

IN THE HIGH COURT FOR ZAMBIA

HP/105/2020

AT THE CRIMINAL REGISTRY

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BETWEEN:

THE PEOPLE

VS.

LAMECK SHAMBANA

WILSON MUSONDA

CHRIS MWIKA

JAMES BANDA

Before the Hon Madam Justice Mrs. Irene Zeko Mbewe in Open Court

For the State: Mrs. A. Mwanza – National Prosecutions Authority

*For the Defense: Mrs. M. M. Banda, Mr. Longwe and Ms. M. K. Chulu-
Legal Aid Board*

JUDGMENT

Cases referred to:

- 1. Woolmington v DPP [1935] AC 462*
- 2. Ilunga Kalaba and John Masesu v The People [1981] ZR 102*
- 3. Mutambo v The People [1965] ZR 15*
- 4. The People v Njovu [1968] ZR 132*

5. *Kambarange Kaunda v The People* [1990-92] ZR 215
6. *Peter Yotamu Hamende v The People* [1977] ZR 184
7. *Yokoniya Mwale v The People* SCZ No 205 of 2014
8. *Edward Sibupiwa v The People* Appeal No 196/197 of 2018
9. *George Misupi v The People* [1978] ZR 437
10. *Madubula v The People* SCZ Judgment No 11 of 1994
11. *Sembauke Changwe and Another v The People* [1988-89] ZR 144
12. *R v McInnes* 55 Cr App R 555
13. *Lengwe v The People* [1976] ZR 127
14. *The People v Abel Zimba* HJ/02/2011
15. *R v Bird* 81 Cr App R 11
16. *The People v Mudewa* [1973] ZR 147
17. *Palmer v R* [1971] 1 ALL E R 1088
18. *Tembo v The People* [1980] ZR 209
19. *Esther Mwiimbu v The People* [1986] ZR 15
20. *Patrick Sakala v The People* [1987] ZR 33

Legislation and other works referred to:

1. *Penal Code Chapter 87 of the laws of Zambia*
2. *Archbold Criminal Pleading, Evidence and Practice, 2010 (Thomson Reuters Limited)*
3. *Smith and Hogan 'Criminal Law'*

The accused persons namely Lameck Shambana, Wilson Musonda, Chris Mwika and James Banda respectively are charged with the offence of murder contrary to section 200 of the *Penal Code Chapter 87 of the laws of Zambia*.

The particulars of the offence allege that Lameck Shambana (A1), Wilson Musonda (A2), Chris Mwika (A3) and James Banda (A4), on the 5th day of December, 2019 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together did murder Joseph Sakala.

The State in pursuit of its case called 5 witnesses.

PW1, Moses Mulenga testified that on 5th December 2019 around 21:00 hours he was at his bar which is near his house. He heard William Musonda fondly known as Willy (A2) and Joseph Sakala (the deceased) quarreling and they started pulling each other in the presence of Lameck Shambana (A1) who was just a bystander.

PW1 stated that he had known A2 since 2018, whilst the other two were people that used to go to the bar with A2. PW1 approached A2 and the deceased told them to stop making noise as they were disturbing other customers in the bar. According to PW1, there was sufficient light in the bar and other people were present though he could not remember who they were. Following the altercation between the deceased and A2, PW1 decided to close the bar as he heard A2 say *"if UPND wins we will start hacking you or beating you up"*. The deceased, A1 and A2 then left the bar through the back door. PW1 identified A1 and A2 from the dock.

In cross examination by Mrs. M.M. Banda defence counsel, PW1 confirmed he owns a tavern at his house which has been operational since 2017. He reiterated that there is light in the tavern and he was able to see the people in the bar but not everyone. It was his testimony that on the material day he never saw Chris Mwika (A3) and James Banda (A4) in the tavern. PW1 confirmed he knew a lady known as mother to Milly that frequented the bar but stated he never saw her in the tavern on that night neither did he know that she started the confusion on the said night. The only confusion he

witnessed was initially between A2 and the deceased. PW1 averred that he knew A2's wife Blessing, as she once worked at his tavern.

When asked as whether Blessing was present at time of the altercation between A2 and the deceased, he responded that did not see her in the bar on the material night. PW1 reiterated that he asked A2 and the deceased to leave his bar but does not know where they went afterwards. In conclusion, PW1 stated that did not see A2 assault or hack the deceased. He testified that he had known the deceased since 2010 and knew that he belonged to the PF party.

There was no re-examination.

PW2, Trust Banda narrated that on 5th December 2019 around 22:00 to 23:00 hours, he went to Shingingi bar owned by PW1 where he met the deceased Joseph Sakala. The duo started drinking alcohol, and when they ran out of money they went to the deceased's house to get some money. On the way back from the deceased's house to Shingingi's bar they met four people in between two houses where there was light, and out of the four he recognized A1, A2 and A3 and he knew the trio because they used to live in the same area. Surprisingly he heard A1 say "*you will be dying one by one*", and after a few minutes a fight ensued.

PW2 testified that A1 punched him whilst A2, A3 and A4 were hitting the deceased, and eventually A1 hacked the deceased on the neck with a panga. The deceased fell on the ground and blood started coming out. The four men surrounded PW2 and the deceased, and A1 got the panga and hit PW2 on the left arm whilst A2, A3 and A4 continued hitting the deceased whilst he was on the ground. PW2 managed to run away and A1 started chasing him as A2, A3 and A4 remained beating the deceased. PW2 testified that as A1 was chasing him, he slowed down to remove his slippers and turned in the direction A2, A3 and A4 were. It is at that point that A1 shouted at

the trio to apprehend PW2 but they failed. It was PW2's recollection that the whole incident lasted about 30 minutes.

PW2 ran to his friend's house where he spent a night. The following morning he passed where the incident took place and found a lot of people at the scene but he did not see the deceased as his body had been taken away before his arrival. He informed the chairman Ackim Banda PW3 what transpired the previous night adding that A1, A2, A3 and A4 are the ones that killed the deceased.

PW2 reported the matter and gave a statement at Plainview police post that the four accused killed the deceased and they wanted to kill him as well. The accused persons were later apprehended. PW2 testified that he was also given a medical report due to a deep cut he sustained on his left arm when A1 hit him.

He identified A3, A2, A1 and A4 from the dock whilst restating that A1 is the one that had the panga.

When cross examined by Mrs. Banda defence counsel, PW2 confirmed he met the accused persons when he was heading back to Shingingi bar around 22:30 hours. He admitted knowing a bar called "Pa Dumbo" but did not know that A3 and A4 were drinking from there at the time of the incident. PW2 testified he did not know that A2 lives in the same house with A1 and A3. PW2 confirmed that he went to Mr. Ackim Banda's house together with other members of the community on the morning of 6th December 2019 and not on 5th December 2019. He further testified he was not aware that on 5th December 2019 A2 was taken to the chairman's house where he was beaten because his wife had an argument with a lady known as mother to Milly. He testified that he was not aware that Patriotic Front (PF) youths met A1 on his way home, nor that the said youths attacked A1 with a panga.

PW2 reiterated he was hacked on his left arm by A1 and had a medical report although he did not produce the same before Court. PW2 stated he did not run to any nearby house for help. He confirmed that the deceased was his friend and left him lying on the ground in a pool of blood. PW2 could not confirm to the Court that A2, A3 and A4 were apprehended by the members of the community as he only told the chairman PW3 then went to the police.

In further cross examination by Mr. Longwe, PW2 stated he had known the deceased for 1 year and was hurt by his death as he witnessed the attack hence he wants justice to be done at any cost over his death. Whilst admitting that the two had been drinking alcohol, the two were not drunk when they went to get more money from the deceased's home. PW2 testified there were a lot of people at the bar which bar was about 40 meters from the place where the attack took place. He reiterated that no one came to their rescue despite them shouting and calling for help nor did he see anyone else witness the attack.

In re-examination PW2 clarified he did not know that the medical report was supposed to be given to his lawyers that is why he did not have with it before Court.

PW3, Ackim Banda testified that on 5th December 2019, he was home around 19:00 hours when he received information from the youth chairman Welcome Mwalilanda (PW4) that some people at Shingingi bar were saying that UPND would be slaughtering PF members one by one. Upon hearing this he went to the said bar but when he got there he did not enter the bar.

At the time PW3 got to the bar he did not witness any fight. He discovered that the person PW4 the youth chairman was talking about was A2. PW3 called A2 outside and asked him why he uttered such words then later advised him that what he was

saying was an offense and he would be arrested. It was PW3's evidence that he counselled A2 and his friends and went back home.

Around 02:00 hours he heard a knock and A2 called his name, when he opened the door, he discovered it was A2 at the door and noticed A1 was wearing a hoodie and folding his hands. Whilst talking to A2, PW3's friend called Rango told him that A1 and A2 had pangas and he got his phone so that he could call for help and the two accused persons left. As PW3 was heading to the bedroom his wife told him that there were two other people in the yard. About 2 minutes later PW4 the youth chairman went to his house saying A2 and his friends tried to kill him at his house. He said he was able to identify the four people that went to his house because there were lights outside on the veranda and the garage and was able to see anyone that entered the gate.

He testified that he never saw anyone with a panga and A1 had his hands behind him. At trial, PW3 identified A1 and A2 from the dock as the ones that were standing on his door and, A3 and A4 as the ones who were by the gate. He stated that as at the time of the incident, he had known A2 for a year and A1 for three months. PW3 told the Court that on 6th December 2020 around 06:00 hours people went to his house and informed him the deceased had been murdered. He rushed to the scene and found the deceased lying on the ground lifeless.

PW3 then thought that the people that went to his house the previous night could have been responsible for the killing of the deceased as his friend Rango said they had pangas. He then reported the matter to the police.

In cross examination by Ms. Chulu, PW3 told Court he received a complaint from a boy called Masuzyo Ndlohvu that there were people fighting at the bar and he went to the said bar but did not go inside. He admitted he did not see A2 fighting with

anyone. He admitted he was a member of the PF party and that members of PF and UPND fought frequently in his area. He admitted knowing PW2 who is also a member of PF. It was his testimony that PW2 is the one that reported to him that the deceased had been killed by the accused persons. PW3 refuted that A2 or his wife had been attacked earlier on. A2 did not show him any medical report indicating he had been assaulted.

PW3 testified that A2 was with the other accused persons when he went to his house and denied that A2 and A1 went to his house to make a report they had been attacked. PW3 testified that he informed the officer in charge of the visit by A1 and A2 at his house. He admitted he was not present when the deceased was killed neither did he see the person that killed him. In conclusion, he told the Court that the accused persons were apprehended from A2's house and that A4 was not known to him prior to that night.

There was no re-examination by the State.

PW4 was Welcome Mwalilanda. His testimony was that on 5th December, 2019 around 02:00 hours he heard a knock on the window. When he peeped through the window he saw A2 who told him that he was being called by the chairman PW3. There were four people outside his house whom he recognized as A1, A2, A3, and the fourth one was not known to him but he could recognize him if he saw him. He was able to see everyone as there was light around the wall fence outside the house. When he went outside he had an iron bar which he uses to lock the door and asked the accused persons as to why they were taking him to PW3 at that time of the night and they did not respond but instead told him to start moving.

He was walking about a meter in front of the accused persons and his neighbor called his name and as he turned he saw A1 lifting a panga to hit him but he blocked it with

the iron bar he was carrying. The other three accused persons wanted to hit him but he ran to PW3's house and started knocking on the window. However, PW3 did not come out then PW4 noticed that A2 had followed him and he decided to jump over the fence. He testified that he never slept home but only returned home around 06:00 hours the following day. When he got home his wife told him that A1, A2 and A3 said he should leave the area or they would do something he would not be pleased with. He then went to his friend Emma's place to explain what transpired and Emma told him that PW2 went to his house saying he had been cut with a panga.

PW4 and Emma went to PW3's house and whilst they were there, PW1 and PW2 came to inform them that the deceased had been killed. They all went to the scene and found that the deceased had a cut on the neck, then PW3 told them to go and apprehend the accused persons and they managed to apprehend A2, A3 and A4. He stated he had known A2 for about 3 months and had seen A1, A3 and A4 a week before the incident. There was dock identification of all the accused persons.

During cross examination by Mr. Longwe, PW4 confirmed he was not present when the deceased was killed but he knew that it is A2 and friends that killed him as PW2 told him that he was at the scene and the deceased had a cut on the neck and he acknowledged that he was not with PW2 when the attack occurred. He reiterated that the accused persons went to his house where they asked him to go with them to the PW3's house and tried to attack him on the way. It was his further testimony that the following day when reporting the murder of the deceased he reported the attempted attack.

PW4 testified that he had known the deceased for 2 years as he was his work colleague and wanted justice to be done over the deceased's death and he would do anything to ensure that. The witness testified that he belongs to the PF party together

with the deceased. He testified that he did not know which political party the accused persons belonged and never knew whether they were members of the UPND. It was his evidence that in his area garden house area, members of PF and UPND do not co-exist.

In further cross examination by Ms. Chulu, PW4 confirmed giving a statement to the police on 5th December 2019 but the said statement was not read to him neither did he sign it. He testified that he informed the police about his attack but he did not know why it was not mentioned in the statement. He refuted the allegation that he was only mentioning the attack as an afterthought because he wanted the accused to be punished as they belong to the UPND.

There was no re-examination of this witness.

PW5, Detective Sergeant Titus Phiri based at Plainview Police Post testified that on 10th December 2019, he was allocated a docket of murder in which PW4 reported having brought a dead body of his friend Joseph Sakala the deceased who was alleged to have been hacked by four known people using a machete (panga). The deceased sustained a deep cut on the left side of the neck. Following his interview of the A1, A2, A3 and A4 in connection with the deceased's murder, he arrested and charged them with murder which charge they all denied.

PW5 stated that he attended the postmortem and the examination report was issued to him which was produced in his evidence and marked "P1". The witness produced the panga which was allegedly used to murder the deceased and it was marked "P2". PW5 identified the accused persons from the dock.

The witness was not re-examined.

At the close of the prosecution's case, I found that the prosecution had established a prima facie case against all the accused persons who were found with a case to answer and were put on their defence. All the four accused persons elected to give sworn evidence and did not call any witnesses.

A1, Lameck Shambana recalled that on 5th December 2019 around 22:00 hours on his way to Shingingi's bar he met A2 and they went to the bar where they found A2's wife. A1 bought beer for A2's wife, whilst him and A2 went to another bar called Pa Dumbo and bought beer then went back to Shingingi's bar. A certain lady known as Milly's mother came to the bar and got the beer that A2's wife was drinking and a quarrel ensued. Milly's mother entered the bar and A1 went to the toilet. After 15 minutes A1 went back but did not find A2 and the wife, he went to look for them inside the bar but they were not there.

It was A1's testimony that as he sat outside the bar on the veranda he heard people singing and as they reached him he recognized Milly's mother and PW4. Milly's mother pointed at him and said he was also there, then the men she was with started beating him and he got defensive and started fighting back. Two men held his hands whilst others lifted his legs, as they said wanted to take him to PW3's house. A1 started fidgeting and fell down then the deceased remarked how stubborn he was and was going to use a panga on him. The deceased removed a panga and tried to hit A1 who kicked the deceased causing the panga to drop to the ground and A1 picked it up. The deceased advanced towards A1 and intended to hit him and in self defence A1 hit the deceased with a panga on the neck. The deceased shouted he been had hurt and his friends ran away and A1 immediately dropped the panga and ran home.

When A1 got home he found A3 and A4 in the bedroom, A3 asked why he was looking the way he did and A1 narrated everything that had transpired. Less than

five minutes later A2 came and said he was at the police post where he got a police report. A2's t-shirt was stained with blood and he informed them that after A1 left them at the bar Milly's mother went to report A2 to PW3 and A2 was picked and taken to PW3's house where he was beaten. All the four accused persons decided to go to the PW3's place to inform him that a complaint had been lodged against him at the police by A2. A1 and A2 entered PW3's yard whilst A4 remained at the gate. A2 told PW3 about his report to the police and in response PW3 said the issue would be dealt with in the morning and the accused persons went home to sleep.

The following morning A1 at around 09:00 hours police officers apprehended him for murder. When they took him to the vehicle, he found A2, and at the police station he found A3 and A4. An hour later all the four accused persons were taken to Kanyama Police Station. He did not tell the police anything in relation to what happened on 5th December 2019, but 3 weeks later he was given a pen and told to sign a document, and was only asked about his village. It was his evidence he did not fight with PW2 and that the other accused persons were not present when he was attacked by the deceased and other persons. That the only misunderstanding he was aware of was over beer.

A1 further stated it was only the three of them that went to PW3's house as A3 was not there and he refuted the allegation that they had pangas on them. He testified that he was alone when he was attacked a fact which he told the police when he was arrested.

In cross examination by Mrs. Mwanza, A1 stated that he did not know PW1, PW3 and PW4 and the only person he knew was PW2. He confirmed he lived in the same community with all the prosecution witnesses and had never quarreled with them. A1 stated he was at PW1's bar on the night of the incident and the bar was never

closed. He admitted hacking the deceased resulting in his death. Whilst admitting that none of the co-accused persons would confirm his testimony, A1 stated that his version of the story was not an afterthought.

According to A1 it is odd that PW3 and PW4 told the Court that the accused persons had pangas on them. A1 admitted leaving the deceased hurt adding that he did not care for his life because the deceased assaulted him, although he did not have a medical report to prove this.

In re-examination by Ms. Chulu, A1 clarified he left the deceased without caring for his life because the deceased was the one that started assaulting him first. That he was surprised when a group of people approached him outside the bar and pointed at him saying “he was also there”. He testified he was assaulted because A2 said he belonged to UPND when he did not know anything about UPND.

A2, Wilson Musonda recalled that on 5th December 2019 he knocked off from work around 17:00 hours and went to see his friends till 21:00 to 22:00 hours. He then went home where he found A1, A3 and A4. A1 and A3 were temporarily living with him. He asked them to go to the bar with him but A3 and A4 remained behind whilst he left with A1 and went to Shingingi’s bar where he found his wife. A2 and A1 went to the next bar to buy beer where they met A3 and A4 going to Pa Dumbo bar and they went back to Shingingi bar.

The deceased later went to Shingingi bar and went inside, a lady known as Milly’s mother also joined them and went to drink the beer A1 bought for A2’s wife. A1 left and A2 asked his wife to go inside the bar and a young boy went to tell him that PW3 wanted to see him. A2 went outside and PW3 told him that he heard about him joining UPND and in response told PW3 that he did not belong to any political party.

PW3 then remarked how stubborn A2 was and was underestimating him and did not to listen to him. He then instructed the youths to teach him a lesson.

It was A2's testimony that A1, A3 and A4 were not present when he was taken to PW3's house where he was beaten. PW2 was sent to fetch water and they poured 5 buckets of water on him as PW3 instructed the PF youths to whip A2. Thereafter the youths went to get A2's wife so that she could be whipped for disrespecting the PF branch chairlady, and A2's wife was undressed and whipped.

A2 went to Plainview police post where he was given a police medical report and he went home where he found A1, A3 and A4 in the bedroom. A2 went to the living room to show his wife the medical report he got from the police and called A1, A3 and A4 around 24:00 hours and asked them to escort him to the PW3's house. Along the way A3 met a lady whom he escorted.

When they got to PW3's house A4 stood by the gate whilst A2 and A1 went inside the yard. A2 knocked on the door and when PW3 came outside, A2 informed him that he had reported to the police and obtained a medical report. A2 averred that PW3 said they could talk the following morning as the issue was not big for the police to be involved. A1, A2 and A4 then left and as they reached the gate A3 came back from where he had gone and they all went home.

In the morning around 06:00 hours, A2 heard noise outside the house and when he went there, he found A3 and A4 had been apprehended, then PW4 said A2 was also there, and stated that the accused persons had killed someone. The three were taken where the deceased's body was and found police officers at the scene. A2 gave Officer Phiri his medical report and they took them to Plainview police post. A3 was asked if he knew where A1 was and he led the police to the taxi rank where A1 was apprehended. The accused persons were taken to Kanyama police station where

A1, A3 and A4 remained whilst A2 was taken to Plainview police post for 2 weeks then taken back to Kanyama police station.

It was A2's evidence that he did not have any fight or exchange of words with the deceased, and that PW1 never chased A2 and the deceased from the bar nor did he close the bar. According to the witness, PW1 has a PF political party branch at his place and A2 refused to join hence PW1 has a grudge against him. A2 contended he never met PW2 on the road on the material day but at PW3's house at 03:00 hours but around 24:00 hours. The witness testified he went straight home after leaving PW3's house and that PW4 just fabricated the facts to implicate the accused persons as A2 refused the political party which the prosecution witnesses belong to.

In cross-examination by Mrs. Mwanza, A2 stated the prosecution witnesses are people he knew who he never argued with however they would have a reason to implicate him as refused to join their political party. He stated that PW1's bar is not near PW3's house, neither is PW4's house. It was A2's testimony that there were other people at the bar although no one was being called as a witness. He contended his testimony was not an afterthought. The witness reiterated he was issued with a medical report which he gave the police but did not have it before Court. A2 confirmed there was no argument between himself and the deceased. He further admitted that PW3 went to counsel him at the bar. In conclusion, A2 stated he was surprised that the four of the prosecution witnesses implicated the accused persons.

In re-examination by Mrs. Banda, A2 stated he had a medical report at the time of his apprehension and gave it to Officer Phiri at the police post.

A3, Chris Mwika testified that on 5th December 2019, he was home with his friend A4 from John Laing and around 21:00 hours A1 and A2 joined them and A2 suggested they go to the bar for some drinks. A1 and A2 went to the bar whilst A3

remained with A4. Later A3 and A4 went to Pa Dumbo bar and found A1 and A2 heading to Shingingi's bar. A3 and A4 started playing pool at Pa Dumbo bar then went back home around 22:00 to 23:00 hours and found A1 and A2 were not home. A1 got home with a blood-stained shirt and said he was involved in a fight and a few minutes later A2 also got home with a medical report stating he had been beaten by PF youths at PW3's house. A2 then asked A1, A3 and A4 to escort him to the PW3's house, but on the way A3 met a lady named Monica whom he escorted and the three proceeded to PW3's house. A3 came back and met his friends coming from PW3's house and they went home to sleep.

Around 06:00 hours the following there was a lot of noise from people shouting and throwing stones, and when A3 and A4 went outside they were apprehended by PF youths and told that they had killed someone. A2 was also apprehended when he went outside the house and the three were taken to the crime scene then later to the police.

The police asked the whereabouts of A1 and A3 took them to the taxi rank where A1 was apprehended and A1, A3 and A4 were taken to the Kanyama police station whilst A2 was returned to Plainview police post. After two weeks A2 was taken back to Kanyama police station and all the four accused persons were interviewed at the CID office. A3 stated he never attacked PW2 neither did he go to PW3 or PW4's house.

Under cross examination by Mrs. Mwanza, A3 averred he only knew PW3 as the chairman and did not know PW4. In addition, A3 stated he had not lived in Garden House are for a long hence he was shocked that he was being implicated in the death of the deceased. It was his testimony that he never reached PW3's house but escorted a lady he met whilst on the way of PW3's house.

There was no re-examination.

A4 was James Banda who testified that on 5th December 2019 around 14.00 hours he went to Garden House compound to visit his friend A3. Around 21:00 hours A1 and A2 got home and said they should go for a drink. A1 and A2 went to the bar and after some time A3 and A4 went to Pa Dumbo bar to play pool. After a while A3 said they should leave as it was late and they went home although he could not remember what time it was.

When they got home A1 came back looking dirty and shortly after that A2 also came back and they heard him talking to his wife and later he came to the living room to find out what was going on. A2 then asked A1, A3 and A4 to escort him to take his medical report to PW3's house and whilst on the way A3 met a lady and decided to escort her. When the three got to PW3's house, A4 elected to stand by the gate in anticipation that A3 would come back while A1 and A2 entered the yard to talk to PW3. A1 and A2 came out and A3 also came back and they all went home.

The following morning around 06:00 hours a lot of people went to A2's house and started throwing stones and as the accused persons opened the door they were apprehended and told that they were the ones who were fighting the previous day.

The accused persons were taken to where the deceased body was found and the mob of people started shouting that these are the same people who are going to reveal where A1 is. After a while police officers came and took them after being beaten by PF cadres. At the police station they were asked of the whereabouts of A1, and A3 took them where A1 was and A1 was also apprehended and all the four accused persons were taken Kanyama police station whereas A2 was returned to Plainview police post. Two weeks later all the accused persons were taken to CID where they gave statements.

When cross examined by Mrs. Mwanza, A4 stated that he was only in Garden House compound for one day and had never seen any of the prosecution witnesses prior to that night. He admitted it is odd that out of all the young people in the community the prosecution witnesses only picked on the four accused persons. A4 stated he was not drinking beer on the material night.

There was no re-examination of A4.

With this evidence, the defence closed its case.

Prosecution's submissions

The prosecution filed written submissions on 25th June 2020, in which it was submitted that the prosecution had proved its case beyond reasonable doubt as required in *Woolmington v D.P.P [1935] A.C 46⁽¹⁾*. It was contended that for the prosecution to prove the offence of murder, the following elements must be satisfied:

1. That the deceased died;
2. The accused caused the death of the deceased by an unlawful act;
3. That he/she did so with malice aforethought; and that
4. In killing the deceased, the accused had no legal justification to do so.

It is the prosecution's submission that it is not in dispute that the first element is satisfied as there is on record the evidence of death and its underlying cause as indicated in the postmortem report. According to the prosecution all the accused persons are connected to the death of the deceased as the evidence shows that the deceased and had quarreled with A2 at PW1's bar and PW3 actually counseled A2 over the same issue. That critical to note is PW2's evidence that he was present when all the accused persons attacked the deceased and A1 hacked him with a panga on the neck, which panga A1 also used to cut PW2 on his left arm. Further, that the

evidence of PW3 and PW4 corroborates PW1 and PW2's evidence that all accused persons were together on 5th December 2019 and engaged in a common purpose.

In respect to the use of the panga, the prosecution submits that PW3 informed the Court that when the accused persons went to his house and when his friend Rango told him that they had pangas this instilled fear in him. In the like manner PW4 testified that he saw A1 with a panga and A1 attempted to hack PW4 causing him to jump over a wall fence for fear of his life. Counsel contends that the foregoing evidence creates odd coincidence and to augment this position the case of *Ilunga Kalaba and John Masefu v The People (1981) ZR 102 (SC)*⁽²⁾, was referred to where the Supreme Court held that:

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

The prosecution contends that the defence that only A1 was involved is farfetched as PW2 identified all accused persons as having taken part in beating the deceased. That A1 failed to bring before Court a police report or medical report to show that he was assaulted by the deceased, hence his testimony is an afterthought. Further that the accused persons' testimonies are fabrications intended to mislead the Court. In the circumstances, the inference to be drawn is that they all beat up the deceased and caused his death and that it is immaterial that only A1 hacked the deceased.

My attention was drawn to section 22 of the *Penal Code, Chapter 87 of the laws of Zambia*, which provides as follows:

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

was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

Further reference was made to the case of *Mutambo and 5 others v The People (1965) ZR 15⁽³⁾* in augmenting that all the accused persons acted and participated in the murder of the deceased.

It is submitted that on the element of malice aforethought, the accused knew or ought to have known that beating a defenseless person continuously would result in death or cause grievous injury. To support this argument, the case of *The People v Njovu (1968) ZR 132⁽⁴⁾* was cited where it was held that:

“To establish malice aforethought the prosecution must prove either that the accused had an actual intention to kill or to cause grievous harm to the deceased or that the accused knew that his actions would be likely to cause death or grievous harm to someone.”

In relation to the last element, the prosecution submitted there was no threat of death or grievous harm to all the accused persons and beating of the deceased was unlawful and unjustified. In conclusion, it was submitted that the prosecution discharged its burden of proving beyond reasonable doubt thus it is their prayer that the Court convicts all the accused persons accordingly.

Defence’s submission

The defence submitted that the onus is on the prosecution to prove its case beyond all reasonable doubt. It is argued that the prosecution all have an interest to serve as they are all affiliated to the PF party whilst the accused persons are accused of being UPND members. It is submitted that PW3 and PW4 confirmed there was enmity between members of the two political parties and had a reason to implicate the

accused persons and this also included false implication by PW2. The defence relied on the case of *Kambarange Kaunda v The People [1990-92] ZR 215⁽⁵⁾*.

The Court was urged to discount the evidence of PW2 who they submitted was an unreliable witness and that he gave false evidence. It is submitted that PW2's testified that he and the deceased met the 4 accused persons between two occupied houses and that A1 cut him with a panga though he had no medical report to prove it.

The defence argued the accused person had given a reasonable explanation as to their respective whereabouts on the fatal day and this was confirmed by PW5. It is argued that it is the duty of the arresting officer to secure independent witnesses who would have testified that they saw or witnessed what PW2 alleged. The defence placed reliance on the case of *Peter Yotamu Hamenda v The People [1977] ZR 184⁽⁶⁾*.

It was submitted that the charge of murder had not been proved beyond all reasonable doubt against A2, A3 and A4 and that they be acquitted. In the case of A1 it was submitted that in the alternative if a conviction arises, it should be for manslaughter as malice aforethought was not established and on the basis that there was a fight between A1 and the deceased.

Analysis

Lameck Shambana (A1), Wilson Musonda (A2), Chris Mwika (A3) and James Banda (A4) are facing a murder charge contrary to section 200 of the *Penal Code, Chapter 87 of the Laws of Zambia*.

In criminal cases, the burden of proof lies on the prosecution which has to prove its case against the accused beyond reasonable doubt. The accused has no obligation to

prove his innocence. The prosecution therefore has to prove that the accused with malice aforethought caused the death of the deceased by an unlawful act or omission. If these ingredients are proved only then can the accused be found guilty.

Section 204 of the *Penal Code* states that malice aforethought shall be established by evidence proving any one of the following circumstances:

- (a) An intention to cause death 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 probably cause 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 by the wish that it may be caused,
- (c) The intent to commit a felony.

The Court has to analyse the evidence in light of the three (3) essential elements required to be proved by the State against all the accused persons.

It is not in dispute that the deceased met his fate on 5th December 2019. This is confirmed by the postmortem report which states the cause of death as a deep wound to the neck (P1”).

A Court faced with evidence of a suspect witness should warn itself against the danger of an accomplice or suspect witness and warn itself against the danger of false implication of the accused and go further to ensure that this danger has been excluded. In *Yokoniya Mwale v The People SCZ No 205 of 2014⁽⁷⁾*, the Supreme Court held that:

“It is sufficient that the record reflects that the trial Judge was alive to this possibility and that on the facts, he was satisfied that any possibility was discounted.”

The Supreme Court in the case of *Edward Sibupiwa v The People Appeal No 196/197 of 2018*⁽⁸⁾ cited the case of *George Misupi v The People [1978] ZR 437*⁽⁹⁾, where it was held that:

“The question in every case is whether the danger of relying on the evidence of the suspect witness has been excluded. Lord Hailsham in Kilborne in the passage used the expression where the witness can reasonably be suggested to have some purpose of his own to serve in giving false evidence. All these extracts make it clear that the critical consideration is not whether the witness does in fact have an interest or a purpose of his own to serve, but whether he is a witness who, because of the category in which he falls, or because of the particular circumstances of the case, may have a motive to give false evidence. Once, in the circumstances of the case this is reasonably possible, or in the words of Lord Hailsham “can reasonably be suggested” the danger of false implication is present and must be excluded before a conviction can be held to be safe. One does not hold such witnesses to be accomplices, one approaches the evidence of such witnesses in the same way as one approaches that of accomplices.”

The only eye-witness was PW2 who allegedly witnessed the hacking of the deceased with a panga by A1. After the deceased fell on the ground, they were encircled by the accused persons and that he managed to get away leaving the deceased bleeding profusely. PW2 narrated that whilst running away from the accused persons, he observed A2, A3 and A4 kicking the deceased.

PW2 further testified that A1 was in hot pursuit and he slowed down to remove his slippers, then faced the direction where A2, A3 and A4 were and that A1 told the trio to catch him but they failed. He further alleged that A1 also used the same panga on him resulting in a deep cut on his arm which PW4 saw when PW2 went to his home. In cross examination PW2 failed to produce a medical report and explained he was not aware it was required before Court.

PW2 testified he left the scene and the deceased in a pool of blood. That due to the brutality exhibited by the accused persons, he feared for his life and did not return to his home. He further stated he never reported the matter to the Police but to PW4.

I have weighed the evidence of PW2. I caution myself that PW2 is a witness with a possible interest of his own to serve having been a friend to the deceased and belonging to the same political party PF as the deceased. Defence Counsel submitted that this Court should treat PW2 as a witness with an interest to serve. In following the principles laid out by the Supreme Court in the case of *Edward Sibupiwa v The People Appeal No 196/197 of 2018*⁽⁸⁾ on witnesses with an interest to serve, the question in every case is whether the danger of relying on the evidence of a suspect witness has been excluded.

PW1 testified he received a report of fighting at his bar known as Shingingi Bar and when he arrived at the said bar, he found the deceased and A2 having an altercation and that A1 was a bystander. On the other hand, PW2 testified he found the bar open. PW1 testified that he closed the bar after the altercation between A2 and the deceased. On the other hand, PW2 stated he was at the bar with the deceased around 22.00 - 23.00 hours contradicting PW1's evidence that he closed the said bar after he went to attend to the altercation between the deceased and A2.

PW2 stated that after he was surrounded by the accused persons, he managed to run away and A1 was in hot pursuit whilst the other 3 remained with deceased and continued beating him. I find the evidence of PW2 unreliable and find it improbable that whilst PW3 was running away from A1 who had a panga in his hand, and having described the incident as brutal was still able to turn around and see A2, A3 and A4 continue beating the deceased.

Further, PW2 testified that when A1 was in hot pursuit and as he was running away from A1 who was wielding a panga, he slowed down to take out his slippers which were affecting his running pace and then u-turned and headed back to where A2, A3 and A4 were and that A1 shouted to the trio to catch him. I find it improbable that PW2 would run towards and not away from the grave danger he allegedly was in. PW2 never explained or described the panga despite being with A1, A2, A3 and A4 for 30 minutes as alleged.

PW2 further testified that the incident took place in between 2 houses with lighting in the verandah. On the other hand, PW5 the arresting officer who visited the crime scene described it as an isolated place. It is my finding that this is a material fact and goes towards the credibility of PW2. I find that there is inconsistency in the evidence of PW2 and PW5 in relation to the crime scene.

Oddly, despite what PW2 allegedly witnessed and saw the deceased fall to the ground with blood oozing out, he was too scared to go home and instead went to a friend's place and never went to the houses that were in close proximity for assistance. On the material night he failed to report the matter to the Police but chose to inform PW3 who was not in law enforcement.

The fact that he failed to contact the Police on the material day and instead chose to go to a friend and to the crime scene in the morning, the reasonable inference I draw

is that he was not present at the time the deceased met A1 and did not witness the events of that night that led to the deceased's death.

It was PW2's testimony that A1 attacked him on his arm with a panga even though he had no supporting evidence. PW4 testified that he saw PW2's arm with a cut on the morning of 6th December 2019. I discount this evidence as there was no supporting evidence from PW2 to prove the allegation that he had been attacked and cut on his arm on the fateful night. PW4 testified that when he saw PW2 he had a cut on his arm.

From the circumstances herein, and in evaluating the evidence of PW1, PW2 and PW5 I find that PW2 can reasonably be suggested to have some purpose of his own to serve in giving false evidence as not only was he a friend to the deceased but they both belonged to the same political party namely PF. I find that the prosecution's evidence as outlined in the preceding paragraphs is tainted and punctuated by inconsistencies in respect to whether the bar was closed or not.

I am guided by the case of *Madubula v The People SCZ Judgment No 11 of 1994*⁽¹⁰⁾ and *Sembauke Changwe and Another v The People [1988-89] ZR 144*⁽¹¹⁾, where it was held that minor discrepancies in the prosecution evidence that do not go to the root of the case are not fatal to the prosecution's case. However, I find that the inconsistency relating to the crime scene is a material fact and it casts aspersions on the testimony of PW2 and whether he was in fact present at the time of the incident.

Having warned myself that PW2 is a witness with an interest to serve who testified that he would do anything for the deceased to ensure justice is done, I find the credibility of PW2 questionable and his version of events improbable. I find there is a clear danger of PW2 giving false evidence and I cannot rely on the evidence of PW2. I therefore discount his evidence.

Having discounted the evidence of PW2 who was the prosecution's eye witness, the question is whether I have found other special and compelling evidence from other prosecution witnesses namely PW1, PW3, PW4 and PW5? I am guided by the Supreme Court in the case of *Edward Sibupiwa v The People Appeal No 196 and 197 of 2018* ⁽⁸⁾ where it was held that:

"Here we would like to pose and reflect and ask ourselves the question: how does the Court satisfy itself that the danger of false implication has been excluded? The first port of call for the Court is to examine whether there is other evidence which corroborates, as a matter of strict law, that of the suspect witness. Such evidence might be the testimony of other eye witnesses which is similar to that of the suspect witness; it might be circumstantial evidence which supports the witness story. Where however, such evidence is lacking it is still competent for the court to convict on the uncorroborated testimony of such witness if there are special and compelling grounds. This was the holding in Machobane v The People."

PW1 did not witness the assault but only witnessed an argument between the deceased and A2 whom he told to leave the tavern. Thereafter he did not know what transpired and was not a useful witness.

PW3 testified that he went to PW1's bar after receiving information of a person threatening to slaughter the PF after UPND came into power. He did not actually hear the words being uttered. He identified A1 as the person who was there and that the fight earlier between A2 and the deceased had stopped by the time he got to PW1's bar. He only called A2 out for purposes of counselling him and never talked to A1. He identified A1 as A2's friend and that he used to see them together.

PW3 testified he was told by Rango that A1, A2, A3 and A4 who came to his house had pangas but he never saw any pangas on them. Rango was not called as a witness by the prosecution. PW3 testified that the following day he only saw the deceased lying down with a cut on his neck and suspected A1, A2, A3 and A4 as the persons who murdered the deceased based on the information that they had pangas on them. This information was clearly hearsay and cannot be relied upon.

It is my finding that PW3 was not present at the time the deceased met his fate nor do I accept that the accused persons had pangas whilst at PW3's home.

PW4 testified that A1, A2, A3 and A4 came to his house and a neighbour warned him that A1 had a panga and that he actually saw it. PW4 explained that there was sufficient light at this house and was therefore able to see A1 with the panga. He further testified that he was told of the deceased's death by PW1 and PW3. PW4 admitted he was the PF chairman of the area and a close associate of the deceased.

I again caution myself of false implication of the accused persons. PW4 admitted there was a lot of political enmity between the PF and UPND in the area. It is my finding that he was a witness with an interest to serve being a member of the PF and I cannot rule out false implication or false evidence from PW4 particularly on the veracity of his evidence of seeing A1 with a panga when A1 came to his house.

PW4 testified that PW2 had called him to tell him about the attack by the accused persons. The prosecution submitted this was an odd coincidence in that not only did PW2 see A1 with a panga but PW4 also testified that he saw A1 with a panga which he wanted to use on him. There was no other corroborating evidence or "special compelling grounds" that A1 went to his house with a panga as elucidated in the case of *Edward Sibupiwa v The People Appeal No 196 and 197 of 2018* ⁽⁸⁾.

In concluding, it was the testimony of PW1, PW3 and PW4 that they were not present at the time the deceased was murdered nor did they witness the events of that fateful night leading to the death of the deceased who was hacked with a panga by his neck. In the case of PW5, he did not find the panga on A1 but testified that it was given to him by another officer who was not called to testify.

Confession by A1

A1 gave evidence on oath. He testified that whilst at Pa Dumbo Bar, and after A2 had left following an altercation with Millie's mum, he went outside to sit at the verandah and found people singing. This was around 23:00 hours. According to A1 these unknown people started assaulting him after Millie's mum pointed at him. He saw PW3 in the mob. He was held by his hands and others tried to hold his legs so that he could be taken to PW4.

According to A1 as he was struggling, he fell down and the deceased who had a panga remarked how stubborn he was and would use a panga on him. He managed to kick the deceased and the panga fell from behind and he picked up the panga. As the deceased was still trying to assault him and was approaching him, he threw the panga which landed on the deceased's neck and A1 then ran away including those who were with the deceased. He narrated that after hacking the deceased he did not assist him as the deceased merely said he had been hurt. In cross-examination he maintained he was accused of being a UPND member by the deceased and others around him.

A1 does not dispute causing the death of the deceased but that he acted in self defence after the deceased attempted to hack him with a panga. PW5 testified that at the time he interviewed A1 under warn and caution, A1 had informed him he was attacked by the deceased and his friends and in defence or retaliation used the panga

on the deceased. I accept the confession of A1 that he is the one that caused the death of the deceased. This is consistent with the findings in the post mortem report that death was caused by a deep wound to the neck. The cause of death is proved beyond all reasonable doubt.

Self defence

However, the matter does not end there. In the present case, the defence argued that A1 did not have the requisite malice aforethought and his action was in response to the attack on his person by the deceased. I have to toil around the issue of whether self defence is available to A1 who raised it as a defence. Section 17 of the *Penal Code* states that:

“17 Subject to any other provisions of this Code or another law for the time being in force, a person shall not be criminally responsible for the use of force in repelling an unlawful attack upon his person or property; or the person or property of any other person if the means he uses and the degree of force he employs in doing so are no more than is necessary in the circumstances to repel the unlawful attack”

The learned authors of *Archbold Criminal Pleading, Evidence and Practice, 2010 (Thomson Reuters Limited)* in paragraph 1941 at p. 1928 have stated that:

“Where a defence of self-defence is raised, the burden of negating it rests on the prosecution but the prosecution is not obliged to give evidence in chief to rebut a suggestion of self-defence before that issue is raised, or indeed to give any evidence on that issue at all. If on consideration of the whole evidence, the jury are either convinced of the innocence of the prisoner or left in doubt whether he was acting in necessary self-defence, they acquit.”

The learned authors *Smith and Hogan Criminal Law, 8th Edition Butterworth 1996* observed that the Court in considering what was reasonable force should take into account all the circumstances, including in particular the nature and degree of force used, the seriousness of the evil to be prevented, and the possibility of preventing it by other means.

In *R v McInnes 55 Cr App R 555⁽¹²⁾* the Court held that:

“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstance. It may in some case be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be if there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence. Of all these matters the good sense of the jury will be the arbiter. There are no prescribed words which must be employed in summing up.”

The learned authors of *Archbold Criminal Pleading, Evidence and Practice (2012)* state at paragraph 19-4 as follows:

“All that is needed is a clear exposition in relation to the particular facts of the case, of the concept of necessary self defence. If there has been an attack so that defence is reasonably necessary, it will be recognized that a person defending himself cannot weigh to a nicety the exact measure of his defensive action; If the jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought necessary, that would be the most potent evidence that only reasonable defensive action had been taken. The defence of self defence either succeeds so as to result in an acquittal or it is disapproved in which case as a defence it is rejected. “

In the case of *Lengwe v The People (1976) ZR 127⁽¹³⁾*, it was held that:

“in the circumstances in this case, a man cannot be expected to consider dispassionately precisely what force he may use or whether a weapon which happens to hand which he picks up in the heat of the moment is or is not more than the occasion warrants.”

In the case of *The People v Abel Zimba HJ/02/2011⁽¹⁴⁾*, which is of persuasive value, Justice Dr. Matibini guided that:

“The defence of self-defence has two aspects. The first is a question of retreat and the second is the degree of retaliation. A failure to retreat is an element in considering the reasonableness of an accused conduct. Thus it is a factor to be taken into account in deciding whether it was necessary to use force and whether the force used was reasonable. The obligation to retreat rather to strike down is reasonable. The obligation to retreat rather to strike down is not absolute. Thus, it is not the law that a person threatened must take to his heels and run in a dramatic fashion. What is necessary is that a person threatened, or attacked must demonstrate by his actions that he does not want

to fight. He must demonstrate that he is prepared to temporize and to disengage and perhaps to make some physical withdrawal.”

In the English case of *R v Bird (D) 81 Cr. App. R 11 CA*⁽¹⁵⁾ the Court of Appeal held that:

“If the defendant is proved to have been attacking or retaliating or revenging himself, then he was not truly acting in self-defence. Evidence that the defendant tried to retreat or call off the fight may be a cast-iron method of casting doubt on the suggestion that he was the attacker or retaliator or the person trying to revenge himself. But it is not by any means the only method of doing that.”

Further, in the case of *The People v Mudewa (1973) ZR 147*⁽¹⁶⁾, the Court cited the case of *Palmer v R [1971] 1 ALL E.R. 1088*⁽¹⁷⁾, where it was held that:

“If a person is under a serious attack and is in immediate peril, then immediate defensive action may be necessary. Thus, if the moment is one of crisis for someone in imminent danger, he may have to avert the danger by some instant reaction. In so doing, it is recognized that a person defending himself is not expected to weigh to a nicety the exact measure of his necessary defensive action. When a person is the object of a murderous assault it is too much to expect a nice discrimination in the method he chooses to defend himself. In calm retrospect other alternatives, may appear. However, it is always important to bear in mind that in such circumstances any man acts under the stress of the moment. Quite often in such circumstances a person has to act swiftly and decisively.”

I further guided by the Supreme Court case of *Esther Mwiimbe v The People (1986) ZR 15*⁽¹⁸⁾, where it was observed that:

“In our view the authorities make it abundantly clear that the facts of any particular case will show whether or not the situation in which the accused found himself, including the nature of the attack upon himself or the gravity of imminent peril was such that it was both reasonable and necessary to take the particular action which has caused death in order to preserve his own life or to prevent grave danger to himself or another.”

Further Ngulube DCJ as he was then in *Esther Mwiimbe v The People (1986) ZR 15⁽¹⁸⁾* proceeded to note that the principles governing the defence of self defence as provided for under section 17 of the *Penal Code, Cap 87 of the laws of Zambia* have normally not been the subject of controversy. He went on to state that it is the application of those principles to the facts in any given case that difficulties are encountered.

The onus of course is upon the prosecution to prove beyond reasonable doubt that A1 knew that the force was excessive or that he did not believe that it was necessary. In applying the principles on self defence as a defence, I have to ascertain whether or not the situation which A1 found himself including the nature of the attack or the gravity of imminent peril was such that it was both reasonable and necessary to take the particular action that he took which caused the death of the deceased in order to preserve his own life or to prevent grave danger to himself.

I have carefully considered the events of that fateful night leading to the death of the deceased. It is apparent there was an altercation earlier on between A2 and the deceased though A2 alleged it had to do with his wife and not which political party he belonged to. This led to PW1 and PW3 going to the bar on a fact-finding mission. A1 testified that the deceased was the aggressor and at the material time, there were only two of them as others had run away. A1 testified that after the panga fell to the

ground, the deceased was still trying to reach it. The prosecution argued that this piece of evidence by A1 was an afterthought, I disagree.

It is my finding that the use of the panga was used to forestall the attack from the deceased who had the panga. There is no evidence that the panga used by A1 belonged to him. I find that the panga "P2" was not found on the person of the A1 or even at his residence. PW5 testified it was given to him by another police officer. I have already discounted PW4's evidence that he saw A1 with a panga as it is improbable that after A1 hacked the deceased, he took it with him to PW4's house.

I am satisfied on the facts and having believed A1's version of events as probable that when he threw the panga on the deceased's neck he believed he was in imminent danger. I have taken into account the possibility of retreat as both parties could have had access to the panga when it fell to the ground. I find that the hacking of the deceased was a use of force wholly proportionate to the necessities of the situation as it was either A1's life or the deceased. A1 knew deceased was a member of PF and this resulted in A1 perceiving he had to attack out of necessity as the deceased perceived him to be affiliated to another political grouping namely UNDP.

I have considered the evidence of PW3 and PW4 who admitted there was enmity between these two political parties. In the circumstances of this case, it is my finding that A1 had to decide how to defend himself in anguish of the moment as he was subjected to a direct assault.

The Supreme Court in the case of *Tembo v The People* [1980] ZR 209 ⁽¹⁹⁾ held that once a person is charged with murder and raises self defence, he must either be acquitted, if the force used was reasonable or convicted of murder if the force used was unreasonable. The defence of self defence is absolute.

It is my finding that the defence of self defence is available to A1 as the force used under the circumstances was reasonable. This means that the defence of self defence succeeds and I am left with no option but to ACQUIT A1 of the offence of murder.

A2, A3 and A4

The prosecution submitted that A1's confession stating that he was alone at the time of the fateful incidence was an afterthought meant to mislead the Court and exonerate A2, A3 and A4.

The prosecution further argued there was a common purpose amongst the accused persons to kill the accused. The doctrine of common purpose, common design or joint enterprise refers to the situation where 2 or more people embark on a project with a common purpose which results in the commission of a crime. In *Patrick Sakala v The People* [2000] ZR⁽²⁰⁾ it was held as follows:

"Section 22 of the Penal Code contemplates that liability will attach to a person for the criminal acts of his confederates which will be considered his acts also, if what those confederates have done is a probable consequence of the prosecution of the unlawful common purpose or design."

PW1 only saw A2 and the deceased having an altercation but not a fight at Shingingi bar. It is my finding that PW1 did not see all the accused persons together on the fateful night. PW3 did not witness any of the accused person assault the deceased. PW3 only saw A2 at the same bar where the deceased person was drinking from. PW3 testified he went to counsel A2 against when he allegedly heard that he was threatening others saying when UNDP comes into power, they shall clear the PF one by one. This part of the evidence is hearsay and the prosecution did not call any witness to corroborate it.

PW4 testified that all 4 accused persons came to his home whilst A3 testified he was not there. PW4 never witnessed the accused persons murder the deceased.

It was PW5's testimony that at the time he arrested the accused persons and interviewed them under warn and caution, A2, A3 and A4 had informed him they were not at the scene of the crime nor where they present when the deceased met his death. In their defence, A2 A3 and A4 all testified that they were not present at the time of the incidence that occurred between A2 and the deceased. A2, A3 and A4 all testified that when A1 came back home he looked ruffled and had blood on his T-shirt and mentioned to them he had used a panga on the deceased and left him lying on the ground.

PW2 placed A2, A3 and A4's at the crime scene as having participated in the murder of the deceased whose evidence I disbelieved and discounted it. I agree with the defence that the postmortem report discloses that the deceased sustained one injury to the neck which caused his death and therefore excluding A2, A3 and A4 having participated in the fight. I find there is no other credible evidence from the prosecution witnesses to link A2, A3 and A4 to the deceased's death.

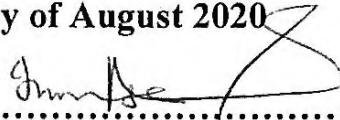
Having discounted the evidence of the prosecution's eye witness PW2, in evaluating both PW3 and PW4 evidence it is apparent they did not witness the events of the 5th December 2019 leading to the deceased's death. I find that the death of the deceased was not caused by A2, A3 and A4 acting jointly and purposively in executing an unlawful act resulting in the death of the deceased. Having accepted A1's confession, I have lingering suspicion of the prosecution's evidence and their version of events.

On the totality of the evidence, I find that the prosecution has failed to prove beyond all reasonable doubt that A2, A3 and A4 caused the unlawful death of the accused

or that they acted jointly with a common intention of causing his death. In the absence of any other evidence direct or circumstantial to link A2, A3 and A4 to the offence, I **ACQUIT** A2, A3 and A4 of the offence of murder contrary to section 200 of the *Penal Code Cap 87 of the laws of Zambia*.

As earlier indicated, and for the avoidance of doubt, I **ACQUIT** A1, A2, A3 and A4 of the offence of murder contrary to section 200 of the *Penal Code Cap 87 of the laws of Zambia*.

Delivered at Lusaka this 12th day of August 2020



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**IRENE ZEKO MBEWE
HIGH COURT ZAMBIA**