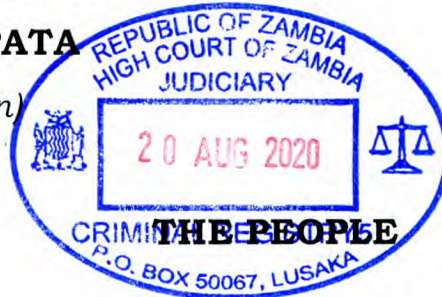


IN THE HIGH COURT FOR ZAMBIA

HJ/61/2020

HOLDEN AT CHIPATA

(Criminal Jurisdiction)



v

HENDRIX MANDA LUNGU

Before Hon. Lady Justice Dr. W. S. Mwenda in open court at Chipata the 20th day of August, 2020.

***For the State: Mr. N. Munkombwe – State Advocate
Mr. B. Mainda – State Advocate***

For the Accused: Mr. J. Phiri of JMP Associates

JUDGMENT

Cases referred to:

- 1) *Gilbert Chileya v. The People* (1981) Z.R. 33 (S.C.).
- 2) *Chiyovu Kasumu v. The People* (1978) Z.R. 252 (S.C.).
- 3) *George Musupi v. The People* (1978) Z.R. 271 (S.C.).
- 4) *Simon Malambo Choka v. The People* (1978) Z.R. 243 (S.C.).
- 5) *Kambarage Mpundu Kaunda v. The People* (1992) SJ 1 (S.C.).
- 6) *Fawaz Shawaza & Prosper Chelelwa v. The People* (1995) SJ (S.C.).
- 7) *Sakala v. The People* (1973) Z. R. 8. (C.A.).
- 8) *Joseph Mulenga & Albert Joseph Phiri v. The People* (2008) 2 Z.R. 1 (S.C.).
- 9) *Major Isaac Masonga v. The People* (2009) Z.R. 241 (S.C.).
- 10) *Mwelwa Murolo v. The People* (2004) Z.R. 207 (S.C.).
- 11) *Joseph Mulenga v. The People*, SCZ Appeal No. 128 of 2017.

- 12) *Simon Miyoba v. The People* (1977) Z.R. 218.
- 13) *David Zulu v. The People* (1977) Z.R. 151 (S.C.).
- 14) *Nyambe v. The People*, SCZ Judgment No. 5 of 2011.
- 15) *Eddie Christopher v. Lawrence Zimba*, SCZ Appeal No. 41 of 2017.
- 16) *Brighton Sakubita and Another v. The People*, SCZ Judgment No. 239/240 of 2011.

Legislation cited:

- 1) *Sections 200, 201 and 204 of the Penal Code, Chapter 87 of the Laws of Zambia.*
- 2) *Article 18 (1) and 2 (b) of the Constitution of Zambia.*

The accused stands charged with one count of murder contrary to section 200 of the Penal Code, Chapter 87 of the Laws of Zambia. The particulars of offence are that on 8th December, 2018, at Nyimba in the Nyimba District of the Eastern Province of the Republic of Zambia, the accused, jointly and whilst acting together with another person unknown, murdered Layton Mwanza. The accused denied the charge and a plea of not guilty was entered by the Court.

The State called seven (7) witnesses. Witness number one (PW1), was Charity Mwale, a 39-year old business woman of Kaminza Village, Chief Ndake, who is also the mother to the deceased. It was her evidence that on 8th December, 2018 she was at Nyimba market selling fish when her niece called Chiseche Daka called her to go to the village and see what had happened to her son Layton. Upon arrival at her mother's village, she was informed about her son's death by her friend known as Meleya (PW3). She testified that the

deceased was 20 years, one month and eight days old at the time of his death.

PW1 narrated that she travelled to Chipembe to visit the scene of the shooting where she found the body of the deceased covered in a chitenge material. When she uncovered the body, she was able to see where the bullet had entered and exited from and that the wound was on the right side of the deceased's chest. It was PW1's evidence that she knew the accused as they grew up in the same village. She identified the accused in the dock.

In cross-examination, PW1 stated that the deceased was her son and the person who narrated to her what happened on the 8th day of December, 2018 was her friend, Meleya. She recalled making a statement to the Police on 12th December, 2018 which she signed, in which she told the police that she had been informed that Hendrix Manda Lungu had shot her son Layton Mwanza. When put to her that what she told the police was very brief compared to what she testified in court which was detailed, she maintained that what she informed the Court is what she informed the police. She denied being aware of any personal differences between Misheck Khoswe and the accused's family. She admitted that while in Feira, she had heard that Misheck Khoswe wanted to get money from the accused's family. She also admitted staying in touch with Misheck Khoswe.

In re-examination, PW1 explained that what she meant by being in touch with Misheck Khoswe, was that each time the matter was

cause-listed, it was Misheck Khoswe who would inform her that they needed to appear before court.

The second prosecution witness was Robson Phiri (PW2). It was his testimony that in December, 2018 he was living in the Chipembe area of Nyimba District and was working as a bar man at Kalambo Restaurant, situated along Great East Road. He testified that on 8th December, 2018, around 18:00 hours, he was at Kalambo Bar watching soccer but left the place early because he had left a child alone. He testified that whilst at the restaurant, he saw a grey Quantum motor vehicle park at Aunt Lisa's shop. Two men came out and entered the bar and came out with a bottle of castle beer each. They went back to their vehicle which was parked at Aunt Lisa's, about 65 meters from where PW2 was standing. After about ten minutes, PW2 saw the deceased with a bottle of castle beer in his hands coming from the direction where the two men in the Quantum motor vehicle had gone. A short while later, PW2 saw the Quantum motor vehicle being driven from Aunt Lisa's. It went and parked at their bar. Aunt Lisa, who was with the other man, pointed at the deceased and said that he was the person who got the beer. PW2 testified that the man started slapping the deceased and said that he had to be taken to the police. It was PW2's further evidence that the one holding the deceased was the tall, huge and dark man while the short and light complexioned one was slapping him. The men then dragged the deceased to the vehicle. The tall, huge and dark man held onto the deceased while the short and light skinned one went into the Quantum vehicle to try and start it.

The deceased managed to slip out of the hands of the tall, huge and dark man and ran away. The short and light complexioned man came out of the vehicle and gave the deceased a chase and they took a turn. It is at this point that PW2 heard the sound of two gunshots. As PW2 rushed to see what had happened, he met the two men coming from the direction of the gunshot sound. They rushed towards the Quantum motor vehicle and drove off in the direction of Lusaka, with the short brown one driving. About ten minutes later, PW2 saw the same vehicle return and upon seeing the multitude of people that had gathered, the vehicle turned in the direction towards the hospital, going at high speed. After some time, PW2 saw a police Land Cruiser head towards the same direction where the Quantum motor vehicle went.

PW2 identified the accused in the dock and also identified the motor vehicle in issue as a grey Toyota Quantum, registration number BAH 3970, with bumpers behind and in front and lights which are very bright when switched on. The motor vehicle was marked "ID1".

In cross-examination, PW2 stated that he did not see who shot the deceased but just heard gunshots. He denied seeing the deceased collecting beer from the motor vehicle but admitted that he saw him with a bottle of beer. He maintained that the accused and the tall dark man mentioned that they would take the deceased to the police and that whilst this was said, the tall dark man got hold of the deceased whilst the accused was slapping him. He admitted

having said that when the deceased fled, the two men gave chase but he could not tell who was nearer to the deceased between the two. He further admitted that the deceased and the two men disappeared at a corner and he did not know what happened beyond the corner apart from hearing gunshots. Further, that after hearing the gunshots, he rushed towards the direction of the gunshots and found four people where the body of the deceased lay but he could not recognise them.

On being cross-examined further, PW2 stated that the place where this happened was a trading area and a lot of people rushed to the scene to see the body. He agreed that the people who had gathered were agitated about what had happened. He stated further, that the Quantum motor vehicle sped away but returned to the scene about ten minutes later. He denied being aware of three other vehicles pursuing the Toyota Quantum from the trading area. He was also not aware that the accused person reported the matter to the police the very evening of the incident. He admitted that Meleya (PW3) was one of the four people present where the body was and that she was one of the people he said he did not know.

In re-examination, PW2 clarified that he did not know the four people at the site where the body was but later came to know Meleya (PW3) when they were called to testify.

The third prosecution witness was Meleya Tembo (PW3). Her testimony was that on 8th December, 2018, around 17:00 hours, she was at a place called Kalambo when the deceased requested her

to buy him beer. She testified that she did not have money on her and told the deceased to wait as someone was bringing her some money. In the process of waiting, the accused came with another person and they bought two bottles of castle beer and went back to a vehicle which they had parked at the next shop. She testified that as the two men sat in their vehicle sipping their beer, the deceased approached them and asked to be given some beer. The accused did not respond. The two men put the beer on the dashboard of their vehicle and entered a shop. The deceased then got one of the bottles of beer from the vehicle. At that time, she (PW3) was standing at Kalambo, a distance of about 30 metres from where the vehicle was parked.

When the accused came out of the shop and discovered that the deceased had taken one bottle of beer, he and the other man he was with followed the deceased at Kalambo and started beating him. The deceased ran away and the accused and his friend gave chase for about 200 metres. It was PW3's testimony that as the two men were chasing the deceased, she was also running behind because she had seen that the deceased was already drunk and she sensed that if they beat him, they would hurt him. PW3 narrated that when the friend to the accused got hold of the deceased, she decided to hold the accused around the waist and begged him to leave the boy alone, but the accused pulled out his gun from his trousers and fired a shot in the air. She testified that at that point, the deceased was struggling with the friend of the accused in an attempt to escape. It was her further testimony that whilst she was

still holding on to the accused, the accused pointed the gun at the deceased, who was being held by the other man, and shot the deceased in the chest.

PW3 testified that the distance between where she was standing holding the accused by his trousers and where the deceased was, was about 6 metres. According to PW3, the bullet entered in the left part of the deceased's chest and exited behind near the left shoulder blade. At this point, she let go of the accused and the accused's friend also released the deceased. The accused then threw the gun to his friend and the two of them ran to their vehicle. She rushed to where the deceased lay, still alive at the time. She knelt down and held him, lifting his head up. It was her testimony that the deceased's final words were "aunt you have tried to rescue me but it has failed, inform the mother to Nandi".

It was PW3's further testimony that at the time she was holding the accused, she had a conversation with him where she pleaded with him to leave the deceased alone and that she would give him the money to pay for the beer which the deceased took. The accused's reply, according to PW3, was that it was only in the village where they probably fool people. PW3 testified that uncle Misheck came and they moved the body of the deceased from the middle of the road where it lay, to the road side. A lot of people started gathering.

In further examination-in-chief, PW3 stated that she grew up with the accused in the same village where his parents are and therefore, she had known him since they were young. She identified the

accused in the dock and identified the vehicle already introduced into evidence and marked ID1.

Under cross-examination, PW3 admitted that she was the deceased's aunt and was very close to the deceased's mother, PW1. She testified that she was not related to the person she referred to as uncle Misheck and did not know his surname. She confirmed that Misheck had been in constant touch with her and was also the one who had been organising witnesses. She testified that she was not aware that Misheck had been demanding for money from the family of the accused through the accused's in-laws and was hearing that for the first time.

On being cross-examined further, PW3 recalled making a statement to the police on the 8th December, 2018 and admitted that her memory was still fresh at the time. She recalled testifying that the friend to the accused held the deceased on both hands and was standing right behind the deceased. She admitted having said that the body of the deceased was discovered with an exit wound where the bullet came out from and that the friend to the accused was standing at the back where the bullet exited the body of the deceased. She also admitted seeing the same man who was standing behind the deceased running about 200 metres to where their vehicle was parked. She denied coming across information that the accused went to report to the police that the person he was with had shot the deceased. She admitted not paying attention to whether any bullet was recovered from the scene.

In re-examination, PW3 clarified that when the friend to the accused saw that the accused had pointed a gun at the deceased, he let loose of the deceased and at that point the accused fired the gun. She further clarified that Misheck is the one who informed her of the court dates as she had not left her phone number with the police.

PW4 was Misheck Khoswe whose evidence was that on 8th December, 2018 around 17:30 hours he was at the market when he heard two gunshots and people who were nearby started shouting that a person had been killed. He rushed to the place and on his way to the scene, he bypassed a silver Hiace minibus which was parked nearby. He reached the scene and found a woman by the name of Meleya (PW3) crying. It was his testimony that he had not known PW3 for long prior to that incident but came to know her because she goes to drink beer from their bar. When he reached the scene, he found PW3 holding a person and attempting to lift him up while lamenting why Manda had killed the person. At the scene he found two men, one short and brown complexioned, while the other was tall and dark. The short and brown man had a gun in his hands. By that time people had started gathering and the short, brown man threw the gun to his friend and both started running towards their vehicle.

PW4 testified that concerned with the death of a person, he phoned the Criminal Investigations Officer (CIO) from Nyimba, a Mr. Zulu, who informed him that he was in Chipata and advised him to call

Mr. Kembe, which he did. According to PW4, when the response was slow from the Police, he decided to call another police officer by the name of Makeche who lives within Chipembe. PW4, with the assistance of others, moved the body of the deceased from the middle of the road where it was lying to the side. As they carried the body, he spotted blood on the left part of the chest and on the back. While covering the body with a chitenge material, he saw the vehicle that had headed in the Lusaka direction along Great East Road coming back but apparently scared of passing through the crowd, it turned and took the road which vehicles do not normally take because it leads to the fields. According to PW4, at the point where the vehicle left the tarmac and went on the dust road, he could see the person inside. The person who was driving was the one he had seen earlier with a gun. When they were going in the direction towards Lusaka, there were two of them but when coming back, he was alone.

It was PW4's testimony that within five minutes, a Land Cruiser belonging to the police with five police officers, all armed with guns, arrived on the scene. PW4 accompanied the five policemen by the names of Kembe, Hansingo, Mumba, Makeche and Tembo, the driver of the Land Cruiser, in pursuit of the vehicle. After reaching a village called Kapili, it was getting dark and they asked the villagers if they had seen a vehicle. The villagers showed them the direction which a vehicle had taken. A short distance away, they saw a vehicle parked with parking lights on. They also saw a torch where the vehicle was parked but it soon started moving away from

the vehicle. PW4 approached the vehicle and found no one there. The passenger door was open and there was a bicycle nearby. He then saw a person approach and he identified himself as the owner of the field where the vehicle was parked and also headman Kapili. When asked what the problem was, headman Kapili said the owner of the vehicle had asked him to help him jack up the vehicle which was stuck in the muddy road. When asked where the owner of the vehicle was, the headman said that the owner of the vehicle had surprised him because when he saw the lights of the Land Cruiser, he told him to run away with him because the police had come for him as he had killed someone but he (the headman) refused to run away. When the police reached where the vehicle was and interviewed the headman, he said the bicycle was his and the owner of the vehicle had asked him to help him. Since the person was nowhere in sight, the police decided to remove one tyre and the battery from the vehicle and left the vehicle in the field.

PW4 identified the accused person in the dock and motor vehicle registration number BAH 3970 (ID1). According to PW4, he first saw the man with the gun on the day of the shooting. The second time was in the dock. He denied knowing the accused's family.

Under cross-examination, PW4 stated that he went to give a statement to the police on 11th December, 2018 and that at the time, the events of the day were still fresh in his mind. He recalled signing the statement which had been read out to him but denied that those were his signatures on the statement. He accepted the

particulars on the statement as his with the exception of his occupation which he said is farmer, not businessman. Further, that he did not know the name of the officer who wrote his statement as the officer was new. He admitted that there was no other person by the name of Misheck Khoswe who gave a statement on 11th December, 2018. He further denied being told that the person who killed the deceased was the elder brother to Danny Kaminza but that he heard PW3 mentioning the name of the accused. He admitted that he had lived at Chipembe for almost two years but did not know the family of the accused. He also admitted that he knew Danny Kaminza but did not know that he is related to the accused. He denied going to anyone to complain that Danny Kaminza accused him of having stolen his K100,000.00.

It was PW4's testimony under further cross-examination, that he did not recall going to the accused's mother-in-law for a bribe so that he could give favourable testimony for the accused and neither could he remember going to the accused's uncle Alex Zulu to ask him to talk to the accused's mother-in-law for a bribe so that he could give favourable testimony for the accused. He denied knowing Mr. Alex Zulu. He stated that he was at the market area when he heard the two gunshots across Great East Road, opposite the direction where the boy was shot. He admitted that at Chipembe area, after the Great East Road, there is a line of shops. He testified that the deceased was shot along the road which leads to Vizimumba School. Further, that the shop near where the deceased was shot is called Abadon and on the other side is a shop

called Pendwe. That, ahead of where the deceased was shot there is a police post. According to PW4, he was able to see the point where the deceased was shot. However, it was his evidence that he did not see anything but just heard the shots.

PW4 testified that the people who were shouting were coming from watching soccer. That, the people came from various places and some were from across the road. He admitted that the people who were across the road were nearer to the scene than himself. However, it was his evidence that the people across the road who were shouting "they have killed someone" were not that many. He did not know how many there were because he did not count them. He admitted that the reason why he rejected the statement which was shown to him was because what he told the police and what he told the court were two different stories.

In re-examination, PW4 stated that what he told the police is what he testified in court, that is, the things which he perceived with his own eyes. He also stated that he did not go to Alex Zulu to demand for a bribe; that if he had those intentions, he would not have come to court to testify. He testified that if he went to the people mentioned to seek for a bribe, they would have dragged him to the police for corruption. He similarly denied going to the accused's in-laws to seek for a bribe. He stated that he did not even know the accused's in-law(s). It was PW4's evidence that his details are with the police because he helps as a neighbourhood watch member.

PW5 was Tyson Kope Standford Ngoma, a headman and farmer of Kapili Village. He testified that on 8th December, 2018, between 18:00 and 19:00 hours as he was coming from his field, he saw a vehicle which looked like a Canter. When he drew near, he saw that the vehicle was a minibus and also saw one person where the vehicle was. PW5 asked that person if he was one of them and the person agreed. The person further stated that he was on a journey going to Mulima but there was no through road and the vehicle got stuck as he tried to turn back. The two tried to get the car out of where it was stuck with the use of logs firstly and then stones but the car remained stuck. Whilst this was being done, PW5 saw lights of a vehicle coming from the direction of his village. It was his testimony that he told the accused that a vehicle was coming in their direction and that maybe it was his friends coming to assist him. That, when the accused heard this, he came out from where he was working and rushed inside the vehicle to get the key and said "old man lets run away, this vehicle which is coming is for the police because I killed someone at the place where I have come from". According to PW5, he was surprised that the man he had been helping had killed someone. He described the person he found at the vehicle and had been talking to as short, light in complexion and fat. He said he could identify him because he was with him for between 10 to 15 minutes. PW5 said he could see the man even though it was getting dark because he had a phone which he could light up to see the man. The man ran away after telling him that he had killed someone.

PW5 testified that when the police approached the vehicle, they asked him what he was doing there and he explained that he was coming from the field when he found the accused and his vehicle which had gotten stuck. He identified the motor vehicle (ID1).

Under cross-examination, PW5 stated that he did not count the number of police officers who had come to where the vehicle was parked. That, he talked to the police for approximately 5 minutes. He stated that the police officers informed him that the person he was with had killed someone in Chipembe and that he could have killed him (PW5) too. When it was put to him that since he was not able to remember the police officer who told him that the person he had been helping had killed a person, that implied that he was not able to remember everything which was said on that day very well, PW5 said that what he narrated before court was what he saw and heard and as for the police officer's name, he did not ask for his name. When reminded that he did not tell the court that the police told him that the person they were pursuing had killed someone in Chipembe and could have killed him too and that it took Counsel to ask him, PW5 stated that he testified based on what he was asked.

When it was put to him that the information about the man killing a man came from the police, PW5 maintained that it was the accused himself who told him to run as he had killed someone where he had come from. PW5 denied being told by the man that he was running away from three vehicles that were pursuing him or being told that the man was looking for a funeral house. He also

denied being asked by the person where the road he was on was leading to. He admitted that the incident happened on 8th December, 2018 and he was summoned to go to Nyimba police to give a statement after a number of weeks or months.

There was no re-examination for this witness.

The sixth prosecution witness was Kebby Makeche (PW6), a police officer of the rank of sergeant. He testified that in December, 2018 he was based at Nyimba Police Station. On 8th December, 2018 between 18:30 and 18:40 hours, he received information from the Criminal Investigations Officer in Charge, Detective Chief Inspector Zulu, to the effect that there was a shooting incident at Chipembe Village which is about 20km east of Nyimba town. He also received similar information through phone calls from members of the public in Chipembe. Detective Chief Inspector Zulu also informed him that two unknown persons who were involved in the shooting incident had run away from the crime scene using a Toyota Hiace vehicle and that the vehicle was approaching Nyimba Boma. Acting on that information, PW6 together with four other police officers, rushed to the scene of crime.

It was his testimony that after travelling for 15km without finding the motor vehicle, they received information that the motor vehicle had changed directions and was now headed eastwards, towards Chipembe village. They proceeded to Chipembe village and visited the crime scene around 19:00 hours where they found a body that was covered in a chitenge material besides the road that leads to Vizimumba Day High School. They found a lot of people at the

scene. The team leader, Detective Inspector Kembe, Inspector Tembo, Sergeant Hansingo and Detective Constable Mumba, came out of the vehicle and proceeded to inspect the body and to extract some clues from the crime scene. They learnt that the deceased was Layton Mwanza and he had a gunshot wound on the left side of the chest and another one at the back. However, no cartridge had been recovered from the crime scene. PW4 informed the officers that the two suspects had changed direction from Chipembe village using Matonje Road, a road that is situated south of Chipembe and that he (PW4) was willing to escort the police in pursuit of the suspects. They followed the tyre marks on the gravel road for about 5km and reached a village where they collected information that the vehicle had changed direction using a narrow road. They followed the tyre marks and passed through Kapili Village, onto the fields.

It was PW6's further testimony that after about 2km, they saw some light ahead of them. As they moved closer to where the lights were coming from, up to a distance of 20 metres, they switched on the headlamps of the police vehicle and observed an abandoned vehicle with a bicycle beside it. The vehicle was stuck in the sand and slightly off the narrow road, almost facing their direction. PW4 volunteered to reach the motor vehicle and reported that there were no people around. As PW4, Detective Inspector Kembe and Inspector Tembo were approaching the motor vehicle, PW5 emerged from the field where he had hidden behind a tree and had a brief discussion with the three. The officers proceeded to inspect the motor vehicle and noticed that there were no keys in the motor

vehicle. They removed the car battery and decided to leave the motor vehicle where it was and went back to the crime scene at Chipembe village where they collected the body of the deceased and took it to Nyimba District Hospital mortuary.

PW6 testified further, that the following day, 9th December, 2018, he received a phone call around 06:30 hours from Detective Chief Inspector Zulu who told him to rush to the office. When he got to the office, he was informed that one of the suspects by the name of Manda, was seen at Mtilizi village where there was a funeral gathering. They went to the location and found the accused in one of the houses near where the funeral gathering was. When asked if he was the one who drove the motor vehicle, the accused agreed and produced the motor vehicle keys. The accused then took the officers where he left the motor vehicle.

According to PW6, on 15th October, 2019, he was at Chipata Central Police Station when he was assigned a docket of a case of murder in which it was alleged that Hendrix Manda Lungu of Lusaka jointly and whilst acting together with an unknown person, murdered Layton Mwanza. PW6 and Constable Mumba transferred the said Hendrix Manda Lungu who was already in custody at Chipata Central Police Station, to Nyimba where PW6 interviewed him in connection with the murder case. The accused denied the allegation, stating that the person who shot the deceased was Andrew Lungu, the person at large. He identified the motor vehicle which had already been introduced into evidence and marked "ID1".

He also identified the Post-Mortem Report and the Road Transport and Safety Agency (RTSA) Report which were marked "ID3" and "ID4", respectively. ID1, ID3 and ID4 were tendered and admitted into evidence as the People's exhibits P2, P3 and P4, respectively.

Under cross-examination, PW6 stated that he interviewed PW3, PW4 and Robson Phiri. He could not recall the date and month when he interviewed PW4 but it was before PW6's transfer to Kabwe Central Police. When it was put to him that he interviewed PW4 on 11th December, 2018, just a day after the burial of the deceased, he maintained that he could not recall the date. He reiterated that there was another person called Misheck Khoswe who was interviewed by the police. When asked to point out where in his report it was stated that he interviewed two people both answering to the name Misheck Khoswe, PW6 said that there was no mention of the name Misheck Khoswe in the report. He admitted that he did not inform the court in his evidence-in-chief that he had interviewed two people who answered to the same name. He could not produce the two reports of the people who both answered to the name Misheck Khoswe. He testified that the report before court was a different one and not the one that he had authored. He however, stated that from the said statement, there was one Misheck Khoswe who accompanied the police to retrieve the vehicle. He admitted that it was not correct to say that Misheck Khoswe was alone when he went with them to pursue the vehicle as there was another person. He admitted that it was not possible to have two people called Misheck Khoswes with the same cellular phone

number. He also admitted that according to the statement, after Misheck enquired on who had shot the deceased, he was informed that the elder brother to Danny Kaminza is the one who would know the shooter. He testified that he did not interview Danny Kaminza, but believed that Detective Inspector Kembe did. He was aware that the accused is the elder brother to Danny Kaminza. He admitted that the accused told him that the one who shot the deceased was Andrew Lungu, the owner of the motor vehicle. He denied being aware that the cellular number on the statement was for the Misheck Khoswe who came to court to testify. He could not recall recording a statement from a Misheck Khoswe who had come to testify and could not tell who recorded the statement.

In further cross-examination, PW6 testified that he remembered interviewing Meleya Tembo (PW3). He admitted that when the accused person first came before the High Court, he was facing a charge of being an accessory after the fact to murder before a *nolle prosequi* was entered. He admitted that the allegation was that he assisted Andrew Lungu to escape after committing murder. He confirmed that the first matter before the *nolle prosequi* was entered, came up long after he had interviewed Meleya Tembo and Misheck Khoswe. He could not tell whether the State already had the information from Meleya Tembo and Misheck Khoswe at the time the accused was being committed for the offence of being an accessory after the fact to murder. It was his evidence that he interviewed Meleya Tembo and Misheck Khoswe between 2018 and 2019. He agreed that the accused appeared for the charge of being

an accessory after the fact to murder much later after the interviews. He denied that after the *nolle prosequi* was entered, the people who PW6 had interviewed came up with different stories. He admitted that he knew that all the witnesses who testified before this court gave statements in 2018 before the accused appeared for the earlier charge which the State was fully aware of.

On being further cross-examined, PW6 stated that the accused was apprehended on 9th December, 2018 and the docket was officially handed over to PW6 at Chipata Central Police Station on 15th October, 2019, which was almost one year later. He could not tell whether the investigations were delayed at the subordinate court because the police were still looking for Andrew Lungu. He was aware that the subordinate court of the second class for the Nyimba District had complained that the accused was detained for a long time without appearing before the court for mention. He could not say whether it was reasonable to have kept the accused in remand for a long time without appearing for mention as according to him, there are procedures to be followed. He was not aware that on the night of 8th December, 2019, the accused went to Nyimba Police Station to report that his colleague Andrew Lungu had shot a person. He admitted not having investigated whether or not the accused person owned a gun and further that he did not search the motor vehicle when it was found in the bush. When taken back to the scene where the motor vehicle was found parked, PW6 recalled having said that he remembered that PW4 was the first person to leave the motor vehicle but he could not recall whether it was the

examination that the charge of being an accessory after the fact to murder was changed after the docket was already submitted, PW6 stated that the investigations were not yet concluded. He reiterated that the statement before court was not the one for the Misheck Khoswe who had testified.

PW7 was Saul Malyambwa, the Assistant Station Manager at the Road Transport and Safety Agency (RTSA). He testified that on 15th October, 2019, RTSA Chipata received a request from Chipata Police Station to release information about the details of motor vehicle registration number BAH 3970. RTSA did accordingly on the same day. The inquiry revealed that the motor vehicle belonged to Andrew Lungu. He testified that he printed the document using an HP computer which is serviced on a monthly basis. He also testified that the said computer is very secure and has a password and no one can access it without the password. He identified the printout which he had made two days prior to his court appearance and the same was marked "ID5" and subsequently tendered into evidence and duly admitted as the People's exhibit "P5".

There was no cross-examination for this witness.

At the close of the State's case, I found the accused with a case to answer and put him on his defence. The defence called four (4) witnesses in addition to the accused.

DW1 was Hendrix Manda Lungu, the accused herein. He testified that his wife's grandfather died in Lusaka on 5th December, 2018 and on 6th December, 2018 it was announced that the body would

be taken to Mtilizi in Nyimba District for burial. He boarded a Hino bus and travelled to the village. On 8th December, 2018 after the burial, Andrew Lungu asked him to take some people to his in-laws at Chipembe to go and bath as there was no water at the funeral house. DW1 used a Quantum bus belonging to Andrew Lungu and took the first group to Chipembe. He returned for the second group, dropped them off at Chipembe and returned to Mtilizi farm where he relayed the message from Andrew Lungu's wife to the effect that she would call him after they finished bathing so that they could go and pick them up. Andrew Lungu suggested that they go and wait for their wives in Chipembe village because they could delay in calling. Upon arrival at Chipembe, Andrew suggested that they go to a restaurant to buy food as he had not eaten. They did not find chips, so Andrew gave DW1 some money to buy two bottles of beer. DW1 bought the two bottles of beer, opened them and both DW1 and Andrew Lungu took some sips and put them on the dash board of the Quantum bus.

It was DW1's testimony that Andrew Lungu continued discussing with the owner of the bar where they bought the beer while DW1 stood near the vehicle. Then two men approached them and said they had seen a young man pick up a bottle of beer and asked if we were with him. Andrew Lungu replied that they were just the two of them and asked where the young man was. He then went inside the bar and apprehended the young man. When Andrew Lungu went inside the bar, he found the young man spraying beer on people. DW1 entered the bar and gave the young man a slap.

Andrew Lungu and DW1 took the young man outside to where the car was. DW1 opened the passenger door so that Andrew Lungu could put the young man (the deceased) inside. According to DW1, Andrew Lungu said the deceased had made a big mistake by spraying people with beer instead of drinking it so they should take him to the police.

DW1 entered the vehicle through the driver's seat so that he could drive the vehicle. At that time, Andrew Lungu and the deceased were struggling and the deceased slipped from Andrew's hands and started running away. Andrew ran after him. DW1 came out of the vehicle and went to close the door which was left open by Andrew and he ran towards the direction which Andrew and the deceased took. As DW1 ran, he heard two gunshots. In that regard, it was his evidence that PW3's testimony was not true because he (DW1) was not there when the gun shots were fired. That, he turned around when he saw Andrew Lungu running from where the sounds of the gunshots were coming from. It was DW1's evidence that PW3 did not tell the truth because he did not meet her and from the time he was born, he has never held a gun. According to DW1, the story that PW3 told was a lie because he (DW1) did not reach the scene of the crime. He testified that PW3 and PW4's statements were made up stories because he had never handled a gun and did not know how to handle a gun.

DW1 testified further, that after he turned, he went close to Andrew and said he had heard gunshots and asked him what happened.

That, Andrew replied that he had shot the deceased. DW1 suggested that they carry the boy to the hospital. At that time, they were approaching a bar and a mob had gathered and started shouting "someone has shot a person!" When they reached the vehicle, DW1 started the engine. Andrew suggested that they go to the police station and they started off for Nyimba Police Station. After driving for about 2km, Andrew commanded DW1 to stop driving. They were moving west as if going to Lusaka. DW1 stopped the vehicle and Andrew dropped the middle seat and went behind where he picked up something which DW1 did not see and went out of the vehicle. That's when DW1 realised that Andrew Lungu had run away and the person who had been shot was lying on the road without any help, so he decided to return and pick him up. When he arrived at Chipembe about six minutes later, people were saying "this is the vehicle where that person who shot the person was". They had sticks and stones. When DW1 saw that there were a lot of people in the direction where the deceased person was and the main road was also covered with a lot of people, he decided to go in the opposite direction where there was another road.

It was DW1's further evidence that he felt frightened when the mob was shouting and realised that if he stopped, the mob would kill him; that is how he decided to make a turn and drive in the opposite direction. The mob started chasing him and he decided to leave the road and branch onto a road leading into the village. He followed the road but it seemed to be a dead end and so he tried to

those were the vehicles that were chasing him. He denied telling PW5 that he had killed a person and testified that he walked for about two to three hours from where he left the vehicle up to the funeral house and narrated to them what had happened. He testified that he (DW1), with four others, later that night went to Nyimba Police where they found a female police officer on duty. They reported what had transpired at Chipembe and the female police officer phoned a male colleague called Mr. Kembe. Mr. Kembe told them to go back to the funeral house and come back the following morning. The following day, between 06:00 to 07:00 hours, DW1's younger brother known as Danny Kaminza, phoned him from the police station to find out where he was and when told that he was still at the funeral house, Danny told him to remain there as the police would be going there to remove the vehicle from where it was parked. DW1 testified that his brother Danny Kaminza said that he was at the police station because the police apprehended him the day before.

DW1 testified further, that the police went and apprehended him at the funeral house and they went and picked up the vehicle and later went to the police station. He was detained on the same day, 9th December, 2018. On 11th December, 2018, Mr. Kembe collected DW1 from the cells and took him to his office where he found his wife and Andrew Lungu's wife. The officer asked DW1's wife if her husband had ever bought a gun and she replied that he never had. The officer then asked Andrew Lungu's wife if her husband had a gun or ever bought a gun and she answered in the affirmative. Mr.

Kembe took a statement from DW1. After one month and two weeks, Mr. Makeche and Mr. Tembo took DW1 to the police station where they tore the statement which Mr. Kembe had recorded and wrote a new one. DW1 was charged with being an accessory after the fact to murder but a *nolle prosequi* was entered. He was re-arrested and charged with the offence of murder. He testified that he did not know where Andrew Lungu was as he ran away. It was his testimony that when coming from Lusaka, he used another vehicle and was with different people, so he could not know if Andrew Lungu carried a gun or not.

Under cross-examination, DW1 said that Andrew Lungu is related to the family where he (DW1) married from. He could not tell the exact time of the shooting but said it was between 18:00 and 19:00 hours. He admitted that there was sunlight and someone was able to identify someone about ten metres away. DW1 recalled Robson Phiri's (PW2) evidence. He admitted having slapped the deceased and Andrew Lungu holding the deceased. DW1 also admitted that Andrew Lungu is tall and big. He recalled PW2's evidence that both Andrew Lungu and DW1 gave chase to the deceased and saying that DW1 was faster than Andrew Lungu. He did not recall that they made a turn as alleged by PW2. He testified that he did not know PW2 and would not know what he was thinking when he said what he said. DW1 also recalled the evidence of PW3. He knew PW3 and admitted that she had testified that they grew up together. He did not recall PW3 telling the court that she was following him and Andrew Lungu behind. He also recalled PW3 testifying that she

was just about three metres away from them. He admitted that PW3 was born in the village where he came from but it had been thirty years since they lived in the same village and he only came to see PW3 again when she came to testify in this court. According to DW1, PW3 did not know him well because it had been long since they lived in the same village. He admitted that if a person who knows you is about three metres away, she can easily identify you. It was DW1's evidence that they had not differed with PW3 but said that he could not tell what she was thinking. He admitted that people were angry with the shooting and wanted to attack him and Andrew Lungu. He also admitted that it did not make much sense that one would go back to a scene where there was an angry mob alone.

With regard to the evidence of PW5, DW1 admitted that he was the person who tried to help him to move the vehicle. He also admitted that PW5 was a good Samaritan who did not know what had happened at Chipembe. He did not recall PW5 testifying that DW1 had told him that the police had come and they should run when he saw lights. He also did not recall PW5 testifying that he (DW1), had said that he had killed someone at Chipembe. He believed that PW5 was coached by the police to give the statement which he gave in court. He stated that he had no evidence that PW5 was coached but it was his opinion because PW5 had mentioned in his evidence that the police told him that they were looking for the owner of the bus as he had killed a person. He did not recall that PW5 told the

court that he ran and hid behind a tree and what brought him back was the bicycle he left behind.

Under further cross-examination, DW1 stated that it was true that his young brother was also detained. He admitted that he (DW1) was supposed to be a state witness and that he had never seen a state witness being detained. He admitted that it is people who are suspected of having committed offences who are put in custody. He did not recall PW4's evidence that DW1 was close to where the deceased person was lying, fatally shot. He admitted having heard PW4 testify that he threw the gun at his friend. He denied knowing PW4 but stated that the reason for PW4 to lie could be because he (PW4) had differed with his young brother Danny Kaminza.

On being questioned further, DW1 stated that Andrew Lungu and himself, found people at Chipembe and that it was around 17:00 to 18:00 hours. He admitted that the people, including the deceased, were happy to see him but that he had never seen those people before. He admitted that where they stopped at Chipembe, there was a lady who came from the village but he did not see PW3. He admitted that he heard PW3 say that the deceased approached their vehicle and asked them to buy him a beer but that, that was not what transpired. He also admitted that he heard PW3 testify that she saw Andrew chase the deceased but his testimony was that he followed in the direction of the shooting but did not reach it because he met Andrew on the road. DW1 admitted that people followed because they heard a gunshot but he could not talk for the people

who witnessed the shooting. That, the reason why he told PW5 that he was going to Mulima was because he wanted to go and report to the police after the people who were pursuing him stopped doing so.

In re-examination, DW1 stated that it rained on the material day, so it was not sunny and there was a cloud cover but there was some light. He explained that Andrew Lungu was in front as they ran. He also stated that Mr. Kembe was the leader and the one who arrested his brother Danny. He reiterated that Mr. Kembe said he should go home that night when he went to the police to report the events of 8th December, 2018.

DW2 was Monde Lisulo, a police constable at Nyimba Police Station. Her evidence was that on 8th December, 2018, she was at work in shift 3 which starts from 16:00 hours to 24:00 hours. She recalled that on that day, between 22:00 and 23:00 hours, she saw five men come at enquiries. After she greeted them, one of them said that they had come from a funeral house and were escorting Mr. Hendrix Lungu. She asked Mr. Hendrix Lungu to explain why they were there. He narrated what had transpired and that Andrew Lungu had shot someone but he did not know where he was. Further, that DW1 had the keys to Andrew's vehicle and if the police wanted the key and the vehicle, they should follow him to the funeral house. DW2 told DW1 (the accused) to wait while she talked to her senior Inspector Kembe. After narrating what the accused had told her to Inspector Kembe, he told her to tell him to go back where he came from and come back the following day.

DW2 told DW1 accordingly. She testified that before DW1 went to the police, there was a report about someone who had been shot at Chipembe and some officers went there.

In cross-examination, DW2 stated that she did not know what happened at Chipembe because she was not there. She admitted that even if someone did not tell the truth about what happened she would not know as she was not there. She could not remember if there was someone by the name of Danny Lungu in custody. She also testified that she had knocked off by the time Mr. Kembe went to the police station. She did not collect any contact numbers of the five people who went to the police station and DW1 did not show her the keys to the motor vehicle.

There was no re-examination.

The third defence witness was Daniel Tembo (DW3), a businessman of Kaminza village and brother to the accused. He testified to the effect that on 8th December, 2018, around 17:00 to 18:00 hours, he was inside his house when he heard people crying outside saying someone had killed a person and they did not know who that person was but Danny's brother who was with the person would know. DW3 did not know the people who were crying because he was inside his house. After that, he heard a knock at the gate and when he sent his watchman to go and check, he came to say that it was the police. He invited them in and they told him to accompany them to the police station. The names of the two policemen were Mr. Makeche and Mr. Mumba. When they arrived at Nyimba Police

Station, they told him that they would keep him there because people were saying that the person who would know the person who shot the deceased was his relative. The following day around 07:00 hours, officer Makeche went and told DW3 to phone his brother so that they could know where he was. When he phoned DW1, he said that he was at the funeral house and that he would report at the police station at 08:00 hours. Officer Makeche told DW3 to tell the accused not to report at the police station as they were going to Mtilizi to collect the motor vehicle keys and the motor vehicle. The police went and picked up his brother, the accused. When they returned, they released DW3 and told him to go home.

DW3 testified that in October, 2019, he received a call from Mr. Josias Banda, a resident of Nyimba, telling him that Misheck Khoswe (PW4) had gone to his house and offered to help out by not testifying against the accused in exchange for money. He wanted Josias Banda to talk to DW3 as he got along well with him. DW3 told Josias Banda that he was not interested in what he was telling him. It was his evidence that his mother-in-law went where he was and told him that she was surprised that a person she did not talk to or discuss anything with went to her home and asked her if she knew that her son-in-law's matter was starting on 1st June, 2020. That, the person also told her that his friend, a police officer, had informed him that the matter was starting on 1st June, 2020 and he should organise witnesses. Further, that he had gone to her so that she could give him money so that he would not mobilise the witnesses. The mother-in-law told PW4 that she had heard what he

had said but she had nothing to say to him and he left. According to DW3, PW4 was not given any money. It was his evidence that he knew PW4 very well because they lived near each other and had lived in that place for about 12 years.

Under cross-examination, DW3 confirmed that the accused person is his brother and that he has an interest to see that he is set free and would be happy if he is set free. He admitted that he had said in examination-in-chief that while he was in the house, he heard people saying that the friend to the accused had killed Layton. He agreed that his house is in a wall fence and said that the yard is 40m x 70m big. It was his evidence that despite the size of his yard, he heard what was being said because people were shouting. However, he did not know who said the words. He stated that he could not go outside to find out who had uttered those words because his leg was swollen and he could not walk.

Upon being cross-examined further, DW3 testified that he was not charged with any offence when he was picked up from his home by Sergeant Makeche and Mumba. He confirmed that he received a call from Josias Banda telling him that PW4 was asking for a bribe and that they did not pay the bribe and did not report the incident to the Anti-Corruption Commission. Further, that PW4 went to the in-laws to ask for a bribe in the month of May, 2020 around the 26th to 28th but that PW4 was not aware that it is the National Prosecutions Authority that decides which witness to call and which witness to leave out. He also did not know that the statements that

the witnesses gave to the National Prosecutions Authority were written as far back as December, 2018.

Under further cross-examination, DW3 admitted that the only information he heard from the people was that they were saying his elder brother was the person who would know who killed Layton. When it was put to him that the reason why those people were saying that was because it was his brother who shot the deceased, DW3 said that that was not what they meant. He admitted that when the shooting took place, he was not there. He stated that since the date of the shooting, no one went to tell him who shot the deceased. There was no re-examination.

DW4 was Francis Zulu. His testimony was that on 8th December, 2018, around 17:00 to 18:00 hours he was coming from his grandfather's house where he had gone to collect two chickens. As he was walking along, he saw two people, one was chasing the other near Chipembe shops. The one chasing the other was tall, dark and fat. He saw him remove a pistol and fire one shot in the air. He fired the second shot which hit the person running in front and he fell down. The name of the person who was shot was Layton Mwanza whom he knew from Kaminza village. He testified that the tall person put on black clothes and the deceased was wearing a white T-shirt which had the word "Love" written across the chest. He left the lane where he was and went closer to where the deceased was. It was his evidence that at that time, the shooter was running towards the shop. He described the area where the

deceased was shot as there being a shop on one side and on the other side, a hammer mill. The shooter ran behind the shop as if going to the tarmac. When DW4 went closer to the deceased, he noticed that he had blood on the left side of the chest. As he stood there, a lot of people came and he was filled with fear and decided to go home. When he arrived home, he informed his wife about the shooting.

Under cross-examination, DW4 stated that he did not witness the shooting but when he observed the person who was shot, he noticed that he had blood on the left part of the chest and he lay down facing up. When it was put to him that having been at the scene he must have seen how the deceased was shot, DW4 said that he was filled with fear when he heard the first gunshot and left the lane which he was using and went to the other lane. It was his evidence that it appeared that the deceased wanted to turn and that is how he was shot at from the front, on the left side of his chest. It was DW4's further evidence that he did not inform anyone about what he knew about the shooting incident and he did not go to the police to inform them that he was at the scene of the shooting and saw who shot the deceased. He said that as a good citizen he decided to just come and tell the court who shot the deceased. When it was put to him that as a good citizen he should have gone to the police to tell them who shot the deceased and thereby help the police to investigate the information at the appropriate time and save the court's time, DW4 said that he was scared to go to the police. When asked what he was afraid of by reporting to the police

when they are the ones who protect the public, DW4 said that at the time he did not have the means which could have enabled him to reach Nyimba Police Station because he lives far from the Police Station. When it was put to him that in his area there is a police post called Musa Police Post where Sergeant Makeche is found, DW4 admitted that he knew Sergeant Makeche but that he is not found at that police post. He said that he did not inform Sergeant Makeche because the vigilante or neighbourhood watch came on the scene. He denied the allegation that PW3 was at the shooting scene. When it was put to him that as a good citizen he failed in his responsibility of reporting to the police or the family of the deceased, he said that he did inform the village headman by the name of Isaac Tembo about what he knew about the shooting on the very day, 8th December, 2018. When it was put to him that since he did not tell the police what he knew about the shooting, whatever he was telling the court was an afterthought, DW4 denied that what he told the court was an afterthought.

In re-examination, DW4 said he did not tell the police or the relatives to the deceased about who shot him because at the scene he left elderly people who also witnessed the incident and he thought they would report it.

The last defence witness, DW5 was Josias Banda. His evidence was that he is not related to the accused in any way but in the past, before he migrated to Nyimba town, they used to stay together in Kaminza village. He could not recall the day, but it was in October, 2019 when he was at home in Mtendere compound in Nyimba when

PW4 went to his home to inform him about the re-arrest of DW1 and that he (PW4) wanted to help with the issue as he knew what transpired. It was DW5's further evidence that PW4 wanted him (DW5) to talk to the brother to the accused (DW3) about his (PW4's) willingness to help with the matter. According to DW5, he told PW4 to talk to DW3 himself as he (PW4) also knew DW3. However, soon after PW4 left, DW5 phoned DW3 about PW4's visit but DW3 showed no interest. DW5 told DW3 that he had heard what he said but he would inform the CIO for Nyimba, Davies Zulu about the incident. It was DW5's testimony that Misheck Khoswe is also known by the name of Misheck Katombola.

Under cross-examination, DW5 said that he did not record the conversation with PW4. He admitted that it was his evidence that he had the conversation with PW4 in October, 2019 and he was not aware that by October, 2019, the docket for the accused was already in the hands of the National Prosecutions Authority. He was also not aware that once a docket is in the hands of the National Prosecutions Authority, no person can change what is indicated in the docket. It was his evidence that he informed the CIO about his conversation with PW4 the same day that he went to visit him at his home. He was not aware that a witness who makes a statement to the police and changes his statement in court can be declared a hostile witness. DW5 stated that the CIO told him that if PW4 came for the second time, he should arrange that he comes with the money and as he is about to hand over the money, the police would apprehend him, but that did not happen as PW4 never

showed up again and that is how the matter died down up to the date of hearing. He denied being among the people who were threatening to beat PW4 for the testimony which he gave in this court and further that he was not even aware that PW4 had been threatened.

There were no questions in re-examination and that marked the close of the defence case.

Both the prosecution and the defence filed final submissions. In the accused's final submissions filed into court on 10th July, 2020, it was submitted that the prosecution had failed to prove the case against him beyond all reasonable doubt. It was argued that the evidence of the prosecution lacked credibility and supported the accused's evidence in many respects. It was submitted that there is evidence of the accused testifying that he neither owns nor does he know how to handle a gun. Further, that the accused did not carry a gun on the material day and did not know that Andrew Lungu had carried one. Arising from this, it was argued that thorough investigation into who owned and was in possession of a gun ought to have been conducted. It was submitted that the failure by the arresting officer, Kebby Makeche (PW6), to carry out investigations on the ownership of the gun went beyond ordinary incompetence and dereliction of duty.

In addition to the above, the defence argued that the arresting officer did not investigate the individuals with whom the accused or Andrew Lungu travelled from Lusaka to Nyimba. According to the

In relation to PW6's statement, the defence submitted that the said statement was introduced onto the court record under cross-examination when the contents were read out in accordance with the guiding procedure outlined in the case of *Chiyovu Kasumu v. The People*². In this regard, the defence argued that in the said statement, PW6 indicated that PW4 had informed him that on 11th December, 2018, he heard two gunshots as he was coming from a football match. Further, that he heard people shouting that a person had been shot and that when he rushed to the scene, he found a lot of people and was told by one of them that the person who would know who had shot the deceased was the elder brother to Danny Kaminza. The defence submitted that the preceding statement is consistent with the testimonies of DW3 and DW4. It was submitted that DW3 testified that he is the young brother to the accused and that he is popularly known as Danny Kaminza. As regards DW4, it was submitted that his testimony was that he witnessed the shooting and that it was a tall, dark man with dark apparel who shot the deceased.

The defence further submitted that the accused was initially charged with being an accessory after the fact of murder before the state entered a *nolle prosequi* and subsequently charging the accused with murder. It was argued that the only reason the state entered the *nolle prosequi* was to facilitate the fabrication of false evidence. The court was invited to take judicial notice of the list of witnesses which was supplied under the initial charge of accessory after the fact and that both Misheck and Meleya appeared on it. It

was submitted that the testimonies before court were changed to meet the fresh charge of murder. The defence further submitted that the testimony of PW3, PW4 and PW6 is unreliable as it is apparent that it was rehearsed. Further, that the said witnesses were coached to justify the charge of murder.

It was further contended that PW3 conceded under cross-examination that she gave the police a previous inconsistent statement which is fundamentally different from what she told the court and that the reason for the fundamental difference was not explained to the court.

As regards PW4, it was contended that whilst giving eerily similar evidence to portions of the statement of Misheck Khoswe given to the police on 11th December, 2018, he denied that the signature on the said statement was his. Arising from this, the defence argued that the only inference to be drawn from the contradictory statement of PW4 is that he (PW4) was coached to deny his own signature so as to ensure that his statement is not admitted into evidence. It was submitted that PW4 and PW6 were seen conversing whilst PW4 was still on the stand when the court had taken a short break and that this piece of evidence was not challenged by the state.

The defence submitted further, that PW3 and PW4 are witnesses with a possible interest to serve. In support of this proposition, reliance was placed on the cases of *George Musupi v. The People*³; *Simon Malambo Choka v. The People*⁴ and *Kambarage Mpundu*

*Kaunda v. The People*⁵. Resulting from this, it was submitted that PW3 is not only the aunt to the deceased but that she also gave a previous inconsistent statement and told an untruth on a material particular regarding what she claimed to have observed on the material day. That she is therefore, an unreliable witness as held in the case of *Fawaz Shawaza and Prosper Chelelwa v. The People*⁶.

The defence further contended that there is evidence that PW4 was soliciting for a bribe from the accused's family so that he could give favourable testimony for the accused. That, this was corroborated by DW1, DW3 and DW5. In addition to the foregoing, the defence submitted that it was highly unethical for PW6 to have refused to tender in the statement for Misheck Khoswe which he authored as it was his duty to place before court all evidence as held in the case of *Sakala v. The People*⁷. Further, that PW6 gave incoherent and twisted evidence as regards the existence of two Misheck Khoswes when the state through the advocates, stated that they only knew of one Misheck Khoswe. It was submitted that this was a clear sign of unfair and fraudulent investigations on the part of PW6 and leads to an inference of fabricated and false evidence. That, it was incompetent of PW6 as the arresting officer, to have carried out investigations into a serious offence in such a casual manner thereby occasioning unfairness on the accused. In support of this argument, reference was made to the case of *Joseph Mulenga and Albert Joseph Phiri v. The People*⁸ where it was held:

“What is required of the prosecution is to adduce evidence to prove all material particulars of the offence charged beyond reasonable doubt in a fair manner.”

To further augment their case, the defence made reference to the case of *Major Isaac Masonga v. The People*⁹ where it was held as follows:

“It is trite law and a constitutional duty for the prosecution to guarantee a fair trial and a fair trial starts with investigations. Any shortcomings in the investigations may seriously jeopardise the right to a fair proceeding, and thereby also prejudice the accused person’s rights to be presumed innocent... The courts have a mandatory duty not only to guarantee a fair trial, but also to ensure that even the investigations are conducted in accordance with well-established principles of fair trial for all suspects regardless of their social status.”

In further support of the argument that the investigations were not done in a fair manner, I was referred to Article 18 (1) and (2) (b) of the Constitution of Zambia which guarantees a fair trial. On this basis, it was submitted that the deposition for PW4 was not availed to the defence thereby denying the accused the opportunity to raise a defence at the earliest possible opportunity.

As regards the evidence of PW5, the defence argued that the said evidence suggesting that the accused confessed to him about killing somebody is not reliable. That PW5, had in examination-in chief, concealed the fact that it is the police officers who informed him that the person he was with had killed a person. Further, that there is evidence that the police only recorded a statement from PW5 several months after and yet he (PW5) informed the police of

the alleged confession on the 8th December, 2018. Thus, the defence argued that there are circumstances in this case which indicate that some witnesses were coached to lie or at least rehearsed evidence. Therefore, it is not safe to rely on PW5's evidence of the alleged confession as there is no supporting evidence of the confession. Further, that the conduct of the accused did not suggest in any way that he committed the offence as there is evidence that the accused drove back to the crime scene to check on the deceased. That, this was corroborated by the evidence of DW2, a female police officer to whom the accused reported this matter at Nyimba Police Station in the night of 8th December, 2018. It was submitted that given the conduct of the accused, it would be illogical to suggest that he confessed to killing the deceased.

In their final submissions dated 10th July, 2020, the state submitted that the prosecution had discharged its legal burden of proving the case as held in the case of *Mwelwa Muroso v. The People*¹⁰. It was submitted that there was evidence of PW2 and PW3 who witnessed what transpired on the material day. That PW2 and PW3 saw the accused chase after the deceased and the subsequent shooting that occurred.

It was the state's further submission that there was evidence of the accused beating the deceased and that the accused's identity could not have been mistaken as PW3 knew the accused from childhood. The state contended that PW3 is a credible witness and had no

motive to lie against the accused. Further, that the evidence of PW3 to the effect that she asked the accused how he could shoot the deceased over a bottle of beer was not challenged by the defence and therefore, this evidence stands. In support of this proposition, the case of *Joseph Mulenga v. The People*¹¹ was referred to, wherein the Supreme Court stated that:

“The trial court or the appellate court cannot ignore the uncontroverted evidence.”

The state submitted that the evidence of PW3 which was not challenged corroborates that of PW4 who testified that he saw the accused give the gun to an unknown person at the scene of crime. That this piece of evidence proves that the accused had possession of the gun and did shoot the deceased.

It was the state's further submission that there was PW5's testimony that he assisted the accused on the night of the incident with the vehicle which had gotten stuck in the mud. That, PW5 is on record as saying that the accused told him to run when he saw a motor vehicle approaching, as he (the accused) had killed a person. It was contended that this was an admission and PW5 had no motive to falsely implicate the accused.

Regarding the witness statement for PW3, the state contended that the said exhibit P1, did not have some of the statements made before court as witness statements are a summary of oral evidence that witnesses give in court. In this regard, it was submitted that there is no law which forbids the court from admitting evidence that is not recorded in the witness statement.

In concluding its submissions, the state contended that the prosecution had proved beyond all reasonable doubt that the accused, with malice aforethought, did cause the death of the deceased.

I have carefully considered the evidence on record and the parties' final submissions. On the evidence before me I find that the following issues are not in dispute and have been proved; it is not in dispute that on 8th December, 2018 there was a skirmish at Chipembe stores between the deceased, the accused and Andrew Lungu who was in the company of the accused. The skirmish was instigated by the deceased when he took an already opened bottle of castle beer from the motor vehicle (exhibit P1), without permission. As a result, the accused and Andrew Lungu were incensed and began to beat up the deceased. They also dragged him to the motor vehicle so that they could take him to the police. In the course of dragging him to the car, the deceased ran away and they both chased after him. In the process, the deceased was shot with an unknown firearm and consequently died soon thereafter. After the deceased was shot at, both the accused and Andrew Lungu hurriedly drove away from the crime scene. After about ten minutes, the accused was seen driving back towards the scene of the shooting and then diverting towards the hospital followed by a police Land Cruiser after some time. A few hours later the motor vehicle which was driven by the accused was found abandoned in a maize field belonging to PW5.

What is in dispute in this case and for adjudication by this court is, who shot and caused the death of the deceased. This court must further determine whether or not the death of the deceased was caused with malice aforethought. I must state from the onset that the case against the accused is mainly anchored on the evidence of PW2, PW3, PW4 and PW5.

I will start by analysing the evidence of PW2, Robson Phiri who testified to the effect that he saw the accused and Andrew Lungu both beating the deceased after the deceased took a bottle of castle beer from P1. That thereafter, he saw them both chase after the deceased and heard gunshots soon thereafter. Throughout his evidence, PW2 maintained that he only saw the beating of the deceased and did not see what transpired after the deceased, the accused and Andrew Lungu turned away from where he was standing. I find that his testimony was truthful and consistent, I accordingly accept it.

With regard to PW3, Meleya Tembo, she gave a detailed account before this court of how she *inter alia*, saw the accused and Andrew Lungu pursuing the deceased immediately before being shot at by the accused. She further narrated how she persistently pleaded with the accused not to cause grievous harm to the deceased and offered him a K20 to replace the bottle of castle beer that was taken by the deceased. According to her, the accused refused to listen to her and was adamant on inflicting injury on the deceased because

of what he had done. That, he therefore, proceeded to produce a firearm which he used to shoot the deceased.

It is however, notable that there is considerable inconsistency between the statement that PW3 previously gave to the police which was produced into evidence as P2, and the evidence that she gave before this court. I have further noted that PW3 did not give any explanation as to why her statement given to the police and the evidence tendered before this court were significantly inconsistent considering that the statement was given to the police shortly after the incident. Thus, it is logical for me to draw a conclusion that the sequence in which the events unfolded on that day was fresh on her mind at the time. In making a determination on the issues raised by the said inconsistencies, I am guided by the case of *Simon Miyoba v. The People*¹² in which the Supreme Court held *inter alia*, that:

- (i) *The general rule is that the contents of a statement made by a witness at another time, whether on oath or otherwise, are not evidence as to the truth thereof; they are ammunition, and only that, in a challenge of the truth of the evidence the witness has given at the trial.*
- (ii) *It is necessary for the trial court to have before it formally the previous statement so that it can compare it with the evidence given in court and assess for itself the seriousness of the alleged discrepancies."*

After a thorough analysis of PW3's evidence and the case cited above, I have come to the conclusion that the credibility of PW3's evidence before this court has been adversely affected and

challenged. I find that her evidence is not truthful and consequently do not accept it.

In relation to the evidence of PW4, Misheck Khoswe, he testified to the effect that upon hearing gunshots, he rushed to the place where the sound of the gunshots had emanated from and saw the accused throw a gun to Andrew Lungu as they were running away from the crime scene. He also gave an account of how he personally contacted the police to inform them of the incident and subsequently led them to the place where the accused was last seen driving off to. He further testified that when they found the motor vehicle, P1 which was driven by the accused and had been abandoned, he met PW5 there who told him that the accused had run away upon seeing the lights of the oncoming motor vehicle.

It was his evidence that PW5 further told him that the accused had told him that he had killed someone and that they must run away. When cross examined, he admitted that he had given a statement to the police and when shown the statement that had been availed to the defence which contained all his particulars, he said that it was not his statement. Owing to his denial, the statement was not produced in evidence. On the other hand, PW6, the arresting officer, when initially asked if he had recorded a statement from Misheck Khoswe, admitted that he had. When shown the statement, he said that it was not the statement that he had recorded from Misheck Khoswe but admitted that it was actually hand written by him. PW6 nonetheless refused that the statement be formally produced into

evidence. I am alive to the fact that this court cannot make a determination on a statement that has not been formally produced before it. However, having taken into account PW4's evidence and all the circumstances surrounding this case, I have arrived at the conclusion that I cannot attach much weight to the evidence tendered before court by PW4. It is my considered view that PW4 was not a credible witness and as such I am at pains to accept his evidence that he in actual fact saw the accused throwing a firearm to Andrew Lungu after the deceased was shot.

Therefore, having arrived at the conclusion not to accept the evidence of PW3 and PW4 with regard to who shot and caused the death of the deceased, it is my considered view that the case against the accused is anchored on circumstantial evidence. This is because no one actually saw what transpired after the accused and Andrew Lungu chased after the deceased. This being the case, I must resolve whether or not from the remainder of the pieces of evidence on record only an inference of guilt can be drawn as guided by the celebrated case of *David Zulu v. The People*¹³. In this case the Supreme Court made the following pronouncements:

"It is palpably clear that the evidence available at the trial was circumstantial evidence. It is competent for a court to convict on such evidence as it is to convict on any other types of admissible evidence. However, there is one weakness peculiar to circumstantial evidence; that weakness is that by its very nature it is not 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 an inference of the fact in issue may be drawn.

(ii) It is therefore incumbent on 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. The judge must be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such a degree of cogency which can permit only an inference of guilt.

As stated above, it is not in dispute that on 8th December, 2018 the accused and Andrew Lungu were aggrieved after the deceased took a bottle of castle beer from the motor vehicle which was being driven by the accused. They were then seen beating the deceased and dragging him to the motor vehicle so that they could take him to the police. When the deceased freed himself from their grip, he ran away and they chased after him. Shortly after that, gunshots were heard, the deceased was found shot on the left side of his chest and was lying down. At that point, both the accused and Andrew Lungu were seen running towards the motor vehicle and drove away from the crime scene. After some minutes, the accused was seen driving back towards the crime scene and was alone in the motor vehicle. The motor vehicle was subsequently found by the police in PW5's maize field where it had been abandoned by the accused after it got stuck.

The gist of the evidence of PW5, Tyson Kope Standford Ngoma, before this court was that he found the accused in one of his maize fields on 8th December, 2018 between 19:00 hours and 20:00 hours as he was on his way back from one of his fields. It was his evidence that the accused at that point requested for his help

because his motor vehicle was stuck. That, as PW5 was helping the accused, he saw lights from an oncoming motor vehicle and informed the accused about it. The accused told him that it was the police and so they must run away because he had killed someone where he had come from. He added that immediately after saying that, the accused removed the keys from the ignition and ran away. According to PW5, he was frightened and perturbed to learn that the accused had killed someone and feared for his own life as well. The accused on the other hand, denies ever confessing to PW5. This becomes a classic tale of one's word against the other. In resolving which version I find to be true, demeanour of the witnesses becomes an important consideration. Commenting on the value of demeanour of witnesses in aiding a court to establish the truthfulness of witnesses in the case of *Eddie Christopher v. Lawrence Zimba*¹⁴, Acting Chief Justice Lombe Chibesakunda observed that:

"...It is a well-established principle that the learned trial judge as a trier of facts, has advantage of observing the demeanour of witnesses to determine as to who is telling the truth."

Bearing in mind the Supreme Court's observation in the case of *Eddie Christopher v. Lawrence Zimba* above, I am of the view that careful attention to demeanour of witnesses by a trial judge is cardinal. In a truthful witness, there is a calmness and simplicity which comes naturally; while an insincere witness will often exaggerate circumstances and forget facts where he would be open to contradiction while remembering others which he knows cannot

be disputed. Further, a witness who is not truthful will often reply evasively or dismissively, show reluctance in giving adverse testimony and pretend not to hear a question in order to buy time as he ponders what answers to give.

Having had sight of PW5 as he was testifying, I noted that his desire was to tell the truth as to what he heard and observed on that evening. He had a calmness and simplicity that came naturally to him and did not show the characteristics of an insincere witness as outlined above. Further, he did not give any impression that he had a motive to falsely implicate the accused in this matter. Furthermore, his evidence was consistent and was not rebutted during cross examination.

DW1 on the other hand, seemed to have selective amnesia when it came to recalling adverse testimony against him. Thus, while admitting that PW5 was the person who tried to help him move the vehicle when it got stuck in the maize field and that he was a good Samaritan who did not know what happened at Chipembe, DW1 could not recall PW5's testimony that he (DW1) told him to run after seeing lights from a motor vehicle saying it was the police that had come as he (DW1) had killed someone or that PW5 had testified that he ran and hid behind a tree out of fear and only came out of hiding because of the bicycle he had left behind.

All in all, I find that PW5 was a credible witness and I therefore accept his evidence in its entirety. I find that the accused voluntarily informed PW5 that he had killed the deceased earlier on

that day upon realising that the oncoming lights were coming from the motor vehicle of the police. I am of the view that at the time of the confession, DW1 had no time to concoct a story and he told PW5 the truth, that he had killed someone earlier that day. As a result, he immediately fled from the police and abandoned the motor vehicle in PW5's field for fear of being arrested. I consequently find that the decision by the accused to report the incident at Nyimba Police Station later that night with the story that Andrew Lungu had killed the deceased was merely an afterthought.

I am fortified by the Supreme Court decision in *Brighton Sakubita and Another v. The People*¹⁵ in which the court endorsed the view that a neighbourhood watch chairperson or member as the case may be, is not a person in authority. Confessions made to this category of persons are admissible without the necessity or expectation of administering a caution. I am of the view that similarly, PW5 was not a person in authority and therefore, the confession made to him is admissible without the necessity or expectation of administering a caution. I therefore find admissible the confession that was made to PW5.

It is my considered view that the fact that ownership of the gun was not proved is not relevant in this matter. The post mortem report, exhibit P3, stated that the deceased died as a result of a gunshot wound. The issue is that the deceased was shot and the accused without any solicitation from PW5 disclosed that he had killed someone on that day.

At this point it is relevant to consider whether the accused caused the death of the deceased with malice aforethought. The offence of murder and malice aforethought are provided for by Sections 200 and 204 respectively, of the Penal Code as follows:

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

204. 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;

On the evidence before me, it has been proved that the accused beat up the deceased after he took a bottle of castle beer from the motor vehicle without permission. There is the confession by the accused to PW5 that he had killed a person that day. As already allude to in the preceding paragraphs, the deceased died from a gunshot wound as evidenced by the postmortem report. It has been established that the deceased was beaten by the accused; the accused himself having admitted beating the deceased. The use of a gun confirms that there was intention on the part of the accused to cause grievous harm as captured under paragraph (a) of section

204 of the Penal Code. In light of the aforesaid, it is my considered view that the accused intended to cause grievous harm to the deceased which consequently caused his death.

I therefore, find that the accused caused the death of the deceased with malice aforethought and is therefore guilty of the offence of murder. I accordingly convict him of the same.

Section 201 (1) of the Penal Code, Chapter 87 of the Laws of Zambia provides for a mandatory death sentence on a person convicted of murder, unless there are extenuating circumstances. Mrs. Liswaniso submitted on behalf of the convict that from the evidence adduced before this Court, it is evident that the deceased in this matter picked a bottle of Castle Lite beer belonging to the convict and a fight ensued between the convict and the deceased; therefore, the deceased was the aggressor in this action. Mrs. Liswaniso also asked the Court to consider that the convict and his friend had been drinking and that the convict went back to the crime scene, showing that he was remorseful for his actions. It was submitted that all these factors amount to extenuation circumstances. She urged the Court to mete out any other sentence other than death.

I have considered the submissions by Mrs. Liswaniso. While acknowledging that the deceased was the aggressor in the sense that he took a bottle of beer belonging to the convict without his permission, I am of the view that the reaction by the convict to the provocation was out of proportion to the provocation by the deceased. Further, with respect to the submission that the accused

had been drinking with his friend before the commission of the crime, the evidence on the record shows that the convict and Andrew Lungu only bought two bottles of beer and were not drinking before that. The evidence shows that the two took sips of the beer before the deceased took one of the bottles. It is clear, therefore, that the convict was not intoxicated when he committed the crime. Consequently, I find that there are no extenuating circumstances in this case, and I impose the mandatory sentence of death on the accused and pronounce that he shall be hanged by his neck until he is dead.

Informed of Right of Appeal.

Delivered at Chipata this 20th day of August 2020.



DR. W. S. MWENDA
JUDGE