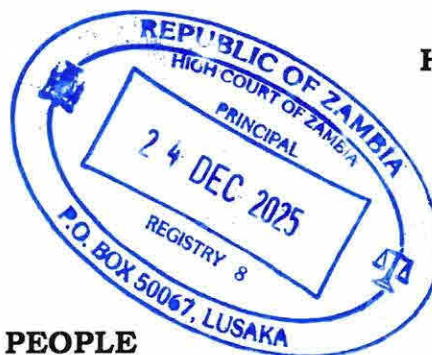


**IN THE HIGH COURT FOR ZAMBIA
HOLDEN AT LUSAKA
(CRIMINAL JURISDICTION)**

HP/203/2025



BETWEEN:

**THE PEOPLE
VS
BENJAMIN BWEMBYA
MOSES BESA**

Before : R. Chibbabbuka, J.
For the State : Mr F. Sikazwe, Principal State Advocate,
National Prosecution Authority
For the Accused Persons : Mr D. Mulenga, Legal Aid Counsel, Pro bono,
Legal Aid Board

JUDGMENT

Cases referred to:

1. *The People v Emmanuel Mbita and Rabi Chilufya*
2. *Ilunga Kabala and John Masefu v The People*

Legislation referred to:

The Penal Code, Chapter 87 of the Laws of Zambia
The Criminal Procedure Code, Chapter 88 of the Laws of Zambia.

1.0 INTRODUCTION

The accused persons stand charged with vandalism contrary to *Section 341 D (1) and (2) (a)* of the *Penal Code, Chapter 87 of the Laws of Zambia*, as amended by *Act No. 17 of 2007*. It is alleged that on 7th October, 2024, the accused persons jointly and whilst acting together did vandalise 10mmsq x 2 core x 25 meters cable valued at K1,589.50 the property of Zambia Electricity Supply Corporation Limited, a public property essential for or incidental to the provision of necessary supply of electricity to the public.

2.0 THE PROSECUTION'S EVIDENCE

The prosecution called five called witnesses.

2.1 The Testimony of PW1

PW1 was Belita Nakaze whose testimony was that on 7th October, 2024 at around 02:00 hours she heard a sound of something falling on the wall fence. She asked Leya Nakazwe and Tazana Siame whether they heard the sound, causing them to get up. PW1 peeped through her living room window and immediately heard some noise, someone shouted that thieves had cut the cables. PW1 and her young ones went outside through the kitchen door and found the Zambia Electricity Supply Corporation (ZESCO) cable that transfers electricity from the ZESCO poles to their house was swinging. There was no light outside but she saw a cable swinging. Upon seeing the cable, she proceeded to open the gate and noticed that the noise was getting louder and saw a mob of people. She heard someone say the people who had cut the cable had been apprehended. PW1 saw two men who had been apprehended by a crowd of people who suggested that the men be burned but PW1 refused and recommended that they be taken to the police. The men were taken to George Central Police Post and handed over to the police who advised PW1 to return to the station at around 08:00 hours.

When she reported to George Central Police Post the following morning, she was given a paper and referred to Matero Police Station where she was asked to make a payment in the sum of K65.00 at the bank which she did. When she went back to Matero Police Station, she was referred to ZESCO at the Malambo office where she made a statement. The ZESCO personnel thanked her and instructed field personnel to reconnect the cable which they did.

A week later, the men were taken to PW1's home to show how they had stolen the cable. PW1 positively identified the accused persons as the men who were apprehended in connection with the alleged act. PW1 also identified the cable which was marked as ID1, and the two pliers that were recovered from the scene which were marked as 1D2 and 1D3. The black mask was marked as 1D4.

Cross examination of PW1

When cross examined, PW1 replied as follows: she was awakened by the noise at around 02:00 hours and not 04:30 hours. She was already at the police station at around 04:30 hours. Any person who testifies otherwise as regards the time would be lying. She did not lie to the court. It was dark when she woke up as there was no up in that area at that time. When she heard the sound, she did not know what had fallen. When she went outside, she saw a cable hanging on the side of the house. Eno is her neighbour and was part of the group that caught the accused persons. Eno and the other persons who apprehended the accused persons are not vagabonds. Some of the people from the group were mourners from a funeral house. She knew nothing of the allegation that the accused persons were robbed of their phones and money on apprehension, or that the accused persons were accosted so that they could be robbed. The accused persons did not have a chance of explaining anything as the mob wanted to burn them. The accused persons were beaten after being apprehended.

Re-examination of PW1

PW1 was not re-examined.

2.2 The Testimony of PW2

PW2 was Daniel Nkumbula, an Electrician in the employ of ZESCO. His testimony was that on 7th October, 2024, he was operating from Zingalume area at around 15:00 hours when he received a call from his supervisor instructing him to visit PW1's house where a service cable which supplies power to PW1's house had been cut. When PW2 arrived at PW1's house, he observed that the service cable had been cut in two pieces. PW2 and his colleagues isolated the cable and replaced it. The cable had been cut from the part where it was reaching the wall fence. Part of the cable was hanging on the side of the house while the other was hanging from the pole. The cable that was removed was taken back to the ZESCO office. PW2 positively identified ID1. The cutting of the cable in the manner it was cut posed a danger to the public and also it stopped the supply of power to PW1's house. The cable is valued at K1,586.00.

Cross examination of PW2

When crossed examined, PW2 replied as follows: he is an electrician and whenever he is working he always wears protective clothing so that he can protect himself from electrocution. Pliers or cutters are used to cut cables. He was not told of any gloves being recovered from the scene, nor was he shown what was used to cut the cables. There are a number of appliances that can be used to cut cables. There are specific types of pliers that are used to cut cables. There was a complaint in relation to the cable being cut but the same has not being shown to the court. He did not tell the court the exact time or date when the cable was cut, or the period of the power outage. Only the affected customer made a complaint.

Re-examination of PW2

PW2 was not re-examined.

2.3 The Testimony of PW3

PW3 was Golden Lungu whose evidence was that on 7th October, 2024 at around 02:00 hours, he heard people shout thief! thief! thief! so he came out of the house and saw A1 being chased. PW3 caught A1 and took him to the mob which he found beating A1's friend. PW3 recognised A1 as they resided in the same compound, and was able to see him at the time of apprehension using the light from his phone. When PW3 inquired from the mob as to why they were beating A1's friend, PW1 and other people responded that the accused persons had cut a ZESCO cable.

His home is about 10 meters from PW1's house. On inspection of the scene, PW3 saw a long cable hanging from the pole while the shorter piece of the cable was inside PW1's yard. PW3 was also shown two pliers, one was small and red while the other was green, which were recovered from the scene. He was also shown a face mask which had a sieve on the mouth. He was able to see the items from the light from the torches of the people's phones. The mob wanted to beat the accused persons because it was rampant for cables to be vandalised but PW1 suggested that the accused persons be reported to the police. The suspects were taken to George Police Post. PW3 positively identified the accused persons. He also identified ID1, ID2, ID3 and ID4.

Cross examination of PW3

In cross examination, PW3 replied as follows: he did not see the accused persons try to cut the cable, it was Darius who saw the accused persons cut the cable. He does not know who Innocent and Isaac are. He is not aware of Darius' evidence that he saw people unsuccessfully attempting to cut the cable. He is not aware that the accused persons were attacked by Darius, Isaac and

Eno. The accused persons did not tell him they were going to look for scrap metal. He does not know who cut the cable.

Re-examination of PW3

PW3 was not re-examined.

The Testimony of PW4

PW4 was Detective Inspector Joyce Mwale whose testimony was that on 7th October, 2024, she reported for work at around 07:00 hours. During the course of her duties, she was assigned to investigate a case of vandalism where two suspects were arrested in Zingalume Compound on allegation that they were found cutting a ZESCO service cable on the 7th October, 2024 at around 02:00 hours. PW4 went to George Police Post where the suspects were detained. She came to know the suspects as Benjamin Bwembya, A1, and Moses Besa, A2. The accused persons were said to have vandalised a ZESCO cable 10-millimeter square x 2 x 25 meter valued at K1,589.50. PW4 also found two cutters, one red and another green, alleged to have been used to cut the cables. She also found a black face mask believed to have been worn during the commission of the offence. The complainant, PW1, made a complaint to ZESCO and was given the complaint number 30213462, and attended to on the very day. The cable that was cut was kept as evidence.

On 6th October, 2024, the area had load shedding from 18:00 hours to 04:00 hours. She visited the scene and found that indeed the cable had been replaced. She interviewed witnesses in relation to the offence and recorded their statements. She also interviewed the accused persons who said that at the time of their apprehension at around 04:30 hours, they were going to buy iron sheets whilst carrying two cutters. A1 said he was a blacksmith who had requested A2 to escort him to buy iron sheets. She recorded the accused persons' statements, and under warn and caution, she charged them with the subject offence. The accused persons reside in Zingalume area, not too far from

the scene. The cable that was cut was supplying power to PW1's house. PW4 positively identified the accused persons. She also identified ID1, ID2, ID3 and ID4 which she produced as P1, P2, P3 and P4 respectively.

Cross examination of PW4

In cross examination, PW4 replied as follows: she interviewed Darius who informed her he was with Eno and Isaac when he found the accused persons. that when the three men saw the accused persons, they hid so that they could observe what the accused persons were doing. According to what Darius told her, the accused persons were found cutting the cable from the rooftop. Before finishing to cut from the other part, they were caught. By that time the accused persons had already cut on the other side. Darius informed her that he and his friends pounced on the accused persons before they could do anything. Darius and his friends were coming from a funeral which is stated in Darius' witness statement. Darius had not testified before court.

The accused persons never told her that they were attacked by Darius, Eno and Isaac. The accused persons told her they were going to buy iron sheets but no shop is open at around 02:00 hours. She was not aware that PW1 did not state in her testimony that she was given a complaint number, nor that PW2 did not mention a complaint number. She was not aware that ZESCO complaint numbers are either 6, 10 or 13 digits. She only knows of the 8-digit number. She is not aware of how ZESCO comes up with the complaint numbers. She did not make up the evidence relating to the complaint number. PW2 is the one who informed her that there was no power from 04:00 to 16:00 hours. She was not aware that PW2 did not testify to there not being power at PW1's place from 04:00 to 16:00 hours. She was also not aware that PW1 testified to not knowing whether or not there was power supply to her house as there was load shedding. The two accused persons were found cutting cables by witnesses who have not been brought to court.

Re-examination of PW4

PW4 was not re-examined.

The Testimony of PW5

PW5 was Darius Phiri. His testimony was that on 7th October, 2024, he was in the company of two friends, Innocent and Isaac, coming from a funeral which was within their compound. At his house, which had a ZESCO electricity pole, they saw two people. One person was carrying the other person on the shoulder. PW5 and his friends quietly drew closer so that they could observe what the people were doing. When the people saw PW5 and his friends, they attempted to run but PW5 caught one of the men. His friends chased the other man. PW5 noticed that the person he had apprehended was wearing a mask. When he removed the mask from the man's face, he recognised the man. PW5 also discovered that the men had cut a black ZESCO cable.

His friends returned having managed to apprehend the other man who had also been wearing a mask. His friends, in the company of some people they had found, brought the man they had apprehended. The accused persons were searched and found in possession of pliers. PW5 was able to see these items using moonlight and he could also see who was who. The cutters dropped from the pockets of the people they had apprehended whilst they were searching them. He picked the cutter to have clear view of it. He knew the two people they apprehended and their names are Benjamin and Moses. He knew them before the incident as they lived in the same compound although he did not know exactly where they stayed.

He did not know the name of the person at whose house, the cable had been cut, although she was his neighbor. He only knew her as "Ambuya" because she is an elderly person. The purpose of the cable that was cut is to supply light from the pole to the houses. On this night there was no electricity. His

house is approximately 7 meters from where the funeral was. The cable was cut into two pieces, the cable that remained at the pole was approximately 20 meters while the cable that was at the house was short. The cable was two core cable in thickness. PW5 positively identified A1 and A2. He also identified P2, P3 and P4.

Cross examination of PW5

In cross examination, PW5 replied as follows: He did go for a funeral in the compound though he had not mentioned it before the court who had passed away. Evidence was there to show that there was a funeral as PW1 also knew that there was a funeral in the area. At the scene he did see two guys and one had carried the other and when they noticed that they had seen them, they ran away. The place where the first person was apprehended was about 8 meters from the scene. When they found them at the scene, he managed to apprehend the one who was on top of the other friend but the other one ran away and Issac and Innocent apprehended them.

They saw the cable even before they reached the scene where the two men were, as they had already cut the cable and where it remained it was just a short cable. From the pole to where the cable was cut there was only a house in between. He did not see the accused persons cut the cable but they found them at the scene where they were carrying each other on the shoulders and the cable had already been cut. He and his two colleagues did not attack the accused persons. The pole where the two were, is at their house inside their yard. After the pole there is a hedge and the accused persons were outside the yard at the hedge. The hedge of flowers and the pole are just next to each other. The accused persons did not tell him that they were going to buy roofing sheets to make braziers. The time they found the accused was 02:00 although he had not told the court this.

Re-examination of PW5

PW5 was not re-examined.

That was the case for the prosecution.

3.0 CASE TO ANSWER

At the close of the prosecution's case, I found the accused persons with a case to answer and consequently placed them on their defence.

4.0 THE DEFENCE'S CASE

The defence called two witnesses, the accused persons themselves.

The testimony of DW1

DW1 was Benjamin Bwembya who testified that he makes braziers and metallic dishes. On the 7th October, 2024 he knocked off from work at the Salt Centre where he operates from. He passed through a bar to buy some beer to drink from home. He found Moses who was playing pool and having some drinks and joined him. DW1 asked Moses to accompany him to Middle West the following day to buy some half cuts, that is the remaining iron sheets for roofing. Moses who he knew from before agreed and at 18:00 hours he left the bar and went home.

The following day around 04:00 hours he asked his wife who was going to draw water to wake up Favour's father, Moses for them to start off for their errand. His wife went to Moses their neighbour's place and woke them up and got Moses's wife to go and fetch some water. He started off with Moses around 04:10 hours for Middle West. They passed through a ground in the middle and as they were walking he heard some people behind them calling and telling them to stop. They stopped and saw three men who asked them where they were going to which they responded that they were going to Middle West to buy half-cuts. This was around 04:30 as Moses checked his phone which he

removed from his pocket together with a snip that they used to cut the iron sheets. One of the three men, Darius got the phone and when Moses asked for it back Darius and the other two were about to leave, Moses grabbed Darius's shirt and Kodak threw a punch at Moses and Moses threw the snip from his hand and started shouting for help and that they were going to kill him. Whilst holding each other, that is when he heard the three say that there were thieves that were cutting cables. As they were screaming two other friends came and they had something in their hands that looked like a stick and were asking who they were. As they ran towards them, Moses was being held by Eno, Darius and Kodak which three were beating him, he thought that he would be beaten too and he began to run away.

They pursued him and apprehended him and took him back to where Moses was. He found that Moses had been severely beaten who was unable to see clearly. They started to beat him and Moses whilst saying that they were the thieves who cut the cables and that they should just burn them. It was at this point that PW1 came from her house and asked the people why DW1 and Moses were being beaten. Eno, Darius, and Kodak explained to her that Moses and he were the ones that had been cutting the electricity lines whilst other people continued screaming that they should just be burnt. PW1 stopped them and suggested that they be taken to the police and she called for a taxi which took them to the police station around 06:00 hours. The police refused to accept them and directed that they be taken to the clinic. In the taxi they were with Eno, Darius and Kodak.

Although PW1 testified that after one week he went back to the scene to demonstrate how he cut the cable, the ZESCO personnel took them there but he did not demonstrate how he cut the cable. When he was apprehended, he did not have a mask as alleged by PW5, he only had a snip which is a tool for cutting iron sheets. Neither he or Moses were in the process of putting each on

their shoulders when they were seen by PW5 in an attempt to cut the cable. He did know PW5 from the neighbourhood but he did not know of any funeral in the area.

Cross examination of DW1

In cross examination DW1 replied as follows: He did hear PW5 testify that he saw two individuals, one was up on the pole and the other was on the ground although he did not recall him say that he saw a cable being cut. PW5 did tell the court that he was coming from a funeral around 02:00 hours, when he saw two individuals and when they gave chase, they apprehended him. He did not agree that he was acting with Moses and that they cut the cable. The snip cannot cut a cable although it could cut a roofing sheet.

He lives in the same neighbourhood with PW5 and they know each other. He has not differed with PW5 for PW5 to come and tell the court that he is the one who cut the cable. The red and green pliers that they were found with are the tools they use to cut the iron sheets. He did not know about the black mask and whose it was as it did not belong to him. This was not the first time he was going with Moses at night to do this exercise and they had always been going on such missions with the pliers. He did not lead the police to Middle West where he would get the off-cuts. The police did not ask him to show them the braziers and shomekas or metal dishes that he would make, although he told the police, they never reacted or made an effort to go where he used to work from. Moses was not in the business of making braziers and shomekas, he was just escorting him and he gave Moses the pliers because the trousers that he had worn was loose. He did not carry the pliers with Moses to cut the cable and before they could roll it, they were picked out by PW5 and that is why they were standing as accused persons.

Re-examination of DW1

There was no re-examination of DW1.

The evidence of DW2

DW2 was Moses Besa who testified that on the 7th October, 2024 around 16:00 hours he was at Texas bar at Muchinga ground drinking beer and playing pool when DW1 came and joined him. DW1 asked him to escort him the following day to Middle West to which he agreed and that DW1 would assist him with something that he could use at home. DW1 went home and he also left the bar at 20:00 hours and went home.

In the morning around 04:10 to 05:00 hours DW1's wife came to wake them up and got his wife to go and queue for water. DW1's wife told him that DW1 was waiting for him so he prepared and proceeded to DW1's house around 04:15 and thereafter they started off for Middle West. They used the road at the ground and went on to the center road which is a gravel road. When they reached the end of the road as they were about to turn at the corner, they heard some voices behind them telling them to stop. They stopped and three people came and asked them where they were going. He explained that they were going to Middle West. He knew these three people who were Darius, Enock and Golden. They asked them what time it was and he removed his phone from the pocket whilst the snip was in his hand. Darius took his phone from his hand and he grabbed Darius by the shirt and asked him why he wanted his phone. Darius then punched him on his neck and he dropped the snip. After he picked the snip he let go of Darius's shirt and that is how his friend hit him with something made out of wood on his face and he shouted that this man was going to kill him.

DW1 ran away and people started coming out of their houses and a lot of women came out who asked why they were being beaten. Those who were beating them responded to say that these are the people who cut the ZESCO cables and that they had found them with the tools they had used to cut the cables. Other people wanted to hear from them what had happened but Enock insisted that they should just be burnt with tyres. One woman discouraged the people from doing that to them and advised that they be taken to the police. She called a taxi which took them to the police who advised that they be taken to the clinic as they had been injured. At the clinic they were given injections and taken back to the police.

Although PW5 testified that they were found at around 02:00 hours that was not him as at that time around 02:00 to 03:00 hours he was at home sleeping. He and DW1 never demonstrated how they cut the cable at the scene. PW5 and him did know each other before the incident because they lived in the same compound and PW5 used to go to his shop. Although PW5 testified that he was coming from a funeral, he did not know anything about a funeral in their neighbourhood. Although PW5 testified that when he apprehended him, he had a mask on and when PW5 removed the mask he saw his face and recognized him, that was not him as he never cut a cable and he did not have a mask. They were caught near PW5's house which is far away from the scene where the cable was cut.

Cross examination of DW2

In cross examination DW2 testified that he was not the one who cut the cable but he was found with cutting tools called a snip as DW1 gave it to him because his trousers were loose. He could confirm that PW5 and him knew each other. He was aware of PW5's testimony that on the night in question he saw two people cut the cable and when they gave chase, they apprehended two people who turned out to be him and DW1. From his recollection he has never

differed with PW5. He never used to hang out with PW5, but PW5 used to play with his young brother who they used to smoke with.

He never ran away from the scene because they approached them nicely and asked them a question. They interacted with these three men for about three minutes and after he got his phone out the fracas started. He knew PW5 but he did not know whether PW5 knew that it was him when they discussing. There is nothing that he did for PW5 to start beating him and he assaulted him for nothing. There were no people that saw them cutting the cable as they were just walking by the road. He could confirm that from the bar he went straight home and he did not know that there was a funeral because he did not see one. He was not the one wearing a black mask in an attempt to disguise himself.

Re-examination of DW2

There was no re-examination of DW2.

That was the case for the defence.

5.0 SUBMISSIONS

Both counsel for the prosecution and the defence opted to rely on the evidence on record.

6.0 DECISION OF THE COURT

From the onset I warn myself that the burden of proving the charge against the accused persons' lies on the prosecution and that they must prove every element of the offence beyond reasonable doubt. If at the end I harbor any doubt as to the guilt of the accused persons, I am obligated to acquit them. There is no burden whatsoever upon the accused persons to prove their innocence.

The following facts are not in dispute:

1. On the 7th October, 2024, the accused persons were apprehended by Enock, Darius and Golden alias Kodak who they accused of cutting a ZESCO cable at PW1's place.
2. DW1 and DW2 were beaten by a mob that wanted to burn them with tyres but PW1 prevented this and called for a taxi to take them to the police.
3. A cable was cut into two pieces from a pole that supplies electricity to PW1's house.
4. DW1 and DW2 were taken to the scene by ZESCO police after one week.
5. The cut cable is the property of ZESCO and is essential for or incidental to the provisions of necessary supply of electricity to the public, which resulted in loss of supply of electricity to PW1's house.

I find those as facts.

The charging section for this offence of vandalism reads as follows:

“(1) Any person who for any purpose vandalizes any public or private property essential for or incidental to the provision of a necessary service commits a felony.

(2) Where the property referred to in subsection (1) is –

(a) a cable, overhead line, power line, electricity pole, pylon, transformer, pole mounted substation, substation, generating station or other property essential for or incidental to the connection, installation, generation, supply or distribution or other use of electricity, notwithstanding the Electricity Act or any other written law, the offender is liable, on conviction-

(i) to imprisonment for a term of not less than ten years and not exceeding twenty-five years; or

(ii) where the vandalism causes the death of any person, to imprisonment for life.

The term 'necessary service' as defined by *Section 341A (a) of the Penal Code (Amendment) Act No. 17 of 2007* includes:

“any service relating to the generation, supply or distribution of electricity,”

The said *Section 341A* also defines the term vandalise as meaning:

“willfully or maliciously destroying, damaging, defacing, disabling or in any way disrupting the functions of repairing public or private property.....”

Justice Lisimba as he was then outlined the main ingredients of the offence of vandalism in the case of **The People v Emmanuel Mbita and Rabi Chilufya**¹ as follows:

“(1) that there has to be willful and malicious act of disabling or in any way disrupting the function or impairing of property as the case may be;

(2) the property in issue must either be public or private;

(3) the property should be essential for or incidental to the provision of a necessary service as defined above.

In applying the aforementioned law and authorities to the findings of facts outlined above, I am satisfied that an act of vandalism as defined under *Section 341D (1) (2) (h)* of the *Penal Code* has been established.

What now remains is for this court to determine whether it was the accused persons that committed the said the said act of vandalism. It is not in dispute that A1 and A2 were apprehended by Darius, Enock and Golden alias Kodak on the 7th October, 2024. PW5, Darius testified that this was around 02:00 hours while both accused persons testified that it was around 04:00 to 05:00

hours. The testimony of PW5 is corroborated by PW2 who testified that she heard some noise outside her house at around 02:00 hours and when she and her young ones went outside to check what was happening, they were informed that a ZESCO cable had been cut which supplied electricity to their house and shortly thereafter she saw that two men had been apprehended and were being beaten by a mob which she stopped. I accept the evidence of PW1 and PW5 that the time of the apprehension of the accused persons was 02:00 because both of their testimonies were not shaken in cross examination. This therefore puts both accused persons at the scene of crime.

Additionally, the testimony of PW5 was corroborated by the accused persons themselves that when they were apprehended, they were found with two pairs of pliers. I find it an odd coincidence that the said accused persons were found with tools known as pliers or a snip as they called them, which were produced before court and based on the testimony of PW2 are in my considered view capable of cutting the said ZESCO cable. Another odd coincidence is that the accused persons know PW5 and he knows them, but both of them testified that they never had any confrontation with him prior to this incident for him to accuse them of committing such an act. The Court in the case of **Ilunga Kabala and John Masefu v The People**² stated as follows:

"It is trite law that odd coincidences, if unexplained, may be supporting evidence. In our view, an explanation which cannot be reasonably be true is, in this connection, no explanation."

Consequently, I do not accept the version of events as narrated by the accused persons that they were on their way to Middle West to buy cut-offs from roofing sheets and find that this was an after-thought.

In the circumstances, I am satisfied that the prosecution has proved the case of vandalism against the accused persons beyond reasonable doubt and convict them accordingly.

Delivered at Lusaka in Open Court this ^{24th} day of ^{December}, 2025

