

**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPLE REGISTRY  
HOLDEN AT LUSAKA**  
*(Criminal Jurisdiction)*

**HP/231/2023**

**THE PEOPLE**

**VS**

**MALAKAI DAKA**



**Before the Hon. Lady Justice S. Chocho in Open Court.**

**For the State : Mr. Sikazwe and Ms. A Nyirenda – National  
Prosecution Authority**

**For the Accused : Mr. B. Chiwala (Probono Counsel) Messrs.  
Andrew & Partners**

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**JUDGMENT**

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**Cases referred to:**

1. *William Zyala Chipango and others Vs the People* 1978 (ZR) Page 304
2. *Bernard Chisha V the People of the* (1980) ZR 36
3. *Katebe V The People* (1975) ZR13
4. *The People V Chimbala* (1973) ZR118 HC
5. *Edward Sinyama V The People* (1993 – 1994) ZR 16 *Re gestae*
6. *Justine Musukwa Vs The People*
7. *The People V Mwendaweli Nyambe* (2011)3 ZR 130
8. *The People V Njovu* (1968) ZR 132(HC) *Blagden C.J*
9. *Bwalya V The People* (1975) ZR 125

**Legislation referred to:**

1. *Section 200 of the Penal Code Chapter 87 of the Laws of Zambia*
2. *Section 204 of the Penal Code Chapter 87 of the Laws of Zambia*
3. *Section (78) of Children's Code Act*

**1. INTRODUCTION**

- 1.1 The Accused stands charged with one count of Murder contrary to section 200 of the Penal Code Chapter 87 of the Laws of Zambia.
- 1.2 The particulars of the offence allege that Malakai Daka on the 18<sup>th</sup> February 2023 at Lusaka in the Lusaka District of Lusaka Province of the Republic of Zambia did murder Promise Jere.
- 1.3 In aid of their case, the prosecution called (6) six witnesses before the Court. The accused person gave testimony on oath.

**2. EVIDENCE BY THE STATE**

**Pw1 – MIRRIAM SAKALA**

- 2.1 PW1 was **MIRRIAM SAKALA** a Business Woman aged 46 years old from Zingalume Compound, Lusaka. Her evidence was that on 18<sup>th</sup> February, 2023, around 04 hours PW1 received a call from her daughter Ireen. The daughter asked her to rush to Joyce Banda her firstborn daughter's house to see what had happened. When she arrived at Joyce's house, she found her grandchild Promise Jere who is the now deceased child was wrapped in a blanket, and his elder sister PW1's granddaughter was outside crying.
- 2.2 When PW1 arrived and unwrapped the deceased, she found that his intestines were out. She asked the now deceased what happened, he called her mom despite being the grandson. The deceased answered that his father had stabbed him twice when he asked his father for a coin. At that point she rushed the deceased to Chingwele level 1 hospital and was attended to upon arrival. The medical personnel at the hospital informed PW1 that the child had fallen down therefore

the intestines had sand prompting them to immediately order and wait for an ambulance to take the deceased to University Teaching Hospital (UTH).

- 2.3 PW1 testified that they reached UTH around 7:40 hours, where no attention was given to the deceased's injuries for about an hour. The medical officers at UTH then indicated to PW1 that the blood had already drained from the deceased. A medical doctor approached PW1 and took the child to a separate room the family was later informed that Promise Jere had died.

**Cross-examination Mirriam Sakala**

- 2.4 In cross examination, the witness told the Court that there were many people at her daughter's place and that, the person who wrapped the deceased in a blanket is an elderly person and that the granddaughter Ireen Sakala told PW1 what had happened.
- 2.5 PW1 further confirmed that Ireen Sakala told her that the father threatened her with a knife and got her younger brother the deceased Promise Jere and took him behind the door. That Ireen Sakala hid under the bed because she was scared. That behind the door, the father threw Promise Jere to the floor and the deceased started crying. Ireen Sakala came out from under the bed and rush to Promise Jere where she found he had soiled himself a thing which had never happened before, this prompted her to shout for members of the public's attention. PW1 said Ireen Sakala identified the father who stabbed the deceased as Malakai Daka and pointed at the accused as her son in law.
- 2.6 PW1 confirmed that she was not present during the stabbing of Promise Jere. That the evidence she has provided was given to her

by word of mouth by Promise Jere (the deceased) and Ireen Sakala. That her daughter's house is a one room and is dark but the grand daughter was still able to confirm the identity of the accused. That there is no sand in the house yet the intestines had sand. PW1 also confirmed, that the doctors at UTH took their time to attend to the child. That the biological father to the two grand children was not visiting nor supporting them. That the mother to the two children Joyce's house was just 20 minutes away from her place and Joyce was at work at the material time the incident happened.

**There was no re-examination.**

**PW2 – JOYCE BANDA**

- 2.7 PW2 was **JOYCE BANDA**, currently unemployed who resides at unknown address in Zingalume in Lusaka district of Lusaka province. Her testimony was that on 17<sup>th</sup> February, 2023, she had left her children at home Ireen Sakala and Promise Jere. At 04 hours whilst at work PW2 received a phone call from Ireen Sakala that she should go home and see what had happened. Upon asking she was told that her son had been stabbed with a knife. She got her phone and called her mother Mirriam Sakala and asked what happened, Mirriam Sakala (PW1) told her that she was at level 1 hospital in Matero, as she was preparing to go to level 1, PW1` called her telling her that they are being referred to UTH.
- 2.8 When she arrived at UTH around 10hrs, she found her son, she even spoke to the son and he told her that his father had stabbed him. She then went outside, when she walked back in she found that her son was dead.

- 2.9 PW2 testified that Ireen Sakala told her that “it was Daddy who came home and stabbed Promise Jere with a knife.” That when she saw the father with the knife, she run to hide under the bed. Ireen Sakala went on to tell her mother Joyce that “I saw daddy lift Promise Jere and the child asked/shouted to the father that he wanted a coin,” the father replied that he did not have a coin.
- 2.10 That he took the child and stood behind the door and stabbed Promise Jere twice, she said the boy shouted “Boss I have stopped”. The father put the child down and left and went away.

**Cross examination – PW2**

- 2.11 In cross examination the witness told the Court that the father Ireen Sakala was referring to was Malakai Daka. That she has been married to the Accused for Three (3) months.
- 2.12 PW2 identified Malakai Daka the accused person in open Court. PW2 confirmed that Ireen Sakala locked the door for her and Promise to sleep. That Malakai had followed PW2 to her place of work at 20 hours and had later gone to a funeral house. That Promise was stabbed around 04 hours.
- 2.13 PW2’s confirmed that her house has no windows and it was dark but Ireen Sakala was still able to identify the accused person because he was wearing a white shirt and his voice was recognizable.
- 2.14 PW2 testified that the report from the (Coroner’s Authority for Burial) stated that the deceased, died from a stab wound to the abdomen.

**There was no re-examination.**

**PW3 – Ireen Sakala**

- 2.15 PW3 – Ireen Sakala a minor or child of tender years was subjected to a voire dire and the Court established convinced she was able to appreciate taking oath and need to tell the truth. PW3 was allowed to testify on oath.
- 2.16 PW3 was **IREEN SAKALA**, 11 years old and a pupil who resides at unknown address in Matero in Lusaka District of Lusaka province. Her testimony was that on 18<sup>th</sup> February, 2023, her father Malakai Daka came home around 19 hours and told her to prepare the bed and go to sleep then he left. He was wearing a white shirt with a white T-shirt on top and greyish trousers. He left home at 19 hours. PW3 testified that her mom from Zingalume brought her and her younger brother Promise some nshima with soya pieces.
- 2.17 The witness further testified that around 04 hours while herself and Promise (deceased) were asleep, the father Malakai Daka, pushed the door to their house and produced a knife from his pocket. PW3 got scared and hid under the bed. PW3 testified that the accused person picked up Promise, took him behind the door and stabbed him in the abdomen area twice. PW3 then heard the deceased shout “Boss I have stopped.” The Accused then covered the deceased with a curtain which was behind the door to cover where the accused had stabbed the deceased, the accused person then got Joyce’s black jersey and left the house.
- 2.18 PW3 then left the house to go and tell the mother what had happened but before she could go far she met an Aunt by the name of Clara who stopped her on the way and asked her why she was rushing. PW3 told her what had happened to Promise back home. The Aunt

Clara called the mother to PW3 and called all the neighbours to inform them what had happened.

2.19 The neighbours went to the roadside to stop vehicles moving at 04 hours. Then they picked Promise and took him to Matero level 1. PW3 accompanied the people taking the brother Promise to the hospital. They were advised to take him to a big hospital because he had sand on part of his wound. PW3 did not go to UTH because the ambulance was not big enough to accommodate all of them.

**Cross examination PW3**

2.20 Under cross examination PW3 confirmed that there was light coming into the house from spaces on the door.

2.21 PW3 further confirmed that the one roomed house did not have windows.

2.22 PW3 testified that the accused came home twice – around 19 hours before they had food and around 04 hours when he stabbed her brother Promise (deceased). Testified that she knew it was around 04 hours because her aunt Clara told her the time when she checked on her phone.

2.23 PW3 confirmed that the kids had been left home alone at night several times before when the parents went for work.

2.24 PW3 testified that it was the first time that the deceased called the accused person “Boss”.

**Nothing in re-examination**

**PW4 – PRECIOUS SHIMUNZA**

- 2.25 PW4 was **PRECIOUS SHIMUNZA**, 27 years old and a Detective Woman Constable service number 47466 Matero Police Station who resides at unknown house in Lilayi Compound in Lusaka District of Lusaka Province. Her testimony was that on 25<sup>th</sup> February, 2023, she reported for work around 07:40 hours, whilst on duty she was allocated a case of docket in which female Joyce Banda reported that her son male juvenile Promise Jere was stabbed on the abdomen by his step father named Mwakai Daka.
- 2.26 PW4 testified that she interviewed female Joyce Banda to ascertain the facts in the issue, who gave a statement that on 18<sup>th</sup> February, 2024 around 04 hours in Zingalume Compound of Matero, her son male juvenile Promise Jere was stabbed by the step farther. This information was given to PW2 by Promise Jere, while the child was receiving treatment. It is the boy who confirmed directly to her that it was the step father male Malakai Daka who stabbed him.
- 2.27 PW4 also interviewed the grandmother to the deceased and female Ireen Sakala, PW1 explained to PW4 that immediately she arrived at the scene male juvenile Promise Jere told her that it was his step father who stabbed him.
- 2.28 PW4 then interviewed female Ireen Jere she explained to her that she physically saw her step father stabbing the young brother.
- 2.29 PW4 interviewed the accused person Malakai Daka who was already in custody who said at the particular time and date of the incident or offence he was attending a funeral with Mr. Chete.

- 2.30 PW4 then took a step further and went to interview Mr. Chete at his house. Mr. Francis Chete, denied being with the accused person and said he only saw male Malakai Daka on 18<sup>th</sup> February, 2023 around 18 hours.
- 2.31 Based on the statement on the witnesses, the post mortem report and the fact that the whereabouts of Malakai Daka was denied by Mr. Francis Chete, PW4 made up her mind to officially charge and arrest male Malakai Daka for the offence of Murder contrary to section 200 Chapter 87 of the Laws of Zambia and forwarded the docket for court proceedings.
- 2.32 PW4 testified that under warn and caution the accused person gave a free and voluntary reply denying the charge.
- 2.33 PW4 identified the accused Malakai Daka.
- 2.34 PW4 indicated that a knife was used in the stabbing of the deceased but when she rushed to the scene of the crime in Zingalume Compound, she did not find or recover any weapon (knife). She described the scene as a one roomed house with assorted kitchen items, a bed and it was medium sized room.

**Cross examination – PW4**

- 2.35 PW4 confirmed that she had at the time of the incident been with the Zambia police criminal investigation for 5 years 6 months and that in investigation she noted that there was one house with two doors. That the particular scene of the crime and the next door had no power but there reflected light from the neighbor's house which was 3 meters away.

- 2.36 PW4 testified that the scene is surrounded by about 3 houses that have power outside. None of the neighbours from the surrounding houses heard or saw anything until after the incident.
- 2.37 PW4 testified that the accused person's profession is a brick layer and a general worker. That PW4 interviewed about 4 (four) people.

**No re-examination**

**PW5 – CORDILIA MARIA HIMWAZE**

- 2.38 PW5 was **CORDILIA MARIA HIMWAZE** a Forensic Pathologist aged 36 years old of plot No. 24794 Lilayi Road Chalala. She testified that she holds a degree in general medicine, a super specialist qualification in pathology medical Degree Ryazan State Medical University Russia. Masters from the University of Zambia, specialist qualification from University of Toronto Canada. That she operates from the office of state forensic pathologist Ministry of Home Affairs and State Security.
- 2.39 PW4 testified that on 21 February, 2023, she received an order for post mortem from the coroner to conduct a post-mortem examination on a boy aged 4. The officer who attended the post-mortem examination gave PW5 the circumstance of the case and went on to conduct the post mortem examination. On the external examination of significance was an incised wound on the right side of the abdomen with extrusion of the intestines.
- 2.40 PW5 further to conducted an internal examination on the deceased, and then noted that there were two puncture wounds on the intestines. The witness examined the rest of the organs and there were no disease or other abnormality. PW5 went on to write the

preliminary cause of death and the cause of death was incised wound to the abdomen due to assault. Therefore, the post mortem report was written and handed over to the investigating officer.

**2.41** PW5 was described the post mortem report and read it in part -

**Pathology Report (P1)**

“This 4-year-old child died after he was assaulted. While the mother to the child was at work, the step father to the child was seen by neighbours to returned home and stab the child with a knife. The neighbours rushed the child to the hospital but was pronounced dead upon arrival. The post-mortem examination is performed on a child with significant injuries to the abdomen including an incised wound with extrusion of the small intestines. There are two puncture sites on the small intestines and bleeding in peritoneal cavity.

Conclusion, cause of death is incised wounds to abdomen due to assault. The mechanism of death is hemorrhagic shock (exsanguination). The manner of death is homicide”.

**Cross examination – PW5**

2.42 PW5 admitted that because sharp force injuries have a wide range to their presentation and that has to be explained hence could not give a yes or no answer if this was a stab wound but was sure it was an incision wound.

2.43 In cross examination PW5 conceded that it was not part of her qualifications to write about the parents of the deceased and that information was given to her by the attending officer.

2.44 PW5 further confirmed seeing sand on the deceased's small intestines.

**No re-examination**

**PW6 – FRANCIS CHENTE**

2.45 PW6 was Francis Chente a Self-employed (Hardware Shop Owner) aged 63 years old of House No. 49 Kasupe Road Lusaka West. He testified that, on 17<sup>th</sup> March, 2023 he was at his bar where the hardware shop is. The bar is called Chante Bar. He was there from 08 hours to 23 hours. That it was around 20 hours he saw a gentleman called Malakai Daka with his wife Joyce. The witness had at the material time known Malakai Daka for about 15 years and knew the wife for about a month since she started working at his.

2.46 PW6 testified that whilst Malakai Daka and his wife were in the bar, they started quarrelling. There were many people at the bar, because of the funeral at the neighbours place.

2.47 Around 22 hours, after the quarrel, Malakai left the bar. He was wearing a white long sleeve shirt. After he left, the wife remained at the bar selling, alcohol.

2.48 Around 23 hours going to 24 hours Malakai's wife came out of the bar and closed it. She left with Mr. Banda to escort her home, because it was for and it was at night.

2.49 PW6 did not know the exact house but Joyce lived in George Compound. The bar is in Kasupe Road. In the morning around 8 hours on the 18<sup>th</sup> March 2023. Whilst the bus heading to the grave yard. He received a phone call from the boss of Malakai's wife. Mrs.

Tembo informed PW6 Joyce's child had been killed. That the child was stabbed with knives. She mentioned that the people that killed the child were not known, and that the child's father – Malakai was nowhere to be seen or found.

- 2.50 PW6 testified that he met Malakai and called him over. PW6 asked him if he heard what happened at his home, this was around 09 hours. At the grave site, the accused person was wearing a faded blue jersey and white shirt inside. He then asked the accused what happened at home, the Accused answered saying -: "Daddy these clothes that I am wearing I have not returned home. These are the same clothes".
- 2.51 They then left the grave site. When they reached Kasupe road, a call came from Malakai's wife saying -: "Dad, if you see Malakai there, do not let him go, we are coming to the funeral house". This was around 11 hours.
- 2.52 The witness stayed in the bus with his friends, Malakai was on a different bus. They dropped off and walked to the funeral house. PW6 saw Malakai in front of him so he called him to get closer. PW6 then asked the Accused to tell him the truth because the wife to the Accused and her family were on their way to the funeral house. The Accused then said he had indeed gone home to take a candle and that he had found the children sleeping in the dark.
- 2.53 PW6 told the Court that, when the wife to the Accused called him, she told him that Malakai is the one who had killed the child. When they arrived at the scene of the house, Mr. Banda who had escorted Malakai's wife the previous night started saying -: "Malakai see you have killed the child".

- 2.54 PW6 took the Accused as many people had gathered. At which point the wife and group from George compound arrived. The people insisted that they kill him but PW6 took the accused and locked him up in his shop and advised the crowd not to take the law into their own hands as there is the government for that.
- 2.55 PW6 testified that his shop has burglar bars so the accused could be seen and was able to be talked to. Malakai's wife and the group were inside the wall fence and the said yard has multiple shops. Malakai's wife asked if the Accused is refusing that he did not go home, how then did he end up now wearing the faded jersey that belonged to her on top of his white shirt?
- 2.56 PW6 testified that he called the officer in charge for Balastone Police post Madam Bwalya, asking her to rush as a person would be killed because the crowd had stones ready to kill Malakai. This prompted the witness to get some men to protect Malakai from harm.
- 2.57 The police arrived and took Malakai to the police station. After a few days, the police came again to interview PW6 and get a statement. They said Malakai at the police station mentioned that on the day Malakai was apprehended, he said he was with PW6 at the funeral. PW6 denied been at the funeral house with the accused.
- 2.58 PW6 testified that he was not at the funeral, he was at the bar day and night. After the accused quarreled with his wife at 22 to 23 hours, Malakai disappeared and was only seen the following day at the grave site around 8 to 9 hours. The funeral was for Mr. Simon Chingangu the neighbor to PW6.
- 2.59 Witness identifies the accused by touching him.

**Cross examination – PW6**

2.60 The witness said that Malakai's wife left the shop at 23 hours at night. That she locked the bar when she knocked off and asked Mr. Banda to escort her home as she had received a call that her child had been killed. PW6 confirmed that Malakai's wife did not tell him this in person, but he heard it from others. PW6 confirmed that he did not go to the funeral house for the neighbor and that the houses are separated by a wall fence.

**Defence Edivence**

**DW – Malakai Daka**

2.61 In his defence, the accused Malakai Daka gave testimony under oath. DW testified that he went home on 18<sup>th</sup> February, 2023 at around 18 hours and the children told him that they had eaten as their grandmother brought them food.

2.62 DW testified that he told PW3, that he would spend the night at the funeral house, got her mother's bomber jacket and left.

2.63 DW further testified that he spoke with his wife at the work place and proceeded to play pool where Mr. Chete was, he then went to the funeral house at midnight where he stayed till the following morning at 06 hours. He then proceeded to the burial site.

2.64 DW testified that PW3 did deny that the accused person stabbed her brother but he was arrested and charged with murder of the deceased.

2.65 DW denied stabbing the deceased nor going home when Promise Jere was stabbed.

2.66 DW testified that his wife's ex husband wanted to reconcile but she refused. He testified that he was in good terms with his wife's children – Promise and Ireen.

**Cross examination - DW**

2.67 Under cross examination DW conceded that he had an alibi – Mr. Chante and did not kill the deceased.

2.68 DW testified that because of the rains he was alone with the family at the funeral house.

**re-examination**

**3. THE LAW AND SUBMISSIONS.**

3.1. Counsel for the state and defence, submitted written arguments to the Court. The same are on record and thus I shall not reproduce them verbatim.

3.2. The prosecution asserted that they had effectively proven the case of murder, beyond reasonable doubt citing section 200 of the Penal Code Chapter 27 of the Laws of Zambia and outlined the necessary elements established. Referring to the act of stabbing an infant as falling within the meaning of malice aforethought as provided under section 204 of the Penal Code.

3.3. The prosecution submitted that its witnesses testified pointing to the accused persons guilt. It was submitted that the deceased gave a dying declaration or mentioned to its grandmother and mother PW1 and PW2 that the accused person was the one that had stabbed him.

- 3.4. Drawing on legal precedent, the prosecution submitted that PW3 a juvenile witness had identified and testified seeing the accused person stab the deceased.
- 3.5. The prosecution submitted that this Court is clothed with discretion to require evidence presented before to be corroborated by some other material evidence. Citing section (78) of Children's Code Act.
- 3.6. The prosecution further submitted that this Court is competent to convict on a single identifying witness provided the possibility of honest mistaken identity is eliminated.
- 3.7. It was further submitted that the prosecution did negative the accused person's purported alibi.
- 3.8. The defense's written submission, in the main asserted that the prosecution failed to prove the charge of murder beyond any reasonable doubt.
- 3.9. The defense submits that the testimony of a child witness must be corroborated and referred the Court to the case of **Bernard Chisha V the People of the (1980) ZR 36<sup>2</sup>** where it was held that the sworn evidence of a child requires corroboration, therefore PW3's testimony needed something more.
- 3.10. It was submitted that PW3's testimony had inconsistencies and appeared to have been tampered with. The defence pointed the Court to danger of convicting on one identifying witness.
- 3.11. The defense argued that PW3's testimony on the black jersey was not mentioned at the first interview with the police and the prosecution never produced the jersey.

3.12. The defense argued that what PW2 was told by the deceased was not a dying declaration as the deceased by asking for money had hopes of living and using the two (K2.00) Kwacha. Further submitted that the prosecution witnesses 1-3, had an interest to serve, and could not corroborate each other.

3.13. Defense argued that the prosecution witness PW6 did not negative the accused alibi and the police did not interview or take the accused person to interview other people at the funeral house.

3.14. Counsel urged the Court to acquit the accused person.

#### **4. COURT'S DECISION**

4.1 I have considered the evidence on record and the submissions filed by counsel for the prosecution and defence for which I am indeed grateful.

##### **Common cause facts**

4.2 It is a fact that one Promise Jere died from injuries sustained from incision in the abdomen.

4.3 It is further not in dispute that the accused person did on the material day go to the house/room.

##### **Facts in dispute**

4.4 The accused person Malaki Daka denies causing the death of the deceased Promise Jere.

##### **Analysis**

4.5 The question is whether it has been proved beyond all reasonable doubt, that Malakai Daka did commit the offence of murder. The

offence of murder is provided for in section 200 of the Penal Code Chapter 87 of the Laws of Zambia:-

***“Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder”***

- 4.6 In casu, it is undisputed that Promise Jere died on 18<sup>th</sup> February 2023. the postmortem report exhibits P1 indicates the cause of death as ‘incised wound to the abdomen due to assault.’ The summary of significant injuries to the abdomen including an incised wound with extrusion of the small intestines. There are two puncture sites on the small intestines and bleeding in the peritoneal cavity.
- 4.7 PW3 a child witness testified under oath that the accused person stabbed the deceased and she saw and recognized him when he entered the room or house. She testified that she recognized his voice and when she saw him produce a knife from his pocket, she hid under the bed.
- 4.8 PW1 and PW2 testified that the deceased told them that the accused person was the one that stabbed him.
- 4.9 PW6 denied being at the funeral house with the accused person on the material night/early hours of the morning.
- 4.10 The accused person testified that he was at all time at the pool table area and at the funeral house with PW6.
- 4.11 I have cast and addressed my mind to the need for a child’s evidence to be corroborated and the dangers of convicting on a child’s evidence. And also convicting on a single identifying witness.

I am convinced PW3’s evidence is believable and true and rule out the possibility of mistaken identity or external influence in the identification of the accused. The only evidence the court considers

is what is mentioned by the witness in Court AND NOT that given at the police station.

PW3's testimony is further corroborated by the deceased's dying declaration and also fact that the accused person's alibi denied been at the funeral house with the accused. I warn myself that the collapsing of the alibi does not point to guilt but rather credibility of the accused testimony. I rely on cases **Katebe V The People**<sup>3</sup>, **The People V Chimbala**<sup>4</sup>.

4.12 On the issue of res gestare, I find that the deceased's statement as to who caused his injuries is acceptable evidence and falls well with the allowable definition of res-gestare. I am forfeited by the authority of **Edward Sinyama V The People**<sup>5</sup>, where it was held:-

*"A statement is not ineligible as part of the res gestae if a question has been asked and the victim has replied or if the victim has run for half a kilometer to make the report. If the statement has otherwise been made in conditions of approximate though not exact contemporaneity by a person so intensely involved and so in the throes of the event that there is no opportunity for concoction or distortion to the disadvantage of the defendant or the advantage of the maker, then the true test and the primary concern of the Court must be whether the possibility of concoction or distortion should be disregarded in the particular case."*

4.13 The deceased told two different people (his grandmother and Mother) that the accused had stabbed him. I find that this evidence is admissible and the only inference one can draw is that the accused person did in fact stab the deceased.

4.14 The Court of Appeal most recently in the case of **Justine Musukwa Vs The People**<sup>6</sup>, in following the decision of the **Edward Sinyama** case held:-

*“Florence Muyenyembe’s incriminating statement was rightly admitted into evidence because although not made in exact contemporaneity, it was made in approximate contemporaneity to the stabbing ruling out the danger of concoction.”*

4.15 The three elements to be proved in a murder case as per authority in **The People V Mwendaweli Nyambe (2011)3 ZR 130**<sup>7</sup> which identified the elements of proving murder as follows:-

1. *The accused caused the death of the deceased*
2. *By an unlawful act; and*
3. *With malice aforethought*

4.16 I am of the considered view that in this case, the answers to the three elements mentioned above, is in the **AFFIRMATIVE**.

4.17 On the element of malice aforethought, I refer to section 204 of the penal code.

*“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:*

*Knowledge that the act or omission causing death will probably cause death or a grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused;”*

4.18 I am of the view that the injuries sustained and caused the death of Promise Jere points to malice aforethought. Stabbing a child in the stomach causing the extrusion of small intestines show and point to the fact that the accused person intended to cause grievous bodily harm or an indifference whether death or grievous bodily harm is caused or not.

4.19 I am convinced that malice aforethought has been proved and established by the prosecution. I cast my mind to the authority in the **The People V Njovu (1968) ZR 132(HC) Blagden C.J** <sup>8</sup>, as he then was stated that: -

***“To establish “Malice aforethought” the prosecution must prove either that the accused had an 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.”***

4.20 I find that the Prosecution/State has proved beyond all reasonable doubt the case of murder contrary to section 200 of the Penal Code Chapter 87 of the Laws of Zambia, against the accused person.

4.21 I hereby find the accused person Malakai Daka guilty of the offense of murder and so convict the said Malakai Daka for the murder of Promise Jere.

4.22 Leave to appeal is hereby granted.

Delivered at Lusaka this 12<sup>th</sup> day of June, 2024.

  
.....  
**SITUMBEKO CHOCHO**  
**JUDGE**

