IN THE SUPREME COURT FOR ZAMBIA **APPEAL NO. 46/2015**
HOLDEN AT NDOLA
(Criminal Jurisdiction)

BETWEEN:

ANGEL CHIBESA LENGWE **1ST APPELLANT**

ABEL BANDA **2ND APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: **Muyovwe, Kabuka and Chinyama, JJS**
On 6th December, 2016 and 13th December, 2016

For the Appellants: Mr. K. Msoni, Messrs J.B. Sakala and Company

For the Respondent: Ms. C. Soko, Deputy Chief State Advocate

J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court

Cases referred to:

1. **Director of Public Prosecutions vs. Lukwosha (1966) Z.R. 14**
2. **Lukolongo and Others vs. The People (1986) Z.R. 115**
3. **Benai Silungwe vs. The People (2008) Z.R. 123**
4. **The People vs. Bunda Mumba and Kamwata (1990-92) Z.R. 194**
5. **David Zulu vs. The People (1977) Z.R. 151**
6. **Ilunga Kabala vs. The People (1981) Z.R. 103**
7. **Gilbert Chileya vs. The People (1981) Z.R. 33**
8. **Tomato vs. The People (1972) Z.R. 64 (Reprint)**
9. **Phiri and Others vs. The People (1973) Z.R. 47**

10. **John Mpande vs. The People (1977) Z.R. 440**
11. **Dickson Sembauke Changwe and Another vs. The People (1988-89) Z.R. 144**

Legislation referred to:

1. **The Penal Code Cap 87 of the Laws of Zambia**

The appellants were tried and convicted by the High Court sitting at Ndola of the offence of murder contrary to Section 200 of the Penal Code. It was alleged that on the 27th March, 2014 at Ndola in the Copperbelt Province of the Republic of Zambia they murdered Raphael Chama Mulenga (hereinafter called "the deceased").

The prosecution evidence from seven witnesses established that on the material day PW1 who resided at House No. 112 Chibwe Crescent, Kansenshi, Ndola left the deceased at her house with instructions to do some gardening for her. When PW3, the land lady at House No. 106B Chibwe Crescent returned home from work in the company of her colleague PW4 between 09:00 hours and 09:40 hours she found the deceased at her home sitting on a septic tank tied to a paw paw tree, with his hands tied together. The appellants told her that the deceased had attempted to steal from

them and the 2nd appellant added that in fact the deceased had stolen from them before. PW3 and PW4 observed nothing unusual about the deceased who was sitted quietly. PW3 advised the appellants to take the deceased to the police instead of keeping him tied up. While PW3 and PW4 were still in the premises, the appellants untied the deceased and walked with him out of the gate. According to PW3, she again saw the appellants get back into the premises and they told her that the deceased had escaped and they intended to search for him after they dressed up properly. PW3 and PW4 left to get back to work.

Later in the day, around 15:00 hours PW1 received a call from her neighbour, a Mrs. Chipasha, who informed her that the deceased had passed on at her house. PW1 rushed to report the matter to the police at Kansenshi Police Station. Accompanied by the police, PW1 went home only to find the body of the deceased on her kitchen verandah. The police picked up the body of the deceased and took it to Ndola Central Hospital mortuary. A postmortem examination was conducted and the cause of death was found to be severe mechanical trauma to the body. The

pathologist explained that this could have been caused by a blunt instrument or assault using fists.

It is noteworthy that in their evidence the police officers who visited the scene at PW1's residence said that they observed that the deceased was foaming at the mouth and was drenched in water. According to Detective Sergeant Kayula, he was told by some witnesses, whom he alleged could not come to testify for security reasons that the appellants had beaten the deceased. Investigations were instituted and the police could not locate the appellants as they had moved from No. 106B Chibwe Crescent immediately after the death of the deceased. Finally, the police discovered that the appellants were working under the commando unit in the Zambia Army. They were apprehended and charged with the subject offence which they denied.

At the close of the prosecution case, the appellants were found with a case to answer and put on their defence.

The 1st appellant stated that on the material day between 09:00 hours and 10:00 hours he was in his bedroom when he saw a (stick rod) being pushed through the window into the bedroom and

then he saw a hand of a person at the window. He quickly got hold of the hand of the person who turned out to be the deceased and called out to the 2nd appellant who helped to apprehend the deceased who was outside the house. According to the 1st appellant, the deceased was very strong and he wanted to run away so together with the 2nd appellant they tied his hands with a torn bed sheet and with another strip of the bed sheet they tied him to a small pawpaw tree. The 1st appellant called DW3 a taxi driver to pick them up in order to take the thief to the police. The 1st appellant did not dispute that the landlady (PW3) and PW4 found the deceased tied up in that manner. He conceded that PW3 scolded them for tying up the deceased and they explained to her that they were just waiting for transport to take him to the police. PW3 told them to untie him which they did but as they took him to the gate to wait for transport to take him to the police, the deceased bolted and they failed to chase him as they were in their boxer shorts. According to the 1st appellant, they informed PW3 that they would look for the deceased later and take him to the police. The taxi driver (DW3) arrived after the deceased had run away. The 1st appellant denied that they beat the deceased. He stated that after a

week they heard from PW3 that the deceased had died. According to the 1st appellant they vacated House No. 106B in September, 2014 but were apprehended in January, 2015. The 1st appellant accused the landlady PW3 of creating a lie that they told her that the deceased had stolen from them before and that he had done piece work for them.

The 2nd appellant's defence was substantially the same as that of the 1st appellant. He said that when PW3 inquired about the deceased who was tied to the pawpaw tree, they told her that they had caught him stealing and she advised them to take him outside her yard. He said they started taking him outside and as they were going the 1st appellant saw a car approaching and they got distracted and this is how the deceased ran off. As they were not properly dressed, they could not give chase. He said they went back into the premises and advised PW3 and PW4 that they would look for the deceased after they dressed up properly. In January 2015 they were apprehended and charged with the offence of murder which shocked him as they did not beat up the deceased.

The appellants called Pasheni Tembo the taxi driver who stated that on 27th March, 2014 around 07:00 hours, the 1st appellant called him requesting for transport to take someone to the police. However, by the time he got there he found that the person "had gone" and he gave the appellants a ride into town. This was the defence case.

In her judgment, the learned judge dealt with the appellants together. She acknowledged that the prosecution case was anchored on circumstantial evidence as no eye witness came forward to testify that they saw the appellants assaulting the deceased. She found that the evidence linking the appellants to the crime is the fact that they tied the deceased to a pawpaw tree as he attempted to steal from them. She questioned how the deceased could sit in a docile manner while waiting to be taken to the police and stated as follows:

> **" The only conclusion for the docility was because at that point in time, he had been so thoroughly subdued that he could not do anything else. The only way he could have been subdued was by way of beatings inflicted on him. I am confirmed in my conclusion by the fact that there was no way a "strong thief" could allow**

himself to be tied to a small paw paw tree and remain seated waiting to be taken to the police"

She found that the deceased could not have been tied up without aggression going by the fact that the appellants said he was a strong man. She stated that the deceased "could not have been strong enough to counter the combined force of two trained commandos." The learned judge came to this conclusion because the post-mortem report showed no abrasions on the deceased's hands which would have indicated that there was a struggle during the time when they tied him up and went on to state that:

" I am further confirmed in my mind because instinct and normal human reaction is that when one catches a thief, they would not sit to have an amicable conversation while waiting for a friend to pick the caught thief and take him to the police. In this case, the two sat on the veranda nonchalantly while the thief was tied up until they were found. This is not the behaviour of a person who had just caught a thief. They behaved thus because they were alive to their actions and that there was no danger of this person running away as he had been thoroughly beaten."

The learned trial judge found that the appellants lied when they said they did not know the deceased claiming that they only knew the deceased's name in court. This was in view of the

evidence from PW1, PW3 and PW4 that the deceased used to do piece work in the area and in particular at House No. 106B Chibwe Crescent where the appellants resided. PW3 said that the appellants told her that the deceased is the one who had stolen their clothes in the past and that he used to do piece work for them. The learned judge found that the demeanour of PW3 and PW4 could not be questioned especially that they were not in the category of witnesses with an interest to serve. She found the demeanour of the appellants to be very unreliable as they told lies. She concluded that they failed to take the deceased to the police in order to avoid further complications as they had already badly assaulted him. And that in fact walking to the gate with the deceased on the pretext that they were taking the deceased to the police was mere pretence put up for PW3 and PW4 as the appellants were aware that they had already taken the law into their own hands by seriously assaulting the deceased.

The learned judge found that the deceased having been 'released' by the appellants went back to the house right next door where he was doing piece work. She rejected the defence's

suggestion that the deceased could have been beaten by someone else after he was released by the appellants. She took the view that the time was too short for such an occurrence.

The learned judge also stated that the fact that the appellants moved from House No.106B after the death of the person they assaulted is an indication that they actually fled the scene making it difficult for the police to locate them and clearly showing that the appellants had guilty minds.

In addressing the question of malice aforethought the learned judge considered the case of **Director of Public Prosecutions vs. Lukwosha**.[1] According to the learned judge, the post-mortem report revealed that the deceased had been badly beaten and her conclusion was that the appellants are the ones who beat him up in order to subdue him and then tied him up and that this is the only inference she could arrive at. She took the view that the appellants should have foreseen that beating the deceased in such a manner would cause injury and, therefore malice aforethought was established. The learned judge was convinced that the circumstantial evidence was cogent and that the appellants were

linked to the commission of the offence as they were found with the deceased who they had tied up hand and foot and who was found a few hours later dead in circumstances where it can only be due to the beatings inflicted on him by the appellants. She found that the prosecution had proved its case beyond reasonable doubt and that the appellants were guilty as charged and convicted them accordingly.

The appellants have advanced four grounds of appeal couched in the following terms:

(1) **The learned trial judge erred in law and in fact when she convicted the appellants of the offence of murder on the basis of circumstantial evidence which is not sufficient enough to prove the ingredient of malice aforethought in the offence of murder.**

(2) **The court below misdirected itself in law and fact when it concluded that the appellants fled the scene of the incidence of death and that the conduct of the appellants was suspect as the said finding was against the weight of the evidence on record.**

(3) **The court below misdirected itself on a point of fact when it found that the two appellants were trained commandos when**

in fact the appellants are regular soldiers and no evidence was tendered to show that the appellants were commandos.

(4) **The appellant will aver that the sentences of 50 years imprisonment with hard labour meted out by the court below against the appellants is excessive and shocking in the circumstances of this case as there are extenuating circumstances and other mitigating factors.**

Mr. Msoni, learned Counsel for the appellants relied on his filed heads of argument and briefly made oral submissions.

In support of ground one, Counsel submitted that the appellants' conviction is based on circumstantial evidence. Counsel attacked the learned judge's finding that the deceased was seated in a docile manner. According to Counsel, the evidence by PW3 was simply that she saw the deceased seated on the septic tank tied to a pawpaw tree and he never complained to PW3 that he had been assaulted by the appellants. Mr. Msoni took issue with the following statement from the judgment:

> **" I am further confirmed in my mind because instinct and normal human reaction is that when one catches a thief, they would not sit to have an amicable conversation while waiting for a friend to pick the caught thief and take him to the police."**

Counsel argued that since the State failed to call witnesses who claimed to have witnessed the appellants assaulting the deceased, the presumption should be that had the witnesses testified, their evidence could have supported the story of the appellants. In support of this argument, he cited the case of **Lukolongo and Others vs. The People**.[2]

In the alternative, Counsel submitted that, if we find that the appellants caused the death of the deceased, we should find them guilty of manslaughter as malice aforethought was not proved. Counsel's argument is that from the evidence of PW3, the appellants and DW3, it is clear that the deceased was tied with the intention of taking him to the police.

In ground two, Counsel submitted that contrary to the finding by the learned judge that the police faced difficulties in apprehending the appellants because they fled from the house where they subdued the deceased, the correct position was that the appellants never fled as they remained in the house from March to September, 2014.

Turning to ground three, Counsel submitted that while it is not in dispute that the appellants were soldiers working at the commando unit, there was no evidence that the appellants were trained commandos. According to Counsel, the learned judge misdirected herself when she made this finding which was not supported by evidence.

In ground four, Counsel submitted that the sentence of 50 years should come to us with a sense of shock considering that the learned judge found that there were extenuating circumstances in this case. He contended that being first offenders, the appellants were entitled to leniency as there were no aggravating circumstances to warrant the imposition of the sentence of 50 years on each appellant. In support of this argument, Counsel called in aid the case of **Benai Silungwe vs. The People.**[3] Counsel contended that the appellants did not set out searching for the deceased but that the deceased was unexpectedly caught by the appellants attempting to steal from them. Counsel prayed that the sentence of 50 years be reduced.

In his oral submissions in relation to ground one, Mr. Msoni submitted that the circumstantial evidence which the learned judge relied on is not cogent. He argued that it was inappropriate for the learned judge to gloss over the fact that there were witnesses who allegedly witnessed the appellants assaulting the deceased and yet they were not called by the prosecution. Mr. Msoni contended that while the post-mortem report reveals injuries on the body of the deceased, there is no evidence that it was the appellants who inflicted them. In relation to ground two, he reiterated that according to the evidence of the 1st appellant, they shifted from the house where they were staying in September, 2014.

In relation to ground three, Counsel submitted that due to the finding by the learned judge that the appellants were trained commandos, she concluded that the appellants knew the areas to inflict injury on the deceased to cause maximum damage or grievous bodily harm. That meanwhile, there was no evidence that the appellants were trained commandos.

Coming to ground four, Mr. Msoni reiterated that there were extenuating circumstances in this case and the court below agreed

that there were a lot of thefts in the area. The gist of Mr. Msoni's argument is that the sentence of 50 years did not reflect that the appellants had diminished responsibility. On this submission, Counsel relied on the case of **The People vs. Bunda Mumba and Kamwata.**[4]

On behalf of the State, Ms. Soko filed heads of argument in response which she relied on.

In responding to ground one, while bearing in mind the case of **David Zulu vs. The People**[5] which is instructive on the issue of circumstantial evidence, Counsel submitted that there was undisputed evidence that the deceased had worked for PW1 on three consecutive days; the house was within the vicinity of the appellants' residence and the deceased was a well known manual labourer in that area. She pointed out that it was also common cause that on the fateful day the deceased had attempted to steal from the appellants; had his hands and feet bound whilst tied to a tree. According to Counsel, these facts are relevant in so far as they go to show that the appellants had the opportunity and motive

to assault the deceased. Further, they were the last persons to be seen with the deceased.

In her written arguments, Ms. Soko referred to the following as odd coincidences: the suggestion by the pathologist that the deceased may have been beaten on the chest and loins while tied up; that despite the danger of being incarcerated, the deceased retreated to his work place within the reach of his captors; the disparity between the time given by the appellants as to when the incident happened and the time given by their own witness DW3 who stated that he was at the appellants' place as early as 08:00 hours; and lastly, the fact that the appellants were only caught 10 months after the death of the deceased. Counsel contended that these odd coincidences were not explained. We were reminded that in the case of **Ilunga Kabala vs. The People**[6] we held that it is trite law that odd coincidences are supporting evidence. According to Counsel, the appellants chose to remain silent at the police instead of giving their full side of the story. She contended that the appellants' claim that the deceased fled while at the same time they

told PW3 that they would proceed to take him to the police revealed that their defence was an elaborately concocted afterthought.

Addressing the argument that the police withheld favourable evidence, Counsel argued that no such evidence existed, adding that the appellants were at liberty to call witnesses in support of their case. It was pointed out that the investigation officers explained the challenges that they faced in securing witnesses. In support of this argument we were referred to the case of **Lukolongo vs. The People**[2] and **Gilbert Chileya vs. The People.**[7] It was submitted that looking at the circumstances, the only inference that can be drawn is that the appellants assaulted the deceased prior to tying him up. And that they only released him after being cautioned by PW3. She argued that it is reasonable to conclude that the assault led to the injuries which led to the death of the deceased.

In response to ground two, it was contended that the lower court was on firm ground when it held that the appellants fled from the scene of incident after the death of the deceased. That there was evidence from the investigation officers that they had difficulty

in tracing the appellants as they did not have accurate information about the appellants' place of work. It was pointed out that this evidence was not discredited in cross examination.

Turning to ground three, it was submitted that whether the appellants were commandos or not is neither here nor there as the fact remains that they jointly assaulted an unarmed person thereby occasioning his death. Counsel took the view that the appellants are soldiers by profession and that the learned judge was correct in arriving at the inference that they are trained in the art of inflicting maximum damage.

In tackling ground four, Counsel left the issue of sentence to this court.

In responding to Mr. Msoni's oral submissions, Ms. Soko submitted on the issue of manslaughter as an alternative to the offence of murder. She argued that the only evidence on record is that there were thefts in that area prior to the material day when the deceased attempted to steal from the appellants. She submitted that although the appellants denied assaulting the deceased, there was circumstantial evidence, which looking at the postmortem

report, showed that there were injuries to the deceased's body and that these injuries were inflicted on him in the process of restraining him.

While Ms. Soko contended that there were no extenuating circumstances and that the manner in which the appellants behaved in correcting the wrong the deceased had committed was so outrageous that the sentence of 50 years was appropriate, she submitted that a lesser sentence would contradict the standard which has been set against mob justice in our society.

We have considered the evidence on record, the judgment of the lower court and the submission from Counsel on behalf of the parties.

In the four grounds of appeal advanced by the appellants we have discerned the following issues for our determination:

1. **whether malice aforethought was established to warrant a conviction of murder;**
2. **whether the appellants fled from House No. 106B Chibwe Crescent and if they did, was the lower court on firm ground when it found that this conduct raised suspicion and was an indication that the appellants had guilty minds,**

3. **whether the learned judge's finding that the appellants were trained commandos had any bearing on their conviction and whether it is a relevant factor in this appeal, and**

4. **whether extenuating circumstances existed in this case and whether the sentence of 50 years was appropriate under the circumstances.**

For reasons that will become apparent in this judgment, we will first deal with the fourth issue relating to the existence of extenuating circumstances.

We have in a plethora of cases pronounced ourselves on the issue of extenuating circumstances which is provided under Section 201 (1)(b), (2)(a) of the Penal Code. In the case in *casu*, what the learned judge found to be extenuating was the fact that there had been a lot of thefts in the area and she opined that the appellants' reaction 'morally diminished their guilt'. She however, took great exception to the fact that the appellants acted harshly towards the deceased who was a mere suspect. She declined to mete out the death penalty and opted to sentence each appellant to 50 years imprisonment with hard labour.

In her response, Ms. Soko argued that there were no extenuating circumstances and yet she supported the sentence of 50 years by the lower court. This submission by Ms. Soko is misconceived. It is trite that in a case where there are no extenuating circumstances, the death penalty applies.

In this case, the learned judge therefore fell into grave error when she accepted the submission by Counsel in the court below that because the area was prone to thefts it amounted to an extenuating circumstance as defined in Section 201(2)(a) of the Penal Code. In a nutshell, there were no extenuating circumstances in this case and the learned judge should have pronounced the mandatory death penalty. The fourth ground of appeal, therefore, fails.

We will now deal with the remaining three issues together as they are inter-related. Counsel for the appellant has questioned the conviction of the appellants in the absence of any eye witnesses to the assault on the deceased. He contended that the circumstantial evidence is so weak that it cannot sustain the offence of murder. The gist of his argument is that we should instead find the

appellants guilty of the lesser offence of manslaughter. Counsel's view is that the prosecution failed to establish malice aforethought. It is not in dispute that on the material day the deceased was assaulted and according to the post-mortem report, the cause of death was severe mechanical trauma to the body. In the post-mortem report the pathologist noted the following changes to the body of the deceased-

> **An irregular shaped abrasion located on the middle anterior side of the right forearm about 11 x 7 in size. Its outer surface was brown-pinkish in colour; severe irregular shaped abrasions located on the anterior side of the shanks and knee joint about 2 x 10 cm in size and less; a large hematoma occupied the left lower lateral side of the chest, whole posterior side of the chest, loin and the upper part of the buttocks, red-bluish in colour; some spots of hemorrhage located under the epicardium on the left part of the heart and internal organs were pale.**

Looking at the injuries on the body of the deceased, there is no doubt that the deceased was assaulted. We agree that this case is anchored on circumstantial evidence and the question is whether the circumstantial evidence is so cogent and compelling that no other rational hypothesis than that the appellants assaulted the deceased existed? The learned trial judge actually asked herself

this question. What is the circumstantial evidence in this case? It is not in dispute that PW1 left the deceased at her residence. From the events of that day, it is not disputed that the deceased left his post and the appellants caught the deceased attempting to steal from them between 09:00 hours and 10:00 hours. Because he was a strong person, they had to tie him up with a bed sheet and his hands were tied together and the landlady found him sitting on the septic tank. We must state that there was no evidence that the deceased's legs were tied up. The evidence is clear that only his hands were tied. So it was erroneous for the learned trial judge to find that the deceased was tied up hands and feet as there was no evidential basis for that finding. We, therefore, reverse this finding of fact by the trial judge.

Getting back to the sequence of events, we accept as the learned trial judge did, that it took the intervention of the landlady for the appellants to untie the deceased. In our view, the very act of tying up a person in the manner the deceased was tied up as per evidence on record shows that some violence was exerted on the deceased whether he was strong or not. And this is more so that he

was even tied to a pawpaw tree. It goes without saying that the appellants had the opportunity to deal with "the thief" as they pleased. We can go further and state that this was a case of instant justice as the deceased was tied up to a tree with his hands bound and made to sit on a septic tank. We are persuaded by the conduct of the appellants which clearly points to the fact that they could not have handled the deceased with kid gloves.

The story that they had called DW3 to go and collect the deceased so that they could take him to the police is not supported by the evidence on record. First of all, DW3 said the 1st appellant called him at 07:00 hours and by the time he arrived between 08:00 hours and 09:00 hours, the person who was to be taken to the police had gone and he gave them a ride into town. DW3 was obviously telling a whole load of lies considering the appellants' own testimony that the deceased attempted to steal from them between 09:00 hours and 10:00 hours. Further, as the learned trial judge observed, it was an odd coincidence that the appellants while dressed in boxer shorts could walk to the gate with the deceased and then immediately they came back into the premises without the

deceased who they claimed escaped at the time they got distracted by an oncoming vehicle which they thought was DW3 approaching them. At that point, they told the landlady that they had returned to dress properly in order to take him to the police and she left believing that they would do so.

Mr. Msoni strongly argued that the appellants intended to take the deceased to the police and that the appellants in fact stated the same in their evidence. However, the difficulty we have and which the learned judge had, and we did allude to this during the hearing of the appeal, is that this intention was never carried out by the appellants. In her evidence PW3 (the landlady) said:

> **"There were the three of them, when they went out and at a later point the two young men came back so that they dress properly and take him to the police. Thereafter, I don't know what happened my lady because I went back for work."**

Their own story of walking to the gate in boxer shorts on the pretext of taking the deceased to the police did not make sense to the trial judge and does not make sense to us as well. Since the deceased was already secured by being tied up and PW3 and PW4 were in the vicinity, the appellants could have dressed up before

walking the deceased to the gate rather than first walk to the gate and not proceed because they were not dressed properly. This is why we take the view that DW3's story was a made up story and because it was a made up story, it only served to add more confusion to the appellants' defence. In one breath, the appellants said they intended to take the deceased to the police, in another breath they said they did not bother to search for him after he escaped them because there was no need to take him to the police as he had not stolen anything from them.

There is also the evidence that the appellants were the last persons seen with the deceased. This person whom they caught attempting to steal from them and whom they had bound was in a few hours of escaping from them found dead in the same neighbourhood. All these are odd coincidences which are unexplained. Of course, we agree with Mr. Msoni that there was no evidence on record that House No. 112 (where the deceased was found dead) and House No 106B (where the appellants were renting) were next to each other. There was, however, no dispute that they were in the same neighbourhood.

On the issue of whether the learned judge was on firm ground when she found that the appellants fled from House No. 106B Chibwe Crescent after the death of the deceased, we have addressed our minds to the evidence on record. We take the view that the best evidence on this issue should have come from PW3 the landlady. Unfortunately, neither the prosecution nor the defence solicited for this information from her. In her evidence, PW3 never mentioned and neither was she asked when the appellants shifted from her house. It is clear that the only information PW3 gave to the police was that the appellants were working from Kalewa Barracks. The trial court, therefore, had to fall back on the evidence of PW6 the investigations officer and his evidence was that the appellants had moved from House No. 106B and he was unable to trace their whereabouts until January, 2015. Even if we consider the appellants' claim that they were still residing at PW3's house up to September 2014, their claim cannot hold water because if the police could find PW3 then it follows that they should have found the appellants at the same residence as well. The learned judge considered the evidence on this issue and she believed the overwhelming evidence of the prosecution, and rightly so, that the

appellants fled the scene of incident after the death of the deceased. We agree with the learned judge that the appellants' conduct of fleeing the area a day after the death of the deceased without trace for 10 months speaks volumes and points to their guilt knowledge.

Turning to the issue of whether the appellants were trained commandos, Mr. Msoni did concede during the hearing to a certain degree that this was not a factor in this case. In our view, the conclusion by the learned judge was not without merit. PW6 one of the investigators had this to say:

> **"My lady, as information came up that they were soldiers, follow ups were made but they were not located and their supervisors did not know them until after when information came that they were actually coming from commando. And the landlord herself is the one who was telling us that they were coming from Kalewa Barracks while in fact they were not coming from Kalewa Barracks but they were from commando unit. That made it difficult.....the same day it happened we went there. We found that they had run away. They shifted and went to an unknown address."**

In re-examination PW6 said:

> **" My lady, they ran away from the place, the house, where they were staying to an unknown address and the information we were given by the landlord that they were coming from Kalewa Barracks made**

it difficult for us to find them because these people were not known in Kalewa."

Having regard to the above, we take the view that the finding by the learned judge that the appellants were trained commandos was based on the above evidence placed before her. We cannot fault her for this finding which was based on the evidence which was not discredited in cross-examination. Having stated thus, we must however, hasten to agree with Ms. Soko that whether the appellants were trained commandos was neither here nor there-what mattered was whether it was the appellants who were responsible for the death of the deceased. Of course, we are alive to the very forceful argument by Mr. Msoni who tied the issue of the appellants being trained commandos to the following statement in the judgment where the learned judge had this to say:

> **"The hematoma occurred on large surfaces of the body, hence the pale organs. The witness found all else to be normal. I believe the prosecution has ably proved that the deceased could not have died of anything else other than the beatings. The position of the hematoma also leads me to believe that the persons who inflicted the injuries knew which part of the body to inflict injuries to produce maximum damage."** (emphasis ours)

We are quick to agree with Mr. Msoni here that the underlined statement had no evidential support and we accordingly reverse the learned judge on this finding.

At this juncture, having made a finding that the appellants assaulted the deceased, the question is whether there was malice aforethought. In addressing this issue, we are alive to the circumstances which led to the death of the deceased. According to the testimony of the 1st appellant, which we have accepted, the deceased attempted to steal by using a fishing stick which he pushed through the window. He was, however, apprehended. It was from this backdrop that the deceased was assaulted. In other words, the deceased set the ball rolling. In the case of **Tomato vs. The People**[8] the Court of Appeal, the forerunner of this court considered an almost similar appeal. In that case the court stated the following:

> **"The appellant took part in an assault on the deceased. The witnesses for the prosecution said that the deceased was first hit, fell down and was kicked and the persons kicking him were using boots. The evidence is that this took place over a period of 10 minutes to half an hour. The injury which caused death was a tear in the intestines described as being possibly caused by a kick and**

even to be possibly caused by a hard blow with a fist. The learned trial judge came to the conclusion that there was no doubt that a reasonable man would contemplate grievous harm from an attack such as this and therefore found malice aforethought. The learned judge must have overlooked the medical evidence. The alleged kicks and blows over a long period alleged in this assault resulted in a small laceration of the right side of the eye and swelling and abrasions of upper and lower lips in addition to the injury which caused death. We have no doubt that when a number of persons set upon a man and kick him in such a manner that serious and obvious injuries are caused such as broken ribs and bones, a court will have little difficulty in arriving at a conclusion that grievous harm must have been in the contemplation of a reasonable man. We do not, however, agree that every attack, even including kicking, must result in such a conclusion. (emphasis ours)

And in the case of **Phiri and Others vs. The People**,[9] the appellants were convicted of murder. They were guarding a grocery store when they saw people near the grocery store whom they suspected to be thieves. They apprehended one of them whom they beat up and he died as a result of the injuries he received. The trial court found them guilty of murder. On appeal, the Court of Appeal had this to say:

"...it is clear that the deceased in fact died as a result of the blows on the head, it cannot be said that the appellants must have known that these blows were likely to cause grievous harm. ... on the

question of malice aforethought had the trial court directed himself properly, and for these reasons the conviction in the cases of appellants one and three must be set aside and convictions for manslaughter substituted."

Further, in the case of **John Mpande vs. The People,**[10] we held, inter alia, that:

(i) The offence of manslaughter does not consist simply in an unlawful act resulting in death; the act must at the same time be a dangerous act, that is, an act which is likely to injure another person.

(iii) The likelihood of harm may stem not only from the violence of the unlawful act itself, but may arise also because of the circumstances in which the violence took place.

The question is whether the appellants contemplated that grievous harm would result from the attack on the deceased. This is in view of the fact that after obviously engaging in a violent struggle to tie up the deceased, the appellants kept him seated on the septic tank until the landlady intervened and advised them to take him to the police. In fact, the evidence of the landlady reveals that she did not take a close look at the deceased but she observed that the deceased walked with the appellants out of the gate and did not observe anything unusual.

In the **Tomato[8] case** as well as in the case of **Phiri and Others,[9]** the Court of Appeal proceeded to set aside the conviction for murder and substituted it for one of manslaughter. Considering the facts of this case and the surrounding circumstances, we are of the view that the case in *casu* must be treated in the same way. Further, in the case of **Dickson Sembauke Changwe and Another vs. The People[11]** we put it simply that:

> **"As Sections 200 and 204 of the Penal Code show, murder is a crime which requires a specific intent or a specific frame of mind and it is for the prosecution to adduce evidence which will satisfy this requirement."**

In this case, the prosecution failed to prove specific intent on the part of the appellants to intentionally cause the death of the deceased. We hold the view that the learned judge misdirected herself when she found that the prosecution had established malice aforethought. In line with Section 15(3) of the Supreme Court Act, we have power to interfere with a conviction whether the appeal is against conviction or sentence only. As we have alluded to herein, the appellants should have been convicted of the offence of

manslaughter. We consequently quash the conviction of murder by the trial court and substitute it with the offence of manslaughter contrary to Section 199 of the Penal Code.

Having altered the conviction, we are at large as regards what sentence to impose. The appellants are first offenders, they are still in their youth and deserve leniency. Sadly, they took the law into their own hands by assaulting the deceased whom they caught attempting to steal from them and who had in fact stolen from them previously. Taking these factors into account we impose a sentence of 6 years imprisonment with hard labour with effect from the date of arrest.

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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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J.K. KABUKA
SUPREME COURT JUDGE

.....
J.C. CHINYAMA
SUPREME COURT JUDGE