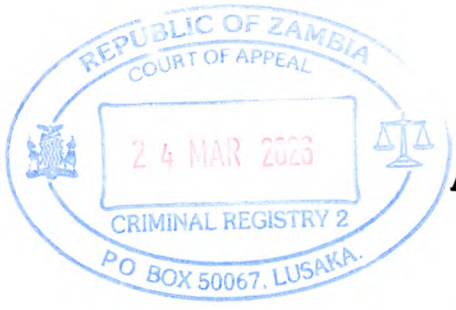
IN THE COURT OF APPEAL OF ZAMBIA Appeal No. 80/2024
HOLDEN AT KABWE

(Criminal Jurisdiction)

BETWEEN:



GILBERT MOFYA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Mchenga DJP, Majula and Muzenga, JJA

On 13th October, 2025 and 24th March, 2026

For the Appellant: *Mr Manda Kapisha, Legal Aid Counsel — Legal Aid Board*

For the Respondent: *Mr. F.M. Sikazwe, Principal State Advocate — National Prosecutions Authority*

JUDGMENT

MAJULA JA, delivered the Judgment of the Court

Cases referred to:

1. *David Zulu v The People (1977) ZR 151 (SC)*
2. *Obvious Matambo v The People, Appeal No. 68 of 2022*
3. *Daniel Banda v The People, Appeal No. 137 of 2018*
4. *Keefe v State (1994) 50 Ariz 393*
5. *R v Bedingfield (1879) 14 Cox CC 341*
6. *R v Woodcock (1789)*
7. *R v Perry (1909) 2 KB 697*

8. *James Mulenga v The People Appeal No. 139 of 2018*
9. *Steven Mukuka v The People, CAZ Appeal No. 156 of 2020*
10. *Yokonia Mwale v The People SCZ Appeal No. 58 of 2011*
11. *Chiyovu Kasum v The People (1978) ZR 262 (SC)*
12. *Yotam Hamenda v The People (1972) ZR 184 (SC),*
13. *Edward Sinyama v The People (1993–1994) Z.R. 16*
14. *Saidi Banda v The People (SCZ SJ No 30 f 2015)*
15. *Mirram Chilosha v The People, CAZ Appeal No. 87 of 2021*

Legislation referred to:

1. *The Penal Code, Chapter 87 of the Laws of Zambia*
2. *The Juveniles Act, Chapter 53 of the Laws of Zambia*

Other works referred to:

1. *Black's Law Dictionary (9th edition)*
2. *Archbold: Pleading, Evidence and Practice*

1.0 INTRODUCTION

1.1 The Appellant appeared before the High Court, presided over by the Honourable Mr Justice I. Kamwendo, on a charge of murder contrary to **Section 200** of the **Penal Code**[1]. He pleaded not guilty and the matter thereafter proceeded to trial.

2.0 BRIEF FACTS

2.1 On 25th July, 2018, the Appellant, Gilbert Mofya, and his wife, the deceased Hellen Shikishi, engaged in a domestic dispute during which he removed household items and tore her clothes. Distressed by reports of beatings, her parents

removed her from the matrimonial home and sheltered her at their residence.

2.2 On the night of 27th July, 2018, around 22:30 hours, the Appellant went to the deceased's parents' house and persistently asked her brother, Ephraim Gome (PW1), to retire to bed, even offering him K3. Shortly after, Blessings Phiri (PW2) saw the Appellant near the deceased's window. Around 23:30 hours, the deceased's parents were awakened by her screams and found her bleeding profusely with a knife lodged in her neck. She identified the Appellant as the assailant.

2.3 The deceased was rushed to a health facility where, in the presence of her mother (PW3), stepfather, and a police officer (PW6), she again named the Appellant as the one who stabbed her. She was transferred to Solwezi General Hospital, where she died. The post-mortem confirmed death from stab wounds, with the jugular vein severed.

2.4 The Appellant fled but surrendered to police on 2nd August, 2018. Investigations led to the recovery of the knife, which was produced in evidence.

2.5 In his defence, the Appellant admitted quarrelling with the deceased and the disorder at their home but denied stabbing her. He claimed he had relocated to his parents' house after the earlier altercation and only later learned of her death. He explained his flight and failure to attend the funeral as fear of the Katondo boys, known for meting out violent mob justice on suspects.

3.0 FINDINGS OF THE TRIAL COURT

3.1 The trial Judge found as a fact that on 27th July, 2018, while at her mother's house in Kyawama Compound, the deceased was fatally stabbed in the neck by the Appellant. This was corroborated by medical evidence, which confirmed death from a deep laceration to the jugular vein. The Court accepted the deceased's dying declaration, supported by consistent eyewitness testimony and medical findings, and held that the offence of murder had been proved beyond reasonable doubt. The Appellant was accordingly convicted and sentenced to the mandatory penalty of death by hanging.

4.0 GROUNDS OF APPEAL

4.1 The Appellant, being dissatisfied with the decision of the Court below, has appealed against the said Judgment on the following grounds:

1. *The learned trial judge erred both in law and fact to convict the Appellant on circumstantial evidence which had not attained the degree of cogency and taken the case out of the realm of conjecture to attain a degree of certainty for the Court to feel safe to convict the Appellant.*

2. *The trial Court erred in law and in fact when it admitted the hearsay evidence of PW6 and later relied on it to convict the Appellant, which evidence was neither res gestae nor a dying declaration.*

3. *The trial judge erred in law and fact when he failed to find and hold that there was dereliction of duty by the investigating officer which prejudiced the Appellant.*

5.0 APPELLANT'S SUBMISSIONS

5.1 In the heads of argument that were filed on 9th October, 2025, Counsel for the Appellant argued that the conviction was wrongly based on weak circumstantial evidence which did not exclude conjecture. It was emphasized that no witness saw the Appellant stab the deceased and that quarrels with the deceased could not, without more, prove guilt. Reliance was placed on ***David Zulu v The People,***[1] where the Supreme Court cautioned that circumstantial evidence must attain a degree of cogency permitting only an inference of guilt.

5.2 Counsel further relied on ***Obvious Matambo v The People,***[2] to submit that prior disputes or threats cannot be conclusive proof of murder absent direct evidence linking the accused to the act.

5.3 It was also contended that the trial Court erred in relying on the uncorroborated testimony of PW1 and PW2, both children below fourteen. By **Section 122** of the **Juveniles Act, Chapter 53**, corroboration is required as a matter of law, a principle affirmed in ***Daniel Banda v The People.***[3]

5.4 Pertaining to ground two, the Appellant has further contended that the learned trial Judge erred both in law and in fact by admitting and relying on the hearsay evidence of PW6 to secure a conviction. It was argued that the statement allegedly made by the deceased, naming the Appellant as the assailant, was inadmissible as it was neither *res gestae* nor a dying declaration. Counsel submitted that the impugned statement was not contemporaneous with the attack nor made under the stress of excitement, and thus failed to

qualify as part of the *res gestae*, relying on ***Keefe v State.***[4] It was further argued that the statement did not meet the requirements of a dying declaration, as there was no proof that the deceased spoke in contemplation of imminent death, citing ***R v Bedingfield,***[5] **R v Woodcock,**[6] and ***R v Perry.***[7] Reference was also made to ***James Mulenga v The People***[8] and ***Steven Mukuka v The People,***[9] where this Court stressed that belief in imminent death cannot be presumed merely from the severity of injuries. On this basis, Counsel argued that the admission and reliance on PW6's testimony materially prejudiced the Appellant and occasioned a miscarriage of justice.

5.5 Counsel further submitted that the evidence of PW1 to PW5, who were close relatives of the deceased, ought to have been treated with caution as suspect witnesses, given existing family animosity and contradictions in their testimonies. It was argued that their accounts were inconsistent and at times contradictory, thereby weakening the credibility of the prosecution's case, with reliance placed on ***Yokonia Mwale v The People***[10] and ***James Mulenga v The People.***[8]

5.6 Moving on to ground three, the Appellant contends that the trial Court erred in law and in fact when it failed to find that there had been a dereliction of duty on the part of the investigating officer, which gravely prejudiced the Appellant. Counsel submitted that a knife recovered from the deceased's neck was not subjected to fingerprint analysis despite the Appellant's denial of knowledge of it. It was argued that this failure amounted to serious dereliction of duty, as recognised

in ***Chiyovu Kasum v The People***[11] and ***Yotam Hamenda v The People,***[12] which establish that such omissions raise a presumption that the evidence, if obtained, would have been favourable to the accused. On this basis, Counsel urged the Court to allow the appeal, quash the conviction and sentence, and set the Appellant at liberty.

6.0 RESPONDENT'S ARGUMENTS

6.1 In opposing the appeal, Counsel for the Respondent filed their heads of argument on 10th October, 2025 wherein he contended that the conviction was properly grounded on cogent circumstantial evidence, which excluded any other reasonable inference but the Appellant's guilt.

6.2 The Appellant was placed at the scene by PW1 and PW2, whose evidence was corroborated by PW6, who received the deceased's statement at Solwezi Clinic within two hours of the attack, expressly identifying the Appellant.

6.3 It was argued that the statement was admissible both as *res gestae* and as a dying declaration. Reliance was placed on ***Edward Sinyama v The People,***[13] which defines *res gestae* as statements made in approximate contemporaneity without scope for concoction, and distinguished from ***Steven Mukuka v The People,***[9] where statements made a day later were excluded. The deceased's words were said to reveal a settled expectation of imminent death, consistent with the principle in ***R v Perry***.[7]

6.4 On credibility, Counsel submitted that PW1 to PW5, though related to the deceased, were not suspect witnesses, citing

Yokoniya Mwale v The People.[10] Finally, it was contended that failure to dust the knife for fingerprints was not a dereliction of duty, as the weapon was found embedded in the deceased's neck by PW4.

6.5 Counsel for the Respondent went on to submit that the offence of murder was proved under **Sections 200 and 204** of the **Penal Code**, as the fatal neck injuries clearly showed intent to cause death or grievous harm. The Appellant's alibi was dismissed as an afterthought, unsupported by corroboration, while PW1 and PW2 placed him at the scene. Relying on ***David Zulu v The People***[1] and ***Saidi Banda v The People***,[14] Counsel argued that the circumstantial evidence attained sufficient cogency to permit only an inference of guilt, and the trial Court rightly convicted.

7.0 HEARING OF THE APPEAL

7.1 The appeal was heard on 10th October, 2025. At the hearing, Mr. Manda Kapisha appeared for the Appellant, while Mr. F. M. Sikazwe appeared for the Respondent. Both learned Counsel intimated that they would rely on the documents already filed on record.

8.0 ANALYSIS AND DECISION OF THIS COURT

8.1 We have carefully considered the record of appeal and the detailed submissions presented by learned Counsel on both sides. We now turn to the grounds of appeal, beginning with

ground two, followed by ground three, and concluding with ground one.

8.2 Concerning the second ground of appeal, the complaint is directed at the reliance placed by the Court below on the testimony of PW6, notwithstanding that it did not qualify either as *res gestae* or as a dying declaration. We have carefully considered the applicable law on these doctrines. *Res gestae* is defined by **Black's Law Dictionary at page 1423 (9th edition)** as, *"the events at issue, or other events contemporaneous with them."*

8.3 The Supreme Court, in the celebrated case of ***Edward Sinyama v The People,***[13] elucidated the scope of what constitutes *res gestae* in the following terms:

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

Dying declaration

8.4 We now turn to consider what amounts to a dying declaration. In this regard, we have examined the

authoritative text of ***Archbold: Pleading, Evidence and Practice***, paragraph 11-27 of Chapter 11, which provides the following guidance on the subject:

> *"It is now settled law that for dying declarations to be admitted, there must be a settled and hopeless expectation of imminent death, i.e that the declarant must have abandoned all hope for living; but that the declarant need not be expecting immediate death. It must be shown for the prosecution, when he made the statement, was under the impression that death was impeding, not merely that he received an injury from which death must ensue, but that he then believed that he was at the point of death."*

8.5 We have considered the direction provided in ***R v Woodcock***[6] and ***R v Perry,***[7] cited to us by learned Counsel for the Appellant, wherein the principle governing the admission of dying declarations was articulated. Further, in ***James Mulenga v The People,***[8] and reiterated in ***Mirriam Chilosha v The People,***[15] the thrust of our decision in the above cases in relation to admissibility of a dying declaration was that it is admissible even if it is not contemporaneous with the act causing death, because the law presumes that a person at the point of death, having abandoned all hope of life, is under the strongest moral obligation to speak the truth, akin to being under oath.

8.6 Additionally, as we stated in ***Stephen Mukuka v The People,***[9] the principle is that for a statement to qualify as a dying declaration, the Court must be satisfied, from the declarant's own words or conduct, that he believed death to be imminent;

in the absence of such evidence, the statement cannot be admitted as a dying declaration.

8.7 In our well-considered view, the distinction between *res gestae* and a dying declaration is well settled. A statement qualifies as *res gestae* if it is made spontaneously or contemporaneously with the occurrence of the event, or so closely thereafter that the declarant remains under the stress of the incident, leaving no room for fabrication. By contrast, a dying declaration is a statement made by a deceased person, in contemplation of death, relating to the cause or circumstances of that death. The admissibility of the former rests on its spontaneity, while that of the latter is grounded in the solemn presumption that a person at the point of death is unlikely to lie.

8.8 Flowing from the foregoing distinction between *res gestae* and a dying declaration, we entertain no doubt that the statement made by the deceased to PW6, shortly before her death, properly qualifies as a dying declaration and not as *res gestae*. In law, such a statement is admissible when made *in extremis*. While it must be approached with caution, it may nonetheless suffice to ground a conviction where corroborated, as guided in ***Edward Sinyama v The People.***[13]

Dereliction of Duty

8.9 The Appellant contended that there was dereliction of duty on the part of the police in failing to subject the knife (exhibit P1), alleged to have been used in the fatal stabbing, to fingerprint examination. We are unable to

agree with this contention. The evidence clearly showed that the knife had passed through several hands and was thus contaminated. The deceased herself removed the knife from her neck; it was thereafter taken to the Urban Clinic by Mr. Kakoma and Bridget, who handed it to the attending medical officer, before it was ultimately delivered to the arresting officer. In these circumstances, any attempt at fingerprint analysis would have been futile, as the integrity of the exhibit for that purpose had been irretrievably compromised.

8.10 Moreover, fingerprint evidence could not be considered in isolation. The record is replete with other cogent and compelling evidence, as earlier outlined, which directly implicated the Appellant as the perpetrator of this heinous act. Accordingly, we find no merit in the allegation of dereliction of duty and dismiss this ground.

False implication

8.11 The Appellant further raised the issue of alleged false implication. The record reveals that the relationship between the Appellant and the deceased was marred by differences, culminating in a violent altercation on 25th July, 2018, which necessitated the intervention of the deceased's parents. This background of conflict is not in dispute.

8.12 In addition, the testimony of the two child witnesses, PW1 and PW2, who unequivocally placed the Appellant at the scene on the material night of the stabbing, remained consistent and unshaken under cross-examination. No

plausible or concrete reason has been advanced as to why these witnesses would fabricate their evidence or falsely implicate the Appellant. We therefore find no substance in the allegation of false implication, which we dismiss as devoid of merit.

8.13 In light of the foregoing analysis and the reasons set out above, we dismiss grounds two and three as lacking merit.

Circumstantial evidence

8.14 We now turn to the first ground, which challenges the learned trial Judge's finding that the prosecution's evidence was sufficiently strong. The Appellant contends that this conclusion improperly elevated the prosecution's case from the realm of conjecture to a degree of certainty sufficient to ground a conviction. We have reflected upon the arguments advanced on this issue.

8.5 This case rests upon circumstantial evidence, for no witness actually saw the Appellant stab the deceased. The record discloses that shortly before the attack, around 22:00 hours, the Appellant was observed in the vicinity of the deceased's home. He spoke with PW1 and PW2, inquiring about where the deceased was sleeping. Thereafter, he conversed with the deceased's brother (PW1), whom he urged to retire for the night. The brother, who was at the time watching the lunar eclipse in the company of friends, confirmed seeing the Appellant in the area and engaging in conversation.

8.15 Shortly thereafter, around 23:30 hours, PW3 and PW4 heard screams emanating from the room in which the deceased was sleeping. They rushed to the scene and found the deceased kneeling on her bed, bleeding from the nose and mouth, with a knife lying on the bed. She was immediately rushed to the clinic, accompanied by PW3, PW4 and PW5. At the clinic in the presence of the police officer PW6, the deceased uttered in Bemba the following words: *"Bwana, bwana, nabanjipaya kubalume bandi ba Gilbert Mofya."* Literally translated, this meant: *"Sir, sir, I have been killed by my husband, Gilbert Mofya."*

8.16 The testimonies of PW1 and PW2, though child witnesses, were properly received and proved to be consistent, credible, and unshaken. When considered together with the medical and photographic evidence, as well as the deceased's dying declaration, the case was effectively removed from the "realm of conjecture," and a cogent nexus between the Appellant and the fatal act was established.

8.17 In this regard, we are unable to fault the Court below for concluding that the evidence adduced satisfied the requisite threshold, as articulated in ***David Zulu v The People***[1] and ***Saidi Banda v The People.***[14] We accordingly find no merit in this ground of appeal, which is hereby dismissed.

9.0 CONCLUSION

9.1 All in all, there is no merit in the appeal. The sum of our decision is as follows:

1. Ground One: The circumstantial evidence, corroborated by consistent child witness testimony,

medical findings, and the deceased's dying declaration, attained the cogency required to sustain a conviction.

2. Ground Two: The deceased's statement to PW6 properly qualified as a dying declaration, not *res gestae*, and was admissible in law.

3. Ground Three: The complaint of dereliction of duty in failing to subject the knife to fingerprint analysis was unfounded, the exhibit being contaminated and the conviction resting on other cogent evidence.

4. False Implication: The allegation of false implication is dismissed as the child witnesses were consistent and credible, with no plausible motive to fabricate.

9.2 The appeal accordingly fails in its entirety and is dismissed. The sentence of the lower Court is upheld.

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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT

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B. M. Majula
COURT OF APPEAL JUDGE

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K. Muzenga
COURT OF APPEAL JUDGE