

**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**

**HP/258/2024**

*(Criminal Jurisdiction)*

02 APR 2025

**BETWEEN:**

**THE PEOPLE**

**vs.**

**JOYCE TEMBO**

**BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO,  
ON 2<sup>ND</sup> APRIL, 2025, IN OPEN COURT.**

*For the People: Ms. L. Zundana & Mr. V. Munsaka – National  
Prosecutions Authority.*

*For the Accused: Ms. A. D. A. Theotis – Theotis Mutemi Legal  
Practitioners.*

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**JUDGMENT**

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**CASES REFERRED TO:**

1. *Tobias Kambenja v The People – SCZ No. 22 of 2014;*
2. *The People v Mwambona (1971) Z.R. 168;*
3. *Sakala v The People (1973) Z.R. 9;*
4. *Mwewa Muroso v The People (2004) Z.R. 207;*
5. *Miloslav v The People (Appeal 49 of 2013) (2014) ZMSC 142(9 March 2014);*
6. *Mwambona v The People (1973) Z.R. (reprint) 169;*
7. *Kambarange Mpundu Kaunda v The People (1990 -1993) Z.R. 215;*
8. *Justine Musukwa v The People – Appeal No. 88 of 2020;*
9. *Subramaniam v The Public Prosecutor (1956) WLR 965;*
10. *The People v Lewis (1975) Z.R. 43;*
11. *Mwiimbe v The People (1986) Z.R. 15 (S.C.Z);*
12. *The People v Abelimba – HJ/02/2011; and*

**LEGISLATION REFERRED TO:**

1. *The Penal Code, Chapter 87, Volume 7 of the Laws of Zambia.*

**1. INTRODUCTION**

1.1 The Accused Person, **Joyce Tembo**, stands charged with the offence of Murder contrary to **Section 200 of The Penal Code**<sup>1</sup>. The particulars of the offence are that **Joyce Tembo**, on the 6<sup>th</sup> day of March, 2024, at Lusaka, in the Lusaka District of the Lusaka Province of the Republic of Zambia, did Murder **Frotia Kamanga** (“the Deceased”).

**2. THE PROSECUTION’S CASE**

- 2.1 The case for the Prosecution is centred on the evidence of PW1, PW2, and PW3.
- 2.2 **PW1** was **Esnart Kamanga**, a Business Lady, who resides in Chawama. She testified, *inter alia*, that at around 20:00 hours, on Tuesday 5<sup>th</sup> of March, 2024, she was in Chawama at her shop. Whilst there, a tenant whose name she did not know, went to her shop to inform her that her uncle, who is the Deceased and aunt, who is the Accused Person, were fighting at home.
- 2.3 PW2 further testified that she locked her shop and went to the home in Chawama, where the Deceased and the Accused Person were reported to be fighting. When she arrived, she found the door to the house open and the

Accused Person shouting, but she did not hear what the Accused Person was shouting about.

- 2.4 When PW1 asked the Accused Person and the Deceased what the matter was, neither of them responded. PW1 noted that the Deceased had fallen towards the bed in an attempt to get up. When the Deceased attempted to get up, the Accused Person picked up a knife from a dish and stabbed the Deceased in the middle of his chest. The Deceased screamed saying "*Joyce, you have hurt me*". At this point, PW1 ran towards the road, booked a taxi and took the Deceased to Chawama Hospital.
- 2.5 When PW1 arrived at the Hospital with the Deceased, the Doctors took the Deceased and asked him what the problem was. The Deceased responded by stating that "*my wife has stabbed me with a knife*". Soon thereafter, the Deceased started vomiting. At that point, the Doctor gave PW1 a piece of paper and requested her to go and buy some medicine.
- 2.6 PW1 went to buy the medicine and on her way, she called her sister Idah Kamanga. When PW1 returned to the hospital, she gave the medicine to the Doctor who administered an injection to the Deceased.
- 2.7 PW1 avowed that on Wednesday, 6<sup>th</sup> March, 2024, she visited the clinic to see the Deceased. She asked him how he was and he told her that he was not well and that the Accused Person has killed him. The Deceased was taken to undergo an x-ray. As PW1 was waiting for

the x-ray results, the Deceased's situation worsened. PW1 was again told to buy some medicine by the Doctor.

2.8 When PW1 returned from buying the medicine, the doctor told her to hold on to the medicine. The Doctor then called her and informed her that the Deceased had died.

2.9 PW1 vied that when she first saw the Deceased at his home, on the fateful day, she could see what transpired clearly as there was a lit candle in the house.

2.10 PW1 recognised the silver knife, which she alleged the Accused Person had picked from a green dish, and used it to stab the Deceased. The silver knife was marked **ID1**. PW1 also identified the Accused Person in the dock as her aunt Joyce Tembo.

2.11 In cross examination, PW1 testified, *inter alia*, that when she went to the Deceased's and Accused Person's house, she found the door slightly open and could see what was happening inside. She stated that since the house was a small one-roomed house, she stood by the door and observed what was happening inside the room. She further stated that the curtain that hang by the entrance door was hang-up in such a way that the whole room was visible. She also stated that the curtain that demarcated the room was hanging up.

2.12 PW1 avowed that the Deceased used to look healthy and was a tall person. She conceded that she did not live in

the same house with the Deceased and the Accused Person, but stated that she knew that they used to fight often.

2.13 PW1 affirmed that she never saw either of them use a knife in their past fights. It was her testimony that the Accused Person used to beat the Deceased often. She conceded that the Deceased was the one who was her relative.

2.14 PW1 stated that the fights that the Deceased and Accused Person had were never reported to the Police. She recalled giving a Statement to the Police on 7<sup>th</sup> March, 2024, but stated that she does not remember telling the Police the conversation that she had with her uncle.

2.15 There was no re-examination conducted.

2.16 **PW2** was **Kalonde Robinson**, who is a Deputy Inspector No. 9570, at Chawama Police Station. He testified, *inter alia*, that on 6<sup>th</sup> March, 2024, at 16:00 hours, whilst on duty, he was assigned to investigate a case in which Esmart Kamanga (PW1) reported that the Deceased was stabbed using a knife by the Accused Person and later died. Acting on the report, PW2 interviewed PW1, who indicated that the Deceased had a quarrel with the Accused Person at their residence, which ended up in the Accused Person stabbing the Deceased with a knife.

- 2.17 PW2 testified that the Deceased sustained a deep cut on the chest and was taken to Chawama Level 1 Hospital where he died. He stated that PW1 further told him that the Accused Person had been handed over at Chawama Police Station.
- 2.18 It was PW2's further testimony that on 7<sup>th</sup> March, 2024, he visited the residence of the Deceased and interviewed the neighbours. One of the neighbours stated that she had heard the couple crying and went to inform PW1. PW2 left the scene without entering the house where the crime was allegedly committed.
- 2.19 PW2 vied that on 11<sup>th</sup> March, 2024, a Post-Mortem was conducted on the body of the Deceased by Dr. Himwaze, at the University Teaching Hospital ("UTH"), who prepared a Post-Mortem Report, which was handed over to PW2, who kept it in his custody.
- 2.20 PW2 further vied that on 28<sup>th</sup> March, 2024, Deputy Inspector Mubita conducted a Scene Reconstruction and recovered a knife that was used to inflict the injuries on the Deceased. On the same date, PW2 recorded a Warn and Caution Statement from the Accused Person, which was administered in Nyanja, a language that she understood better.
- 2.21 PW2 avowed that on 4<sup>th</sup> April, 2024, at 10:20 hours, he charged the Accused Person with the offence of Murder, contrary to **Section 200** of **The Penal Code**<sup>1</sup>, which charge she denied.

2.22 PW2 identified the knife (**ID1**), the Post-Mortem Report (**ID2**), and these were admitted into evidence marked **P1** and **P2**, respectively.

2.23 It was PW2's testimony that the cause of death, according to the Post-Mortem Report (**P2**) is a stab wound to the chest due to assault. He identified the Accused Person in the dock, as Joyce Tembo, whom he had charged with the offence of murder.

2.24 In cross examination, PW2 testified that only one Post-Mortem was conducted and that the Report is the one produced as **P2** before this Court. When referred to page 7 of **P2** headed "Internal Examination", PW2 stated that under Digestive System, it read "unremarkable". PW2 further stated that next to "Stomach Contents" it read that "not present as stomach was opened at first post-mortem".

2.25 PW2 insisted that only one Post-Mortem was conducted and that only Dr. Himwaze can comment on why she stated "first post-mortem". PW2 stated that he was not aware of any other Post-Mortem apart from this one.

2.26 There was no re-examination conducted.

2.27 **PW3** was **Paul Mubita**, who is a Deputy Inspector No. 11519, at Chilenje Police Station. He testified, *inter alia*, that he is a Scenes of Crime Officer, whose main duties are to analyse Crime Scenes.

2.28 PW3 recalled that on 28<sup>th</sup> March, 2024, at around 09:30 hours, he was assigned by his supervisor, Deputy Chief Inspector Obvious Musenge, to conduct a Scene Reconstruction within Chawama Compound. He was also informed that the Accused Person was already in custody.

2.29 PW3 picked up the Accused Person and took her to the Criminal Investigations Division (“CID”), where he interviewed her. The Accused Person narrated that she had a marital quarrel with her late husband on 5<sup>th</sup> March, 2024, at her house, which is within Chawama Compound. She further narrated to him that during the quarrel, she stabbed her late husband on the chest with a knife.

2.30 PW3 avowed that he left the station in the company of other Officers and the Accused Person, who led them to her house. Whilst at her house, the Accused Person showed them the knife which she had used to stab the Deceased. According to PW3, the said knife was under the bed, in a one-roomed house. After recovering the knife, PW3, the Officers and the Accused Person went back to the Police Station, where the Accused Person was detained for the offence of Murder. Thereafter, PW3 submitted the Scenes of Crime Report to his Supervisor and the knife was submitted to the Arresting Officer.

2.31 PW3 identified a knife shown to him and the Scene of Crime Report, which contained a Photographic Album

that he had compiled. The Scene of Crime Report with Photographic Album was produced into evidence as **P3**.

- 2.32 PW3 testified that the images in the Photographic Album depicted the Accused Person leading him and the other Officers to her house in Chawama; the transport that they used when they went to the scene to recover the knife; and the Accused Person standing by the door to the house. He further testified that the Photographic Album also depicted the inside of the Accused Person's house and the knife with blood stains.
- 2.33 PW3 identified the Accused Person in the dock as Joyce Tembo.
- 2.34 In cross-examination, PW3 testified, *inter alia*, that he before conducted the Scene Reconstruction, he interviewed the Accused Person, but did not record a Statement from her.
- 2.35 PW3 further testified that the door to the Accused Person's house was locked by members of the public who were related to the Deceased. He stated he gained access to the house, by using the key that was handed to him by the Accused Person's neighbour.
- 2.36 PW3 vied that from Picture No. 4 of the Photographic Album, the Court could see the view of the house, which was depicted by the door way to the house. He conceded that the picture depicting the knife does not demonstrate that the knife was found under the bed.

- 2.37 PW3 conceded that he had identified a knife from a different case and not the one in relation to this case, but stated that it was due to lapse of time. He further stated that he could identify the knife that was depicted in the Photographic Album.
- 2.38 PW3 avowed that as a Scene Reconstruction Officer, before he went to the scene, he did not review the Statements of other officers.
- 2.39 There was no re-examination conducted and that marked the close of the Prosecution's Case.
- 2.40 At the close of the Prosecution's Case, I found the Accused Person with a Case to Answer and informed her of her right to give evidence under oath or give unsworn evidence from the dock or choose to remain silent. The Accused Person opted to give sworn evidence on oath.

### **3. THE ACCUSED PERSON'S CASE**

- 3.1 **DW1** was **Joyce Tembo**, the Accused Person herein, who is 24 years old and is a Business Lady, residing in Chawama. She testified, *inter alia*, that on the night of 5<sup>th</sup> March, 2024, she had gone to her mother's place. When she returned to her home, she found her husband (the Deceased) was already home. She sent a child to go and check if the child's uncle was back or if he was at the shop. The child found the uncle at the shop, who gave the child a K40.00, which DW1 used to buy mealie meal, charcoal and cooking oil from the roadside.

- 3.2 When DW1 returned home, she prepared a brazier and put a pot of water on the brazier. When the water boiled, she entered the house to get the mealie meal. At that point, the Deceased opened the door and said "*this time, that is when you are cooking?*" DW1 responded saying that was when she had started cooking.
- 3.3 It was DW1's testimony that the Deceased started beating her with his fists. She asked him if he was drunk but he never heard her as he continued beating her. When she turned back, she grabbed him and he held onto a vegetable rack. She noted that the Deceased held a knife and in the course of struggling for the knife, the Deceased fell. It is at this point that the Deceased stated that DW1 had stabbed him.
- 3.4 It was her further testimony that the Deceased went outside whilst shouting that she had stabbed him. He was taken to the clinic, whilst she remained at home.
- 3.5 DW1 vied that she remembered the testimony of PW1 who stated that that the curtain demarcating the room was hang up, which was not true as it was demarcating the room. She further vied that if the curtain is not hung up, anyone standing by the door could not see the bedroom area.
- 3.6 DW1 avowed that she was not the one that was beating the Deceased, but that it was the Deceased that was beating her. She stated that it was not her intention that the Deceased should die when they fought.

- 3.7 When cross-examined, DW1 testified, *inter alia*, that on that fateful date, she and the Deceased had an altercation, and in the process, he punched her. It was her testimony that she was not annoyed following being punched by the Deceased. She stated that the Deceased and herself had a good relationship since they used to live together.
- 3.8 DW1 asserted that she had a good relationship with PW1 as they stayed together. She stated that PW1 lied when she said that she got a knife from the dish and stabbed the Deceased, as there was no such dish. She conceded that she never told her lawyer to challenge PW1's statement. She insisted that it was not her intention to kill the Deceased.
- 3.9 There was no re-examination conducted and that marked the close of the Accused Person's case.

#### **4. SUBMISSIONS**

- 4.1 The parties were invited to file their written submissions within a specified time frame, but at the time of writing this Judgment, only the Accused Person's Counsel filed her written submissions.
- 4.2 By Defence Counsel's Submissions, filed on 2<sup>nd</sup> October, 2024, Counsel submitted, *inter alia*, that the Prosecution has failed to prove its case beyond reasonable doubt, and urged this Court to acquit the Accused Person.

- 4.3 Counsel submitted that during a physical altercation initiated by the Deceased, the Accused Person acted in self-defence by grabbing a knife, and in the ensuing struggle for control of the weapon, both Parties fell, resulting in the accidental stabbing of the Deceased.
- 4.4 Counsel contended that under Zambian law, for a conviction of murder, the Prosecution must prove beyond reasonable doubt that: -
- i. The Accused caused the death of the deceased (*actus reus*); and
  - ii. The death was caused with malice aforethought (*mens rea*).
- 4.5 It was her submission that neither of the above have been satisfactorily proven by the Prosecution.
- 4.6 Counsel submitted that there were inconsistencies and unreliability in the Prosecution Witnesses. She stated that the only Witness who claims to have witnessed the alleged stabbing was PW1, who claims to have observed the incident from the doorway of a one-roomed house. She further stated that under cross-examination, PW1 admitted that a curtain separates the room, which would obstruct her view but that the curtain was up and she could therefore see her uncle on the bed.
- 4.7 Counsel submitted that the Accused Person disputed this evidence and averred that the curtain was not

raised, making it impossible for PW1 to have seen the alleged stabbing.

4.8 It was further submitted that the Crime Scene Investigator, did not assist the Court with a photograph of the room from the doorway, which would have assisted the Court in seeing the view of PW1 and whether indeed the curtain was raised or not. Counsel contended that the photographs adduced by the Crime Scene Investigator did nothing to assist the Court arrive at any findings as to what transpired.

4.9 Counsel contended that there was an issue of potential bias and credibility, as PW1 is the niece to the Deceased. In fortifying her contention, she invited the Court to the case of ***Tobias Kambenja v The People***<sup>1</sup>, where the Supreme Court cautioned against relying on the evidence of witnesses with a possible bias or with their own interest to serve.

4.10 It was Counsel's submission that PW1 admitted to having a better relationship with the Deceased, who was her blood relative, rather than with the Accused Person, who was her aunt by marriage. It was argued that the contradictions in her testimony regarding the presence and position of the curtain diminishes her credibility.

4.11 Counsel contended that there was a failure to observe protocols, as the Investigating Officer did not enter the crime scene or collect physical evidence personally.

Instead, he relied on information from neighbours, whose identities he could not recall.

4.12 Counsel further contended that the Post-Mortem Report refers to a “first post-mortem”, which was neither submitted nor acknowledged by PW2. She submitted that this raises questions about the completeness and reliability of the medical evidence.

4.13 Counsel further submitted that it was the duty of the Prosecution to place all available evidence in their possession before this Court and that if it was not so produced, there is an assumption at law that if it had been produced, it might have been favourable to the Accused Person and was in fact favourable to him. For this submission, Counsel placed reliance on the cases of *The People v Mwambona*<sup>2</sup> and *Sakala v The People*<sup>3</sup>.

4.14 It was also Counsel’s submission that when evidence has not been obtained in circumstances where there was a duty to do so and when it was obtained and not laid before the Court, and possible prejudice has resulted, then an assumption favourable to the Accused Person must be made. Counsel contended that in this instance, it was not known why the first Post-Mortem report, referred to **P2**, was not produced before Court. She submitted that the only inference that the Court can draw from its absence is that the evidence, if produced, would have favoured the Accused Person.

4.15 Counsel contended that there was mishandling of physical evidence, as PW3, the Scene of Crime Investigator, initially identified the wrong knife in Court. She further contended that PW3 required substantial prompting and reference to photographs to identify the correct weapon. It was also contended that PW3 described the knife that had been identified by previous witnesses as having a black plastic handle, when the previous Witnesses had described the knife as being silver with a grey handle.

4.16 Additionally, Counsel contended that PW3 failed to take essential photographs that would aid the Court's understanding and admitted to using random numbering for evidence tags, which is against standard procedure.

4.17 Counsel submitted that there were anomalies in **P2**, which made reference to a "first post-mortem" that was absent, and PW2 could not explain this discrepancy thus casting doubt on the cause of death and the reliability of the medical evidence. She further submitted that the contents of the stomach would have been vital in determining whether or not the Deceased had been drunk at the time of the stabbing, which would have led credence to the evidence of the Accused Person that the Deceased started the fight.

4.18 Counsel contended that the Accused consistently maintained that she did not intend to harm the

Deceased and described a scenario where the Deceased was the aggressor. She stated that this was supported by the claim of self-defence or accident. She argued that no evidence was presented to refute the Accused Person's account effectively.

4.19 Counsel submitted that malice aforethought is a requisite element for murder under **Section 200** of **The Penal Code**<sup>1</sup> and argued that the Prosecution failed to establish that the Accused Person had the intention to kill or cause grievous bodily harm. It was further submitted that the Accused Person's actions were a reasonable response to an immediate threat, which is aligned with self-defence under **Section 17** of **The Penal Code**<sup>1</sup>. It was also Counsel's submission that the Accused Person was subjected to physical assault by the Deceased and that the struggle over the knife was instigated by the Deceased grabbing the weapon. Counsel cited **Section 17** of **The Penal Code**<sup>1</sup> in fortifying her submission that a person is justified in using reasonable force to defend themselves.

4.20 Counsel argued that there was lack of reliable evidence due to the inconsistencies and procedural failures in the Prosecution's case to create reasonable doubt. She reiterated that key evidence, such as the weapon and the cause of death, is tainted by mishandling and unexplained anomalies.

4.21 In conclusion, Counsel submitted that given the Prosecution's failure to prove the elements of the offence beyond reasonable doubt, and considering the credible defence presented by the Accused Person, who acted without malice aforethought, there is significant reasonable doubt concerning the circumstances of the Deceased's death, thus she should be acquitted of the charge of Murder.

4.22 Alternatively, Counsel submitted that if the Court is not inclined to acquit, the offence should be reduced to Manslaughter due to the lack of intent and the presence of provocation and self-defence factors.

## **5. CONSIDERATION AND DECISION OF THE COURT**

5.1 I have carefully considered the case before me, together with all the evidence adduced by the Witnesses. The Accused Person stands charged with Murder contrary to **Section 200** of **The Penal Code**<sup>1</sup>. The cardinal principle ingredient in Murder is malice aforethought. **Section 200** of **The Penal Code**<sup>1</sup> provides that: -

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

5.2 Malice aforethought relates to the state of mind of the Accused Person at the time that she caused the death of the Deceased. It is defined under **Section 204** of **The Penal Code**<sup>1</sup> 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; ...”***

5.3 I must state from the onset that the burden of proof is on the Prosecution to establish the charge against the Accused Person and the standard of proof which must be attained before there can be a conviction is such standard as satisfies the Court of the Accused Person’s guilt beyond reasonable doubt. This position is fortified by the case of ***Mwewa Muroso v The People***<sup>4</sup>, where the Supreme Court held as follows: -

***“In criminal cases, the rule is that the legal burden of proving every element of the offence charged and consequently the guilt of the accused, lies from beginning to end, on the prosecution. The standard of proof is high. The case must be proved beyond reasonable doubt.”***

- 5.4 Accordingly, the burden of proof is on the Prosecution to establish that the Accused Person, **Joyce Tembo**, beyond all reasonable doubt, with malice aforethought and by unlawful act or omission, caused the death of the Deceased.
- 5.5 In so far as the present case is concerned, it has not been disputed that on 6<sup>th</sup> March, 2024, the victim, **Frotia Kamanga**, sustained a stab wound to the chest, which resulted in his death as evidenced by **P2**, the Report on the Post Mortem Examination. What is in dispute, however, is whether the Accused Person stabbed the Deceased and thereby intentionally caused the death of the Deceased.
- 5.6 From my analysis of the evidence on Record, it is the testimonies of PW1 and PW3, that directly implicates the Accused Person to the commission of the offence.
- 5.7 According to the testimony of PW1, on 5<sup>th</sup> March, 2024, following a report by a tenant that the Deceased and the Accused Person were fighting, she went to the home of the Accused Person and the Deceased. When she arrived at the door of their one-roomed home, she found the Accused Person shouting and that the Deceased was on the floor. PW1 narrated that when the Deceased attempted to get up, the Accused Person picked up a knife from a dish and stabbed the Deceased in the middle part of the chest.

- 5.8 It was PW1's testimony that the Deceased shouted stating "*Joyce, you have hurt me*". PW1 took her uncle to the hospital for the treatment of the stab wound. At the hospital, the Deceased complained of the pain caused by the stab wound.
- 5.9 PW1 vied that when she visited the Deceased at the hospital the next day, he undertook an x-ray examination, and whilst waiting for the results, she was informed that the Deceased had died.
- 5.10 PW3 testified that when he was assigned by his supervisor to conduct a Crime Scene Reconstruction, he took the Accused Person from custody and interviewed her. It was his testimony that in the course of the interview, the Accused Person told him that on 5<sup>th</sup> March, 2024, she had a quarrel with the Deceased and that she decided to stab her husband on the chest with a knife. PW3 stated that he did not record a Statement from the Accused Person.
- 5.11 PW3 avowed that the Accused Person led him and other Officers to the Accused Person's home in Chawama. When they arrived at the Accused Person's home, she showed them the knife that she had used to stab the Deceased. PW3 took photos at the scene of crime and compiled a photographic album (**P3**). He stated that when the knife was recovered, the Accused Person was taken back to the Police Station and PW3 prepared a Scene of Crime Report.

- 5.12 By her Defence, the Accused Person stated on 5<sup>th</sup> March, 2024, when she returned home from visiting her mother, she found the Deceased at home. During the course of preparing a meal, the Deceased asked her if that was the time she had started cooking a meal. The Accused Person responded by stating that it was the time that she had started cooking the meal. Following this response, the Deceased started beating her.
- 5.13 The Accused Person stated that during the altercation, she turned back and grabbed him. It was at this point that the Deceased grabbed a knife from the vegetable rack. She further stated that in an effort to grab the knife from him, they both fell down and he started shouting that the Accused Person had stabbed him.
- 5.14 From the foregoing summaries of the Prosecution and the Accused Person's testimonies, it is clear that this Court is faced with two conflicting testimonies in that PW1 testified that during the altercation between the Accused Person and the Deceased, when the Deceased got up after a fall, she saw the Accused Person pick a knife from a dish and stab the Deceased in the middle part of his chest. Further, PW3 testified that during the interview, the Accused Person told him that she decided to stab the Deceased during the course of their quarrel. On the other hand, the Accused Person in her defence stated that during the altercation, she grabbed the Deceased and he in turn reached for the knife which was

on the vegetable rack. She further stated that in her attempt to grab the knife from him, they both fell and soon thereafter, the Deceased shouted that she had stabbed him.

5.15 The Supreme Court in the case of ***Miloslav v The People***<sup>5</sup> guided on how a trial Court must resolve conflicting evidence as follows: -

***“Therefore, it was the duty of the trial court to resolve the disputed issue of consent by assessing the two conflicting versions between the complainant and the appellant. Upon that assessment, the trial court should have accepted one and rejected the other, giving reasons for doing so.”*** (Court’s emphasis)

5.16 From the foregoing authority, it is clear that in resolving the conflicting evidence of the Prosecution Witnesses and the Accused Person, this Court must assess the conflicting evidence and upon that assessment, this Court must accept one and reject the other and give reasons for doing so.

5.17 In assessing the testimonies of PW1, PW3 and DW1, with respect to determining whether the Accused Person stabbed the Deceased or the Accused Person and Deceased both fell during the struggle for the knife, I shall begin by considering the testimony of PW1.

5.18 I note from the evidence on Record that PW1 is a niece to the Deceased and as such, she may have been biased and I therefore warn myself of this possibility. I am

guided by the case of ***Mwambona v The People***<sup>6</sup>, where it was held as follows: -

***“The evidence of a biased witness should be treated with caution and suspicion and failure to regard him as such is a misdirection on the part of the court which may lead to a conviction to being quashed.”***

5.19 I am further guided by the case of ***Kambarange Mpundu Kaunda v The People***<sup>7</sup>, where the Supreme Court stated that: -

***“Prosecution witnesses who are friends or relatives of the prosecutrix may have a possible interest of their own to serve and should be treated as suspect witnesses. The Court should therefore warn itself against the danger of false implication of the accused and go further to ensure the danger has been excluded.”***

5.20 On my analysis of the evidence on Record, as it relates to the testimony of PW1, I find that Defence Counsel did not ask PW1 any questions that would create a possible motive for PW1 to be biased in her testimony. I note further that PW1’s testimony was consistent and not shaken during cross examination at trial. I also note that PW1’s testimony that the Deceased was stabbed in the Chest is corroborated by the Post-Mortem Report (**P2**), which states the cause of the Deceased’s death as stab wound to the chest and her positive identification of the knife during trial. I therefore find PW1’s testimony reliable.

- 5.21 My finding is further supported by the fact that PW1's testimony that the Deceased stated that the Accused Person had stabbed him on the day of the incident and on the day that he died, was not challenged at trial. This statement by the Deceased was even reiterated by the Accused Person herself who stated that when the Deceased fell, he shouted out that she had stabbed him.
- 5.22 In my view, this portion of PW1's testimony amounted to a *res gestae* statement and is admissible evidence. This is because the Deceased's statement was made in circumstances of spontaneity, in the course of the altercation, such that the possibility of concoction can be disregarded. My finding is fortified by the case of ***Justine Musukwa v The People***<sup>8</sup>, wherein the Court of Appeal stated as follows regarding *res gestae* statements: -

***“As the law stands, such statements are admissible as long as the person tendering the statement satisfied the court, in the case of res gestae, that they were made contemporaneous to the infliction of the injury that caused death, and in the case of a dying declaration, that the deceased lost expectation of living.”***

- 5.23 On my assessment of the testimony of PW3, I note that he stated that when he interviewed the Accused Person, she told him that during the course of the altercation with the Deceased, she decided to stab him. In my view, this testimony amounted to inadmissible hearsay as by this testimony, PW3 sought to establish the truth of

what had transpired during the altercation between the Accused Person and the Deceased. I am fortified by the case of ***Subramaniam v The Public Prosecutor***<sup>9</sup>, where it was held that: -

***“It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement but the fact that it was made.”***

5.24 Based on the foregoing authority, I find that the portion of PW3’s testimony regarding the Accused Person stating that she decided to stab the Deceased in the course of the altercation, is inadmissible and shall not be considered in the determination of this case.

5.25 Turning to my assessment of the Accused Person’s testimony, the Accused Person by her defence has called to aid the defence of self-defence by testifying that the Deceased was beating her and in the course of the altercation, she grabbed him and he reached for a knife that was on the vegetable rack. In her attempt to grab the knife from him, they both fell, and at which point the Deceased shouted that the Accused Person had stabbed him.

5.26 It is important to note that once the issue of self-defence or any other defence is raised, there is no burden on the Accused Person to establish it. The burden is on the Prosecution to negative it, and moreover, negative it so

convincingly that the Court can be sure beyond reasonable doubt that the Accused Person was not justified in committing the said offence.

5.27 **Section 17** of **The Penal Code**<sup>1</sup> provides as follows with respect to the defence of self-defence: -

***“Subject to any other provisions of this Code or another law for the time being in force, a person shall not be criminally responsible for the use of force in repelling an unlawful attack upon his person or property; or the person or property of any other person if the means he uses and the degree of force he employs in doing so are no more than is necessary in the circumstances to repel the unlawful attack.”***

5.28 From the foregoing authority, it is clear that a person is not criminally responsible for the use of force in repelling an unlawful attack as long as the means used, and the degree of force employed in doing so, is no more than is necessary to repel the unlawful attack.

5.29 Additionally, in the case of **The People v Lewis**<sup>10</sup>, cited with approval by the Supreme Court in the case of **Mwiimbe v The People**<sup>11</sup>, it was held as follows: -

***“In considering the defence of self-defence, two aspects arise:***

***The first is the question of retreat and the second the degree of retaliation.”***

5.30 The aspect of “retreat” referred to in the foregoing authority was aptly discussed by Matibini J., as he then

was, in the case of ***The People v Abel Zimba***<sup>12</sup> as follows: -

***“A failure to retreat is an element in considering the reasonableness of an accused’s conduct and is therefore a factor in deciding whether it was necessary to use force and whether the force used was reasonable. It is not the law that a person threatened must take to his heels and run in a dramatic fashion. What is necessary is that a person threatened, or attacked must demonstrate by his actions that he does not want to fight. He must demonstrate that he is prepared to temporize and to disengage. And perhaps to make some physical withdrawal.” (Court’s emphasis)***

5.31 On my analysis of the evidence on record, I note that the Accused Person’s testimony that during the altercation, the Deceased picked a knife from the vegetable rack and that in an attempt to grab it from him, he fell and shouted that the Accused Person had stabbed him, was only raised for the first time at defence stage. I note further that this version of events was not alluded to by Defence Counsel during cross examination of the Prosecution Witnesses or at all. This, in my view, is an indication that this version of the Accused Person’s testimony was an afterthought on the part of the Defence. It follows therefore, that the Accused Person’s version of events cannot be relied upon. I am fortified by the case of ***Donald Fumbelo v The People***<sup>13</sup>, where the Supreme Court stated as follows: -

***“When an accused person raises his own version for the first time only during his defence, it raises a very strong presumption that the version is an afterthought and, therefore, less weight will be attached to such version. Therefore, in a contest of credibility against other witnesses, the accused is likely to be disbelieved. This is the approach which the trial Court took. We find no fault in it.”***

- 5.32 Based on my findings above and my careful analysis of the events leading to the death of the Deceased, I find that PW1’s testimony that during the altercation between the Deceased and the Accused Person, the Deceased fell and when he attempted to get up, the Accused Person picked up a knife from a dish and stabbed him, is more credible. Therefore, I shall rely on it.
- 5.33 Even in the event that the Accused Person’s testimony was credible, I am not satisfied that Accused Person’s version of the conduct of the Deceased during the altercation created a reasonable basis for the Accused Person to believe that she was at risk of sustaining grievous bodily harm or that her life was in immediate and imminent danger.
- 5.34 This finding is supported by the Accused Person’s testimony at trial where she stated that she was not angry even after the Accused Person punched her. She further stated that during the altercation, she turned and grabbed the Deceased prior to him picking the

knife, which was on the vegetable rack. This testimony, in my view, is an indication that the Accused Person had an opportunity to retreat or disengage from the Deceased's alleged confrontation, but chose not to and therefore, failed to demonstrate that she did not want to fight.

5.35 Accordingly, I find that the Prosecution has proved that the Accused Person had no lawful justification for stabbing the Deceased. The net result is that the defence of self-defence is not available to the Accused Person, as it is not supported by the evidence on Record.

5.36 Based on the foregoing assessment of the testimonies of PW1 and that of the Accused Person, I find that during the altercation, the Accused Person picked a knife and stabbed the Deceased in the Chest, which resulted in a stab wound to the Deceased's chest and consequently, led to his death.

5.37 What then remains for determination is whether the Accused Person had the requisite malice aforethought when she caused the death of the Deceased.

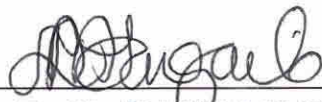
5.38 On my analysis of the evidence on record, I am of the view that as the Accused Person picked a knife and stabbed the Deceased in the chest, the Accused Person possessed knowledge that her actions would cause grievous harm to the Deceased. Therefore, I am of the view that the Accused Person's intent to cause grievous harm was evident and as such, there was malice

aforethought on the part of the Accused Person within the meaning assigned under **Section 204** of **The Penal Code**<sup>1</sup> cited above in paragraph 5.2.

5.39 In view of my findings above, I am satisfied that the Prosecution have proved the charge of Murder against the Accused Person beyond reasonable doubt. I therefore find the Accused Person, **Joyce Tembo**, guilty of the offence of Murder as per **Section 200** of **The Penal Code**<sup>1</sup> and I accordingly convict her.

5.40 The Convict is advised of her right to Appeal.

**SIGNED, SEALED AND DELIVERED AT LUSAKA, ON 2<sup>ND</sup> DAY  
OF APRIL, 2025.**



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**P. K. YANGAILO  
HIGH COURT JUDGE**