

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

HP/101/2018

THE PEOPLE

VS

KELVIN WELEKI

**BEFORE THE HON. MRS. JUSTICE M. C. KOMBE IN OPEN
COURT ON**

**For the State : Mrs. G. Mulenga -Principle State
Advocate and Mr. N. Munkombwe- State
Advocate – National Prosecutions
authority**

**For the Accused : Mrs. M. Vukovic- Legal Aid Counsel-
Legal Aid Board**

J U D G M E N T

Cases referred to:

1. **Chimbini v. The People (1973) Z.R. 191.**
2. **Mbundi Nyambe v. The People C.A.Z. No. 4573**
3. **Muvuma Kambanje Situna v. The People (1982) ZR 115**
4. **Issa Mwasumbe v The People (1978) Z.R. 354.**
5. **The People v. Pelete Banda (1977) Z.R 363 (H.C)**
6. **Mwiimbe v. The People (1986) Z.R. 15 (S.C.)**
7. **Kambarange Kaunda v. The People (1992) SJ.1. (S.C)**

8. **George Masupi v. The People (1978) Z.R 271.**
9. **Yokoniya Mwale v. The People SCZ Appeal No.285 of 2014**
10. **Simutenda v. The People (1975) Z.R. 294.**
11. **Nyambe Mubukwanu Liumbi v. The People (1978) Z.R. 25 (S.C.)**
12. **Tembo v. The People (1980) Z.R 218**

Legislation referred to:

1. **The Penal Code Chapter 87 of the Laws of Zambia.**
2. **The Criminal Procedure Code Chapter 88 of the Laws of Zambia.**

The accused person **KELVIN WELEKI** stands charged with the offence of **Murder** contrary to **Section 200 of the Penal Code, Chapter 87 of the Laws of Zambia.**

The particulars of the offence are that **KELVIN WELEKI** on 6th day of June, 2017 at Chongwe in the Chongwe District of the Lusaka Province of the Republic of Zambia did murder **HUMPHREY MWIKA.**

The Prosecution called seven (7) witnesses to prove the commission of the offence.

The first witness **PW1** was **MOSES GAMA**, a Police Inspector number 4938 of Chudleigh Police Station which is under Chelstone Police Station aged forty-seven (47) years old.

He testified that on Wednesday 16th August, 2017, he reported on duty at 08:00 hours. Whilst on duty, at about 11:25 hours, he received a report from Mr. Likando of Mulalika Primary school in Chongwe District who reported that a person who was suspected to have committed Murder was spotted in Ng'ombe-Kasisi.

Upon receiving the information, he organized himself, a police officer Constable Kalenga and one Mr. Likando who was a relative to the deceased. Mr. Likando led the police officers to where the accused was spotted. When they arrived in Ng'ombe Kasisi, they saw the accused and his friend in an unfinished building. The officers were in plain clothes but they had guns. When the accused saw Mr. Likando and the officers about 6-7 meters away, he started running leaving his friend behind. The officers gave chase and whilst they were chasing him, they shouted at him to stop but he continued running. The officer fired a warning shot in the air but he continued running. He fired another shot and that's when the accused fell down and the officer quickly got hold of him and he was apprehended. He was taken to Chudleigh Police Station where he was interviewed. The witness later discovered that the person was Kelvin Weleki, the accused herein aged twenty- six (26) years old of Likata village in Chongwe District.

PW1 informed the police officers from Chongwe Police Station about what happened. They were informed by officers from Chongwe that the accused was wanted for the offence of Murder. The accused was

later detained at Chelstone Police Station pending transfer to Chongwe Police Station.

PW1 identified the accused person by pointing at him as the person who killed Humphrey Mwika.

In **cross examination**, the witness confirmed that he was in plain clothes and they didn't introduce themselves as police officers because the accused fled upon seeing them. The witness also confirmed that the accused was able to know that they were police officers because he saw the gun and a relative to the deceased.

After they apprehended the accused, they went with him to Chudleigh Police station and later he was taken to Chelstone Police Station. He told the Court the members of the public also helped in the apprehension of the accused as it was during the day.

The witness further testified that he knew nothing concerning the circumstances that transpired in Chongwe and was also not aware of the suspects that were apprehended in relation to the offence.

In **re-examination**, the witness confirmed that the accused person recognized Mr. Likando who was a relative to the deceased.

The second witness **PW2** was **LIKANDO LIKANDO** a thirty-five (35) year old Teacher of unknown house number in Kafue District.

He testified that he recalled what happened on 6th June, 2017. He used to stay in Mulalika area of Headman Lukata of Chongwe District. On the material day, around 21:00 hours his wife Petronella Mwika received a call from Amos Weleki informing them that their in-law had been killed. Upon hearing the information, they woke up and rushed to the scene. As they were going, they met Amos Weleki and Mutalange who carried a person in the ox-cart whom they were taking to the clinic. The witness also joined those who were going to the clinic when he saw that it was his in-law in the ox-cart. When they reached the clinic, they were informed that the person died a longtime ago and they were advised to go and report at the police station.

They went to the police station and reported the matter. They gave statements of what happened and later they deposited the body of the deceased at the mortuary.

PW2 told the Court that the following day, they went with the police to the scene of crime where they found a pool of blood, teeth, a piece of firewood and people who witnessed what had happened. The police officers recorded statements in their books and asked Amos where the accused was. Amos responded that he didn't know the whereabouts of the accused as he had run away. Later, they went to the accused's mother who also denied knowing the whereabouts of his son.

The police instructed the neighbourhood watch officers to search for the accused person. Later, he was informed by the same neighbourhood watch officers that the accused went to hide in Ng'ombe though they didn't know the exact house. PW2 told the Court that after receiving that information, he called his in-law who lived in Ng'ombe. His in-law inquired about the whereabouts of the accused and she later informed PW2 that he stayed in a house near her in-law.

In August, 2017 he travelled to Ng'ombe at a house of his in-law where he spotted the accused and later reported to the police at Chudleigh Police Station. Thereafter, PW2 and two officers went and apprehended the accused. He explained that the police officers were in plain clothes and had two guns with them, one had a Pistol and the other one had an AK47 rifle.

He also told the Court that they went in his vehicle which was known to the accused person so they decided to hide the car somewhere. When they arrived at the house where the accused was spotted, they found the accused and his friend in an unfinished building. When the accused saw them, he took off leaving his friend. The Police fired a warning shot in the air to stop him but he continued running. When the police fired a second shot, that was when the accused person was apprehended and he was taken to Chudleigh Police Station. At the station the witnesses informed other family members who went to see the accused.

PW2 told the Court that he knew the accused very well because he was his teacher.

The witness identified the accused by pointing at him. PW2 also stated that at the crime scene, they found a short piece of log of about half a meter which was damaged by termites and partially burnt. He identified the log and it was marked **ID1**.

In **cross examination**, PW2 confirmed that they were awakened around 23:00 hours and around that time they went to the scene. However, they met the people carrying the body of the deceased in the ox-cart. He didn't know what happened in the night because he was not there.

The witness also stated that the following day around 11:00 hours to 13:00 hours, they went to the scene with the police officer. They found Amos Sheleni and another woman who was selling beer at her house. PW2 confirmed knowing the deceased as he was his in-law.

When the witness was asked to describe the scene of crime, he stated that there was a house nearby and there were people who lived nearby.

After visiting the scene with the police officers, that was when the police told the neighbourhood watch officers to search for the accused. After several days had passed, his wife and the

neighbourhood watch officers went in search of the accused in Mwalumina area within Chongwe District.

The witness admitted that the accused didn't live in Chongwe but in Lusaka. He further told the Court that the accused ran away because when he saw the vehicle in which PW2's wife was the accused ran away to Lusaka. Before the accused fled to Lusaka, he stayed in Chongwe for about a month as he was helping his aunt to harvest maize. That he stayed within Chongwe but in the bush.

The witness further told the Court that he was aware that there were other people who were apprehended in connection with the same case.

There was no re-examination.

The third witness **PW3** was **AMOS SHELENI** a sixty-four (64) year old Farmer of Lukata village, Mulalika area in Chongwe District.

He testified that on 6th June, 2017 around 18:00 hours he started off to go and drink beer with six (6) other people namely Victor Mutalange, Thomas Musati, Matibini Weleki, Kelvin Weleki and Humphrey Mwika. Whilst they were drinking beer, a fight between two biological brothers, Kelvin and Matibini broke out. As they were fighting, people tried to stop the fight but the two didn't stop fighting. Matibini the older brother ran away and thereafter Kelvin took a piece of firewood and went where everyone else was seated and everyone

ran away because the accused threatened to kill them all. The witness explained that after the people ran away and some of them went into hiding, the accused person hit the deceased on the forehead, then on the nose and mouth with a firewood. He stated that the deceased's front teeth came out and he died. After that the accused left the log of firewood and he ran away.

The witness further told the Court that whilst all these things were happening, he hid behind the bathroom which was five (5) meters away from where Kelvin was. He told the Court that even if it was dark, he was able to see as there was light from the moon light.

He stated that the deceased was left by the fire place and when he wanted to run away that's when he was hit with a piece of firewood by the accused.

The witness further stated that after the deceased was killed, he and Matibini came out from where they were hiding. He woke up the bar lady who was the owner of house, and they got water to clean the deceased's mouth. Later they went to call Matibini's mother who rushed to the scene to see what happened. When they woke up Dick's uncle, they took the deceased to the Mulalika clinic where upon arrival, the deceased was certified dead by a medical doctor. They were advised to report the matter to the police.

They reported the matter to the police and gave statements. Later they deposited the body at Chongwe Hospital Mortuary and they returned home the same night.

The following day, the relatives to the deceased went to the police station and later they went to the scene with the police. At the scene, the police officers examined the scene and the witnesses were called one by one and they gave statements of what happened there. The relatives to the deceased showed the police officers the log which was used to hit the deceased and the officers took it with them.

PW3 told the Court that he knew Kelvin well because he was the son to his cousin.

The witness was able to identify the accused person by pointing at him. He also identified the log **ID1** which was used to kill the deceased. He stated that the log was about half a meter, it was partially eaten by termites and that in front it was lit with fire.

In **cross examination**, the witness told the Court that he gave a statement at the police station and at the crime scene and that he signed the second statement.

The witness confirmed that they arrived at the drinking place at 18:00 hours and the fight started at 21:00 hours.

When asked what time was indicated on the statement, he told the Court that he didn't know how to read but signed the statement based on what he told the police.

He also explained that he was drinking beer but he wasn't drunk, he was sober as he didn't get drunk fast. That he and his three friends were taking Chibuku and the deceased was the one who was drinking tujilijili. The accused was drinking Chibuku also but he wouldn't know what the accused put in his drink.

He explained that at the house where they were drinking from, they sat in groups of three. He sat in a makeshift with Dick and Victor on logs as they were warming themselves on the fire. The other three, Matibini, Humphrey and Kelvin sat outside the makeshift.

PW3 confirmed that by the time the fight started, the fire had gone down but the place was lit because of the stars and moonlight.

He denied knowing what caused the fight. All he saw was that the two brothers started fighting. He also agreed that the accused was not near the fire but that he went to where he sat with his friends and got the firewood. The fire went off on the log as he was running but it was still hot. The witness confirmed that where he hid and where the accused was, was about 50 meters.

The witness also confirmed that the next day around 10:00 hours, the police officers went to the scene and got the log when he gave the

statement. He denied going with the police at the crime scene at night. That they only took the body to the mortuary.

The witness also testified that the bar lady's name was Cheswa and was not related to the deceased. That she was just a business woman who used to sell beer. He denied that the accused was dozing by the fire place at the time of the fight. He confirmed that the accused knew the deceased very well.

PW3 also stated that the fight was between the two brothers but when the elder brother fled, the accused threatened everyone who was there with a piece of firewood that, he would kill them all. That he was surprised as to why the accused was behaving like that. He told the Court that at his age, the accused, he would scare people as he didn't know what the accused was thinking even though he was slim and small in stature.

He told the Court that from the safety of his hiding place, he was able to observe everything that happened. That when his brother fled, the accused rushed and got the log and he started threatening people.

In **re-examination**, the witness confirmed that there was light from the stars apart from light from the fire and that they were able to see.

The fourth witness **PW4** was **WELEKI MATIBINI** a twenty-nine (29) year old, a Bricklayer and Charcoal Burner of Lukata village, Mulalika area in Chongwe District.

His evidence was that on 6th June, 2017 around 19:00 hours he decided to go and drink beer at a bar. He found his friends Kelvin Weleki, Victor Mutalange, Amos Sheleni, Humphrey Mwika and the owner of the bar, Prudence Shimwewa drinking beer and he joined them. After sometime, Kelvin the accused person herein asked him where his phone was as it had his sim-card. The witness explained to the Court that he told him that the phone was grabbed by a lady they did piece work for because he owed her money. The accused further asked why he gave the lady the phone with his sim-card and he responded that the lady just grabbed the phone because her mother told her to get something that had value worth the money he got.

Later, a quarrel ensued between him and the accused over the phone and the sim-card and this led to a fight. People who were around them noticed that they started fighting near the fire. They managed to separate them and he ran away. He didn't go very far but just about 100 meters away so he could hear the noise behind.

After about twenty-five (25) minutes, he went back to the bar. When he reached the bar, he didn't see anyone but found a person lying down behind the house of the bar lady. He went and woke up the bar lady who came out with light and they saw that blood was oozing from the person's nose and mouth. After a while, he saw Sheleni come out from behind the bar and he asked for a cup of water so that they could pour it on the deceased's head. They poured some water on him and he complained that it was Kelvin who did that to him.

PW4 testified that he recognized the person who was lying down as Humphrey Mwika.

The witness also stated that the bar lady woke up her grandfather so that he could see what had happened at her house. When her grandfather woke up, they decided to take the deceased to the clinic using the ox-cart as transport.

The following day, PW4 woke up and went back to the scene because he wanted to know exactly what happened. On his way to the scene, he met people who were also going to the scene who told him that the person who was beaten last night had died. He proceeded to the scene and he was told to wait for police officers.

When the police officers arrived at the scene, they asked for the person who killed the deceased. The people told the police that it was Kelvin and he had run away. When the police discovered that he was the accused's brother, they took him to the vehicle and asked him questions about what transpired. He told the officers that he did not know where the accused was. He explained that at first the accused used to live in the village and went to school there. Later he went to Lusaka to look for a job and he stayed in Lusaka for five (5) years and then he went back to the village. That at the time of the incident, the accused was staying in the village with their father near his house.

In **cross examination** the witness confirmed that he arrived at the bar at around 19:00 hours and that he found some people already

drinking and that they were in a happy mood as though they were drunk. The witness also confirmed that his brother was drunk. He further confirmed that the fight was between him and his brother. According to him, it appeared as though all the anger the accused had was towards him. That during the fight they did not exchange blows.

The witness further stated that Dick went and held Kelvin and asked him why he was behaving like that. That he threw him on the ground and wanted to beat him.

PW4 further told the Court that when his brother, the accused was not drunk, his behaviour was okay. That he didn't talk too much and that he was quite strong in terms of work.

However, he was not very surprised of accused's behaviour because he realized that accused appeared drunk.

PW4 stated that he ran away when they lifted the accused on top of him after he pushed him down but he didn't see clearly what happened since it was at night. He further stated that there was no fight between the accused and deceased as they were drinking and laughing together. The accused was his immediate young brother and he loved him.

There was no re-examination.

PW5 was **SYDNEY MWIKA** a thirty (30) year old Technician in Boiler Making of Plot M450, Mazabuka.

He testified that on 9th June, 2017 around 9:00 hours they went to Chongwe mortuary to pick the body of his brother Humphry Mwika with two police officers, his elder sister and his two cousins. The body was taken to University Teaching Hospital (UTH) for a postmortem to be conducted. The Doctor arrived at 10:00 hours.

While at the mortuary, they were told where to lay the body and later they left, leaving the two police officers with the doctor while the postmortem was being conducted. He was able to recognize his brother as he last saw him in May, 2017 and that they grew up together. He stated that his brother had a gap in his teeth and a birth mark on the forehead. After postmortem examination, they collected the body for burial.

There was no cross examination.

PW6 was number 5649 Detective Inspector **GODFFREY MWELWA** of Chongwe aged fifty-three (53) years old.

He testified that on 6th June, 2017, in the company of Detective Constable Walawala, a report of Murder was made where one Humphrey Mwika was beaten and later died.

On 7th June, 2017, the following day around mid-day, he was escorted by a family member namely Likando Likando who reported the matter to the police. He stated that when they reached Mulalika village in Chongwe District, he was shown the place where the fight was alleged to have occurred. While there, he interviewed persons who were reported to have been at the scene at the time of the incident. These were Amos Sheleni, Dickson and Victor. The witnesses later followed the police officers for further inquiries.

The witness told the Court that at the scene, he found blood stains indicating that somebody had bled there. Amos Sheleni also showed him a piece of wood which he claimed was used to hit the deceased with. Later he collected the piece of wood and took it to the police station and handed it over to D/Chief Inspector Kosamu who was the investigation officer. At that stage the arresting officer continued with the case.

In **crossing examination**, PW6 stated that at the scene, the witnesses were interviewed verbally and upon reaching the police station he handed over the matter to the investigating officer. He added that he went to the scene between 10:00 hours and 11:00 hours and that the same was not secured but the log was given to him by the deceased's relatives. He also stated that there was blood which was mixed with soil and at the point where it dripped, it was red in colour and no samples were collected as they didn't have necessary equipment to use for that purpose. That logistics were not in place to do what they were supposed to do and it was possible that

the crime scene was compromised. PW6 explained that the report was made on the material day 6th June, 2017 and the body was already at Chongwe Mortuary.

In **re-examination**, the witness clarified that at Chongwe Police Station in particular, they only had one kit for crime scene investigations. When that kit was taken by other officers for investigations, any other report could be attended to without the use of a kit. Therefore, he didn't have the kit that day.

PW7 was No. 9659 Senior Criminal Investigations Officer **EVANS KOSAMU** a D/Chief Inspector based at Chongwe aged forty- six (46) years old.

He testified that on 17th August, 2017, around 14:00 hours whilst on duty, he took over a docket of Murder in a case in which male Likando Likando aged forty (40) years old from Mulalika Primary School in Chongwe District reported that his brother in law who was also aged forty (40) years old was murdered by Kelvin Weleki of the same village. It was reported that the deceased sustained head injuries.

He carried out investigations and later discovered that a piece of log was used in the act which log was received from the other officer who visited the scene earlier and he kept it in his custody. He also visited the scene where he interviewed a number of witnesses. The witnesses identified the log which was half a meter, brown in color and was partially burnt. It was admitted in evidence and marked **P1**.

The witness testified that the Postmortem report was already collected which indicated that the deceased died of head injury due to fracture of skull due to blunt force. The suspect was on the run. He made efforts to look for the accused in Chongwe but he didn't find him. They also went to his village where he used to stay with his family but to no avail.

On 18th August, 2017, he got hold of the accused who was apprehended in Lusaka with the help from Chelstone Police Officers. On 19th August, 2017, the accused was picked and taken to Chongwe Police Station. Thereafter he interviewed the accused but he did not give a satisfactory reply. He made up his mind, charged and arrested him for the offence of Murder. Under warn and caution administered to him in Nyanja, a language he understood better, the accused gave a free and voluntary reply denying the charge. He later placed him in police custody pending court appearance.

The witness identified the postmortem report and it was admitted in evidence and marked **P2**. He also identified the accused person by touching him on the shoulder.

In **cross examination**, PW7 confirmed that on 17th August, 2017, he was handed over the docket of Murder in which a crime took place on 6th June, 2017 around 22:00 hours in Mulalika area Chongwe District. He confirmed visiting the scene on 18th August, 2017. He told the Court that Inspector Mwelwa visited the scene but he also went back for investigations after taking over the docket. He told the

Court that Inspector Mwelwa didn't immediately go to the scene because the incident happened in the night around 21:00 hours and so the officers went there the following day on 7th June, 2017.

The witness told the Court that he was aware that the police officers arrived at the scene around 11:00 hours the following day because the scene was far from the police station and the roads were bad.

That a report was made towards midnight and that's why the officers did not visit the scene immediately as they also needed to arrange for transport logistics. The witness agreed that Inspector Mwelwa did verbal interviews at the scene however he went to the scene immediately after taking over the docket. He denied that the investigations were stalled. He explained that the investigations were ongoing and that he went to the scene two (2) months later. He also stated that when he visited the scene, he interviewed several witnesses verbally and later recorded statements at the police station.

PW7 agreed that it was prudent to record statements when the incident occurred. He added that the persons he interviewed had already given statements earlier to a team who had gone there earlier led by Inspector Mwelwa. That the persons interviewed went to the police station and statements were recorded from there.

That he listed the officers to record statements immediately the incident happened and not two (2) months later. He agreed that at

first he was not in charge but that as a person in charge of investigations he rendered help to the officers. That he recorded a statement from Amos Sheleni.

PW7 confirmed that to the Court that there was a quarrel between accused and his brother Matibini at the bar where they were drinking from.

The witness denied collecting any samples from the scene because the body, was picked from the scene by the family members and the community. By the time the officers went there, the body was already contaminated so there was nothing to pick, just the log.

The witness further told the Court that carrying out his job was sometimes dependent on the situation and that in that case they did their best. He insisted that the investigations were not staled for two (2) months but that were on going. He further stated that at every police station the case was handed over for allocation. PW7 denied that all the statements were recorded in August but that the statements were recorded under his directive as he realized that he had to record the statements.

He further confirmed that investigations ascertained that there was a quarrel between the accused and Matibini and later spread to all the people who were there and the victim failed to run.

In **re-examination** PW7 clarified on the issue raised that there was late response from the police by stating that since the incident happened very far from the police station, the police officers wouldn't have stopped the people from disturbing the scene of crime. He added that there were many people at the scene such that the police officers did not pick any samples. That the scene was disturbed so they only managed to pick a piece of log.

He also confirmed that after interviewing the witness, he felt it was necessary to get something from those who witnessed the incident. The other thing was that if a witness gave a statement without giving details, it was his duty to correct the situation that was why witness statements were recorded after he had been allocated the docket.

He emphasized that investigations did not stall, it was only that they changed the dealing officers. He stated that where he saw that an officer was lacking, it was his responsibility to take over or re-allocate the matter and that was what he did in this case.

That was the close of the prosecution's case.

At the close of the prosecution's case, I found the accused with a case to answer. After his rights were explained to him, he elected to give evidence on oath and did not call any witnesses.

KELVIN WELEKI aged twenty-one (21) years old Welder at a company in Lusaka was **DW1**. He testified that on 26th June, 2017

he went to his parents' farm in Chongwe. Around 15:00 hours, he and his elder brother went to drink beer. He returned at 16:00 hours and his brother asked him for his phone as he wanted to make a call. He bid him farewell and went to buy cigarettes. His elder brother went with the phone. The accused went back to the place and continued drinking. Around 19:00 hours, his elder brother returned and continued drinking as well. The accused asked him to give him back the phone because he wanted to use it and he was told by his brother that he didn't go back with the phone because someone who he owed money got it. His brother explained to him that he would only get the phone once he paid back the money. He then asked for his sim-card which was in his brother's phone. They started quarrelling over the phone and the sim-card. His elder brother grabbed him and he also grabbed him and they both fell down. The other people who were drinking beer got hold of him and they started beating him. He wanted to free himself and run.

When he freed himself, he was hit with a stick on his leg and he fell down and picked the same stick they used to hit him and he threw it behind where there was a group of people who wanted to beat him. He then ran away leaving his brother at the drinking place. That when he reached his parent's house, he didn't find his father.

Later, he went to his house to sleep and the following day in the morning, he told his young brother that he would go to his aunt's place in Mwalumina village in Chongwe District around 16:00 hours to tell his auntie that he would be leaving for Lusaka.

When he arrived at his aunt's place, his aunt told him that it was good he went there as she was sick and asked him to harvest maize in the field. He and his brother in law helped his aunt to harvest maize. He stayed in Mwalumina village for one (1) month and some days.

Thereafter, he left for Lusaka and continued working with the company he used to work for. After two (2) months, on 15th August, 2017, he was told that some people went to look for him at his house. Later when he arrived home, he only found his wife who told him that no one was looking for him. Around 10:00 hours to 11:00 hours the following day, some police officers in plain clothes stood at the shop at the roadside.

Upon seeing the police officers, he told his wife to go to the shop to attend to them. The police officer, went behind his house and they apprehended him and he was told that he committed an offence. He was told that they would explain to him later and he was taken to Chudleigh Police Station where according to him, he was beaten. He was also told that he killed Humphrey Mwika.

He was detained at Chudleigh Police Station for thirty (30) minutes and later he was taken to Chelstone Police Station where he spent a night. The following day around 08:00 hours he was taken to Chongwe Police Station where he was told that his friends who witnessed the incident were also arrested. The police officers insisted that he was the one who killed the deceased.

The accused told the Court that his home in Lusaka was located in Ng'ombe Compound and that he used to work for Avic International. While he was at the drinking place they sat on benches in different places and that they were about eight (8) people in number. He didn't know most of the people there apart from his brother and the bar lady. He stated that there were no lights, they were using phones and the firewood was almost going off.

The witness denied ever fighting with his brother. That when they fell down, people thought they were fighting. At the bar, they bought a bucket of Chibuku and bought small bottles of 'Officer' spirits and poured that in opaque beer. When he was being beaten, he didn't know where his brother was as other people just started beating him and the beating lasted for ten (10) minutes. He didn't know how many they were but they were many.

He further testified that he did not sustain any injuries but just pains in the ribs and the forehead as he hit himself on the bench. That there was blood on the forehead and the skin came out.

In **cross examination** the accused confirmed that the fight between him and his brother was because of the phone though he denied that they fought, but that they just fell down together. He also confirmed to the Court that he was not happy that his brother gave out the phone to other people. He also stated that he was beaten by people for no reason and these people knew his brother and not him.

The accused also confirmed Matibini Weleki's testimony that he was aggressive. He denied hearing the evidence of his brother that he picked up a log from the fire. The accused agreed with the testimony of PW4 that PW4 ran away but stated that he didn't know why PW4 ran away. He fell down with PW4 so he thought he was with the group. The accused denied that he heard the evidence of PW3 that he picked a log from the fire. That it was a long stick which was thrown to him and the one which he threw back at them. He denied that he saw the log because it was at night and the same size could have been the same. He stated that the distance was about fifteen (15) meters and the log was short and that he threw it only once. He didn't see if it was the same log that was in Court and he didn't know that it hit someone.

He further stated that he ran off because they were chasing him. When he went to the village he went to live with his parents. According to the accused, after the fight, he went back to his parents' house. He denied that people went to look for him at his parents' house. That he didn't inform his parents of his leaving for Mwalumina village because they went to burn charcoal. He also didn't inform his elder brother but he told his young brother that he would travel to his aunt's place.

After his visit at his aunt's place, he went straight to Lusaka without going back to his parents' house. That he stayed at his aunt's place for a longer time and denied that no one looked for him while there.

He confirmed that he didn't know that someone had died in the village. It was the police officers who were in plain clothes who told him that piece of information when they went to his place of work.

He denied that he knew that they were police officers. He only told his wife to attend to customers at the shop. He went out from the unfinished structure to where people were throwing stones and that's when he was apprehended.

He agreed that he was beaten and that he never reported to the police. Therefore, he didn't have any medical report to show that he was assaulted.

That was the end of cross examination.

In **re-examination** he confirmed that where they stayed and where the police station was far. They used to pay K35 and he didn't have money to go and report the assault. Although he didn't have the medical report, the shirt had blood stains on it.

He denied that people went to look for him at his aunt's place. He only told his young brother that he would be leaving for his aunt's place.

He didn't know that they were police officer because they were in plain clothes. He only knew when he was taken to the vehicle after he was apprehended.

This marked the close of the case for the defence.

The Court gave orders for directions in relation to the filing of submission. The prosecution did not file any submissions but the Defence counsel did. I shall not endeavor to enumerate the same but I shall be making reference to them in this Judgment.

The accused has been charged with one count of Murder contrary to Section 200 of the Penal Code, Chapter 87 of the Laws of Zambia. Section 200 provides that:

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

Thus it has to be proved that the accused caused the death of the deceased by an unlawful act with the necessary malice aforethought.

The onus of proof is on the prosecution to prove beyond reasonable doubt the essential elements of the offence and the guilt of the accused person. The accused person has no obligation to prove his innocence.

From the evidence that is on record, the following facts are not in dispute:

- (i) On the material day, that is 6th June, 2017, the accused and the deceased who are brothers were both at a drinking place in Chongwe drinking beer.
- (ii) While at the drinking place, a quarrel ensued between the accused and his brother Matibini Weleki as Matibini had given away the accused's phone to a creditor who demanded to be paid her money.
- (iii) The two grabbed each other and fell to the ground.
- (iv) Some other people who were also at the drinking place moved to separate the two brothers.
- (v) The deceased died the same night whilst at the same drinking place having sustained head injuries.

Based on the evidence from the prosecution, they contend that it was the accused who caused the death of the deceased. In this regard, what they have to prove in accordance with the charge of Murder is that the accused person is the one who caused the death of the deceased with the necessary malice aforethought.

In order to prove the charge, the prosecution called seven (7) witnesses. However, there is only one eye witness PW3.

There is a string of cases which sets out the correct approach to the evidence of a single identifying witness. In the case of **Chimbini v.**

The People ⁽¹⁾, the Court of Appeal, the forerunner to the Supreme Court held that:

"It is always competent to convict on the evidence of a single witness if that evidence is clear and satisfactory in every respect; where the evidence in question relates to identification there is the additional risk of an honest mistake, and it is therefore necessary to test the evidence of a single witness with particular care. The honesty of the witness is not sufficient; the court must be satisfied that he is reliable in his observation. Many factors must be taken into account, such as whether it was daytime or night time and, if the latter, the state of the light, the opportunity of the witness to observe the appellant, the circumstances in which the observation was alleged to have been made . . ."

To further illustrate that identification by a single witness can be fallible; the Supreme Court in the case of **Mbundi Nyambe v. The People** ⁽²⁾ had this to say:

"There is perhaps no area in which there is a greater danger of honest; mistake than in the area of identification, particularly where the accused was not known to the witness prior to the occasion on which he is alleged to have been seen. The question is not

one of credibility in the sense of truthfulness, but of reliability, and the greatest care should therefore be taken to test the identification. It is not enough for the witness simply to say that the accused is the person who committed the offence; the witness should be asked to specify by what features or unusual marks, if any, he alleges to recognize the accused, what was his build, what clothes he was wearing, and so on; and the circumstances in which the accused was observed; the state of the light, the opportunity for observation, the stress of the moment - should be carefully canvassed. The foregoing, considerations are not, of course, exhaustive, but are intended merely to illustrate; the adequacy of evidence of personal identification will depend on all the surrounding circumstances and case must be decided on its merits. The danger of honest mistake in identification is even greater where there is only a single identifying witness.'

Furthermore, in the case of Muvuma Kambanje Situna v. The People ⁽³⁾ the Supreme Court held that:

"The evidence of a single identifying witness must be tested and evaluated with the greatest care to exclude the dangers of an honest mistake; the witness should be subjected to searching questions and careful note

taken of all the prevailing conditions and the basis upon which the witness claims to recognize the accused.”

- (ii) If the opportunity for a positive and reliable identification is poor, then it follows that the possibility of an honest mistake has not been ruled out unless there is some other connecting link between the accused and the offence which would render mistaken identification too much of a coincidence.**

It is clear that the above cases lay down the requirements that a trial Court should show in its judgment that it is alive to the dangers of an honest mistaken identification.

However, it is important to note further the holding of the Supreme Court in the case of **Issa Mwasumbe v The People** ⁽⁴⁾. It was held *inter alia* that:

“...but where there is good quality identification evidence from a reliable single identifying witness it is competent for a court to convict even in the absence of other evidence to support it.”

I am guided by these authorities and I am therefore alive to the dangers of convicting on the evidence of a single identifying witness. This evidence can be believed or rejected as the case may be

depending on whether I am satisfied that the possibility of an honest mistake has been ruled out or that it has not been so ruled out.

PW3's evidence was that he was drinking beer with six other people who included the accused, his brother Matibini Weleki and the deceased, Humphrey Mwika. Later a quarrel ensued between the accused and his brother Matibini which led into a fight. The people around then tried to stop the fight but they didn't stop and Matibini ran away. Kelvin then took a piece of firewood and went where everyone was seated but they ran away as he threatened to kill them all. He also ran away and hid himself behind the bathroom which was five meters away from where the accused was.

That he was able to see what was happening even though it was dark. What he saw was that the accused hit the deceased with a log on the forehead, then the nose and the mouth. The deceased's teeth came and he passed away. That the deceased did not manage to run away as he was by the fire place. When he tried to run away, that was when the accused hit him with a piece of firewood.

The accused person's version of what transpired on the other hand conflicts with the evidence given by the prosecution. At the commencement of his defence, the accused's advocate informed the Court that the accused's defence was based on self defence.

In this regard, he testified that on the material day on 6th June, 2017 he went to his parents' farm in Chongwe. Around 15:00 hours, he

and his elder brother went to drink beer. He returned at 16:00 hours and his brother asked him for his phone as he wanted to make a call. His elder brother went with the phone. The accused went back to the place and continued drinking. Around 19:00 hours, his elder brother returned and continued drinking as well.

The accused asked him to give him back the phone because he wanted to use it and he was told by his brother that he didn't go back with the phone because someone who he owed money got it. His brother explained to him that he would only get the phone once he paid back the money. He then asked for his sim-card which was in his brother's phone. They started quarrelling over the phone and the sim-card. His elder brother grabbed him and he also grabbed him and they both fell down. The other people who were drinking beer got hold of him and they started beating him. He wanted to free himself and run.

When he freed himself, he was hit with a stick on his leg and he fell down. He picked the same stick they used to hit him and he threw it behind where there was a group of people who wanted to beat him. He then ran away leaving his brother at the drinking place.

In the submissions, the Defence contend that the accused in a desperate bid to repel an unlawful attack on himself cannot be held criminally responsible for using force in order to repel an attack on him. It is further contended that the accused feared for his life when

the angry mob began the merciless beatings that lasted approximately ten (10) minutes.

The question I have to determine is whether the evidence adduced supports the defence of self defence. In short, whether the killing of the deceased was lawful or justifiable.

Section 17 of the Penal Code thus provides that:

“Subject to any 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.”

It is clear from the above provision that the defence is available to a person who uses force to repel an unlawful attack upon his person or property. It is therefore both good law and good sense that a person who is attacked may defend himself but may do only what is reasonably necessary to defend himself.

In this regard, in the case of **The People v. Pelete Banda** ⁽⁵⁾, the Supreme Court held that:

“Self defence consists of an attack upon the accused as a result of which the accused must have believed on reasonable grounds that he was in imminent danger of death or serious bodily harm. It is not a question of what the attacker intended but did he have a reasonable apprehension that he was in danger of death or serious bodily harm.”

Furthermore, the Supreme Court in the case of Mwiimbe v. The People ⁽⁶⁾ Ngulube D.C.J noted that:

“In our view the authorities make it abundantly clear that the facts of any particular case will show whether or not the situation which the accused found himself including the nature of the attack upon himself or the gravity of imminent peril was such that it was both reasonable and necessary to take the particular action which has caused death in order to preserve his own life or to prevent grave danger to himself or another.”

What I discern from the foregoing therefore is it is important for the court to consider whether the accused's life was in immediate and imminent danger and whether there were reasonable grounds to believe so.

In terms of the burden of proof, PJ Richardson and others (eds) of Archibald Criminal Pleading, Evidence and Practice 2011 state at para 10-43 that:

“Where a defence of self-defence is raised, the burden of negating it rests on the prosecution but the prosecution is not obliged to give evidence in chief to rebut a suggestion of self-defence before that issue is raised or indeed to give any evidence on that issue at all...”

As I have mentioned, there was only one eye witness to the killing and this is PW3. The Defence in their submission contend that the quality of the identification was questionable because PW3 ran away and hid behind the bathroom, he was an old man aged sixty-five years old, it was pitch dark and he stood at a distance.

Furthermore, it was submitted that it was not established which group PW3 was sitting at the time as the accused stated that there were two groups of people. One group sat around the fire where he was with his brother and the other group sat at a distance away from them. It was therefore not established where PW3 was seated. In view of the confusion that ensued and considering the circumstances that it was at night and therefore dark, the possibility of honest mistake had not been ruled out.

I have carefully analyzed the above evidence of PW3 and the submissions by the Defence to ascertain the quality of identification and whether there was an opportunity for a reliable identification.

It is not in dispute that the incident happened at night and the witness admitted that there were no lights. However, the quality of the identification was tested through searching questions from both the prosecution and the defence.

PW3 stated that although it was at night, he was able to see because there was moonlight. He repeated this evidence even in cross examination that he was able to see because he was interested in knowing what was happening. He further stated that while he went and hid behind the bathroom, he was only five meters away from where the accused hit the deceased with the firewood. He estimated the distance in court and stated that the distance was like from the judges' door in the High Court courtroom and the exit door.

I had an opportunity to consider this estimation. It is very clear that the distance between where PW3 was and where the accused hit the deceased from is not far and so I find.

In his evidence PW3 also stated that the accused hit the deceased on the forehead, then on the nose and mouth and the front teeth came out. PW2 who visited the scene with the police officers the following day stated that they found a pool of blood, teeth and a piece of firewood which he identified in Court. PW5 who identified the body

of the deceased also stated that the deceased had no front teeth. The evidence of the teeth that were found at the scene and that the deceased's body had no front teeth body supports the evidence of PW3 that the deceased was hit on the mouth and his teeth came out.

In addition, the evidence by PW3 that the deceased was hit on the forehead and also on the mouth and nose is supported by the postmortem report which indicates that the cause of death was subdural hematoma as a result of blunt force head injury and that there was trauma to the head. The report also shows that the deceased had multiple injuries on the face and the external examination revealed that there were lacerations on the upper and lower lip and that the teeth frontal teeth were broken.

The significance of this evidence by PW2 and PW5 and also the results of postmortem examination that the frontal teeth were broken and that the deceased had lacerations on the lips is that PW3 was reliable in his observation when he stated that he saw the accused pick a piece of firewood and hit the deceased on the forehead, then the nose and the mouth.

What is also clear from the evidence is that apart from PW3 stating that the accused was the one who attacked the deceased, PW3 also stated that after the two brothers were separated, the accused's brother Matibini ran away and the other people ran away while he was still at the fire warming himself. Thereafter the accused picked a

piece of firewood and ran to where everyone was seated and threatened that he would kill them. As a result, people ran away.

The witness did not at any point state that whilst the accused was on the ground a mob of people descended on him and started beating him up and that the accused was hit with a stick on his leg. He also didn't state that the accused fell down and picked the same stick and threw it behind where there was a group of people. In short he didn't state that the deceased was hit by a log which the accused picked up and threw at the mob that was beating him.

If at all it was true that the accused was attacked by the group of people who were at the scene, PW3 would have stated so since he had an opportunity to observe what was happening at the scene.

Furthermore, during cross examination of PW3, it was never suggested to him that the accused was actually under attack and that in the process, he picked up a log and threw it at the group of people who allegedly attacked him. The main focus of the cross was whether the witness had an opportunity to observe what was happening as the incident happened in the dark, his eye sight was not good because of his age and he couldn't remember properly because he had taken alcohol.

In point of fact, what was suggested to the witness was that the accused was actually dozing by the fireplace and it was other people who were fighting and that someone threw a log at him that's how he

woke up. This line of cross examination actually contradicts his own evidence that he was under attack and that there was an altercation between him and his brother. It was never suggested that the accused was under attack or in any imminent danger of death of serious bodily harm.

In addition, the accused in his defence stated that he was beaten by the mob for about ten (10) minutes but did not sustain any injuries but just had pain in his ribs and forehead as he hit himself on the bench and blood came out. He also stated that he did not report the matter to the police as the police station was very far but the shirt was stained with blood.

This evidence by the accused that he did not report the matter to the police after he was beaten by the mob for about ten minutes is hard to comprehend and accept. I say this because even though the incident happened at night, he had all the time to report in the morning that he was attacked the previous night and that in the process he sustained an injury on the forehead. That is why I find it hard to believe that he was attacked and sustained an injury.

In the submissions by the Defence, it is also contended that all persons who were at the scene were suspects of what transpired that night and this includes PW3. Therefore, there is a possibility that this witness falsely implicated the accused in a bid to shift blame from himself.

Can it be said that PW3 falsely implicated the accused person as he is a suspect witness who had a motive of his own to serve?

The position of the law on such witnesses was considered in the case of **Kambarange Kaunda v. The People** ⁽⁷⁾ where the Supreme Court held that:

“That as the prosecution eye witnesses were relatives or friends of the deceased and could, therefore, would have had a possible bias against the appellant; and as they were the subject of the initial complaint by the appellant as having attacked him and his friends and, therefore, had a possible interest of their own to serve, failure by the learned trial judge to warn himself and specifically to deal with this issue was a misdirection.”

However, as was pointed out by the Supreme Court in the case of **George Musupi v. The People** ⁽⁸⁾ the critical consideration is not whether the witness does in fact have an interest or a purpose of his own to serve, but whether he is a witness who, because of the category into which he falls, or because of the particular circumstances of the case, may have a motive to give false evidence.

More recently, the Supreme Court gave further guidance in the case of **Yokoniya Mwale v. The People** ⁽⁹⁾ on this subject and more importantly in reference to its earlier decisions like the cases referred to above. It stated that:

"We ought however to stress that these authorities did not establish nor were they intended to cast in stone a general proposition that friends and relatives of the deceased or the victim are always to be treated as witnesses with an interest to serve and whose evidence thereby routinely required corroboration. Were this to be the case, crime that occurs in family environments where no witnesses other than near relatives and friends present would go unpunished for want of corroborative evidence. Credible available evidence would be rendered insufficient on the technicality of want of independent corroboration. This in our view would be to severely circumscribe the criminal justice system by asphyxiating the courts even where the ends of criminal justice are evident. The point in all these authorities is that this category of witnesses may in particular circumstances, ascertainable on the evidence have a bias or an interest of their own to serve or a motive to falsely implicate the accused. Once this was discernable and only in those circumstances should the court treat those witnesses in the manner we suggested in the Kambarange case. A conviction will thus be safe if it is based on the uncorroborated evidence of witnesses who are friends or relatives of the deceased or victim provided the court satisfies itself that on the evidence before it

those witnesses could not be said to have had a bias or a motive to falsely implicate the accused or any other interest of their own to serve. What is key in our view is for the court to satisfy itself that there is no danger of false implication.”

What comes out from the above cases is that it is not a general proposition that friends and relatives of the deceased or victim are always to be treated as witnesses with an interest to serve and whose evidence routinely required corroboration. A friend or a relative can only be treated as a witness with possible interest to serve if in particular circumstances it is ascertainable on the evidence that the witness has a bias or a motive to falsely implicate the accused person.

To begin with, there is no evidence that PW3 was related to the deceased. The evidence on record which was not disputed is that PW3 was related to the accused as he was the son to PW3's cousin. Furthermore, there is no evidence that PW3 was detained as a suspect for the offence because he was at the scene or that he was a subject of an initial complaint by the accused that he had attacked him.

Given the foregoing, I do not see how PW3 would fall in a category of suspect witnesses just because he was found at the scene and he would have a motive to falsely implicate the accused. In the view that I hold, PW3 being related to the accused, would have had every

motive to shield the accused as he is a relative. However, he did not do that but gave an account of what had transpired.

In this regard, I find that it cannot be ascertainable from the evidence that PW3 had a reason to falsely implicate the accused person. That line of argument is misconceived and I dismiss it.

If I may just add, if the accused's evidence is anything to go by that he just threw the log at the group as he was under attack, then it would follow that the deceased would have just sustained one fatal blow and died. However, the postmortem examination report reveals that the deceased sustained multiple injuries on the face. This evidence dispels the accused's version of the story that he just threw the log in the direction of the group but supports the evidence of PW3 that the deceased was hit on the forehead, the nose and then the mouth.

Furthermore, the accused's conduct after the incident is not one which was consistent with one who had been beaten and attacked. The evidence from the prosecution witnesses is that the accused person was a suspect in the murder case and that he went into hiding as he was not found at his father's place where he used to stay. That his own mother didn't know his whereabouts. He was only apprehended after two months.

Additionally, the evidence from PW1 and PW2 a relative to the deceased was that before the accused was apprehended in Ngombe,

he ran away upon seeing them. The police had to fire two warning shots. It was only after the second shot was fired that he fell down and was apprehended. This evidence of the accused running was not challenged by the Defence in any material aspect and I accept it.

If the accused had not done anything wrong and if he was the victim of what happened on the material day, I do not see why he had to run away upon seeing the relative to the deceased.

His conduct shows that he was not a victim or an innocent person but someone who knew that he had done something wrong.

All in all, after careful consideration of the above evidence, I am inclined to believe and accept the evidence of PW3 and not that of the accused person in relation to the events of the 6th June, 2017 and make the following findings:

- (i) Although it was at night, PW3 was able to see what was happening from where he was hiding as there was moonlight and he hid not too far from the scene.
- (ii) The deceased was hit with a firewood on his forehead, nose and mouth by the accused after the group separated the accused and his brother who had been fighting.
- (iii) Blood stains and teeth were found at the scene of crime.
- (iv) The deceased had broken teeth as stated by PW3 and PW5 and supported by the postmortem report.

- (v) The multiple injuries sustained on the face as shown by the postmortem report are consistent with the evidence of PW3 that the accused picked up the log and hit the deceased with it on the forehead, on the nose and on the mouth.
- (vi) The deceased was not hit with one blow as suggested by the accused but was hit repeatedly with the firewood on his forehead, nose and mouth as he sustained multiple injuries on the face.
- (vii) PW3 had an opportunity to observe what was happening as he was able to give a detailed account of how the accused hit the deceased and what weapon was used. He was thus reliable in his observation and the possibility of honest mistake was ruled out.
- (viii) The accused was not attacked by a mob of people and he did not pick a log and throw it in the direction where the group was in order to dispel an attack as no questions were put to PW3 in cross examination to suggest that. The accused's story was therefore a fabricated story.
- (ix) That the people who were at the scene including his brother ran away after they separated the two brothers and that the accused turned to the group that had remained and threatened to kill them. They also ran away including PW3 who went and hid himself behind the bathroom.
- (x) The accused threatened to kill the people who were at the scene of crime and not that he was beaten by the mob and

as such was under attack or that there was reason to believe that he was under any attack.

- (xi) That the accused did not hit the deceased with a firewood in retaliation of an attack.
- (xii) That the accused fled the scene immediately after he hit the deceased with the firewood.
- (xiii) The accused's family that is his brother and mother did not know his whereabouts after the incident as he had gone into hiding.
- (xiv) Before the apprehension, the accused ran away upon seeing PW1 and PW2. He only stopped after the second warning shot was fired.

In short I find that the plea of self defence is not available to the accused as it has been negatived by the prosecution evidence that the accused is the one who hit the deceased with a firewood, **P1** and that he was not under any attack or there was no reason for him to believe that he was in imminent danger of death or serious bodily harm.

The accused has also raised the defence of provocation in the alternative that he was provoked through the action of the group that ganged up on him and beat him. The Court in this regard was referred to the case of **Simutenda v. The People** ⁽¹⁰⁾ on the ingredients of the defence. These are the provocation itself, the loss of self- control, both actual and reasonable and the retaliation to the provocation which must be reasonable.

In this regard, it was submitted that the act of provocation was the severe beating that the accused received from the group including the final act of the throwing of a log at him as he tried to take his escape. That this prompted him to retaliate by picking up the same log and throwing it back in the direction from which it came. It is therefore contended that the accused's action was not only reasonable but it was actually in equal proportion to what had been done to him and was not in any way excessive.

The elements of provocation referred to by the Defence were re-echoed by the Supreme Court in the case of **Nyambe Mubukwanu Liyumbi v. The People** ⁽¹¹⁾, where it held that:

“There are three inseparable elements to the defence of provocation- the act of provocation, the loss of self-control both actual and reasonable and the retaliation proportionate to the provocation. All three elements must be present before the defence is available.

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

While the accused contends that he was severely beaten by the group, I have made a finding that there is no evidence that the

accused was beaten. In this regard, the first element of this Defence of provocation has not been satisfied. Furthermore, I have accepted the evidence of PW3 because I have found that his evidence was reliable and he had the opportunity to observe what was happening. This witness did not state that when the accused grabbed the firewood and hit the deceased, he did so in retaliation.

In view of the foregoing, I find that the defence of provocation is not available to the accused and it fails.

The two defences having failed, I find that the accused is the one who caused the death of the deceased by hitting him on the forehead, the nose and the mouth.

The next question I have to determine is whether the accused person caused the death of the deceased with the necessary malice aforethought.

In terms of malice aforethought, Section 204 of the Penal Code provides that:

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

(a) An intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;

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

As I have made a finding that the deceased was hit on the forehead, nose and mouth with a log; that PW4 and PW6 found blood at the scene of crime when they visited the scene the following day. The postmortem report shows that the cause of death was subdural haematoma as a result of blunt force head injury and that there was trauma to the head and that the skull was fractured. The report also shows that the deceased had multiple injuries on the face. The report also indicated that the manner of the death was consistent with homicide.

The Defence have however submitted that the accused was highly intoxicated as he had been drinking from 15 hours to approximately 22 hours. That he was drinking a potent alcoholic drink commonly known as '*tujilijili*'. That this and coupled with the fact that the accused did not even know the deceased person shows that he could

not possibly have formed the necessary intent or malice aforethought.

Reference was thus made to the case of **Tembo v. The People** ⁽¹²⁾ where the court construed the law as provided under section 13 (4) of the Penal Code as follows:

“There must be evidence that an accused person’s capacities may have been affected to the extent that he may not have been able to form the necessary intent.”

It is trite law that intoxication can be raised as a defence as well as an extenuating factor. In this regard, the accused has raised it as a defence.

Section 13 of the Penal Code which counsel for the Defence referred to provides that:

- 1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.**
- (2) Intoxication shall be a defence to any criminal charge if, by reason thereof, the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and-**

- (a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or
 - (b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.
- (3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused person shall be discharged, and in a case falling under paragraph (b) the provisions of section one hundred and sixty-seven of the Criminal Procedure Code relating to insanity shall apply.
- (4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.
- (5) For the purposes of this section, "intoxication" shall be deemed to include a state produced by narcotics or drugs.

(No. 10 of 1935 as As I said, the Defence referred the Court to the case of ***Tembo v. The People***. However, the complete holding by the Supreme Court was not captured. The Court in that case held that:

“Evidence of drinking even heavy drinking is not sufficient in itself nor is evidence that an accused person was under the influence of a drink in the sense that his co-ordination or reflexes were affected. To constitute evidence fit to be left to the jury for the purpose of section 13 (4) there must be evidence that an accused person’s capacities may have been affected to the extent that he may not have been able to form the necessary intent.”

I have stated that it is not in dispute and therefore a fact that the deceased and the accused were both at a drinking place and they were drinking alcohol. Both PW3 and PW4 attested to this. However, there is no evidence that the drink that the accused took was tujilijili as he didn’t mention that he was drinking tujilijili. The evidence by PW3 is that he was drinking chibuku but the quantity of how he had taken is not known. Be that as it may, there is no evidence that the accused’s person’s capacities were affected to the extent that he may not have been able to form the necessary intent.

In fact, the evidence which is on record and I have made a finding is that the accused went about threatening the people at the scene that he was going to kill them after his brother who he had been fighting

with ran away. And also that immediately after the incident, he went into hiding as he was only apprehended two (2) months after the incident.

So whereas there was evidence of drinking, the accused's conduct shows that he did not fail to appreciate what he had done. The accused knew what he had done and that his capacities therefore were not affected.

In this regard, the accused's own conduct presupposes that he was not incapacitated and so I find.

In view of the foregoing and given the above cause of death and the fact that the deceased was hit on the forehead with a log, I find that the accused person had the knowledge that by hitting the deceased on the forehead and the face which is the most delicate part of the body, death or grievous bodily harm would be caused to the deceased.

In the light of the foregoing, I am satisfied having looked at the evidence of PW3 which is supported by the postmortem report the evidence is strong against the accused that he caused the death of the deceased and his capacities were not affected to the extent that he was not able to form the necessary intent. In short, I find that the accused caused the death of the deceased with the necessary malice aforethought. It is immaterial that he caused the death of the deceased who he did not know because malice aforethought is an

intention to cause the death or do grievous harm to any person whether such person is the person actually killed or not

For these reasons, I find that the prosecution has discharged its burden beyond all reasonable doubt that **KELVIN WELEKI** caused the death of the deceased **HUMPHREY MWIKA**. I therefore 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 I **CONVICT** him as charged.

Leave to appeal is granted.

DELIVERED AT LUSAKA THIS 16TH DAY OF FEBRUARY, 2024


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M.C. KOMBE
JUDGE

