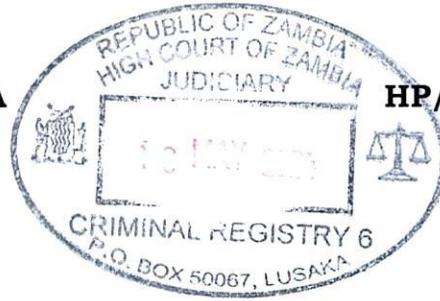


**IN THE HIGH COURT FOR ZAMBIA
HOLDEN AT LUSAKA**

(Criminal Jurisdiction)

BETWEEN:



HP/37/2024

THE PEOPLE

V

JOHN KANGWA

**BEFORE THE HONOURABLE MR. JUSTICE I. M. MABBOLOBOLO IN
OPEN COURT ON THE 10TH OF DAY, MAY, 2024.**

For the State: *Mr. S. Phiri, State Advocate - National Prosecutions
Authority.*

*Ms. S. Malundu, State Advocate- National Prosecutions
Authority.*

For the Defence: *Mrs. A. Banda Chimimba, legal Aid Counsel - Legal Aid
Board*

Mr. N. Tembo, Legal Aid Counsel - Legal Aid Board

JUDGMENT

A. CASES REFERRED TO

1. *Mwewa Murolo v The People (2004) ZR 207*
2. *The People v Mwimbe (1986) ZR 15*
3. *The People v Daudi Phiri and Tamara Milanzi (2011) HJ06*
4. *Kalinda v The People (1966) ZR 29*
5. *Attorney General v Kakoma (2008) ZR1 SC*
6. *Chibeka v R (1959) 1R & N 476*
7. *James Chibangu v The People (1978) ZR 37*
8. *Nyambe Mubukwanu Liyambi v The People (1978) ZR 25*
9. *Jack Chanda and Kennedy Chanda vs The People SCZ NO. 29 of 2000*

B. LEGISLATION REFERRED TO

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

1. The Accused person was charged with the offence of **Murder** contrary to **Section 200 of the Penal Code Chapter 87 of the Laws of Zambia**.
2. Particulars of the offence are that **JOHN KANGWA** on 25th day of April, 2023, at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia did murder **MARTIN KUNDA**.
3. The accused person pleaded not guilty to the charge and the Matter proceeded to trial.
4. Throughout the trial and at the time of writing this Judgment, I have warned myself that the burden of proving the charge against the accused lies from beginning to end on the Prosecution to prove every element of the offence beyond all reasonable doubt. If at the end there is any doubt that the accused person is guilty, I am obligated to acquit. There is no burden whatsoever that is placed on the accused person to prove his innocence. There is a plethora of authorities in this regard one of which is the case of **Mwewa Muroso v The People**¹.
5. The offence of Murder is provided for in **Section 200 of the Penal Code** and is couched as follows.

“Any person who of malice aforethought causes the death of another by an unlawful act or commission is guilty of Murder”.
6. In order to establish the guilt of the accused person, the State must prove the following elements.

- i) The accused person had malice aforethought and
- ii) That the accused person by an unlawful act or commission caused the death of another person.

In legal parlance, there must be *mens rea* and *actus reus*.

Prosecution Case.

7. In support of the charge of Murder against the accused person, the Prosecution called Seven (7) witnesses. The first witness was 29 years old Yvonne Mulenga (“hereinafter called **PW1**”) who informed Court that on 25th April, 2023, around 22:00 hours she was asleep with the man who wanted to marry her. That while they were asleep, they heard a person hitting the wall of the house they were renting at a point where there was a provision for a window, but had bricks built there instead.
8. **PW1** averred that they woke up and rushed to the sitting room where her son John Chipulu and daughter Catherine Kangwa were watching television and were surprised at the sight of the two. She stated that when they went to check, they found that it was **PW1**’s former husband, the accused herein. That at that point **PW1**’s son rushed out of the door which closed and locked itself because it was damaged, the accused entered the house through the window where he had broken the blocks.
9. **PW1** testified that the accused who is her former husband hit the man who wanted to marry her with a handle on his head

three times and he fell down. That after the man who wanted to marry her had fallen down, the accused started beating **PW1** and that she did not know what happened thereafter because she just found herself at the hospital.

10. **PW1** informed Court that the name of her fiancé was Martin Kunda and that the name of her former husband is John Kangwa who she had got married to in 2013 until 2022 when the marriage ended because of fighting all the time during the time of their marriage. **PW1** said they had two children named Catherine Kangwa and Miniva Kangwa. She stated that she started staying alone after the dissolution of the marriage in John Laing and that her former husband was also staying in John Liang with his new wife.
11. It was **PW1**'s testimony that the incident about the attack by her former husband happened after just a year from the time when their marriage had ended. That during the attack she sustained injuries on the left eye which even now does not see and that three of her fingers were broken and are not functional and her hand cannot even lift heavy things. That she was also hit on her head and ended up at Kanyama Hospital where even her fiancé died from.
12. **PW1** identified the accused in Court as well as the axe handle and iron bar allegedly used by the accused to attack her and the fiancé.
13. In Cross examination **PW1** said she could not confirm the month when she and the accused were divorced as she had

forgotten. That she had not brought any papers to Court for the dissolution as their marriage did not end in Court. She denied that their marriage with the accused still subsisted because he had married someone else who had even given birth to a child and that the new wife even used to go to visit the accused at the Police Station. **PW1** however admitted that she did not witness the wedding of the accused and the said new wife and that she has no evidence to show that the second wife used to go to the Police Station to see the accused.

14. **PW1** confirmed that she had not indicated to Court the name of the alleged second wife to the accused. She agreed that it is provocative if a man finds his woman in bed with another man. She confirmed that when the accused came, he found them in bed with her fiancé because they were staying together and he was the one who was looking after her.
15. It was **PW1**'s response that when the accused came, he peeped through an opening in the bedroom window which had been covered by blocks which he broke and through which he gained entry into the house. She denied that the accused asked her fiancé what he was doing in the house, but that he just came and started beating **PW1**'s fiancé. She denied that her fiancé got the iron bar at the point that the accused tried to manhandle him. She also denied that the iron bar was being used to lock the door of the house.
16. **PW1** stated that she was not the one who went to the Police Station to give a statement because she was sick at the time

but that the Police took a statement from her on phone. She denied that the rentals for the house where the incident happened were being paid by the accused and instead stated that the person who was paying was the deceased.

17. **PW1** confirmed that the accused works at Soweto Market and denied that he used to knock of late because when they were staying together, he used to knock off at 18:00 hours. She also denied the assertion that the accused would stay away even for two days before returning and stated that he used to return home.
18. **PW1** conceded that she had not shown any medical report that her eye cannot see or that her fingers were broken because she did not know where the medical reports and all related documents which were together were put by her mother.
19. Regarding the question whether it was not true that the axe handle and iron bar were tools for the house, **PW1** stated that she did not know because the way she saw it is that those were things which the accused used to break the walls on the window.
20. In re- examination, **PW1** stated that when the accused came she and her fiancé were just sleeping and not having sex.
21. Regarding the axe handle and the iron bar, **PW1** stated that after they rushed to the sitting room, she saw the accused with the axe handle and the iron bar.

22. The Prosecution's second witness was **PW1**'s son John Chipulu aged 14 years ("hereinafter referred to as **PW2**"). After necessarily conducting a *voire dire*, I was satisfied that he possessed sufficient intelligence and understood the duty of telling the truth. **PW2** told Court that they were fast asleep in the house in the living room when he heard noise like someone was hitting and breaking the walls and woke up. He stated that the noise was coming from the bedroom side where his mother and father who he only knows as Mr. Kunda were sleeping at the time.
23. **PW2** testified that he proceeded to open the outer door to the sitting room using a spoon because it had no handle and at that point his mother and Mr. Kunda had rushed to the sitting room. That after opening the door, he went outside and saw someone jumping into the house and that is when he went to call the neighbors and then rushed to the Police Station whose name he does not know but in Kampasa area. He stated that the report he gave to the police was that his mother and father were about to be killed. That his first father is the one who wanted to kill his mother and father and that his name is John Kangwa.
24. **PW2** stated that he knew that it was Mr. John Kangwa who wanted to kill his mother and father because he had gone outside and he saw him jumping and entering into the house and he heard him shouting and there was some moonlight which helped him to identify Mr. Kangwa.

25. It was **PW2**'s testimony that after reporting at the Police Station, he was accompanied by the Police Officers to the house where there were people who were trying to stop his father from running away.
26. **PW2** was able to positively identify the accused from among four (4) men randomly lined up in the Court room. He stated that he could not tell how long he had known him and that in the past he was staying with them, but that he had started living with Mr. Kunda in the last month. Further that he had been staying with John Kangwa earlier at his grandmother's place. He told Court that after they moved from his grandmother's place to another place Mr. John Kangwa used to go to visit them at their new place.
27. In Cross examination, **PW2** confirmed that Mr. John Kangwa was not his biological father and that Yvonne was his biological mother. He also confirmed that he had told the Police that Mr. John Kangwa was taken to the Police Station while he was there.
28. Hilda Katongo aged 35 years was the Prosecution's third witness (hereinafter referred to as **PW3**). She testified that they were sleeping in the house around 22:00 hours when she heard the mother to Joe who is her neighbor (**PW1**) shouting that "mother to Biggie (which is herself) please come and help, call some people, we are dying here". That when the Landlord's wife came out, they went to **PW1**'s house and

found the door to the house locked where upon the Landlord's wife told someone to force open the door.

29. It was **PW3**'s testimony that **PW1** was staying with her husband, the deceased and the children and that she had known **PW1** as their neighbor for about 5 months and the deceased for about 2 months. She said that she did not know very well what happened to the deceased because after the men forced the door open she picked up her child who was crying and went away.
30. In Cross examination she maintained that she did not know what happened to the deceased. When asked whether she knew that **PW1** was not married to the deceased, **PW3** stated that they were staying together. **PW3** confirmed knowing John Chipulu and that since John Chipulu was staying with **PW1** and the deceased, he would be better placed to know the exact period that the deceased had stayed with them.
31. **PW3** confirmed that she knew the accused and that he used to go to **PW1**'s place before **PW1** started staying with the deceased. She responded that she did not know that the accused was the husband to **PW1** or that the accused was the one who was paying the rentals for the house.
32. The Prosecution called 37 years old Violet Tembo as its fourth witness (hereinafter referred to as "**PW4**"). She testified that she was in the house when the child John came to wake her up that their house was being broken. **PW4** stated she went outside and found that Mr. John Kangwa was inside the same

house and that when she reached there she touched the locked door and begged them to open. She stated that she asked the people to force open the door and that is how Mr. Kangwa came out with a mattress and some blankets and they started struggling. That after struggling, the deceased told her that she would stand in Court.

33. **PW4** testified that the accused attempted to run away but the people around apprehended him and took him to the Police Station. That she later met the Police Officers at the house where the Police told them to look for a wheel barrow to use to carry **PW1** because she was not able to walk. That as for the deceased, the men helped to carry him and were exchanging on the way. She stated that the two were not able to walk and the deceased was not talking.
34. **PW4** stated that as the person responsible for the place where the incident happened, she knows that **PW1** had stayed at that place for about 5 months and that when she went to look for the house, she was alone. That when the incident happened, the deceased was also in the house and she knew him as Kunda because his parent's house was not far away and that is where Kunda was staying.
35. When asked how she knew that the man who was trying to escape when Joe went to call for help was John Kangwa, **PW4** responded that because she knew him when he would go to see his children because the children were staying with their mother, **PW1**.

36. In Cross examination, **PW4** responded that she did not know that the deceased was not married to **PW1**, insisting that when **PW1** went to look for a house, she was alone. When asked further, she confirmed that she would see the accused from time to time. **PW4** responded that it was only after some days that she saw him and later he stopped going there. She stated that she did not know that the reason she was not seeing him is because he was going late. Further that by 20:00 hours she would already be in her house.
37. **PW4** declined to confirm that the person she saw coming out with a mattress and blankets was very angry because she did not know that. She also stated that she knew nothing about the accused telling her that he was taking the items because he had bought them. **PW4** confirmed however that she did not know how the injuries were inflicted on **PW1** and the deceased.
38. **PW4** stated that she did not know that it did not make sense for her to say that the accused used to only go to see his children when there was only one child who was not even his biological child.
39. Prisca Maloba, aged 47 years was called as the Prosecution's fifth witness (hereinafter referred to as "**PW5**"). She testified that on 25th April, 2023 at between 22:00 hours and 23:00 hours she heard a person shout that Kunda had been killed. That she rushed there and entered the house where the deceased and **PW1** were staying. That herself and Justin

deceased and took him outside where she removed the socks from his legs and shirt thinking that he had just fainted while the lady caretaker was struggling with the accused who wanted to carry the mattress.

- 40 According to **PW5**, **PW1** and the deceased were taken to Kanyama Clinic where the staff managed to suture **PW1** while nothing was done to the deceased who died by 11:00 hours. **PW5** stated that the deceased was her younger brother.
41. **PW5** testified that the deceased only spent five (5) days at **PW1**'s house but that he used to go and come. Regarding the relationship between **PW1** and the deceased, **PW5** stated that they were in a boyfriend/girlfriend relationship and she did not know that they were planning to get married. She admitted that this was the first time she was seeing the accused.
42. In Cross examination **PW5** confirmed that the relationship between **PW1** and the deceased was that of boyfriend/girlfriend. She also confirmed that she was staying with the deceased and that he would go to **PW1**'s place and return to her place. On whether **PW5** knew that **PW1** was married to the accused, her response was that she used to hear so.
43. The Prosecution lined up Mwaba Mambwe, a Constable at Kanyama Police Station aged 29 years as it's sixth witness (hereinafter referred to as "**PW6**"). He testified that he reported for duty on 25th April, 2023, on a shift which runs

from 18:00 hours to 06:00 hours the following day. That it was between 21:30 hours and 22:00 hours when he received a report of an assault from Male Juvenile John Chipulu (**PW2**) who reported that there was commotion at his house and two people were badly hurt, and that one of them was his mother Yvonne Mulenga (**PW1**).

44. **PW6** stated that as he was preparing to book out to the scene of crime, two ladies led by Prisca Maloba came to report that they had apprehended the suspect Male John Kangwa who had badly injured two individuals who were left unconscious and unresponsive. **PW6** stated that he detained the accused in Police custody and charged him with the offence of **Assault Occasioning Actual Bodily Harm** and later went to the crime scene. That at the scene, he found one adult male lying in the house unconscious and unresponsive.
45. It was **PW6**'s evidence that after seeing the scene of crime, he made immediate arrangements to ferry the two victims to the Police Station where medical reports were issued. According to **PW6**'s observation, the deceased had a deep cut on his head while **PW1** had multiple cuts all over her body and arrangements were made to ferry the two to Kanyama Level 1 Hospital for medical attention.
46. **PW6**'s further testimony was that the following day which was 26th April, 2023, he received a call from Prisca Maloba who is the sister to the deceased informing him that Martin Kunda had died and that the body was being conveyed to the

University Teaching Hospital of Zambia (UTH) for a Postmortem. That acting on this information, he amended the charge from **Assault Occasioning Actual Bodily Harm** to **Murder** after which he compiled a docket and forwarded it to late Constable Kasongo Oswald for further investigations and dealings.

47. Regarding what **PW6** saw at the scene of crime, he testified that there seemed to have been a breaking as things were not in an orderly manner which was indicative of a violent confrontation. He also stated that he recovered an iron bar and axe handle which were tendered into evidence as **P1** and **P2** respectively.
48. It was **PW6**'s testimony that when he arrived at the scene, he could tell that the accused had difficulties accessing the house as the place earmarked for a window had instead been built up with blocks. That the place was badly damaged which indicated to him that the accused must have used the same objects **P1** and **P2** to gain entry into the house.
49. In Cross examination, **PW6** confirmed that he was not the Arresting Officer, but that he was the Officer who responded to the crime at the scene. He also confirmed that it was his assumption that the point where there were broken bricks was the source of the entry by the accused into the house.
50. **PW6** confirmed that as a scenes of crime Officer, he had a duty to take photos and show them to Court but that he had not brought any before Court. Further that it was correct that

when **PW2** went to report he did not tell **PW6** that he had witnessed anyone being harmed. **PW6** conceded that he did not know what had actually happened that led to the commotion.

51. The Prosecution's seventh and last witness was 51 years old Detective Chief Inspector Evans Kosamu (hereinafter called "**PW7**"). He told Court that it was in the year 2023 in the month of August that he was transferred to Kanyama Police Post as the Criminal Investigations Officer and that he found this case of Murder. That after going through the Case Record, he found a Post Mortem Report which contained the details of the cause of death for the deceased issued by the State Pathologist from UTH. Further that he also came across a Police Report written by the Investigating Officer, Detective Constable Kasongo containing details of how he had conducted investigations in the matter and which report was addressed to the Officer Incharge. He testified that Officer Kasongo had passed away in December, 2023.
52. **PW7** informed Court that the Post Mortem Report and the Police Report were in his custody and he wished to tender them into Court. These were admitted into evidence as **P3** and **P4** respectively.
53. In Cross examination and responding to whether he can agree that because he was not the Investigation Officer, he could not vouch for the truthfulness of the Report, **PW7's** response

was that he had just come to present the Report as he could not say anything further.

54. The accused person (hereinafter referred to as **DW**) gave evidence on his own behalf and called no other witness. **DW** began his testimony by informing Court that it all started when he knocked off around 22:00 hours on the 25th April in the year he had forgotten. He stated that when he reached home, he knocked at the door which was not opened for him and that he then started calling out the name of his wife Yvonne who still was not opening the door. He denied that **PW1** and him were divorced. Further that they had stayed together for eight years.
55. **DW** testified that when he saw that the door was not being opened, he went to the bedroom window where there was a sack with blocks placed on it. According to him, there was space for him to peep because the sack had only been secured with nails on the outside and the blocks were inside. That when he pushed the blocks, he entered the house and caught his wife red handed with a man in the house. He stated that he found them having sex. He denied having used an instrument to remove the blocks and stated instead that he merely pushed the blocks and removed the sack.
56. It was **DW**'s testimony that after he had entered the house, he started struggling with the man as he asked the man what he had gone to do in that house. That after being asked, the man using a blow hit **DW** who fell down and was overpowered. **DW**

stated that he at that point got a plank and hit the man with the same plank. He stated that the same man is the one who started the fight.

57. **DW** stated that he then got his wife (**PW1**) and asked her why she would bring a man in a matrimonial home. That **PW1** failed to explain and that is how **DW** beat her up.
58. When asked by Defence Counsel on how he felt when he peeped and saw his wife having sex, **DW** responded that he felt bad and went outside where he found the Landlady with his heart still in pain and he got the mattress and blankets which he threw outside. **DW** denied the assertion by the Landlady that he refused to open the door.
59. Regarding the Landlady's testimony that she had only seen **DW** once, **DW** testified that he used to work and sometimes he would just send money to his wife and that he never used to find the Landlady because she would be sleeping. That he would sometimes go for piece work as a general worker (mixing concrete for the builder) at ten miles.
60. **DW** denied the claim by **PW1** that he was married to another woman and insisted that **PW1** was the only one he was married to. He stated that he did not know that his wife had a fiancé because his family just knows that he was married to **PW1**.
61. In Cross examination, **DW** in responding to a question on how they were locking the house since he claimed it was his, stated

that the padlock was a bit damaged and they were not using the iron bar to lock from inside. He agreed that if it was his house he would have said that “we were using the iron bar” instead saying “they were using the iron bar”.

62. **DW** denied the assertion by the Landlady that the blocks or the space where there was a provision for the window were built up and stated that they were just placed there. He admitted having heard **PW1** and the Landlady testify that it was **PW1** who went to look for the house. When it was put to him that since he had no interaction with the Landlady, there was no reason for her to falsely lie against him, **DW**'s response was that he was not in good terms with the Landlady.
63. When **DW** was reminded that he had earlier testified that he would always find the Landlady sleeping when he got home and how he could not be in good books with her, **DW** was evasive until he responded that he did not know what she had against him in her heart.
64. **DW** denied having destroyed the blocks at the window opening and insisted that he had just pushed them. When it was put to him that the reason he asked the deceased what he was doing in the house was because, he did not know what the deceased was doing, **DW** responded that he found them having sex and that the reason he asked is because he wanted to hear it from the deceased's mouth why he had done that.
65. When it was put to him that the only reason he went there at 22:00 hours when it was dark, was because he had heard that

his former wife **PW1** had a fiancé, **DW**'s response was that there was light and he had never heard anything about his wife having a fiancé.

66. **DW** admitted that the weapon he used to hit the deceased with was a wooden axe handle. He denied that it was because he knew that the window had been built and that is why he had gone with the iron bar and the wooden handle. He stated that the wooden handle was in the house.
67. In re- examination, **DW** clarified that the marriage with **PW1** was still subsisting.

Submissions

68. At the close of the Defence's case, I invited submissions from the Parties. The Prosecution indicated that it would place reliance on evidence before the Court while the Defence proceeded to make *vica voce* Submissions.
69. It was submitted that in a Murder case, the onus to prove the case beyond all reasonable doubt from the beginning to the end lies solely on the State. Further that it was not in dispute in this case that the accused person had caused the death of the deceased. The Court was being invited to keenly look at the circumstances that led to the deceased's death.
70. According to Defence Counsel, the accused testified that he was married to Yvonne Mulenga (**PW1**) and further that although **PW1** disputed that at the time of the incident, she was divorced from the accused person, she has not provided

provided any proof that she was divorced from the accused person. That in the absence of any evidence from **PW1**, the Court was urged to resolve the question whether or not the two were married in favour of the accused person,

71. The Submission was that the accused person was provoked by the action of **PW1** and the deceased person in that the deceased was found in the house and bedroom of **PW1** who the accused tells Court was his wife at the time of the incident. That for provocation to succeed as a defence, it must be established that the actions that led to such provocation made the accused person to lose self-control. The case of **The People v Mwimbe**² was cited where the Court stated that

“Such act of provocation that leads to the death of a person must be so sudden such that there should not be allowed a time for cooling off”.

72. Submitting further, it was stated that the Court must be satisfied that there must be a provocative act within the meaning of **Section 205 of the Penal Code**. Further that the act of finding a spouse in bed with a man is an act of provocation as stated in the case of **The People v Daudi Phiri and Tamara Milanzi**³ that:

“The doctrine that provocation may reduce murder to manslaughter seldom applies. Only one exception has been provided, finding one’s spouse in flagrante delicto or adultery”.

73. Finally, the Defence referred me to the case of **Kalinda v The People**⁴ where it was stated that:

“To be found in adultery has in the English common law been considered as one of the gravest forms of provocation”.

Consideration and the Decision of Court

74. I have considered the information, the evidence by the Prosecution and the Defence and also the Submissions by the Defence. What will help me determine this matter is whether or not the ingredients of the offence of Murder which the accused person has been charged with have been satisfied as set out in Paragraph 6 above.

i) Whether the accused person had malice aforethought.

75. The Oxford dictionary defines malice aforethought as the intention to kill or harm which is planned beforehand. **PW1** stated that while she was asleep with the deceased she heard a person breaking the wall of the house where there was a provision of a window but which had been built up instead using blocks. **PW2** John Chipulu, the biological son of **PW1** also stated that they were fast asleep when they heard noise like someone was hitting and breaking the walls. **PW6**, a Constable at Kanyama Police stated that when he visited the crime scene, he could tell that the accused had difficulties accessing entry into the house as the place earmarked for a window had instead been built up with blocks and that the place was badly damaged which indicated that the accuse must have used the iron bar and axe handle to break the wall to gain entry into the house.

76. In my estimation, the above evidence points to a person who was determined to gain entry into the house when the door was not opened and to cause harm to **PW1** and the deceased who he says were having sex in the matrimonial bed. I am disinclined to believe the accused's testimony that he found the iron bar and the axe handle in the house after he entered. Even the landlady who was responsible for the place stated that the area earmarked for the window had bricks built there instead. This also points to what I find as a fact that it cannot be true that the accused simply pushed the blocks which were used according to him to secure the sack which covered the place.

77. The determination exhibited by the accused person to gain entry into the house, leads me to the inescapable conclusion that the requisite element of malice aforethought has been proved by the state.

In the case of the **Attorney General v Kakoma**⁵ the Supreme Court held that:

“A Court is entitled to make findings of fact where the parties advance directly conflicting stories on the evidence before it and having seen and heard the witnesses giving that evidence”.

ii) Whether the accused person by an unlawful act or commission caused the death of the deceased.

78. There is no dispute that the accused person caused the death of the deceased from the evidence on record. I will therefore not belabour the point. The question I will address my mind

to is whether the accused person had any lawful justification to cause the death of the deceased.

79. The Defence has spiritedly submitted that what led him to kill the deceased is that he found **PW1** who was his wife having sex with the deceased in the matrimonial bedroom. **PW1** on the other hand denied being married to the accused and having been found having sex with the accused. She however admits that she was found sleeping with deceased who was her fiancé and who was the person paying rentals for the house where the incident occurred.
80. The accused has insisted that the marriage with **PW1** is still subsisting while **PW1**'s position is that the marriage with the accused had been dissolved and that she was at the time of the incident in a relationship with the deceased who was her fiancé. **PW5** who was the sister to the deceased testified that the deceased only spent five days at **PW1**'s house but that he used to go there and would return to her place where he was staying. She also indicated that as far as she knew, **PW1** and the deceased were in a boyfriend/girlfriend relationship and she did not know that they were planning to get married. Further that the night of the incident was the first time she saw the accused because she had just been hearing that **PW1** and the accused were married.
81. What I find as a fact is that **PW1** and the accused were at some point husband and wife who between them had two daughters namely Catherine Kangwa and Miniva Kangwa. I

find no evidence that the union between the two had been dissolved. I also find as a fact that at some point, **PW1** went to look for the house where the incident happened and that she dealt with the landlady alone without the accused who was not known as the husband to **PW1** by the landlady and the other neighbours. It appears obvious to me that whatever relationship had existed between **PW1** and the accused was at the time of the incident seriously strained and that **PW1** in her mind had moved on which is why according to her she was on the fateful night, sleeping with the deceased when the accused found them and beat them up.

82. The conclusion I reach from the above is that this was a crime of passion to which the provisions of the Penal Code on Provocation may apply. **Section 206 (1) of the Penal Code** states that:

“The term “Provocation” means and includes except as hereinafter stated, any wrongful act or insult of such nature as to be likely when done or offered to an ordinary person or in the presence of an ordinary person to another person who is under the immediate care, or to whom he stands in a conjugal, parental, filial, or fraternal relation, or in relation of master or servant, to deprive him of power of self control and to induce him to assault the person by whom the act or result is done or offered.”

83. In the case of **The People v Daudi Phiri**³ the Supreme Court stated that where provocation is successfully pleaded, it operates to reduce Murder to Manslaughter and that the essence of provocation is that the accused person kills another in the heat of passion before there is time to cool and

that there is a momentary loss of self control and the test applied in our jurisdiction is that of an ordinary person in the accused's community. Further that it is not for the accused to establish provocation as a defence.

84. The Court went on to state that if there is evidence of provocation, the Court cannot convict of Murder unless the prosecution has proved beyond all reasonable doubt either that there was no provocation as defined in the Penal Code, or if there was provocation, that what was done in the assault could not be regarded as what an ordinary person of the community to which the accused belonged, who had lost self control, might have done on the provocation given citing the case of **Chibeka v R**⁶.

85. In the case of **James Chibangu v The People**⁷, the Supreme Court stated that:

“In Zambia, the test for provocation is objective but only in a limited sense that it is of a parochial nature, namely faced with similar circumstances can it be said that an ordinary person of the accused's community might have reacted to the provocation as the accused did?”.

86. Related to the element of loss of self control, the Supreme Court cited the case of **Nyambe Mubukwanu Liyambi v The People**⁸ where it was stated that:

“The question is not merely whether an accused person was provoked into losing self control, but also whether a reasonable man would have lost his self control and having done so, would have reacted as the accused did”.

87. The Supreme considered the second element of reasonable relationship between retaliation and provocation which is not defined in the Penal Code. The essence is that the retaliation must not be excessive. In the present case, the accused claimed that he was hit with a blow by the deceased and was overpowered before he picked what he called a plank and struck the deceased. According to **PW1**, the accused hit the deceased with axe handle three times and this evidence was not rebutted. In the circumstances of this case, where the force used by the accused to repel an attack by a blow (assuming it is true) was excessive, the defence of provocation would not be available to the accused. This is clearly a case of a failed defence of provocation.

88. But the matter does not end there. I am guided by the case of **Jack Chanda and Kennedy Chanda vs The People**⁹ where the Supreme Court held that:

“A failed defence of provocation, evidence of witchcraft accusation and evidence of drinking can amount to extenuating circumstances”

89. A failed defence of provocation by the accused has therefore directed me to the law regulating extenuating circumstances which is set out in **Section 201 (2) of the Penal Code** as follows:

(1) Any person convicted of Murder shall be sentenced to life imprisonment or, where there are extenuating circumstances, a sentence other than life imprisonment;

(2) An extenuating circumstance, referred to under Subsection (1) shall not apply to Murder committed in the course of aggravated robbery with a fire arm under Section 294

(3) For purposes of this Section-

(a) an extenuating circumstance is any fact associated with the offence which would diminish morally the degree of the person's guilt.

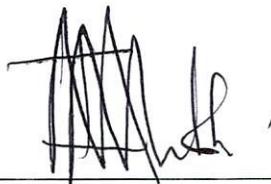
(b) In deciding whether or not there are extenuating circumstances, the Court shall consider the standard of behavior of an ordinary person of a class of the community to which the convicted person belongs."

90. In the present case, I have found extenuating circumstances on account of a failed defence of provocation. There is also evidence that the accused and **PW1** were married from 2013 to 2022 and had two daughters between them before their relationship ended because of fighting all the time according to **PW1**. There is evidence that **PW1** had a boyfriend/girlfriend relationship with the deceased who would sometimes spend nights at **PW1**'s place including the fateful night when the incident took place. This is indicative of a love triangle gone sour with the accused carrying on as though everything between himself and **PW1** was normal while **PW1** had moved on with her relationship with the deceased.

91. In my estimation and considering the standard of behavior of an ordinary person of a class of the community of the accused person, the above constitutes facts which would diminish morally the degree of the accused's guilty on the strength of the cases and statutory provisions referred to above.

92. In the premises, I find the accused guilty of the offence of **Murder** contrary to **Section 200 of the Penal Code Chapter 87 of the Laws of Zambia** and Convict him accordingly.

DELIVERED AT LUSAKA THIS 10TH DAY OF MAY 2024.



I. M. MABBOLOBOLO
HIGH COURT JUDGE.