

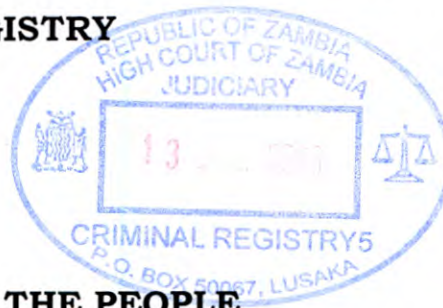
IN THE HIGH COURT FOR ZAMBIA

HP/089/2020

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Criminal Jurisdiction)



BETWEEN:

THE PEOPLE

vs.

RONNY CHINYAMA

CEPHAS NGANDU

CHANDA MUNKHOMBWE

STEPHEN PHIRI

MUMBA KASELA

**BEFORE HONOURABLE LADY JUSTICE P. K. YANGAILO ON
THE 13TH DAY OF JULY, 2020, IN OPEN COURT.**

For the People:

*Mrs. R.M. Jackson – State
Advocate, National Prosecutions
Authority*

For the 1st, 2nd & 3rd Accused:

*Mr H. Mulunda – Legal Aid
Counsel, Legal Aid Board*

For the 4th & 5th Accused:

*Ms. M. Marabesa, Senior Legal Aid
Counsel & Dr. O. Kaaba, Pro Bono
Counsel – Legal Aid Board*

RULING

CASES REFERRED TO:

1. *Mwewa Muroso vs. The People* (2004) Z.R. 207 (S.C.);
2. *The People vs. Japau* (1967) Z.R. 95;
3. *The People vs. Winter Makowela and Robby Tayabunga* (1979) Z.R. 384;

4. *The People vs. Kombe Joseph Chimpako (2010) Vol. 1 Z.R. 25; and*
5. *Patson Simbalula Chiblele vs. The People (1991) S.J. (S.C.).*

LEGISLATION REFERRED TO:

1. *The Penal Code, Chapter 87, Volume 7 of the Laws of Zambia; and*
2. *The Criminal Procedure Code, Chapter 88, Volume 7 of the Laws of Zambia.*

1 INTRODUCTION

1.1 The accused persons **Ronny Chinyama, Cephass Ngandu, Chanda Munkombwe, Stephen Phiri** and **Mumba Kasela**, stand charged with one count of the offence of Murder, contrary to **Section 200** of **The Penal Code**¹.

1.2 The particulars of offence are that, **Ronny Chinyama, Cephass Ngandu, Chanda Munkombwe, Stephen Phiri** and **Mumba Kasela**, on the 26th day of February, 2020, at Lusaka, in the Lusaka District, of the Lusaka Province, of the Republic of Zambia, did murder **Jimmy Daka**.

1.3 For convenience's sake, I will refer to Ronny Chinyama as (A1), Cephass Ngandu as (A2), Chanda Munkombwe as (A3), Stephen Phiri as (A4) and Mumba Kasela as (A5).

2 PROSECUTION'S EVIDENCE

2.1 The Prosecution called a total of seven (7) witnesses in support of their case and closed their case. PW1 was **Boyd Phiri**, a Caretaker residing in Linda Compound, who testified that on 19th February, 2020, at around 20:00 hours, the deceased who appeared drunk passed through his yard and when he was told that he was lost, he went straight to A3's yard. A3 started

beating the deceased with a weapon and moved him from his place to the road side after which A1 who lived with PW1 joined him and they both continued to beat up the deceased. The place where the deceased was being beaten was near his house and PW1 could see what was happening as there were some security lights that lit up the place. There was no other persons there except the two that were beating the deceased.

- 2.2 According to PW1, the deceased was dragged further away to a place that was much darker where PW1 could not see clearly, but that he heard A1 asking for a machete and say that the people who were gassing should not be let free. PW1 later heard a voice asking where they had put the genitals that had been cut off from the deceased and that A1 responded that he had just thrown them where the body was.
- 2.3 PW1 further testified that A1 later went back to his home and got some water saying that he needed to wash off the bad luck. He then went to sleep. Later, when A1 heard the cries of people outside, he woke up and told PW1 that if anyone came looking for him, he should tell them that he did not know him. Soon after, A1 left the premises.
- 2.4 PW2 was **Lonas Mbewe**, the wife to PW1, who is a house wife and resides in Linda Compound. She testified that on 19th February, 2020, she was seated outside her house with PW1 and A1 when the Deceased, who appeared drunk passed by them and

went next door to A3's place, where he slept by the door. A3 came outside with a weapon in hand and started beating the deceased alleging that he was one of the gassers. A3 further dragged the deceased to the roadside and continued beating him, at which point A1 stood up and joined A3 in beating the deceased.

- 2.5 PW2 further stated that she and PW1 went inside their house and locked the door, but that she continued to peep through a window. She could clearly see what was happening as the place where the deceased was dragged to was near her home.
- 2.6 Later, A4 went to the place where A1 and A3 were beating the deceased. A4 was not able to beat the deceased as he appeared to be very drunk and therefore, he left the scene. Shortly, A5 went to the scene with a machete and joined in the beating of the Deceased. At that point, A3 decided to go home and on his way home, he continuously shouted that they had apprehended a gasser. The two that remained at the scene, A1 and A5, decided to undress the deceased and continued to beat him. A1 then asked A5 for the machete to cut off the deceased's genitals.
- 2.7 A group of people that gathered asked A1 where he had taken the genitals that he had cut from the deceased and he told them that he had thrown them on the Deceased's body. On the suggestion of someone in the crowd, the body of the deceased was set ablaze. A1 then left the scene and went to PW2's home where

washed his hands saying that he was washing off bad luck.

- 2.8 Later that night, upon hearing some people crying outside, A1 woke up and told PW1 and PW2 that if anyone came looking for him, they should say that they did not know him. He then left the premises. In Cross-Examination, PW2 confirmed that she did not see the people who set the deceased ablaze.
- 2.9 PW3 was **Chanda Nkuwa**, a 17 years old pupil residing in Linda Compound. His testimony was that on 19th February, 2020, at around 20:00 hours, he saw a mob of people shouting "gasser" and saw A1, A3 and A5 beating the deceased. He did not see A4, but saw A2 who was standing on the side with a stick, although he did not participate in the beating. PW3 knew A1 because he had worked with him for a month, while A2 and A5 were his neighbours. PW3 stated that he had known A3 for a year. In cross-examination, PW3 confirmed that he did not see the people who burnt the deceased.
- 2.10 PW4 was **Isaac Mbilichi**, a 40 year old resident of Linda Compound, with a speech impairment, who testified through an interpreter that on 17th February, 2020, at around 10:00 hours, he gave A5 his machete which A5 asked to borrow from him for cutting firewood. The machete was returned to PW4 on 23rd February, 2020 and on 28th February, 2020, at around 20:30 hours, three police officers with one handcuffed person went to his house. The police officers asked

PW4 where the machete was and took him to the police station where they recorded a statement from him. Later, PW4 went with the police officers to look for the machete and after they retrieved the machete, PW4 was taken back to the police station where he signed the statement. He was then released by the Police.

2.11 PW5 was **Joseph Manda**, a Detective Sergeant, who testified that on 9th March, 2020, he reported for work at the Criminal Investigations Department and was assigned to conduct a scene reconstruction for five suspects who were in custody. The General Criminal Investigations Office was prepared in readiness for the interview and the 5 accused persons brought in. PW5 cautioned the accused persons, informed them of the purpose of the interview and of their rights. A3 who is a Juvenile had his mother, Mwansa Mulalu, in attendance, whilst the other four Accused persons were not represented. According to PW5 the accused persons voluntarily and willingly accepted to take the officers to the scene of crime in Linda Compound.

2.12 PW5 further testified that each accused person stated the role that they played and the whole process was captured on video by Detective Sergeant Kazhimoto. Upon finishing the scene reconstruction, none of the accused expressed displeasure on how the scene reconstruction was conducted and they drove back to Chilanga Police Station.

2.13 Under cross-examination, PW5 confirmed that there was nothing recovered at the scene when they went for

scene reconstruction. He was not aware if any officers had been to the scene of the crime prior to the scene reconstruction. According to him, there was nothing anomalous about the accused persons who had denied the offence, leading the police to the crime scene.

2.14 PW6 was **Patron Kazhimoto**, a Scene of Crime Officer stationed at Lusaka Division, who testified that on 9th March, 2020, at the Lusaka Division Scene of Crime Office, he was assigned to attend to a scene of crime reconstruction for a murder which Chilanga Police Station was investigating. He went to Chilanga Police Station, with a Panasonic video camera and whilst at Chilanga he met Detective Sergeant Manda, who was the interviewer for that proceeding. The five accused persons were brought inside the General Criminal Investigation Department Office and before they could proceed with the assignment, Detective Sergeant Manda informed the accused persons of their rights to have either legal, friend or family representation during the proceeding.

2.15 PW6 testified that this was the first part of the proceedings which he captured on video. Among the accused persons, A3 had his mother attendance, whilst A1, A2, A4 and A5 opted to proceed without any representation. The scene reconstruction which was captured on video began with A1 showing the interviewer where the victim was killed and was followed A2, A3, A4 and A5, respectively. PW6 further testified that he produced 3 DVD copies of the scene

reconstruction. The video was played in Court and it showed the five accused persons showing the police where the incident happened and that all the five accused persons denied having murdered the deceased.

2.16 In cross examination, PW6 confirmed that none of the accused persons stated that they murdered the deceased. He further confirmed that whilst taking the video during reconstruction of the scene of the crime, he was led to the scene by persons who knew where the deceased died from. He also stated that it was normal to be led to the scene of the crime by accused persons who had denied committing the offence as the basis of the leading is to interpret the physical evidence.

2.17 PW7 was Detective Sergeant **Kennedy Chiluba Chisulo**, stationed at Chilanga Police Station, who testified that on 25th February, 2020, he was allocated a docket for a case of murder and he instituted investigations into the matter. The complainant in this matter, Willard Daka, explained to PW7 that his Uncle Jimmy Daka, the deceased, who had travelled to Linda Compound to attend his sister's funeral, had been killed and set ablaze after being suspected of being a gasser.

2.18 PW7 further testified that the body of the deceased was taken to UTH mortuary to await post mortem. On 22nd February, 2020, a post mortem was conducted on the body of the deceased and the Post Mortem Report

given to him. PW7 stated that through the help of their informers, the names of the suspects were availed to him and together with other officers, they apprehended the suspects. Through further investigations, PW7 learnt that the suspects were involved in killing the deceased and that a machete and a pick handle were used in the killing.

2.19 Furthermore, PW7 testified that A5 led to the recovery of the machete from Isaac Mbilichi and that A2 led them to the recovery of a black pick handle. PW7 later engaged Scene of Crime Officer Detective Sergeant Kazhimoto to help conduct a crime scene reconstruction. Following the crime scene reconstruction, PW7 decided to charge the accused persons with murder. Following a warn and caution statement, the accused persons freely and voluntarily replied denying the charge.

2.20 PW7 identified all exhibits collected during investigations and they were admitted into evidence as follows: -

1. Machete – marked as **P1**;
2. DVD – marked as **P2**;
3. Pick Handle – marked as **P3**; and
4. Post Mortem Report– marked as **P4**;

2.21 In cross examination, PW7 confirmed that the incident happened during the time that several cases of gassers were reported around the country and suspected gassers were beaten by mobs. He further confirmed that it was not strange for persons to go and watch

what was happening when a suspected gasser was caught. Furthermore, PW7 testified that A5 borrowed the machete at the time when there was noise that a suspected gasser had been caught and confirmed that the machete which had not been subjected to forensic examination, cannot be scientifically proven to have been used as a weapon to cause the alleged death. He also testified that he would not know if the deceased's body was missing genitals and confirmed that the Post Mortem Report did not state anywhere that the deceased's genitals had been cut off.

2.22 In re-examination, PW7 testified that the machete had not been scientifically examined because it had exchanged hands and had been used in other activities. He further testified that he apprehended the accused persons, based on information that he received from informers.

3 SUBMISSIONS

3.1 The Prosecution closed its case and Learned Defence Counsel for 1st, 2nd and 3rd accused persons submitted that he would rely on the evidence on record. Learned Defence Counsel for the 4th and 5th accused persons, made *viva voce* submissions, wherein he submitted that the Prosecution's evidence had not in any material way connected A4 to the commission of the alleged offence. He further submitted that PW2 who had direct observation of the events that transpired leading to the death of the deceased testified that A4 did not

participate in the killing of the deceased as he was extremely drunk. Counsel based his submissions on the case of ***Mwewa Muroho vs. the People***¹ and prayed that the said Accused person, Stephen Phiri (A4) be acquitted, as the State had not led any material evidence connecting him to the crime. In response, the Prosecution's Learned Counsel stated that they would rely on the evidence on record.

4 THE LAW

4.1 At the close of the Prosecution's case, the Court adjourned the matter to consider whether or not a *prima facie* case had been established against the accused persons. If the Prosecution evidence is such that a reasonable tribunal might convict upon it should the Defence offer no explanation, then there is a case to answer. The procedure to be adopted is highlighted under **Section 291 (1) of The Criminal Procedure Code**², which provides as follows: -

"When the evidence of the witnesses for the prosecution has been concluded, and the statement or evidence (if any) of the accused person before the committing court has been given in evidence, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding."

4.2 The aforementioned position was reiterated in the case of ***The People vs. Japau***², where it was held as follows: -

"A submission of no case to answer may properly be upheld if an essential element of the alleged offence has not been proved, or when the prosecution evidence has been so discredited by cross-examination, or is so manifestly unreliable, that no reasonable tribunal could safely convict on it."

4.3 Provided that there has been sufficient evidence adduced by the Prosecution which, if accepted, would justify a conviction, then the Court should rule that there is a case to answer. I am guided in this regard by the leading Supreme Court Judgment of ***Mwewa Muroso vs. The People***¹, cited by Defence Counsel for 4th and 5th Accused Persons, wherein the Supreme Court of Zambia guided as follows: -

"A submission of no case to answer may properly be upheld:-

(a) When there has been no evidence to prove the essential element of the alleged offence; and

(b) When evidence adduced by the prosecution has been so discredited that no reasonable tribunal could safely convict on it."

4.4 At this stage I am not required to delve into the strict merits of the case, but need only ascertain whether the Prosecution has established a *prima facie* case against the Accused persons, that is if the Prosecution evidence is such that a reasonable tribunal might convict upon it should the Defence offer no

explanation. I must state that the position of the law at this stage, is that the Court should not concern itself with the quality of the evidence by considering the veracity of various witnesses and deciding which evidence to accept. In the case of **The People vs. Winter Makowela and Robby Tayabunga**³, it was stated that: -

"If however, a submission is that there is no case to answer the decision should depend not so much as to whether the adjudicating tribunal (compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal may convict on the evidence so far laid down before it there is a case to answer." (Court's emphasis)

4.5 The charge of Murder is provided for in **Section 200** of **The Penal Code**¹ and reads as follows: -

"Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder." (Court's emphasis)

4.6 This provision essentially entails finding firstly, that the accused person did cause the death of the Deceased and secondly, that he did so with malice aforethought. In the case of **The People vs. Kombe Joseph Chimpako**⁴, it was held that: -

"A prima facie case does not mean proving each and every ingredient of the offence charged. If there is evidence to prove one element then there is a prima facie case. That, sufficiently to require him to make a defence does not mean to prove beyond a reasonable doubt."

5 ANALYSIS AND FINDINGS

5.1 I will now turn to make my findings in respect of the prosecution's evidence adduced before me. The following facts were adduced before me: -

1. *That on 19th February, 2020, A3 was seen dragging the Deceased to the roadside and beating him with a weapon.*
2. *That A1 and A5, joined A3 in beating the Deceased and that A3 left whilst A1 and A5 remained beating the deceased.*
3. *That A4 arrived at the scene of the incident but that he did not participate in beating the Deceased as he was extremely drunk.*
4. *That A2 was seen at the scene of the crime with a stick in his hands.*
5. *That the Deceased was set ablaze.*
6. *That the cause of death as per the Post Mortem Report produced by PW7 indicates that the Deceased died as a result of inhalation of smoke (Toxic Gases) due to fire due to assault by mob.*

5.2 I have considered the testimony of PW1, PW2, PW3, PW4, PW5, PW6 and PW7 and now turn to determine whether the Prosecution has led cogent evidence to prove the essential element of the alleged offence, that warrants putting the Accused persons on defence. The essential element in this case would be whether the accused Persons caused the death of the Deceased.

5.3 As to the common law doctrine of causation, it is a requirement that the evidence established an unbroken link between the unlawful act or omission and the immediate cause of death for murder to be

established. In the case of **Patson Simbalula vs. The People**⁵, the Supreme Court had this to say: -

"Where a person inflicts an injury and the injured person later dies of a cause not directly created by the original injury, but caused by it, the requirement of causation is satisfied."

- 5.4 The import of this holding is that even if the immediate cause of the death is not the original injury or unlawful act or omission as the case may be, the immediate cause of the death should have been caused by the original injury. This clearly establishes the chain of causation and the accused persons cannot escape liability. It follows, therefore that for a conviction of murder to be sustained, it must be proved beyond reasonable doubt that the acts of the Accused persons were either the direct or latent cause of the deceased's death.
- 5.5 According to the Post Mortem Report produced at trial, the immediate cause of death was found to be inhalation of smoke (toxic gases) due to fire as a result of an assault by mob. On the whole of the Prosecution evidence before me at this stage, A1, A3 and A5 have been identified as the ones that were beating the Deceased, while A2 stood by holding a weapon.
- 5.6 Based on the foregoing authorities and the Prosecution's evidence on record before me, I am satisfied that the Prosecution has established a *prima facie* case against the accused persons requiring **A1, A2, A3** and **A5** to make their defence and I therefore

put them on their defence. The said accused persons are informed that they have the following rights: -

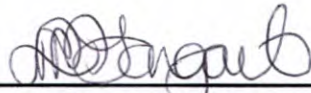
1. To give testimony on Oath;
2. To give unsworn evidence from the dock;
3. To choose to remain silent; and
4. To call witnesses.

5.7 With regards **Stephen Phiri (A4)**, I am not satisfied that the Prosecution has established a *prima facie* case against him as there is no direct evidence implicating **A4** in the commission of the offence. **Section 206** of **The Criminal Procedure Code**² states as follows: -

"If, at the close of the evidence in support of the charge, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case, and shall forthwith acquit him."

5.8 Based on the foregoing authority, I dismiss the case against **Stephen Phiri (A4)** and acquit the said accused person of the offence of murder. I order that he be released forthwith.

DELIVERED AT LUSAKA THIS 13TH DAY OF JULY, 2020.



P. K. YANGAILO
HIGH COURT JUDGE