio data for the users of the numbers and that this revealed that the last number to use the phone was 0978507032 for Pascal Kapepula Chamfya of Kaunda Square Stage II. That the other number 0974273920 that had used the phone was for Charles Bwalya. PW12 stated that he apprehended Pascal Kapepula Chamfya and interviewed him who told him that the phone was lost but he led him to Charles Bwalya of Kaunda Square Stage II stating that he sold him the phone.

Charles Bwalya told PW12 that he bought the phone from Kelvin Banda who in turn said that he bought it from Moses Munyeke of Kaunda Square Stage I. When PW12 interviewed Moses Munyeke, he was told that Moses Munyeke bought the phone from Fraser Ndhlovu A2, who denied having sold Moses Munyeke an Itel phone. PW12 further in his testimony stated that he came across a postmortem report which showed that the deceased died due brain hemorrhage due to a cut on the skull

and the head. That he had interviewed both the accused persons, and A1 had under warn and caution statement told him that he saw the deceased on 8<sup>th</sup> April, 2015, and they had a confrontation and the deceased left.

A2 however denied having sold the phone to Moses Munyeke. PW12 produced 'ID1' and 'ID2' and they were marked 'P1' and 'P2'. He identified the Airtel activity report and it was marked 'ID3', and the bio data report for Pascal Kapepula Chamfya and it was marked 'ID4'.

In cross examination, PW12 testified that he had interviewed the deceased's girlfriend but denied that she had told him that she was with the deceased until 18:00 hours on the material day. When referred to the report that he wrote to the Officer in Charge, PW12 testified that he had written that Moses Munyeke had failed to lead him to who had sold him the phone. That Moses Munyeke was apprehended on 13<sup>th</sup> December, 2016, and PW12 had written on the second last page of the report that Jonathan Lupiya a close friend of the deceased was not interviewed.

Whilst agreeing that Jonathan Lupiya was not interviewed, PW12 testified that this was not because he could not be found. He also stated that on the last page of the report he had written that the remaining persons were still elusive. He denied that A2's father had approached him with the serial number of the phone or had shown him a calendar with a phone number and serial number. He also denied that A1 had told him that the deceased's relatives were looking for him, but that the two had a confrontation. He however testified that PW11 had observed the confrontation, and that there was sufficient light so he was able to see. That PW11 did not tell him that among the items retrieved from the deceased was a cell phone, and he stated that the deceased's cell phone

was not handed over to the police, and that there was a handover certificate to that effect.

PW12 also testified that he was not aware that PW11 testified that there were six men who ran away to a dark area, and he maintained that the phone was stolen, and not found by the deceased's body. He explained that someone from Airtel could confirm if the deceased's phone number made a call at Soweto Market.

In re-examination, PW12 stated that no phone was handed over to him, and that Jonathan Lupiya had been elusive since the matter came to court.

The last State witness was Isaac Musadabwe Banda. He is a Subscriber Information Analyst at Airtel Zambia PLC. In his evidence, he testified that his duties include extracting subscriber information such as bio data, call records and serial numbers of devices and handsets. That to do this he uses an Airtel customized laptop, an active printer and local network to connect to the devices. He further testified that he executes search warrants, and that in this case PW12 had taken a search warrant to him for execution, requesting a detailed report of a serial number and the details of the last user of that particular device. That he put the serial number on the system called DV or Dynamic Validity and that the system automatically generated the report for the particular serial number requested.

He stated that he then printed the report using the laptop printer and handed it over to PW12 after he signed and stamped it, to authenticate it. He identified 'ID3' as the report for the serial number called the IMEI report, which is the international mobile equipment identity, stating that it is a unique number given to a device. He explained that the device



serial number was in the second column, whilst the first column indicated the sim cards that had used the device at particular times and dates. PW13 also identified 'ID4' as the report that he handed over to PW12.

In terms of the working condition of the equipment used to print ID3' and 'ID4', PW12 stated that it was in good working condition and was serviced routinely, and not when there was a fault. In terms of accessibility to the system, PW13 testified that the laptop is opened by his fingerprint so it is very secure, and that the data is stored in binary format, which is a format that human beings cannot translate unless using a translation server, and this prevents data manipulation. He produced 'ID3' and 'ID4' in evidence, and they were marked 'P3' and 'P4'.

He further testified that the mobile number 0978507032 is the number that last used the device 357831062828500 on 27<sup>th</sup> June, 2015. That the said mobile number was registered to Pascal Kapepula Chamfya of Kaunda Square Stage I. PW13 testified that when a sim card is placed in a device, the date and time that is done is recorded. Further that on 8<sup>th</sup> April, 2015, 0978996194 was active on the device and after that date the sim card was removed, and was never re-inserted into the device, but the device was active on other sim cards, due to several factors.

In cross examination, PW13 stated that 0978507032 is registered to Pascal Kapepula. That the document showing the area where the person was calling from called the Call record was generated by Airtel, and he stated that the bio data form confirmed the registration details of the sim card holder. He stated that the Call Records confirmed the caller and the time, and that on 8<sup>th</sup> April, 2015 the sim card was active as shown on the call records. He told the court that the call records were incomplete, as page 62 was just one of many pages and that from 'P4' he could not

tell the time that the last call was made. That IEMI end time signified the last transaction in terms of the device being switched off, or a sim card being detached from the device.

That the end time on 'P4' was not stated on 8<sup>th</sup> April, 2015, but the start time was. When referred to the call records, PW13 stated that it originated from Airtel and it was produced by him. He stated that the last call on the document was indicated as having been made at Soweto Market using 0978996194 and 09765204915. PW13 stated that the document was incomplete as it had no header so he could not confirm which number made the call and which one was in Soweto, and that he would need to have page 1 to tell so.

When put on their defence, A1 testified that on 8<sup>th</sup> April, 2015 he was at the complex by the bakery in Jesmondine, socializing with his friends, and that he told by Lewis that if he sees the deceased he should tell him that his relatives were looking for him, and he should go home. That he saw the deceased and told him so, and A1 left the place. He testified that PW1 is the person that was looking for the deceased, and that he had never differed with her. He stated that he does not know PW2, and that PW3 had told the court that he did not know who stole the deceased's phone and murdered him.

It was also A1's testimony that PW4 told the court that the post mortem report results were not known as the records could not be found at UTH, and A1 testified that he did not tell PW5 that he had not seen the deceased in a long time, but that he was not sure where the deceased was, and that he would ask around to find out where he was. That the witnesses PW6, PW8, PW9 and PW10 did not connect him to the offence, and that PW11 had testified that A1 was among the people fighting, and that he had identified him by virtue of his bald head. However PW11 had

testified in cross examination that he did not see A1 push the deceased into the drainage, and that this witness could not tell the court what A1 wore on the material night.

A1 also in his evidence testified that PW12 did not tender the exhibits before court, while PW13 testified that Pascal Kapepula's sim card was the last one to use the phone.

In cross examination, A1 admitted to having been at Jesmondine Bakery in the late evening, around 20:00 hours, where PW11 was the security guard on duty. He agreed that he was drinking beer there, and he stated that he would see the deceased but did not know him. He denied that for a person to approach him and ask him where the deceased Chanda was, meant he was friends with Chanda. That the person approached him between 20:00 and 21:00 hours. A1 denied that he was drinking with Chanda, stating that he later saw him and told him that his sister was looking for him at a shop where he went to buy beer. That at the time everyone else was far away, and A1 denied that it was time that he pushed Chanda into the drainage after they quarreled. He agreed to being present at the bakery, but not at the crime scene.

A1 agreed that the scene was in the direction of his house, and that there are shops where alcohol is sold, and they would sit outside to drink. He agreed that the postmortem report 'P2' shows the cause of death as brain injury with hemorrhage, and that the wallet 'P1' was produced. It was his evidence that the phone was not produced. Whilst agreeing that the deceased was picked up from the drainage between 21:00 and 23:00 hours, A1 could not recall where he was at the time, stating that he may have gone home as he was drunk. He also told the court that he did not see the deceased's sister that evening but before that. On the persons

that he was drinking with that day, A1 stated that they were Sangu, Lubinda, Muyunda, Russ, Shawn, Max, and a barberman.

A1 agreed that PW11 said that there were about six people fighting, but he stated he left them to go and buy alcohol. He told the court that he did not have a confrontation with Chanda, but advised him to go home.

In re-examination, A1 stated that he did not plot to commit the offence as he did not know the deceased. He denied having pushed the deceased into the drainage, and he also testified that not all the evidence was tendered in court, as the cell phone was not produced. He denied that any witness testified that he had a confrontation with the deceased, and he denied having conveniently gone to buy liquor so that he could meet the deceased. That he went to buy beer, as that is what they were drinking. That apart from the six he had mentioned, there were other people drinking beer.

A2 was DW2. He told the court that PW7 had testified that he had sold him a cell phone. He stated that it was an MTN phone, but the cover and battery were Itel. That he bought the phone on Cairo Road at an MTN stand in September 2014, and he had recorded the serial number of the phone behind a Jesus portrait at his father's house, and he denied any knowledge of the charges.

When cross examined, A2 testified that on 8<sup>th</sup> April, 2015 he was at home with his family between 20:00 to 23:00 hours in Munali, Tunduya Area. He agreed that PW7 knew him and could not mistake him, and he told the court that he sold PW7 an MTN phone, and not the deceased's phone. It was his evidence that police did not avail him the opportunity to give them the phone that he was using, and that he could not recall the number of that phone due to lapse of time.

The last witness for the defence was Francis Ndhlovu, A2's father. He explained that A2 bought a phone in 2014 and he would use it to communicate with him. Then A2 left home to go and live with his grandmother in Bauleni Compound. DW3 also testified that PW12 on 24<sup>th</sup> December, 2016 went to look for A2, and had asked DW2 to call him as he had sold a phone belonging to a person who was thrown into a drainage. It was his testimony that A2 was apprehended on 25<sup>th</sup> December, 2016, and on 29<sup>th</sup> December, 2016, A2 had sent a message that he had written the details of the phone he had bought on a Jesus portrait on a calendar in the house, and DW3 found those details. The portrait was identified and marked 'DD1' for identification, and on production it was marked 'DI'.

He stated the details on the document as phone number 0967435863 and serial number 358749068407402. That when he contacted PW12 to give him the details he told him that he was busy as he was driving, and when he followed him up later with another phone call, PW12 angrily told him that he was busy and cut the line. Even efforts to talk to him at the office failed, as PW12 alleged that DW3's wife had insulted him.

In cross examination, DW3 stated that he did not know when the details were written on the poster, but he maintained that A2 wrote them, as he knew his handwriting. He further stated that when he tried to show PW12 the said details, PW12 no interest. DW3 agreed that the numbers could be searched at MTN, and he testified that he did not get a police permit to search the phone, but he asked someone at Eastgate MTN office to avail him the details. That the person told him that the phone was an MTN, but the phone number changed shortly. It was also his testimony that he was not given any document to that effect as he had no police permit.

DW3 told the court that he did not know the phone that was sold, as he was not there, but stated that A2 told him that he sold an MTN phone. That A2 had an MTN phone for months, but he did not know when he sold it.

I have considered the evidence. It is not in dispute in this matter that the deceased Chanda Joseph Sakha was removed from a drainage along Jesmondine shopping complex on 8<sup>th</sup> April, 2015, after he was alleged to have been pushed there, and that he sustained injury to his head. It is a fact that the deceased was taken to Levy Mwanawasa hospital where he was admitted and that he died, and PW6 Derrick Zilifi, found him in the mortuary at the said hospital on 18<sup>th</sup> April, 2015. The question is whether it has been proved beyond all reasonable doubt that it is the two accused persons who committed the offences.

In the first count the offence is aggravated robbery, contrary to Section 294(1) of the Penal Code, Chapter 87 of the Laws of Zambia. It defines aggravated robbery as;

***“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 this count, it must be established that one person who was armed with an offensive weapon or who was one or more persons used or threatened to actual violence to Chanda Joseph Sakha at or immediately before or immediately after the time of such stealing the cell phone, in order to prevent or overcome resistance from its being stolen or retained. An offensive weapon is defined in Section 4 of the Penal Code, as;

***"offensive weapon" means any article made or adapted for use for causing or threatening injury to the person, or intended by the person in question for such use, and includes any knife, spear, arrow, stone, axe, axe handle, stick or similar article;"***

The only eye witness in this matter was PW11, the security guard who was on duty at Jesmondine Bakery on the material day. This witness testified that he saw a group of about six young men who were fighting as they ran along the road, and one of them pushed the deceased into the drainage, and the men ran into different directions. He also testified that after he reported the incident to management at the Bakery, PW3 had advised him to take the person who had pushed into the drainage, and that on doing so with his colleague, and they were waiting for the police to pick him up, they had searched him and PW11 recovered a phone and K52.00, which he handed over to management.

PW12 testified that when he interviewed PW1, she had told him that her deceased brother was using phone number 0978996194, and he had obtained a print out for the handset which showed that the deceased last used the phone on 8<sup>th</sup> April, 2015, and on 10<sup>th</sup> April, 2015 phone number 0974273920, used the handset. Thereafter on 11<sup>th</sup> April, 2015, phone number 0978507032 used the handset. That when he obtained the bio data for that phone number it revealed that it was for Pascal

Kapepula, PW10. That when PW12 traced PW10, he told him that he bought the phone from PW9, Charles Bwalya.

PW9 when interviewed told PW12 that he bought the phone from PW8, Kelvin Banda who in turn said that he bought it from PW7, Moses Munyeke. PW7 stated that he bought the phone from A2. A2 denied having sold PW7, an Itel phone, stating that it was an MTN phone. PW13 who is the Airtel Subscriber Information Analyst testified that he generated 'P3' the report which shows the phone numbers that used the mobile device belonging to the deceased. This document shows that the deceased last used the phone on 8<sup>th</sup> April, 2015. Then on 10<sup>th</sup> April, 2015 the phone number 0974273920 belonging to PW9 started using the phone, and on 11<sup>th</sup> April, 2015, 0978507032 belonging to PW10 started using the phone until 27<sup>th</sup> June, 2015.

The defence in this matter alleged that the phone that A2 sold to PW7 was not the one that belonged to the deceased. His father DW3 produced before the court the serial number of a phone he alleged that A2 had bought on Cairo Road, and which A2 had been using to communicate with. That when he went to the MTN office at Eastgate, he was told that the phone was MTN phone. A2 when cross examined, stated that PW7 knew him well and could therefore not have mistaken him when he said that he was the person that sold him the phone.

'P3' shows the serial number of the phone that the deceased was using on 8<sup>th</sup> April, 2015. This is the same phone that PW7 said A2 sold him. I do not accept the argument by A2 that he sold PW7 his phone as the serial number for the deceased's phone shows that it is the phone that left a trail after sim cards were inserted in it, which eventually led to PW10. The serial number of a phone is unique to a particular phone, and in this



matter 'P3' shows that the deceased's phone is the one that found itself with PW9 and PW10, after PW7 sold it to PW8 on buying it from A2.

A2 did not discredit this evidence in any way by showing that his phone once sold to PW7 was used, and PW7 inserted his sim card in it. Therefore, I find that the phone that A2 sold PW7 who in turn sold it to other people until it ended up with PW10, Pascal Kapepula Chamfya is the one that the deceased was using on the day that he was pushed into the drainage.

As to whether A2 stole the phone from the deceased and used or threatened violence to the deceased at the time of such stealing, the evidence of PW11 is that he saw about six young men fighting, and the deceased was pushed into the drainage. PW11 also told the court that he had handed over the phone found on the deceased to management at Jesmondine Bakery. There is no evidence to show that the phone was ever handed over to the police, but it found its way into A2's hands. There is no direct evidence placing A2 at crime scene, and most importantly the offence of aggravated robbery has not been established as PW11 said the phone was handed over to management, and it was therefore not stolen.

The defence in the submissions argued that there was no common purpose formed between the two accused persons to commit the offence of aggravated robbery, and they relied on the case of **MWAPE V PEOPLE 1976 ZR 160**. Further that neither of the accused persons aided or abetted the offence which would bring them within the ambit of Sections 22 and 23 of the Penal Code, as there was just a scuffle between the young men. They also relied on the case of **R V BETTY'S AND RIDLEY** cited in the book **A case Book on Criminal Law by John Hatchard and Muna Ndulo 1983, 1<sup>st</sup> Edition page 162** to argue that the

accused persons did not form any common purpose to commit the offence.

Indeed the evidence as given by PW11 was that the young men were fighting, when the deceased was thrown into the drainage, which evidence does not establish common purpose to commit the offence of aggravated robbery. However A2 was in possession of the deceased's phone, which he sold to PW7. He is therefore not guilty of the offence of aggravated robbery, but he is guilty of the offence under Section 318 of the Penal Code, which states that;

***“318. (1) Any person who receives or retains any chattel, money, valuable security or other property whatsoever, knowing or having reason to believe the same to have been feloniously stolen, taken, extorted, obtained or disposed of, is guilty of a felony and is liable to imprisonment for seven years.***

***(2) Any person who received or retains any chattel, money, valuable security or other property whatsoever, knowing or having reason to believe the same to have been unlawfully taken, obtained, converted or disposed of in a manner which constitutes a misdemeanour, is guilty of a misdemeanour and is liable to the same punishment as the offender by whom the property was unlawfully obtained, converted or disposed of.”***

A2 falls under Section 318 (2), as he received the cell phone in this matter and he had reason to believe that the same was unlawfully taken, looking at the circumstances in this case, as someone took the phone after PW11 handed it over to management at Jesmondine Bakery, and I accordingly find him **GUILTY** of receiving property unlawfully obtained

and I **CONVICT** him accordingly. As for A1, he was placed at the scene of the crime by PW11, and PW12 in his evidence stated that when he interviewed him, he has stated under warn and caution that he had an altercation with the deceased, and then he left. Therefore, while the evidence of PW11 was discredited in evidence on the basis that he did not see A1 among the six young men who were fighting, and the case of **LOVE CHIMBINI V THE PEOPLE 1973 ZR 191** relied on, stating that in that case it was held that **“in cases of identification of a single witness, the honesty of the witness is not sufficient; the court must be satisfied that he is reliable in his observation”**, PW12’s evidence on what A1 said under warn and caution about him arguing with the deceased remained unchallenged in cross examination. I find that A1 and the deceased had an altercation on the material day.

While A1 was involved in an altercation with the deceased there is no evidence that he stole the phone from the deceased, as PW11 stated that he handed over the deceased’s phone to management at Jesmondine Bakery. There is therefore no evidence linking A1 to the offence of aggravated robbery, and I find him **NOT GUILTY** and **ACQUIT** him forthwith in count one.

The offence in count two is murder. It is defined in section 200 of the Penal Code as;

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

Section 204 of the Penal code on the other hand defines what malice afore thought is. It 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.***

As already seen in this matter, PW11 testified that he saw a group of six young men fighting when the deceased was pushed into the drainage, and he was injured on the head resulting in his death. PW12 testified that A1 under warn and caution stated that he had an altercation with the deceased, and that A1 left after that. PW11's evidence placing A1 at the scene is corroborated by PW12's evidence which was not challenged in any way. However the question is whether A1 had the malice aforethought to commit the murder, and did in fact commit the murder? A1 admitted to having had an altercation with the deceased under warn and caution to PW12.

He however testified that he had met the deceased and told him to go home as his sister was looking for him. In cross examination, A1 stated that he did not see the deceased's sister PW1 on the material day, and he therefore lied about the reason that he had differed with the deceased. In the case of **SALUWEMA V THE PEOPLE 1965 ZR 4** it was held that ***“Lying by the accused may render conclusive reliable evidence against him but cannot add weight to discreditable, conflicting or otherwise unreliable evidence.”***

Applying that principle to this case, the evidence before court is that PW11 saw the six young men fighting, and one of them pushed the deceased into the drainage. He did not identify A1 as the person who pushed the deceased into the drainage, but just being among the six men. Therefore in this case there is no evidence showing who pushed the deceased into the drainage, and it is on record that all the men were fighting as they ran. It consequently follows that there is no evidence establishing that because A1 had an altercation with the deceased, he is the one who pushed him into the drainage.

There was more than one person with A1 and there was a duty placed on the police to investigate fully who the other people were and ascertain their involvement in pushing the deceased into the drainage. In fact A1 in his defence named some of the men whom he was with, who were about six, and thus supporting PW11's evidence on how many men that he saw fighting. Had all these people been interviewed, the person who pushed the deceased into the drainage would possibly have been established. The deceased was pushed into a drainage where he sustained a head injury resulting in his death as seen on the post-mortem report 'P2'. Man is presumed to intend the natural and probable

consequences of his actions, and the case of **DIRECTOR OF PUBLIC PROSECUTIONS V LUKWOSHA 1966 ZR 14**, is authority for this.

It was stated in that case that;

***“It is for the prosecution to prove that there existed in the accused the intention or knowledge which constitute malice aforethought. Intention and knowledge are not susceptible of direct proof. It is not possible to look into a man's mind and see the intention and knowledge therein. Sometimes a man may declare his intentions or state his knowledge. That is about as near as one can get to direct evidence of intention and knowledge. More usually intention and knowledge are matters of inference to be drawn from proved conduct and actions. There is a presumption that a man intends the natural and probable consequences of his acts. It is a presumption of good sense; but, of course, it is readily rebuttable.”***

In this case by pushing the deceased into the drainage, where he sustained a fatal injury to his head, it was intended that harm or grievous bodily harm would be done to him and this constituted malice aforethought, as stipulated in Section 204 of the Penal Code. However the evidence before the court does not establish that A1 is the person that pushed the deceased into the drainage and can therefore be said that he had malice afore thought for murder when he did so. It could have been any of the other young men whom PW11 saw fighting and running, and that is why all the possibilities in this case needed to have been exhausted by ruling out each and every person who was involved in the scuffle.

Had it only been A1 and the deceased that were involved in the scuffle, an inference of intention to do grievous bodily harm could have been inferred. There is insufficient evidence before the court, and I find A1 **NOT GUILTY** in count two, and I **ACQUIT** him forthwith, and set him at liberty.

A2 was linked to the offence by virtue of having possesses the deceased's cell phone shortly after the deceased was pushed into the drainage, which he sold to PW7. I have already stated that PW11 said that he handed over the phone to management, and therefore A2 could not have taken it at the crime scene, and thereby place him there. There is equally insufficient evidence linking A2 to the charge of murder in count 2 and I find him **NOT GUILTY** and **ACQUIT** him forthwith, and set him at liberty.

**Delivered in open court at Lusaka the 6<sup>th</sup> Day of March, 2018**

*S. Kaunda*  
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**S. KAUNDA NEWA**  
**HIGH COURT JUDGE**