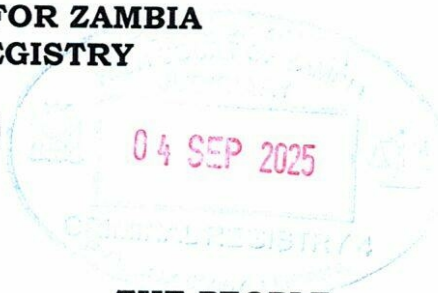


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IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

HP/264/2025

BETWEEN:



THE PEOPLE

V

CLEVER HAMUCHEMBA

FRANCIS PHIRI

PETER NJOVU

Before: Hon. Mr. Justice L. Mwanabo on 4th September, 2025

For the State: Mrs. G. M. Muhambi, State Advocate with Ms. S. Malundu, State Advocate- National Prosecutions Authority

For the 1st, 2nd & 3rd Accused: Dr. O. Kaaba, Pro-bono Legal Aid Counsel-Legal Aid Board and Mr. S. Mubanga of Messrs. Hibanjene Mulundu Advocates

For the 1st Accused: Mr. I. Tindi of Messrs. Zambezi Chambers

JUDGMENT

Cases referred to:

1. *Mwewa Murolo v The People* (2004) ZR 207
2. *The People v Njobvu* (1968) ZR 132 (HC)
3. *Yoani Manongo v The People* (1981) ZR 152
4. *Peter Yotam Haamenda v The People* (1977) ZR 184
5. *Charles Lukolongo and Others v The People* (1986) ZR 115
6. *David Zulu v The People* (1977) ZR 151 (SC)
7. *Bwanausi v The People* (1976) ZR 104
8. *Saidi Banda v The People* SCZ Selected Judgment No. 30 of 2015
9. *Joseph Sikaona v The People* SCZ Appeal No. 129/2011
10. *Kalaba v The People* (1981) ZR 102

Legislation Referred to:

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

2. The Constitution of Zambia, Chapter 1 of the Laws of Zambia

1.0 INTRODUCTION

1.1 The first accused herein was charged with one count of Murder contrary to **Section 200 of the Penal Code**¹. Particulars of the offence are that CLEVER HAMUCHEMBE (A1) on unknown date but between the 5th day of December, 2024 and the 10th day of December, 2024 at Chongwe in the Chongwe District of the Lusaka Province of the Republic of Zambia, did murder AMON MOOYA MAAMBO.

The 2nd and 3rd accused stood charged with the offence of Accessory after the fact to murder contrary to **Section 217 of the Penal Code**¹. Particulars of the offence are that FRANCIS PHIRI (A2) and PETER NJOBVU (A3) on unknown date but between the 5th day of December, 2024 and the 10th day of December, 2024 at Chongwe in the Chongwe District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together, being accessories after the fact to murder, did receive, comfort, harbour, assist and maintain CLEVER HAMUCHEMBA.

1.2 At the close of the Prosecution case, no *prima facie* case was established against A2 and A3 and they were found with no case to answer. I, therefore, acquitted and set them at liberty. However, A1 was found with a case to answer. Therefore, this Judgment relates to Count 1 against A1 only.

1.3 I remind myself that the burden of proof to establish the charge against the accused is on the prosecution and the standard of proof which must be attained before there can be any conviction is one that should satisfy me of the accused's guilty beyond all reasonable. The accused bears no burden of proving his innocence. If, after considering the evidence adduced in this case I entertain some doubt in my mind as to the guilt of the accused, then he must be given the benefit of that doubt and must be

acquitted. I find solace in the case of **Mwewa Muroño v. The People**¹ for the foregoing position.

1.4 **Section 200 of the Penal Code**¹ under which the accused is charged provides as follows:

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

And malice aforethought is defined by **Section 204 of the Penal Code**¹ as follows:

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

- (a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;***
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;***
- (c) an intent to commit a felony;***
- (d) an intention by an act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”***

1.5 Blagden, CJ, as he then was, in the case of **The People v Njovu**² explained malice aforethought as follows:

“To establish “malice aforethought” the prosecution must prove either that the accused had the actual intention to kill or to cause grievous harm to the deceased... or that he knew that what he was doing

would be likely to cause death or grievous harm to someone.”

- 1.6 In the present case, the state must satisfy me of the following:
- (a) That A1 caused the death of AMON MOOYA MAAMBO;
 - (b) by an unlawful act; and
 - (c) with malice aforethought.

2.0 Evidence and Submissions of the Prosecution

- 2.1 The Prosecution called nine (9) witnesses who adduced evidence relating to the alleged offences. PW1 was Jimmy Mooya, brother to the deceased. He testified that on 5th December, 2024, some children went to his place in the night and among them was Kennedy Muzipa Phiri and Ben, a son to A1. They informed him that their father, A1, had sent them to call him because the deceased had stolen a chicken and two goats. PW1 told the children that he was not feeling well and would go to A1's house the following morning.
- 2.2 According to PW1, he went to A1's place in the morning on 6th December, 2024 and told A1 that his mission was to discuss the issue of the Amon (the deceased). In reply, A1 told PW1 that the deceased was kept in the night but he did not know what time he managed to escape. A1 was told that the deceased stole a goat. PW1 suggested that the look for the deceased and then discuss the matter. It was narrated by PW1 that whilst at A1's place, a child came and said the goats had come back the ones you had issues with Amon in the night.
- 2.3 PW1 then told A1 that the issue of the goats was gone and that what was remaining was the issue of the chicken. A1 said that all he wanted was the chicken. It was testified that from Friday 6th December, 2024, the deceased was nowhere to be seen. It was decided that the matter be reported to the Police. On 10th December, 2024, as PW1 was going to Chongwe Police, his cousin Mweemba Habeene called him and informed him that Amon had

been found dead. He then went with Police Officers to the scene, which was at Mwapula Stream/river around 15:00 to 16:00 hours. The deceased was found floating on water with his face facing the water and the head and back were visible. PW1 told the Court that the deceased was only wearing a black underwear and his skin was peeled.

- 2.4 The body of the deceased was decomposed and could not be taken to the mortuary. The family was told by the Police to bury the deceased's remains awaiting a post-mortem examination. After that the Police from Lusaka Central and Chongwe arrested the accused.
- 2.5 Under XXN by Dr. Kaaba, PW1 confirmed giving a statement to the Police. PW1's statement was produced and marked as "**D1**". PW1 admitted that in his evidence in chief he indicated that the accused told him that he did not know the time the deceased ran away but in his statement he stated that it was around 04:00 hours.
- 2.6 PW1 was asked to show the Court where it shows in his statement that the accused was troubling the deceased but could not show the Court. Further, PW1 was asked to show court in his statement where it is indicated that A1 was his suspect to which he indicated that it was not just recorded. PW1 conceded that he did not tell the Court the clothes the deceased was wearing the last time he saw him.
- 2.7 In further XXN, PW1 admitted that he reported A1 because the deceased was last seen in A1's home and that he did not personally see the accused going to and leaving A1's house. When asked to confirm whether the accused lived with other adults, PW1 indicated that A1 lived with his wife and children. PW1 agreed that two gentlemen named Ben Chimimba and Novaster Dudwa Hamuchimba spent the night with the deceased and that he did not tell the Court that the deceased was beaten

at A1's house. PW1 admitted that he did not see A1 beat or kill the deceased.

- 2.8 In XXN by Mr. Tindi, PW1 indicated that he last saw the accused on 5th December, 2024 around 11:00 hours when they knocked off from the field. He admitted not knowing the type of clothes the deceased could have worn that night. According to PW1, when the body of deceased was found floating, it had marks on the skin and that on the night when Kennedy Phiri and A1's son went to his place, they merely went to invite him for a discussion over the deceased and not to report any incident that occurred.
- 2.9 PW2 was Annety Siamweemba Siakavuba from Kateya Village. She narrated that on 10th December, 2024 around 09:00 hours while working in her field she decided to go and drink water in the river. When she found a spot where she could drink water she saw a person in the water. PW2 went to Annie Simalumbe's place and told her what she had seen. The two proceeded to Mr. Patrick Mweemba's home and told him about the news. She took them to the river at the place where she saw the deceased's body. PW1 narrated that they were four of them at the river and they could see that the body was for Amon Mooya because of the haircut. Later they went to PW1's house but did not find him but managed to meet Oken Mooya and they told him the news and took him to the river where the body was together with Harrison Mooya, the deceased young brother. Harrison Mooya then called PW1. PW1 later went with the Police to the scene. There was no XXN by the defence.
- 2.10 The third prosecution witness was Ophen Machila (PW3). He testified that it was on a Friday in December 2024 when he went to school around 17:00 hours at Kaminebe Primary School. When he reached the school, he found PW1's son and asked where PW1 was. He was told that PW1 had gone to A1's house. PW3 decided to meet PW1 in order to discuss the issue of fertilizer and he found him talking to A1. PW3 did not know what PW1 and A1

were talking about. He narrated that whilst seated they saw some goats coming and A1 stood up saying to PW1 that those were the goats he was talking about that went missing which means that only the chicken was missing.

- 2.11 After talking to PW1, PW3 left. On a Monday, PW3 as Chairman of the village went to look for money for feeding children at school. It was agreed that each household should pay K30. PW3 passed through A1's place around 10:00 hours. They sat down and before he raised the issue of money, three girls arrived. One of the girls picked up a cloth with a stick. The girl said the cloth was for the deceased and her mother told her to put it on a tree and that the deceased was going to pick it up because at that house they usually brew beer.
- 2.12 PW3 told the Court that on Tuesday he went to the field and when he knocked off around 12:00 hours he learnt that the deceased was found dead in the river from the people in the village. He then rushed to the scene and found the police with a lot of people.
- 2.13 Under XXN, PW3 admitted that in his evidence in chief he did not say a child said the goats A1 was troubling the deceased over had come. He indicated that there were about 54 adults in Kateya Village. PW3 confirmed that the cloth that was picked by a girl did not come from A1's house. He admitted that he did not give the location where the cloth was found. When asked whether he personally knew the owner of the cloth, PW3 indicated that he did. However, he admitted that he did not state the owner of the cloth in his evidence in chief. PW3 confirmed that it was the mother of the girl (A1's wife) who said the cloth belonged to the deceased and not him. PW3 admitted not seeing A1 killing the deceased.
- 2.14 PW4 was Novaster Dudwa Hamuchembe, son of A1. He testified that some time in December he went home around 04:00 hours. He heard someone talking but did not hear what was talking about. He proceeded to his bedroom and found the deceased

sleeping on the floor beside his bed. PW4 asked his young brother to give him space to sleep. According to PW4, he was able to see the deceased in the room using the light from his phone. It was PW's testimony that when he saw the deceased, he was just fine. When PW4 woke up he did not find the deceased in the room. A1 then asked him to accompany him to the field.

- 2.15 Under XXN by Dr. Kaaba, PW4 indicated that he did not go to the Police but that the Police went to the village to get a statement from him. PW4's statement was produced and marked as "**D2**". He confirmed that in his statement he said he reached home around 03:00 hours and found the deceased on the floor talking about things that did not make sense and that he woke up around 05:00 hours to yoke animals for ploughing. Further, it was confirmed by PW4 that he did not find the deceased when he woke up and he did not know where he went.
- 2.16 PW4 admitted that he shared his bedroom with Ben but did not know his actual age. He confirmed that in his testimony he did not indicate that when he arrived home between 03:00 and 05:00 hours, A1 went to beat up the deceased nor mention the clothes the deceased was wearing. PW4 confirmed that there were no two people who went to pick the deceased from their bedroom and that he did not know where the deceased went after he left the bedroom.
- 2.17 PW5 was Dr. Victor Telendiy, a Forensic Pathologist from the Office of the State Forensic Pathologist and University Teaching Hospital. He testified that on 10th Jnauary, 2025, he did a post-mortem examination on an exhumed body of the Amon Mooya Maambo (the deceased). He tested that during the post-mortem examination he found the prolonged decomposed body. All soft tissues were decomposed. Therefore, he was only able to examine the bones.
- 2.18 He testified that examination is done in four categories:
1. Marks of trauma and witnesses.

2. Marks of trauma but no witnesses- not able to tell how it happened.
3. Witnesses but no trauma on the body. Conclusion of death from trauma is from witnesses only.
4. No witnesses, no evidence of trauma, cause of death unknown.

2.19 PW5 said that when he did the post-mortem examination, he noted decomposition of all internal tissue. He was only able to examine the bones of the deceased. He indicated that all the bones of the deceased were intact. PW5 indicated that there was no fracture on any bones. Further, that the police could not tell whether there were any witnesses. It was stated by PW5 that he could not make any conclusion on the soft tissue or internal organs because of decomposition. PW5 indicated that the cause of death was undetermined. The post-mortem report was produced and marked P1. He, however, stated that he could not exclude or prove any homicide.

2.20 Under XXN, PW5 was referred to his evidence that when he conducted the post-mortem on 10th January, 2025 the Police had no indication of witnesses and agreed that he would be surprised if the Police later brought eye witnesses. PW5 indicated that because the person was seen late, it was impossible to tell when he died.

2.21 There was no RXN.

2.22 PW6 was Thomas Mweemba. His testimony was that in December 2024, he left home and borrowed a bicycle from Banda. He passed through A1's home. A1 got a piece of cloth that was on a tree. After getting the cloth he went to the western side of the house, got some grass and burnt the deceased's cloth. PW6 asked A1 why he was burning that cloth and his answer was that, **"Bulakatazya Bumboni"**, meaning **"evidence is difficult."** When A1 said that, PW6 did not ask any further. He described the cloth as a PF T-shirt and that he was the only one who had it

in the area. According to PW6, the colour of the T-shirt was black.

- 2.23 Under XXN, PW6 was reminded of the statement he gave to the Police that Jimmy Habeenzu and Rostern Mwembela wanted to arrest him over the deceased's death. He indicated that they were Neighbourhood Watch Officers. PW6 confirmed that he was taken to the police station but he did not stay for a long time. He further confirmed that he was not happy for being suspected to be the deceased's killer and wanted to explain what he saw. PW6 explained that he saw a black cloth on tree at the deceased's place. He confirmed that he was not asked in his evidence in chief what the deceased was wearing when he went missing on 5th December, 2024. He further confirmed that he did not see what the deceased was wearing. On whether he saw the person who put the cloth on the tree, PW6 admitted that he did not know who had put it there. He said he only went to the accused's place once.
- 2.24 PW6 admitted as his the statement to the Police and the part where it says that he was being taken to the police by the Neighbourhood members and he saw a piece of cloth which happened to be a colour of the shirt which was burnt by A1. He stated that it was the same cloth he mentioned in his evidence in chief. He admitted that the cloth was not produced before court. PW6 later changed his statement and said he saw the cloth before going to the Police. He agreed that he did not indicate in his statement that A1 burnt the cloth.
- 2.25 When asked by Mr. Tindi for the date when he went to borrow the bicycle, PW6 could not remember the date but said it was after the burial of the Amon. He confirmed that it was during the time when there were investigations for the deceased's death. It was indicated by PW6 that he realised that the cloth was for the deceased the the same day he went to borrow a bicycle. He later confirmed that he did not tell anyone until he was approached as a suspect. Additionally, PW6 confirmed that the cloth was the

type which is used for campaigns and it was labelled PF. He conceded that such clothes were given to many people who belong to that political party.

- 2.26 There was no RXN.
- 2.27 The seventh witness was Harrison Mooya (PW7), brother to the deceased. His testimony was that on 5th December, 2024 around 16:00 hours, he met the deceased. He saw what the deceased was wearing as a black top and short with a zipper on the side. Inside there was a white shirt. He said that from that time he never saw the deceased again. It was his testimony that Annety Siakavuba went to tell him to go and see what had happened at the river. When he reached the river, he identified the deceased from the black short with pockets on the side. He told the Court that the whole skin was coming from the body of the deceased and that on the side of the head, it looked like he was bleeding. Further, that on the ribs by the side he had blood.
- 2.28 Under XXN, PW7 confirmed giving a statement to the Police on 8th January, 2025. He confirmed the part of the statement that says the deceased was wearing a short black colour and a white T-shirt with a short sleeve and black Hood with green labels written PF and that the colours were correct. PW7 denied that the deceased owned a shirt written PF and that anyone who comes to Court to say that the deceased had a white shirt labelled PF would be lying.
- 2.29 There was no RXN.
- 2.30 PW8 was Detective Inspector Mwanamuchende, a Scenes of Crime Officer. He testified that he made a visit to the scene when he was informed about a decomposed body floating at Mwapula stream. His description of the body matched that of the other witnesses and will not be reproduced. He told the court that he took pictures of the deceased using a Police camera and compiled a Photographic Album depicting the sequence of events. He testified that the photographs were developed at Police

Headquarters. The Photographic Album was produced and marked “P2”.

- 2.31 There was no XXN.
- 2.32 The last prosecution witness was Chief Inspector David Banda (PW9). He said that he was assigned a docket from Chongwe Police involving the death of the deceased. PW9 testified that he interviewed A1 and Francis Phiri (A2) and Peter Njobvu (A3). According to PW9, he interviewed a number of witnesses on the suspected murder. Among them were Thomas Mweemba, Harrison Mooya and Ophen Machila who narrated that they had seen what happened. Upon gathering evidence PW9 decided to charge A1 with the offence of murder and A2 and A3 with the offence of Accessory after the facts. That under warn and caution statement administered in Tonga, A1 denied the charge.
- 2.33 Under XXN, PW9 confirmed that Detective Inspector Kalituta did a scene crime reconstruction and that she took samples of the cloth which was found at A1’s place. He also confirmed that during post-mortem she took some samples from the deceased. He conceded that he never told the Court what they did with those samples and that he had not given the Court any DNA results.
- 2.34 The Prosecution did not file any final written submissions.

3.0 Evidence and Submission of the Defence

- 3.1 A1 was found with a case to answer and when put on his defence he elected to exercise his right to remain silent. However, Counsel filed written final submissions on 1st September, 2025.
- 3.2 The first limb of the defence’s submission was on the standard and burden of proof. Counsel adverted to **Article 18 (2) (a) of the Constitution²**, which provides that: **“Every one who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty.”** It was submitted that from this flows the sacrosanct principles that the prosecution bears the burden of proving an accused person guilty

beyond reasonable doubt. The case of **Mwewa Muroho** (*supra*) was relied upon to buttress the point.

- 3.3 Counsel then delved into the ingredients for the offence of murder by reproducing **Section 200 of the Penal Code**¹ and quoting the passage from the case of **The People v Njovu** case (*supra*) where the ingredients were outlined. I will not list them here as I have already done in the beginning of the Judgment. It was contended that the three elements as espoused in the **Nobvu** case should be present together or else the crime is not proved.
- 3.4 In the second limb of its submissions the defence considered the evidence against A1. Counsel highlighted the weaknesses in the evidence of the all the prosecution witnesses, which I have duly noted. It was asserted that there is simply no evidence as to how the deceased died. Further, that there is no evidence showing that the accused acted with malice aforethought towards the deceased. The case of **Yoani Manongo v The People**³ was called to aid where it was held that where intention cannot be inferred from the evidence, malice aforethought is not proved.
- 3.5 The fourth limb of the defence's submissions was on dereliction of duty. The main contention was that the State failed in its duty by: 1) not identifying the piece of cloth in contention and linking it in any way to the deceased and showing what role the piece of cloth had in the arrest and prosecution of the accused in this matter; 2) not producing the said piece of cloth in evidence when the testimony of the witnesses confirmed the continuing existence of the said cloth; 3) not conducting a timely post-mortem when the body of the deceased still had soft tissue which could easily have helped determined the cause; and 4) not producing the DNA results and indicating whether the results exonerate or implicate the accused. Counsel cited several cases, among them the cases of **Peter Yotam Haamenda v The People**⁴ and **Charles Lukolongo and Others v The People**⁵. The gist of

the argument from the cases cited was that dereliction of duty will operate in favour of the accused.

- 3.6 Lastly, the defence submitted that there is no direct evidence in this case and that state is seeking to rely on circumstantial evidence. It was contended that this, however, does not mean that the state should rely on assumptions and mere conjecture. Further, that there must be an unbroken chain of facts upon which the Court should be invited to draw an inference, which should be the only reasonable inference based on the facts. Reliance was placed on the case of **David Zulu v The People**⁶, **Bwanausi v The People**⁷ and **Saidi Banda v The People**⁸ to buttress the submission.

4.0 Analysis and Decision

- 4.1 I have considered the evidence and submission of both the prosecution and defence. A1 stands charged with the offence of murder contrary to **Sections 200 of the Penal Code**¹, which has already been reproduced above.
- 4.2 According to the evidence adduced herein, the following facts are not in dispute:
1. That the deceased, Amon Mooya Maambo, was last seen on 5th December, 2024;
 2. That on the night of 5th December, 2024, the deceased spent the night at A1's house;
 3. That A1 on the same night sent some boys to call the deceased's brother, PW1, over the issues he had with the deceased but the brother refused saying that it was late and only went to A1's home the following day. He did not find the deceased at A1's home and was told that the deceased escaped in the night;
 4. That PW3 and PW6 saw a cloth at A1's place said to be belonging to the deceased days after the missing and/or death of the deceased;

5. That the deceased and the accused person had some misunderstanding over two goats and a chicken. The two goats were found. However, the chicken was not found;
6. The body of the deceased was discovered dead and floating in Mawapula stream/river by Annety Simweemba Siakavuba (PW2) on 10th December, 2024;
7. That the body of the deceased was found only wearing a black short when it was discovered without any shirt on top;
8. Detective Inspector Mapenzi Mwanamuchende (PW8) took pictures of the deceased's body and produced a photographic album;
9. An exhumation postmortem was conducted by Dr. Victor Telendiy, PW5; and
10. The Postmortem Examination Report was produced by PW5 indicating the cause of death as undetermined and the manner of death as unknown.

4.3 The evidence adduced shows that A1 had a disagreement over two goats and a chicken with the deceased on 5th December, 2024. On this same night, PW1 was called by A1 to go and discuss the matter but only went the following morning. PW4 who is A1's son confirmed that the deceased slept in the same bedroom for PW4 at A1's house but did not find him in the morning. However, nothing in the evidence shows that PW4 could have had any motive to harm the deceased. The fact that the deceased had a misunderstanding with A1 at A1's house and went missing the following morning is an odd coincidence which remains unexplained. The question is whether this odd coincidence provides a connecting link of A1 committing the offence and constitutes supporting evidence. The Supreme Court in the case of **Joseph Sikaona v The People**⁹ referred to its

decision in **Kalaba v The People**¹⁰, where it was held that odd coincidences if they remain unexplained may be supporting evidence.

- 4.4 According to PW1, when he went to A1's house in the morning he was told that the deceased was kept in the night but he did not know what time **"he managed to escape"**. This explanation suggests that the deceased was kept against his will but it is not conclusive proof that A1 killed the deceased. Therefore, this statement alone is not enough to link A1 to the deceased's death.
- 4.5 I note that the evidence of PW1 does not point at A1 directly as the person who killed the deceased. Although, he did testify that the two had a misunderstanding over two goats and a chicken, but nothing was produced before Court to show that A1 was seen killing the deceased. PW4 confirmed seeing the deceased at A1's house in the bedroom where he slept when he arrived between 03:00 and 04:00 hours. He stated that he did not see any blood on the deceased and in his testimony he did not mention witnessing anything that shows any form of violence inflicted by A1 on the deceased.
- 4.6 Further the evidence of PW2 relates only to how she discovered the body of the deceased. PW3 confirmed seeing a cloth at A1's place which he said that it was the deceased's cloth but the cloth was never produced before Court. In any case there was no special feature given about the cloth to separate it from any other clothes other than just saying it was a PF (Patriotic Front) attire.
- 4.7 I find the evidence of PW6 not to be very credible as he kept changing his story over the cloth he saw at A1's house. When challenged in XXN he stated that he saw the cloth when he was being taken by the Neighbourhood Officers. He later changed that he saw it before being taken by the Neighbourhood Watch Officers. Moreover, PW6 was one of the suspects and may have had an interest to serve. Further, his testimony that what the deceased wore was a shirt conflicts with that of PW7 who

indicated that the deceased wore a black short, white T-shirt inside and a black hood labelled PF. In any case, the evidence of PW7, PW8 and PW9 mainly speak to the events that happened after the deceased body was found. They do not prove how A1 is directly linked to the killing of the deceased.

- 4.8 In the absence of direct evidence that linked A1 to the death of the deceased, there is also need to determine whether there is sufficient circumstantial evidence which connects A1 to the crime. The danger of convicting an accused person based on circumstantial evidence was espoused in the case of **David Zulu v The People** (*supra*) as follows:

"It is a weakness peculiar to circumstantial evidence that by its very nature it is not direct proof of a matter at issue but rather is proof of facts not in issue but relevant to the facts in issue and from which an inference of the facts in issue may be drawn. It is incumbent on a trial judge that he should guard against drawing wrong inferences from the circumstantial evidence at his disposal before he can feel safe to convict. The judge must be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such a degree of cogency which can permit only an inference of guilty."

- 4.9 The Supreme Court in the **David Zulu case** (*supra*) further guided that it is competent for a court to convict as follows:

"It is palpably clear that the evidence available at the trial was circumstantial evidence. It is competent for a court to convict on such evidence as it is to convict on any other types of admissible evidence. However, there is one weakness peculiar to circumstantial evidence; that weakness is that by its very nature circumstantial evidence is not direct proof of a matter

at issue but rather is proof of facts not in issue but relevant to the fact in issue and from which an inference of the fact in issue may be drawn. As Professor Nokes states in the 2nd Edition of his book "An Introduction to Evidence" at p. 467:

"The possible defects in circumstantial evidence may . . . include not only those which occur in direct evidence such as falsehood, bias or mistake on the part of witnesses, but also the effect of erroneous inference."

It is therefore incumbent on a trial judge that he should guard against drawing wrong inferences from the circumstantial evidence at his disposal before he can feel safe to convict. The judge in our view must, in order to feel safe to convict, be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such a degree of cogency which can permit only of an inference of guilt."

4.10 And in the case of **Saidi Banda v The People** (*supra*), the Supreme Court further guided that:

"Where the prosecution's case depends wholly or in part on circumstantial evidence, the court is, in effect, being called upon to reason in a staged approach. The court must first find that the prosecution evidence has established certain basic facts. Those facts do not have to be proved beyond all reasonable doubt. Taken by themselves, those facts cannot, therefore, prove the guilt of the accused person. The court should then infer or conclude from a combination of those established facts that a further fact or facts exist. The court must then be satisfied that, those further facts implicate the accused in a manner that points to

nothing else but his guilt. Drawing conclusions from one set of established facts to find that another fact or facts are proved, clearly involves a logical and rational process of reasoning. It is not a matter of casting any onus on the accused, but a conclusion of guilt a court is entitled to draw from the weight of circumstantial evidence adduced before it."

- 4.11 The deceased's body was found floating in a river about five days after he was last known to have spent a night at the accused's residence. However, the evidence of PW4 was that when he arrived home past midnight he found the deceased in his bedroom which had no door and the deceased did not appear to have any injuries. When he woke up he did not find the deceased. There is no evidence of A1 going into PW4's bedroom and picking the accused. Therefore, it will be farfetched to conclude that the deceased was last seen with accused as the evidence is simply that he spent the night at his residence. What happened from the time PW4 found the deceased in his bedroom to the time he was found dead and floating in the stream does not lead to only one inference of being killed by A1 and being thrown in the said river. It can also be inferred that since the deceased was not tied and the room where PW4 found him had no door, it is possible that he left the accused's home on his own before meeting his death.
- 4.12 Furthermore, the evidence of PW5 was that the cause of death is undetermined and the mechanism and manner of death is unknown. According to PW5, the deceased's body was discomposed making it impossible to examine the tissues to ascertain the cause of death, therefore, he only examined the bones which were all intact. PW5 as an expert also testified that it was impossible to determine the actual day the deceased died. Simply put, the cause of death of Amon Mooya remains unknown, thereby making an inference that he was killed by A1 unsustainable

- 4.13 I further agree with the defence that there was dereliction of duty by the police in investigating the matter for the following reasons:
- a. There was no identification or production in court of the piece of cloth alleged to be for the deceased said to have been seen at A1's residence and to link it in any way to the deceased and to further show its relevance or the lack thereof to the matter;
 - b. Failure to conduct timely post-mortem before burying the body of the deceased before further decomposition; and
 - c. Despite giving evidence that samples were collected from the cloth and from the deceased's remains as well as from the accused no DNA results were produced to either exonerate or implicate the accused. The cases of **Peter Yotam Haamenda v The People⁴** and **Charles Lukolongo and Others v The People⁵** are to the effect that dereliction of duty will operate in favour of the accused.
- 4.14 Having evaluated the evidence before me, I am of the considered view that the prosecution has not removed the case from the realm of conjecture to implicate A1 to the crime. The whole prosecution evidence falls short of proving the case against A1 to the required standard which is beyond all reasonable doubt. Therefore, I ACQUIT A1 of the charge of murder **contrary to Section 200 of the Penal Code¹** and set him at liberty forthwith.

Delivered at Lusaka on the 4th September, 2025



Lastone Mwanabo
HIGH COURT JUDGE