

IN THE HIGH COURT FOR ZAMBIA

HK/85/2019

AT THE KITWE DISTRICT REGISTRY

HOLDEN AT KITWE

(CRIMINAL JURISDICTION)



BETWEEN:

THE PEOPLE

VS.

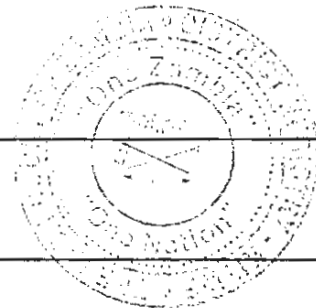
JACKSON MHANGO

Before Hon. Mrs. Abha N. Patel ,S.C. on theday of August , 2021.

For the People: Mrs. G.K. Ngulube, National Prosecution Authority.

For the Convict: Mr. P. Chavula, Senior Legal Aid Counsel,
Legal Aid Board

JUDGMENT



Legislation referred to:

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

Cases referred to:

1. Joseph Mulenga and Anor v The People (2008) Z.R.1 Vol.2 (S.C).
2. Shamwana v The People (1985) Z.R. 41
3. Micheal Chonya and Another v The People CAZ Appeal No. 135-136/ 2019

4. James Mulenga v The People CAZ Appeal No. 136/2018
5. R v Woodcock (1987) 1 Leach 500
6. The People v Mwendalubi Nymbe HT/17/2010
7. Liyumbi v The People (1978) Z.R 25
8. Bwanausi v The People (1976) Z.R. 103 (S.C)
9. Dorothy Mutale and Richard Phiri v The People (1977) S.J 51 (S.C).
10. George Musupi v The People (1978) Z.R. Z.R 271.
11. The People v Muchabi (1966) Z.R 130
12. David Zulu v The People(1977) Z.R 151
13. John Mwanaute v The People Appeal No.200/2011
14. Mupota v The People(1976) Z.R 212 (SC)
15. Micheal Chonya and Anor v The People CAZ Appeal No. 135-136/2019
16. Muiwani V The People SCZ Appeal No. 44 of 2015

1. INTRODUCTION

- 1.1** The accused, Jackson Mhango, stand charged with the offence of Murder contrary to section 200 of the **Penal Code, Chapter 87 of Laws Zambia.**
- 1.2** The particulars of the offence alleged that the Accused on 2nd March, 2019 at Kitwe in the Kitwe District of the Copperbelt Province of the Republic of Zambia, did murder one **Dick Mhango.**

1.3 The accused denied the charge and the State led six witnesses, **PW1** to **PW6**, before it closed its case.

2. PROSECUTION EVIDENCE

2.1 PW1 was Francis Siame, who testified that on 2nd March, 2019 around 22.00hours he was sleeping in his house when he heard a knock at the window. When he asked who it was, he heard a voice saying "*it is Dick Mhango*", his landlord, the now deceased. **PW1** explained that he lived in the same yard with the deceased.

2.2 PW1 went outside and the deceased told him that he had called him to help rescue **PW2**, his girlfriend, who was being beaten by the deceased's nephew, the now accused, who also stayed in the same yard.

2.3 When **PW1** reached the entrance of the Deceased's bedroom he saw the accused sitting on top of the deceased's girlfriend, **PW2**, punching her on the mouth while saying that he wanted to kill her. **PW1** pointed out that he was able to see because there was light coming from a lit candle. At that point **PW1** asked the accused's wife, who had also came, to go and hold the accused so that **PW2** could be rescued to come out of the bedroom.

2.4 When the accused was restrained by his wife, the naked **PW2** ran out of the house and went and hid behind the orange tree where the deceased followed her. After that, **PW1** went back to sleep thinking the fight was over.

2.5 It was his evidence that after 20-30 minutes, **PW1** heard a knock at the window again but this time it was **PW3**, a fellow tenant, who was knocking. **PW3** asked him to go outside and see what was happening. When he went outside **PW3** switched on a torch on his phone and pointed it on the ground, where **PW1** noticed the deceased lying on the ground three metres away from his house and his whole body was covered in blood.

2.6 **PW3** then told him that he heard the deceased shout that "*he had been stabbed with a knife*". **PW3** also told him that **PW2** was still hiding within the yard. **PW1** asked his wife to give her a chitenge and a blouse. Thereafter they informed the deceased's relatives and **PW1** in the company of his wife, **PW2** and **PW3** went and reported the matter at Kawama Police Station. He added that **PW2** had swollen cheeks and other injuries sustained at the hands of the accused.

2.7 After making a report, they went back to the scene of crime accompanied by two police officers who after checking the deceased told them he was already dead. The officers went to check the accused's house, they found the door open and right at the entrance of the house they found a knife which they showed **PW1**. The knife had a mukwa like handle and a silver blade.

2.8 Later, the deceased's body was taken to the mortuary. On 4th March, 2019 both **PW1** and **PW2** were summoned to the

police station where they gave their respective statements. As they were giving their statements the accused was brought and asked in their presence if he was the one who had killed the deceased and **PW1** heard him say *"it is me who stabbed him with a knife, it is me who killed him."* **PW1** identified the accused in court and the knife retrieved from the scene of crime.

2.9 When cross-examined, **PW1** stated that at the material time he had been renting that house for a month and a half. He told the court that the deceased and the accused were stayed together. When asked how he knew that the lady the accused was beating was the deceased's girlfriend, he responded that it was the deceased himself who told him that she was his girlfriend. He also said that he heard the accused say that she was a prostitute.

2.10 Under further cross-examination he explained that after he went back to sleep he did not hear any noise of a fight outside.

2.11 **PW2** was Vanessa Phiri. She testified that on 2nd March, 2019 she was with her boyfriend, the now deceased, in his house in Kamatipa compound in Kitwe. While sleeping, they heard someone knocking at the door. The deceased asked who it was and she heard a voice saying it was Jack, the now accused. The deceased refused to open the door but the accused forcibly opened the door and entered the house, he

went straight to the bedroom. She said that she was able to see because there was a lit candle.

2.12 It was her evidence that when the accused entered the bedroom he sat on top of her, (**PW2**) and started punching her on the head and ribs. She pointed out that she was naked and the deceased was wearing only a pair of shorts. Further, she explained that the deceased had been her boyfriend for three months and that she never knew the accused and only came to know his name that fateful night. When asked if she knew why he was beating her she said that she had no idea but she heard him shouting at the deceased that the reason he had not opened the door was because of her.

2.13 She narrated that the deceased attempted to restrain the accused from beating her but the accused kept pushing him away and continued beating her. **PW2** started to bleed causing the deceased to run outside to call for help. She then saw the deceased enter the house accompanied by a man and a woman. The woman held the accused and the man pushed her from the room. As she was trying to run away the accused held her leg and bit her with his teeth. **PW2** showed the court where she had been bitten by the accused.

2.14 **PW2** ran outside and hid behind a lemon tree, she explained that she could not go home because she was naked. After sometime as she was hiding she saw a man walking towards

the deceased's place. So she asked him to get her some clothes from the deceased's house. After sometime a woman brought her a blouse and a chitenge and was told by the man who rescued her that the deceased had been stabbed.

2.15 PW2 accompanied by the woman who had given her clothes, **PW3** and **PW1** went to Kawama Police Post where they reported the matter. She was issued with a medical report and she remained at the Police Post as the police officers and others went back to the crime scene. Later, she learned that the deceased had died. She took the medical report to Kitwe Central Hospital on 4th March, 2019. She identified the medical report and the accused in court.

2.16 During cross-examination, she stated that she did not see the deceased drink beer that fateful night. When asked if it was not true that on that night she was with the accused before she ran away from him, she responded that it was not true. She also denied the fact that the accused when beating her was shouting that she was a prostitute who had run away from him at the bar. She maintained that she did not know the accused.

2.17 When cross-examined further, she explained that although there were no lights inside the deceased's yard the outside was lit by the neighbour's house.

2.18 PW3 was Daniel Nundo Mutale. He testified that on 2nd March, 2019 around 23.00 hours he was sleeping in his

house when he heard a knock at the door and a voice calling him saying "*bashi Sam, bashi Sam*" but he did not answer. But when the knocking continued he asked who it was and he heard the voice say it was the deceased.

2.19 When he asked him what he wanted at that late hour the deceased asked him to go out quickly because his girlfriend, **PW2**, was going to be killed by the accused. **PW3** said that he had known both the deceased and the accused for three months as both of them were staying in the same yard with him but in different flats.

2.20 When he opened the door, the deceased started going towards his home and he heard the accused's voice saying "*today you shall see*". **PW3** explained that he was able to see because of the moonlight and the lights from the neighbours' house which had ZESCO power. After getting dressed, **PW3** rushed towards the deceased's house. On his way he heard a female voice calling him from behind a lemon tree, so he switched on the torch on his phone and saw the naked **PW2** who asked him for some clothes. He told her that he would call a fellow woman to provide clothes for her. **PW2** then cautioned him not to raise his voice because the accused would kill her.

2.21 As he approached the deceased's house he heard him say "*people I beg of you I have been stabbed with a knife by Jack*", so instead of going to organise clothes he went to where the deceased's voice was coming from which was his

house. He found the deceased outside by the door holding the accused tightly by his clothes who was standing inside the deceased's house. They were facing each other locked in a struggle.

2.22 When he reached them the accused pushed the deceased very hard and he fell to the ground in a sitting position. **PW3** moved closer to the accused, and started shouting at him saying that the deceased was his parent who he was not even supposed to beat. The accused did not say anything but the deceased said *"this person you are talking to has stabbed me with a knife"* but the accused told him to stop telling lies.

2.23 **PW3** checked the deceased using a torch on his phone, he noticed that the deceased had blood all over his chest. After that **PW3** went to wake up **PW1** and as he left the deceased's house, he saw the accused run away. He went with **PW1** to go and see the deceased, who had been stabbed. **PW1** also told him that he had earlier rescued a woman who was almost killed by the deceased. The wife to **PW1** also woke up and **PW3** asked her to organise clothes for the naked woman (**PW2**), behind the lemon tree.

2.24 **PW3** proposed that they look for a vehicle to take the deceased to the hospital but as it was late, it was difficult to find a vehicle. Instead they went to Kawama Police Post where they reported the matter. **PW3** was accompanied by

PW1, **PW1's** wife and **PW2**. They also phoned the sister and niece to the deceased.

2.25 After the matter was reported, **PW2** was issued with a medical report. The Police officers accompanied **PW3** and others back to the crime scene and after checking the deceased it was discovered that he had already died. The officers then entered the deceased's house where they found a lot of blood and they opined that the deceased may have been stabbed in the house.

2.26 The officers then went to the accused's house, but before they could enter the house they found a knife by his door which they showed to both **PW1** and **PW2**. Around 03.00 hours the officers from Mindolo Police Station picked up the deceased's body. On 4th of March 2019, **PW3** went with **PW1** to Kawame Police Post to give their respective statements. After giving their statements the accused was brought and he voluntarily admitted in their presence to have killed the deceased. **PW3** identified the accused and the knife found at the entrance of the accused's house.

2.27 During cross-examination, **PW3** stated that when he went to the deceased's house the only thing he saw was the accused pushing the deceased and that the accused refused having stabbed the deceased. He also stated that he did not see the accused holding a knife.

2.28 PW4 was Sergeant Kakoma Nyambe, a scenes of crime technician. He testified that in the early hours of 3rd March, 2019 he received a phone call from Detective Chief Inspector Bowa, who was then Mindolo Officer in-charge informing him that they had received a report of murder which required scene procession.

2.29 It was his evidence that he organised himself and went to Mindolo Police Station, upon arriving there he accompanied Detective Chief Inspector Bowa and others to Kamatipa compound. At the scene of crime, he observed that the scene was an outdoor case of homicide, the deceased person was found outside lying in a pool of blood about 10 metres from his house. The deceased's half naked body was covered in a chitenge material.

2.30 He explained that the scene had flats with some other houses surrounding the flats which had no lights but the place was lit by lights from the neighbour's house about 15 metres away. The sky was also clear hence it provided some light.

2.31 When the deceased's body was physically examined it was found with 3 deep cuts on the left side of the body i.e. on the neck, chest and near the diaphragm. Inside the deceased's sitting room there was blood on the floor and on the door step. **PW4** took photos of the scene using a canon police camera. When asked if he was among the first officers to go

to the scene of crime he said that he was among the second group.

2.32 It was **PW4**'s further testimony that on 5th March 2019 he attended a post-mortem examination for the deceased at Kitwe Central Hospital Mortuary conducted by Dr Olga. Later, he prepared a photographic album which he kept in his custody. He identified the photographic album and produced it as part of the evidence.

2.33 **PW5** was Constable Lavious Samudimu. He testified that on 2nd March, 2019 he was working the night shift at Kawama Police Post. Around 00.12 hours he received a report from **PW1** that the deceased had been stabbed with a knife by his nephew, the now accused. He testified that he went with **PW1** to the scene of crime where he found the deceased's body lying in a pool of blood outside his house approximately 3 metres from the door step of his house. **PW5** then checked the deceased's body using a touch, he observed a cut on the left shoulder and two cuts on the abdomen.

2.34 He then scanned the surrounding area and 60 metres from where the deceased's body was lying, he saw a blood stained knife on the ground. He put on his gloves and picked the knife which he put in a plastic. He then informed the criminal investigations officer, **PW6**. **PW5** identified the knife he picked from the scene of crime. He also identified the accused who he said he had known since 2016.

2.35 During cross-examination, **PW5** stated that he used the torch to check the deceased's body because there was no electricity at that particular house.

2.36 PW6 was Detective Sergeant Lyson Chainda. He testified that on 3rd March, 2019 around 00.30 hours he received a phone call from the officer in-charge informing him about a matter in Kamatipa area. He rushed to Kawama Police Post. At the enquiries he found **PW1**, **PW2** and **PW3**. **PW2** narrated to him what had transpired. **PW6** with other officers and the reporters went to check out the scene of crime. They found the body of the deceased at the scene, lying in a pool of blood 3 metres away from his house.

2.37 PW6 also observed that the door to the deceased's house was wide open. Upon checking the deceased's body, **PW6** observed two wounds on the left side of the stomach and a stab wound on the shoulder which was bleeding.

2.38 Thereafter the body was taken to the mortuary. Later that same day, the accused surrendered himself at Kawama Police Post. On 5th March, 2019 **PW6** attended a post-mortem examination of the deceased's body conducted at Kitwe Central Hospital. After a warn and caution statement was administered to the accused, **PW5** formally charged the him with the subject offence. **PW5** identified the accused in court. He also identified the knife found at the scene of crime, the medical report for **PW2** and the post-mortem report and produced all of them as part of the evidence.

2.39 During cross-examination, when asked if the knife was submitted for finger prints, **PW5** said that no finger prints were lifted from the knife. He also stated that he did not subject the blood stains on the knife to chemical analysis.

2.40 At the close of the Prosecution case the accused was found with a case to answer and he elected to give sworn evidence and did not call any witness.

3. DEFENCE EVIDENCE

3.1 In his defence, the accused testified that on 2nd March, 2019 during the night he woke up to go to the toilet outside the house. On his way back to the house he passed near the deceased's window. He heard a voice of his girlfriend, **PW2**, coming from inside the deceased's house. He knocked at the door but the deceased did not answer. He then entered and went straight to the bedroom where he found both **PW2** and the deceased naked on the bed.

3.2 The accused asked the deceased what was happening as he knew that **PW2** was his girlfriend who he used to sleep with since 2015 and was actually planning on marrying her. He explained that **PW2** even used to cook for him and the deceased knew about that. When asked if there was anyone who knew about his relationship with **PW2** he responded that only the deceased did.

- 3.3** The accused went on to testify that after he found both the deceased and **PW2** naked in the bedroom he slapped **PW2** who then left the room. The deceased got very upset such that he grabbed a knife and tried to stab him but the accused grabbed the deceased's hand which had a knife and they both struggled for the knife.
- 3.4** As they struggled, they fell in different directions. He said there was a lit candle as there was no electricity in the entire compound on that particular day. The accused then managed to get away from the deceased and ran outside to look for **PW2** but he could not find her. Instead of going back home he decided to go to his friend's house by the name of Michael to spend the night, which was 2 kilometres away. When asked why he did not go back home, he responded that he was scared that the deceased would stab him.
- 3.5** The following day on his way back home, he met four women from his neighbourhood who told him that the deceased had been taken to the hospital. Upon being given that information, the accused decided to go and see the deceased at Kitwe Central Hospital, but before he reached the hospital he changed his mind and decided to go to Kawama Police Post to give a statement on what had happened the previous night. However, when he introduced himself to the two officers he found at the enquiries, he was accused of having killed the deceased and he was locked up in the cells.

- 3.6** It was his evidence that he was taken to the CID room where during interrogations he denied having killed the deceased. But in a bid to force a confession out of him, the police officers beat him with a short baton and kicked him until he was injured on the knees and hands. As the beatings got worse to point of making him urinate and defecate, the accused admitted having killed the deceased, just for the beatings to stop.
- 3.7** When asked why **PW2** said that she was not his girlfriend, he said that she denied being his girlfriend because she was the cause of the deceased's death. And when asked about his relationship with the deceased, he responded that he used to relate very well with him. He also denied being the owner of the knife found at the crime scene and insisted that the knife belonged to the deceased.
- 3.8** When cross-examined, the accused reiterated what he said in examination in chief, that it was dark on that fateful night as there was no power and that there was a lit candle in the deceased's house. He also stated that when he entered the deceased's house he started beating **PW2** and admitted that on that fateful night he had a confrontation with the deceased but added that it was the deceased who wanted to stab him with the knife.
- 3.9** Under further further cross-examination, the accused denied having stabbed the deceased.

3.10 The Defence closed its case and learned counsel for the Prosecution and Defence filed written submissions. These have been received by the Court and carefully considered. The Court acknowledges the industry and diligence of Counsels respectively.

4. SUBMISSIONS BY THE PROSECUTION

4.1 In their submissions filed on 1st June 2021, the Prosecution submitted that the only inference that could be drawn from the evidence on record was that the accused with malice aforethought stabbed the deceased person with a knife and the deceased person died as a result of the stab wounds. According to Counsel, the accused did not challenge **PW3's** evidence that the deceased was stabbed by him and she referred the Court to the case of **Joseph Mulenga and Anor v The People (2008)**. It was also contended that the evidence of the accused person was discredited in cross-examination, as it had a lot of inconsistencies thereby questioning the credibility of his testimony.

4.2 According to Counsel, since the accused's versions of events was different from that given by the Prosecution witnesses, there was need for this court to assess the credibility of the witnesses pertaining to their truthfulness.

To buttress this position the Prosecution referred to the case of **Shamwana v The People** where the court stated that:

"Finality of assessment as to witness` credibility especially as to his truthfulness should be reserved until the final judgment stage after both sides have been heard."

- 4.3** It was also submitted that the Prosecution evidence was more credible than that of the accused person because the Prosecution witnesses corroborated each other. Further, it was submitted that what the accused said shortly before dying that *"people I beg you, I have been stabbed"* qualifies as a dying declaration and should be admitted in evidence.

In buttressing the preceding submission Counsel relied on the following cases **Micheal Chonya and Another v The People**, **James Mulenga v The People** and **R v Woodcock**.

- 4.4** Furthermore, it was submitted that the defence of provocation was not available to the accused because **PW2** denied being the accused`s girlfriend and that her evidence was corroborated by **PW3** who said that he saw **PW2** for the first time on that fateful night. Counsel also added that the fact that the accused had time to calm down as per **PW1`s** evidence means that the accused could not claim that he had lost self control. This court was called upon to consider

the case of **The People v Mwendalubi Nyambe** and **Liyumbi v The People**.

5. SUBMISSIONS BY THE DEFENCE

5.1 In their submissions filed on 21st June, 2021 the Defence submitted that the Prosecution case was anchored on circumstantial evidence but the circumstantial evidence against the accused did not take the case out of the realm of conjecture to permit only an inference of guilty.

5.2 According to Counsel, the circumstantial evidence against the accused permits several reasonable inferences such as; the accused stabbed the deceased in self defence, that the accused stabbed the deceased out of provocation after he found the deceased in bed with his girlfriend or that he stabbed the deceased accidentally as both were struggling for the knife. In support of this submission the Defence relied on the case of **Bwanausi v The People** in which the Supreme Court noted that:

“Where a conclusion is based purely on inference that inference may be drawn only if it is the only reasonable inference on the evidence; an examination of alternatives and a consideration of whether they or any of them may be said to be reasonably possible cannot be condemned as speculation.”

5.3 In addition, it was submitted that since several possible inferences could be drawn from the evidence, this court ought to examine all the inferences and adopt the one more favourable to the accused, which is that the accused acted in self defence to repel the attack from the deceased. To buttress this submission the Defence cited the case of **Dorothy Mutale and Richard Phiri v The People**.

5.4 Defence also submitted that from the evidence of **PW2** and that of the accused himself, the only inference that can be drawn is that there was a relationship between the two as such **PW2** is a witness with her own motive to serve hence her evidence needed corroboration. The Defence supported this submission with what the Supreme Court said in the case of **George Musupi v The People**.

5.5 In conclusion, the Defence contended that since **PW2** was the accused's girlfriend, he was provoked when he found her naked in the deceased's bedroom. In support of this contention the Defence relied on the cases of **The People v Muchabi**.

6. ANALYSIS OF THE LAW AND AUTHORITIES

6.1 Having considered the evidence and written submissions from both sides, I find as a fact that the deceased was stabbed and consequently died on 2nd March, 2019. There were no witnesses to the attack that left the deceased with stab wounds of the sub clavicular vein and fractured ribs as

disclosed in the Post-Mortem Examination Report. Therefore, the question that needs to be resolved relates to the identity of the person who murdered the deceased.

6.2 The Prosecution has maintained that it is the accused who stabbed the deceased thereby causing grievous wounds that led to his death. The accused, on the other hand has denied the accusation.

6.3 As stated above, none of the Prosecution witnesses saw the accused stab the deceased. The evidence of the Prosecution, therefore, as to who killed the deceased, is largely circumstantial. It is~~s~~ trite that a Court can only convict on the basis of circumstantial evidence if the only reasonable inference from the available evidence is that the accused committed the offence.

This position was espoused by the Supreme Court in the celebrated case of **David Zulu V. The People**. The question in *casu*, therefore, is whether the Prosecution's circumstantial evidence is cogent enough to take the case out of the realm of conjecture and permit only an inference that it is the accused who murdered the deceased.

6.4 The relevant evidence of **PW1** was that he was sleeping in his house when the deceased went to ask for his help to rescue **PW2** who was being beaten by the accused. Indeed when he accompanied the deceased to his house, he found the accused beating **PW2** in the deceased's bedroom. With

the help of someone who was described as the accused's wife, **PW1** managed to help **PW2** escape from the accused. However, 20 to 30 minutes later his neighbour **PW3**, summoned him back to the deceased's house where he found the deceased lying on the ground and his whole body covered in blood. This version of events was confirmed by both **PW2** and **PW3**. The accused however said he only slapped **PW2** and she walked out of the house. To my mind, the accused's version of the state of events seems fabricated and rehearsed. It defies logic that if **PW2** indeed walked out of the room as stated by the accused, that she would have done so without taking her clothes with her. I find as a fact that the accused's attack on **PW2** was so violent and aggressive that the deceased ran out to look for help and brought **PW1** to help break the fight. Further the medical report of **PW2** (**P2**) confirms the extent of the injuries sustained in the attack. This also makes the events that followed of **PW2** running out and hiding behind a tree more plausible.

- 6.5** Further the evidence of **PW2** was corroborated in all material respects by **PW1** and **PW3**. It was further not challenged that **PW3** saw her hiding behind a tree and he confirmed that she was naked and further confirmed that **PW1's** wife gave clothes to **PW2**. She also testified that she left the accused with the deceased in the deceased's house. The defence have attempted to submit that she may have been the one to cause the death of the deceased. This suggestion

has no merit as she was outside the yard, and hiding her nakedness behind a tree and left the deceased and the accused struggling with each other. Further I find that she had no motive to cause the death of the deceased.

6.6 The accused claims that after he slapped **PW2**, the deceased became upset and got a knife to stab him. They then struggled for the same knife, the accused managed to escape from the deceased who fell down in the process of the struggle. He then went and slept at his friend's house (only known as Michael) and came to know about what had happened to the deceased the following day. The Court has noted that the accused did not call this person called "*Michael*" to testify for him in a matter where his evidence was critical. I find that this line of evidence was fabricated and is dismissed outright.

6.7 Further **PW3** told the court that as he was going towards the deceased's house he heard his voice saying "*I have been stabbed with a knife by Jack*". When he reached the deceased's house, **PW3** found the deceased holding the accused tightly by his clothes, and then the accused pushed the deceased with so much force and he ended up falling down in a sitting position. The deceased again said "*this person you're talking to has stabbed me*".

The accused admitted that he did not challenge the evidence of **PW3** who testified that he saw the two of them locked in a struggle and that he saw a knife, nor did he deny his evidence

that he saw the accused push the deceased so hard that he fell down in a seated position, after which **PW3** saw the deceased's body with blood all over. He also did not challenge **PW3's** evidence that after this, the accused fled the scene.

PW3 further confirmed having phoned the niece and sister of the deceased and confirmed that he had their numbers saved in his phone. This also confirms that he knew the deceased and the accused relatively well.

On the evidence of **PW3**, I make a finding that the evidence of **PW3** was credible, and consistent. It was corroborated by **PW1** who said that when he came out of his house, he and **PW3** saw the body of the deceased in a pool of blood. I also note that both **PW1** and **PW3** were tenants of the deceased and had no reason or motive to fabricate their evidence in Court. The accused equally admitted that he knew of no reason why they would offer evidence against him.

6.7 The evidence of **PW1**, **PW2** and **PW3** places the accused at the scene of crime, which is the deceased's house. Both **PW1** and **PW2** said that they left the accused at the deceased's house while **PW3** said that he found the accused at the deceased's house and even saw the accused push the deceased who fell to the ground in a sitting position. Immediately after he fell to the ground, **PW3** observed that the deceased's chest was covered with blood. This was evidence that was not challenged.

I also note that a lot of issue was made with the state of light in the area that particular night. I find that although there

was no power from Zesco, all the prosecution witnesses confirmed there to have been adequate light that night, firstly from the moonlight and secondly from zesco powered light from the neighbour's yard. The fact of having used torches from a cell phone, and flash lights by the Police, only served to confirm what the witnesses were able to observe in any event. This was equally confirmed by the evidence of **PW1, PW2, PW3, PW4 and PW6.**

- 6.8** The only reasonable inference having regard to the above facts is that it was the accused who caused the fatal stab wounds on the deceased which caused his death, as he was the last person seen struggling with him. This guidance was given by the Supreme Court in the case of **John Mwanautse v The People**. In that case, the evidence before Court was that the appellant was the last person seen with the deceased. The Supreme Court upheld the conviction by the trial Court and said the following:

"Applying the above principles to the facts of this case, we are satisfied that the learned trial Judge was on firm ground when he drew the inference of guilty on the basis of the circumstantial evidence before him. The totality of this circumstantial evidence which is that the Appellant was the last person seen with the child before the child wound up dead in the bush, takes this case out of conjecture."

6.9 On the authority of the *John Mwanauta* (*supra*), I find and hold that it was the accused person who caused the death of the deceased person by inflicting fatal stab wounds on him that led to his death.

6.10 The accused insisted that **PW2** was his girlfriend who he even wanted to marry. However, even without considering whether or not **PW2** was his girlfriend, the attempt by the Defence to use provocation as a defence cannot succeed and, on this issue, I agree with the Prosecution's submission that the accused had had time to cool off. According to **PW1**, after rescuing **PW2** from the accused, he went back to sleep thinking the fight was over and after 20-30 minutes he was told the accused had stabbed the deceased. It follows therefore that the accused had had the about 30 minutes to cool off or end the scuffle between himself and the deceased. Further, I am not satisfied that **PW2** was the girlfriend of the accused. He said he had been a long term relationship with her since 2015, and yet he said that the only person who knew of this relationship was the now deceased uncle. **PW2** herself denied any relationship with the accused and both **PW1** and **PW3** testified that they were seeing her for the first time the night of the incident.

6.11 In this regard, I note the guidance offered by the Supreme Court in discussing the defence of provocation when it said in the case of *Mupota v The People* that:

“Even if the appellant was speaking the truth about the insults that had been offered him over a period of years, and repeated on the day in question, there had been time for his “passion to cool”.”

6.12 Further, the lack of interest in helping the deceased also speaks volumes against the accused. According to **PW3**, when the deceased fell down and said that he had been stabbed by the accused, (which allegation he denied, but did not challenge in Court) **PW3** used a torch to confirm if indeed he had been stabbed in the presence of the accused. **PW3** observed that the deceased’s chest was covered with a lot of blood, but instead of helping him, the accused ran away. I find the act of running away by the accused very suspicious and could be said to be evidence of his guilty conscience. I also observed that the evidence of the accused was so well rehearsed and staged and he did not come across as credible and his demeanour was evasive, especially under cross examination.

6.13 According to the Defence, since there are several possible inferences to be drawn from the evidence, this court has been invited to consider the one more favourable to the accused, which was that he acted in self defence to repel the attack from the deceased.

I find this submission most flimsy in that none among the Prosecution witnesses saw the deceased attack the accused. I note from the evidence that the accused was not assaulted

by the deceased. There is no evidence to show that the accused feared for his life nor was he overpowered by the deceased in any way. Instead the evidence reveals that the deceased tried to avoid the fight and protect **PW2** by soliciting for help from both **PW1** and **PW2**.

In this regard I am guided by the holding in the case of **The People v Njovu**, where it was held that:

"The right of self-defence extends no further than doing what is necessary to repel the attack".

6.14 PW3 also told the court that the deceased told him in the accused's presence that the person who stabbed him was the accused. **PW3** further saw the accused push the deceased to the ground. I find that **PW3** had no reason to falsely implicate the accused. Further, the deceased told **PW3** that the accused had stabbed him within minutes of being stabbed. I have no reason to disbelieve or otherwise discount the deceased's allegation against the accused. Therefore, I accept the deceased's statement as his dying declaration which I hold to be conclusive evidence of the identity of the person who stabbed him. I am fortified in my decision by what was said in the case of **Micheal Chonya and Anor v The People** referred to above by the Defence.

7. VERDICT

7.1 In light of what has been said above, I am satisfied beyond reasonable doubt that as the last person to have been seen struggling with the deceased; it could only have been the accused that inflicted the fatal stab wounds that caused the death of the deceased.

Further, I find and hold that the accused viciously stabbed the deceased 3 times. It is a settled principle of law that right of self-defence extends no further than doing what is necessary to repel the attack. As regards provocation, my opinion is that the accused did not stab the deceased in the "heat of the moment" as he had enough time to cool off.

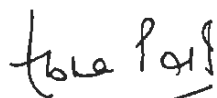
7.2 In the present case, the Post Mortem Examination Report, **P4** and indeed the pictures in the photographic album **P3**, indicate that the cause of the deceased's death was stab wound of the sub clavicular vein with profuse bleeding. On the basis of the above findings, the only inescapable conclusion is that when the accused stabbed the deceased 3 times, he must have known that his act of inflicting deep vicious wounds would probably cause death or cause the deceased grievous bodily harm.

7.3 I am therefore satisfied that the accused had the requisite malice aforethought when he caused the death of the deceased. The prosecution has proved beyond all reasonable doubt that the offence of murder contrary to **section 200** was committed on the material date.

Having failed to find any extenuating circumstances in this case, and as guided by the authorities, and more recently by a decision of the Supreme Court in the case **of Mulwani vs The People**, from the circumstances of the case, I hold the view that the deceased was murdered in cold blood and impose the mandatory death sentence.

Leave to appeal to the Court of Appeal is granted.

Delivered in Open Court at Kitwe,
the 2nd day of September, 2021.



Mrs. Abha N. Patel, S.C.

HIGH COURT JUDGE