

**IN THE HIGH COURT FOR ZAMBIA**

**HP/ 287/2023**

**AT THE PRINCIPAL REGISTRY**

**HOLDEN AT LUSAKA**

*(Criminal Jurisdiction)*



**THE PEOPLE**

**V.**

**CHIKONDI DAKA, FRANCIS KATEMBO KABUBI, JOHNSON  
MUSUKUMA & JULIUS PATSON DAKA**

***Coram: Chigali Mikalile, J this 15<sup>th</sup> day of April, 2024***

For the People: Mr. S. Phiri & Mrs G. Mwiinga Mhambi - National  
Prosecution Authority

For the 1<sup>st</sup> & 4<sup>th</sup> Accused: Mr. C. Sokoni - Messrs OMM Banda & Company,

For the 2<sup>nd</sup> Accused: Mr. V. Kachaka – Messrs Victor Kachaka & Co.  
Legal Practitioners

For the 3<sup>rd</sup> Accused: Mr. B. Banda – Messrs Legal Aid Board

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## **JUDGMENT**

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**Legislation referred to:**

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

**Cases referred to:**

1. Sweet v. Parsley (1970) A.C 2
2. Ilunga Kabala & John Masefu v. The People (1981) ZR 102,
3. Kateka v. The People (1977) ZR 35
4. Ali & Another v. The People (1973) ZR 232

5. Mwewa Muroño v. The People (2004) ZR 207
6. R v. Larkin (1942) 29 Cr App R 18.
7. Mbuyu Kaito v. The People, Appeal No. 22/2020
8. Justine Soko v. The People, Appeal No. 31/2017
9. Shawaza Fawaz & Prosper Chelelwa v. The People (1995-1997) ZR 36
10. Nyambe v. The People, SCZ Judgment No. 5/2011
11. Mwaba & Others v. The People ( 1987) ZR 19
12. Mutambo & 5 Others v. The People (1965) ZR 15
13. Haonga & Others v. The People (1976) Z.R. 200 (S.C.)

### **Introduction**

1. The four accused persons stand jointly charged with the offence of Manslaughter contrary to section 199 of the Penal Code Chapter 87. Particulars of the offence allege that the accused, on the 4<sup>th</sup> day of November, 2022 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together did unlawfully cause the death of Barry Phiri.
2. The accused pleaded not guilty to the charge.
3. In its endeavour to prove the charge, the prosecution called 13 witnesses. At the close of the prosecution's case, all four accused were placed on their defence and elected to give evidence on oath. No other witness was called for the defence.

### **Prosecution's case**

4. The first prosecution witness or **PW1** was Gift Mwanza aged 33 of Ng'ombe compound, a neighbourhood watch officer. He

testified that on 4<sup>th</sup> November, 2022, he was working at Ng'ombe police post as a neighbourhood watch officer. At around 06h45, A2 brought a report that a thief had been apprehended at his residence and he sought assistance in picking the suspect. A2 led PW1 and his colleague Penias Phiri (PW2 herein) to his residence.

5. It was his evidence that when they reached the gate, they found two women and three kids leaving the premises and these are people he could identify. One of the women was Mrs. Manda. When they entered the yard, he saw the suspected thief lying on the ground facing upwards. According to PW1, he recognized the suspect, the now deceased, as Barry Phiri.
6. He observed that Barry had burns on his legs from melted plastic and wigs. The melted stuff was stuck on the legs. Further, Barry was still moving and according to PW1, he tried to get up. As he did so, he turned and PW1 saw the injuries on his back.
7. He testified that he found two people standing around and these were A1 and his father, A4. A4 was standing 5 meters away from the deceased. PW1 also observed a man hole close by whose cover had been removed.
8. Upon observing the deceased's appearance, PW1 suggested that he be carried to the police station and thereafter taken to the hospital. A2 and PW2 lifted him onto a wheelbarrow. However,

looking at the deceased's condition and the distance to the police station, PW1 did not deem it fit to transport the deceased in that manner and suggested that a vehicle be used instead. Shortly afterwards, a Toyota Spacio driven by an elderly man arrived. According to PW1, he observed that the deceased's head had slumped and uttered the words "I think this person has passed on." The elderly driver checked the deceased's eyes and hand and also opined that he was dead.

9. PW1 said he left the scene and on his way to the office called the CIO of Ng'ombe Police, Mr. Chikatula. Mr Chikatula instructed him to pick up all the people at the scene and take them to the police station.
10. PW1 was not cross examined as the state failed to secure his attendance for that purpose.
11. **PW2** was 45-year-old Penius Phiri also a neighbourhood watch officer. It was his evidence that on 4<sup>th</sup> November 2022, he was on duty at Ng'ombe Police Post when A2 approached him and informed him that a thief had been apprehended at his residence. The shift officer, Ms. Tembo, instructed him to proceed to the scene with PW1.
12. When they arrived at the gate, they found two ladies leaving. Inside the yard was the suspect who was lying on the ground and not talking. According to PW2, water had been poured on the suspect and his shirt was removed. They asked what items

had been stolen and their attention was drawn to the the soakaways and the vehicles. The information received was that the suspect had taken the soak away covers.

13. PW2 testified that upon seeing that the suspect had been beaten, they refused to take him to the police. The situation he was in demanded that he be taken to the hospital. A taxi was hired and the elderly taxi driver pointed out that the suspect was dead. At that point the deceased was in the wheelbarrow. Other than PW1 and PW2, at the scene were the owner of the house and his family plus A2 who reported the matter.
14. It was PW2's testimony that when it was discovered that the suspect was dead, they called the shift office.
15. In *cross examination* by Mr. Sokoni, PW2 confirmed that he was called to the scene before 08h00. They found two people inside the yard and two ladies outside the yard. When they asked what had happened, they were told that a dog was heard barking and it was discovered that the thief had entered the yard. He confirmed that the deceased did not reside at that house. He also confirmed that he did not know who beat the deceased as this occurred before their arrival at the scene.
16. In *cross examination* by Mr. Banda, PW2 stated that the information he got was that there were many people in the yard. The deceased wanted to jump into the next yard. He confirmed that water was poured on the deceased to resuscitate him. He

denied the assertion that he contributed to the death of the deceased because he had no training in handling a critical person.

17. In *re-examination*, PW2 reiterated that he was not involved in the death.
18. **PW3**, Matildah Bwalya aged 61 years of plot 5559 Kalundu testified that on 4<sup>th</sup> November, 2022 around 05h00, she received a phone call from her neighbour, Francis Katembo (A2), informing her that a thief had been apprehended. She had known A2 for three years. She did not go there immediately as it was still dark and she was unwell. She only managed to follow through around 06h30 and found Barry, the deceased, lying on the ground and facing the wall. She knew him as he was born and raised in the neighbourhood. Also present was her friend and neighbour, Catherine Changaya, A2, A4 and another one young man. She only knew A2. Her friend called the deceased by his name three times and it was then that he turned to look at them. He appeared to have been beaten. According to PW3, she went back home thereafter.
19. Later, she was summoned to the police station where she was asked about the state she found the deceased in and was then informed that he had died.
20. According to PW3, in her yard are two houses, the main house on rent and the house she occupies. Her tenant procures

security services so there is always a security guard in her yard. She confirmed that there was a security guard when the incident occurred.

21. In *cross examination* by Mr. Sokoni, PW3 stated that she did not know who killed the deceased.
22. When cross examined by Mr. Kachaka, she stated that the main reason she went to the scene is because she had also been a victim of thefts. She confirmed that even other neighbours had been complaining of thefts and just like her, they also went to see the alleged thief.
23. The witness was not re-examined.
24. **PW4** was Catherine Mbewe Changaya aged 70 years of Kalundu. Her testimony was that on 4<sup>th</sup> November, 2022, she received a call from her neighbour Mrs. Manda, informing her that a thief had been apprehended next door at Mr. Daka's residence. PW4 proceeded to Mr. Daka's residence where she met Mr. Daka, now A4. She then approached the young man who was lying down. She recognised him as Barry and called his name three times. On the third occasion, he turned his head. It was her testimony that she had known Barry since his childhood. He grew up in Mrs. Chafilwa's house. Mrs. Chafilwa is her neighbour.
25. According to PW4, she inquired from A4 as to what had transpired. A4 told her that Barry was found in his yard. Other

than A4, there was A4's son, A1 and the tenant, A2, who were standing not more than 2 metres away from Barry.

26. Thereafter, PW4, PW3 and Mrs. Manda (PW5 herein) left the premises. They left together with PW3's grandson and PW5's grandson.
27. Under *cross examination* by Mr. Kachaka, PW4 stated that A2 was a tenant at the premises where the deceased was found. She also stated that she had no idea what happened to the deceased. The witness was no re-examined.
28. **PW5** was 69-year-old Christine Mwape also of Kalundu whose testimony was that she received a phone call around 05h00 from PW3 informing her that their neighbour had caught a thief. PW5 decided to go the said neighbour's house and found the deceased lying face down on the ground. She the phoned PW4, who, upon arrival called out the deceased's name. He turned when she called him for the third time. It was her testimony that she found a group of people at the premises but couldn't state the number. She and her friends left the scene after seeing what had happened.
29. When *cross examined* by Mr. Sokoni, PW5 confirmed that she did not know the health condition of the deceased at the time the incident occurred. She reiterated that she did not know the occupants of the house where the deceased was found.

30. **PW6** was Constable Naomi Tembo of Ng'ombe Police Post. She testified that on 4<sup>th</sup> November she was on duty as shift officer together with Community Crime Prevention Unit (CCPU) Officers also known as the neighbourhood watch. Around 06h30, she received a complaint from A2 that a thief broke into their yard and attempted to steal but they managed to catch him. A2 wanted police assistance to bring him to the station.
31. Acting on the matter, she sent two CCPU officers, PW1 and PW2, who later returned to the station without the suspect. They informed her that the suspect was not in good health and appeared to be dead. She then detained A2 who had returned to the station with the CCPU officers.
32. When *cross examined* by Mr. Banda, PW6 clarified that she afforded A2 an opportunity to be heard before detaining him.
33. **PW7** was Constable Jonas Mushanga of Ng'ombe Police Post who testified that on 4<sup>th</sup> November, 2022, he reported for duty and rushed to house number 5556, Magoye Road, Kalundu. He proceeded to the open space between the main house and the servant's quarters where he found a person lying on the ground. The person looked lifeless. His face was swollen and had mud on it and his clothes were wet.
34. According to PW7, he checked the scene and near this person, within 2 or 3 metres, was a stick, a fan belt and some wigs which were partially burnt. Upon close inspection, he observed

some burn marks on the person's feet as if someone had dropped burning plastic on them. PW7 said he left things as he found them as his duty was just to protect the scene.

35. PW7 further testified that when he arrived at the scene, the owner of the house, Mr. Julius Patson Daka (A4) was in the house.
36. When *cross examined* by Mr. Sokoni, PW7 stated that he was informed that there was a theft and the suspect was the deceased. PW7 further stated that he knew the deceased before this date as he was at one time reported for stealing a phone.
37. When cross examined by Mr. Kachaka, PW7 confirmed that he got to the scene around 07h00 and this was after the CCPU officers had already visited the scene.
38. When cross examined by Mr. Banda, he stated that the information he received was that the deceased was beaten by an irate mob. The witness was not re-examined.
39. **PW8** was Brighton Chipalabwe, an employee of JSPS security company whose duties include keeping and issuing of supplies. His testimony was that on 15<sup>th</sup> November, 2022 the company received police officers from Ng'ombe Police Post who had in their possession a rain coat, a barret and reflector and wanted to know if the items belonged to the security company. PW8

confirmed that it was their uniform. The items had the letters 'JSPS' inscribed on them. All three items were marked ID1.

40. According to PW8, the police informed him that the items were recovered from plot 5559 Kalundu. The employee deployed at that premises on 3<sup>rd</sup> into 4<sup>th</sup> November, 2022 was Johnson Musukuma (A3). The police asked for A3's employment record as well as the record book in which the company records the items issued to an employee.
41. PW8 produced the employment record (marked P2) and the record book (marked P3). P2 shows that A3 was employed by JSPS on 21<sup>st</sup> July, 2022. He is, however, no longer an employee. P3 shows that the company uniform was issued to him which included a barret, a raincoat and reflector. PW8 testified that A3 had not returned the uniform.
42. In *cross examination*, PW8 confirmed that JSPS did not have a security contract with the owner of the house where the body of the deceased was found, therefore, no officer was deployed there. He conceded that the uniforms had no special marking to indicate that they had been issued to a particular individual. He, however, stated that the police informed him that they recovered the uniform, ID1, from plot 5559.
43. **PW9** was Sgt. Rosa Chutu of Chelston Police Station, a Scenes of Crime officer. She testified that on 4<sup>th</sup> November, 2022 she was assigned to attend to a scene of crime at a house in Kalundu

area. Upon arrival, she noticed that the house is secured by one lockable gate. Upon entering the premises, she saw an unknown male lying lifeless. Before she could touch or inspect the body, she noticed reddish discoloration on the skin. She was able to see this because his shirt was torn. On both his feet was black stuff which looked like burnt wigs. There were also some burnt wigs and a stick a few meters from where the body lay. She secured the burnt wigs and the stick.

44. According to PW9, at the scene were a good number of people, among them, the owner of the house, his son, a tenant and others she could not recall. A1, A2 and A4 were identified as the son, the tenant and owner of the house.
45. She inspected the body and discovered that almost all of it was reddish. She then confirmed that life had ceased. She came to know the deceased as Barry Phiri. She used the police camera to take photos of the crime scene. Unfortunately, the memory card crashed and so there were no photos to tender in evidence.
46. It was her further testimony that the body was transferred to UTH mortuary and a post-mortem was subsequently conducted by the state pathologist, Dr. Himwaze, whose findings were that the cause of death was blunt impact trauma to torso due to assault. According to PW9, when the doctor opened the body of the deceased from the back and removed the whole skin, she was able to see the blood clots all over the body. She asked the pathologist the meaning of the clots and she explained that this

indicated that the person was beaten with something blunt whilst lying down.

47. PW9 produced a straight dry brown stick of about 1 meter and it was marked P4. She explained that that was the stick that was found just a short distance from where the body lay.
48. In *cross examination* by Mr. Sokoni, PW9 confirmed that there were no photos of either the crime scene or the blood clots she saw during post mortem. She reiterated that the stick, P4, was near the body and denied the assertion that it could be any stick. She further stated that the cause of death was blunt impact trauma to torso but she does not know who in particular assaulted the deceased.
49. When cross examined by Mr. Kachaka, PW9 clarified that the doctor is the one who informed her that the deceased could have been injured whilst sleeping. She admitted that this is not indicated in the post mortem report.
50. In cross examination by Mr. Banda, PW9 conceded that she did not lift finger prints from the stick as this is because the scene was disturbed. She, therefore, does not know who used the stick to inflict injuries on the deceased. There was no re-examination of this witness.
51. **PW10** was 40-year-old Saul Daka who testified that on 4<sup>th</sup> November, 2022 around 08h00, he received shocking news of

the death of his young brother, Barry Phiri, from his mother Mrs. Chafilwa, of Kalundu. The family remained in the dark as to how Barry died until the following evening when word went round that there was a video circulating on Facebook. He saw the video and went back to the police station to show the CIO.

52. PW10 told court that he attended post mortem and was shocked by the brutality with which his brother was murdered. There were burns on the legs and ear inflicted using either a burning plastic or sack, what the witness described as 'donya donya' in local language. When the skin was cut on the back and opened up, there were blood clots everywhere and the pathologist explained that this was due to excessive beatings.
53. The witness was not cross examined.
54. **PW11** was 13-year-old Kunda Ethan Ngosa, PW3's grandson, whose testimony was that on 4<sup>th</sup> November, 2022, his mother woke him up and informed him that a thief had been caught next door. She asked him to take a video with his phone so that she could watch the video after work. According to PW11, he dressed up and went next door with his grandmother.
55. PW11 and his grandmother entered the yard and found the alleged thief lying down. He had already been beaten. He was able to recognize him by his face and his name was Barry. According to PW11, a security guard who used to guard at his house arrived on the scene and beat the thief with a pipe a few

times. Afterwards the guard asked them to leave because he wanted to urinate on the thief.

56. Whilst at the scene, PW11 managed to record a video using his phone, a Techno Pop 2. When he got home he shared the video with his uncle who later posted it on face book. PW11 produced his phone in evidence and it was marked P5. The video was played in court and a person is seen lying down on the ground and someone wearing a blue coat is seen whipping him. PW11 identified the person in the blue coat as the security guard from his house. He also identified his friend John in the video. He told court that there were about 6 to 7 people at the scene.
57. Under *cross examination* by Mr. Sokoni, PW11 stated that his phone had been in police custody since he was interviewed. He admitted that there was no date reflected on the video. He acknowledged that there was no evidence that his phone is the one that captured the video posted on Facebook. He conceded that video evidence, being electronic, can be distorted during storage.
58. When cross examined by Mr. Kachaka, PW11 stated that he was asked by his grandmother to delete the video and he did just that.
59. When cross examined by Mr. Banda, he confirmed that when he went to the scene, he found the deceased lying lifeless, having been beaten already. He also confirmed having heard that there

was a mob that beat the deceased. He further confirmed that the person holding a stick in the video was his friend John. When shown P4, PW11 couldn't be sure if it was one and the same stick that John is captured holding in the video.

60. In continued cross examination, he was referred to the statement recorded from him by the police (which was admitted in evidence as D2) and he admitted that it states that he deleted the video from his phone. He clarified that the video was not permanently deleted from his phone. He denied the assertion that the video came from social media.

61. There was no re-examination of this witness.

62. **PW12** was 15-year-old John Manda, PW5's grandson. His evidence was that on the morning of 4<sup>th</sup> November, 2022, as he was preparing for school around 6 am, he heard that a thief had been caught in the next yard. He awakened his grandmother and the two of them proceeded to there. He noticed the presence of more than five but less than ten people there.

63. He testified that he did not know who the thief was. He only came to know his name when his grandmother's friend repeatedly called him. It was his testimony that the thief turned to look at them when he was called for the third time. He appeared to have been beaten. What he observed as he stood nearby was a security guard whipping the thief. The guard was in uniform and PW12 identified him as the guard that was working at his grandmother's friend's premises.

64. PW12 told court that he was aware of the video where he was captured holding a stick. He explained that his grandmother asked him to pick the stick so that they could use it to tie tomatoes. He said he picked it at the gate as they entered the premises. He denied taking part in whipping the deceased. He testified that he went home with the stick he picked up and it was used to tie the tomatoes.
65. When *cross examined* by Mr. Kachaka, PW12 confirmed that English was one of the subjects he takes at school. According to him a mob refers to 50 people or more. He maintained that there were not too many people at the scene. He, however conceded that in the statement he gave to the police, he mentioned that they found a lot of people.
66. Under cross examination by Mr. Banda, PW12 stated that he just witnessed the guard beating the lifeless body using what appeared to be a belt. Therefore, he could not confirm that the deceased was beaten by a lot of people. He confirmed that the deceased was still alive when they got to the scene. He further stated that he only saw the deceased being beaten once and it was not with much force. He said he did not know if that light beating could cause the death of the deceased. He clarified that only one person was wearing a security guard's uniform.
67. **PW13** was Dt. Insp. Edwin Chikatula of Matero Police Station who, at the material time, was stationed at Ng'ombe Police Post.

He testified that on 4<sup>th</sup> November, 2022, around 06h00, he received a call from the shift officer on duty woman Constable Tembo (PW6) regarding a matter at Plot No. 5556, Magoye Road in Kalundu. According to PW13, he told the officer not to allow anyone who was at that premises to leave.

68. He later proceeded to plot 5556 and observed that the premises has the main house and a servant's quarters. In between is a space where vehicles were parked and that is where a male person lay facing upwards. He looked unconscious or dead. Upon noticing this, he contacted Chelstone police for transport and for the scenes of crime officer.
69. It was his evidence that there were a few people on the premises and these were the owner of the house whom he came to know as Julius Patson Daka (A4) and another person who claimed to be a tenant, whom he came to know as Francis Katembo Kabubi (A2).
70. PW13 further testified that the deceased had some marks on his body which indicated that he had been whipped. The marks were on his front, back and on the head. Near the deceased was a stick (P4), fan belt from a motor vehicle tied with a white string and some burnt wigs which items were subsequently admitted in evidence marked P6 and P7 respectively.
71. When he inquired as to what had happened, he was informed that the deceased was a thief who jumped into the yard. He was

informed that it was Chikondi Daka (A1) who apprehended him. By then, A1 had left home. PW13 requested for A1's return as there was an issue at hand.

72. A1 was questioned regarding the deceased's state and his response was that the deceased was the person who entered the yard. A1 informed him that man hole covers were stolen the previous week but nothing was stolen on the material day. PW13 went around the yard to check if there was anything that had been misplaced, however, nothing could be verified as stolen.
73. The body was picked up and a relative to the deceased confirmed that the deceased was Barry Phiri. The body was then deposited at UTH mortuary. In the meantime, A1 and A2 were detained.
74. It was his further testimony that a video emerged on social media and he carried out investigations which revealed that it was posted by Francis Bukolo. He interviewed Mr. Bukolo who revealed that his nephew (PW11) sent him the video. PW11 confirmed having captured it and showed it to PW13. PW13 watched the video and saw A2 and A4. A4 is seen holding a fan belt. He also observed another person who was dressed in a blue coat. PW13 summoned A4 and questioned him regarding the fan belt and the fact that the deceased lay on the ground bearing marks as if he had been whipped by a belt or stick. A4's response was that he just picked the fan belt from the ground.

75. It was PW4's testimony that he began looking for the person captured in the video wearing a blue coat and whipping the deceased. He later discovered that he was a guard at Plot 5559, Magoye Road, Kalundu. He went to the said plot and met the landlady, Matildah Bwalya (PW3) who confirmed that her tenant had a guard. He interviewed the tenant who informed him that the guard was from JSPS Security company but had not yet reported for work at the time.
76. PW13 located the security company and was informed that the guard deployed at Plot 5559 was Johnson Musukuma (A3). A3 was arrested on Sunday when he reported for work. When shown the video, A3 accepted that it was him that was captured in it. He went on to state that he found the deceased unconscious.
77. On Monday 7<sup>th</sup> November 2022, PW13 attended the postmortem together with the scenes of crime officer and the deceased's relative, PW9. The Pathologist reported that death was caused by blunt force trauma inflicted by a blunt instrument in the assault.
78. After the postmortem, PW13 warned and cautioned the now accused persons who were already in custody. The four accused were charged with manslaughter because the deceased was assaulted to death and PW13 was not satisfied that he was assaulted by a mob. He said he did not find a mob at the scene and the scene was not in the compound where there are a lot of

- people. According to PW13, the deceased being able to jump over the wall fence meant that he was okay initially and was assaulted from within the premises where he was caught.
79. PW13 also tendered in evidence the JSPS uniform (ID1) and the post mortem report (ID8) and the exhibits were admitted marked P1 and P8 respectively . When referred to the phone (P5), PW13 told court that the video was in the camera folder and not WhatsApp. This means that the person who had the phone used the phone camera to take the video.
80. In *cross examination*, PW13 stated that he did not count the number of people present at the scene. He also stated that the video was recovered by the owner of the phone. He, however, had no evidence of the data recovery process. He attested that the video had been in his possession since recovery. He further maintained that what was in A4's hand as depicted in the video was a fan belt. A2 is seen holding a phone in the video and nothing else.
81. PW13 stated that he only got to the scene at about 07h20 and this was over an hour after the deceased was caught. He admitted that in that one hour, a number of people could have come and left the scene. He, however, maintained that he did not see a mob. He recalls that the witnesses he interviewed used the phrase "a group of people". He does not recall hearing "a lot of people." He admitted that a lot of people use Magoye street including maids and garden boys as they go for work.

82. PW13 confirmed that he had been at Ng'ombe police since 2019 but was not aware that the deceased found himself in a similar situation in September, 2021 where he was badly beaten. He did, however, hear that the deceased had caused problems for the community in the past but he never personally dealt with any of his issues.
83. PW13 confirmed that the security guard's facial features were not clear in the video. He denied the assertion that he recovered P1, the uniform, from plot 5559 but that he got it from A3's body.
84. As to whether the stick or fan belt were brought by the accused, PW13 stated that he could not rule out that possibility.
85. In *re-examination*, PW13 affirmed that a citizen has a duty to take someone who is dying either to the hospital or the police.

**Defence case**

86. **A1**, Chikondi Daka aged 31 years testified that on 4<sup>th</sup> November, 2022, he woke up around 04h30 hours as he had a trip. He then heard a loud noise which sounded like something had dropped and soon heard the dog barking aggressively. He quickly dressed up and went outside through the kitchen door. He saw the dog charging at the truck and then retreating because stones were being thrown at it. At this point, he proceeded with caution and checked behind the truck. He saw

someone trying to climb the fence and quickly grabbed the person and pulled him down.

87. It was A1's testimony that after a brief struggle, he managed to get hold of the intruder and begun shouting for help. His father (A4) soon arrived and A1 phoned A2 who also quickly came out. A4 then went back into the house as the bag that was attached to his catheter started accumulating blood.
88. According to A1, he noticed that people had started rushing through the gate which was supposed to be locked as the residents only start leaving for work between 05 and 06h00. When those people entered the yard, they charged at the intruder and he quickly stepped aside as he was afraid of being caught up in whatever they were planning to do to him. The people started taking turns to beat the intruder.
89. A1 also testified that while this was going on, he went into the house to continue preparing for his trip. When he went back outside after a few minutes, he observed that most of the crowd had dispersed. It was then that he and A2 decided to call the police as they were afraid of leaving the premises with many strangers on it.
90. After a good amount of time, two neighbourhood officers arrived from Ng'ombe Police Post. The neighbourhood officers recognized the intruder and called him Barry. He opened his eyes and rolled on the ground. The neighbourhood officers then

asked if anything had gone missing. They were shown the missing manhole covers as well as the vehicle with missing parts stolen the previous week.

91. At this point, A1 informed the neighbourhood officers that he had a trip to Mansa and had to leave. The neighbourhood officers asked for transport to take the intruder to the hospital because of the condition he was in. A1 gave A2 a K50.00 for a taxi and then left.
92. It was A1's further evidence that whilst he was in town, he received a call from his father informing him that the intruder had passed on and that he needed to go back home urgently. When he got home, his father advised him to head to Ng'ombe Police Post. Once at the police post, he was detained together with A2 and they were later transferred to Chelstone Police Station. Three or four days later, they were informed of the reason they were detained.
93. When *cross examined*, A1 confirmed that it was still dark around 04h30. He further confirmed that the yard has two houses, the main house where he lived and the other that was occupied by A2. To his knowledge, the gate was still locked when he woke up. He was not sure at what point the gate was opened and he did not know who opened it because he was holding the deceased at the time.

94. He explained that the rear fence had collapsed and the neighbour had no gate. As a result, he did not know where the people gained entry from. He added that the house is near Ng'ombe compound so a lot of people heading for work use the street where the house is. He, however, confirmed that the front fence facing the street was intact.
95. A1 was adamant that he did not beat up the deceased. When referred to the video evidence, he stated that there are people other than the ones he is charged with. A1 said he was unable to identify the people that came into the yard.
96. **A2**, Francis Kabubi Katembo aged 40 years testified that on the morning of 4<sup>th</sup> November, 2022, he received a phone call from A1, the son to his landlord, A4, informing him that he had apprehended a thief. According to A2, immediately he hang up, he called his neighbours to his left and right namely Mrs. Manda and Mrs. Bukolo who were both witnesses for the state.
97. It was his evidence that the previous night, he had attended a work function and arrived home late, between 22h50 and 23h00. He found the gate open and did not lock it as he thought A1 or someone else from the main house had stepped out.
98. Back to the morning of 4<sup>th</sup>, he testified that he took a bit of time finding his house keys and unlocking the door. By the time he went outside, about 10 minutes later, A1 was already with A4 and other people were flowing into the yard. According to A2, he

went back to his house to brush his teeth and collect his phone and then returned to the scene. He said he found a lot of people he did not know beating the suspect.

99. At some point, he discussed with A1 that the police had to be involved and consequently he proceeded to Ng'ombe Police. Two neighbourhood watch officers were assigned. Once at the scene, the officers noted that the deceased had been beaten and transport was needed to take him to the clinic. A1 then provided a K50.00 and A2 went out to look for a taxi but did not find one. He did, however, find a good Samaritan who was willing to help. Back at the scene, the neighbourhood watch officer informed him that the deceased was not looking good and they needed to go to the police station so that A2 could give a statement.
100. A police officer recorded A2's statement and A2 then returned home to prepare for work. He then heard a knock at his door and the police officer who accompanied him home asked him to accompany him back to the station. Once A1 joined him at the station, the two of them were detained. They were later transferred to Chelstone Police Station and learnt that the intruder had passed on. He said he denied the charge of manslaughter.
101. It was A2's evidence that he did not participate in beating or causing harm to the deceased. He had just heard from others that the deceased was a thief who had troubled the neighbourhood.

102. Under *cross examination* by Mr. Sokoni, A2 stated that his two neighbours that testified did not beat the deceased. He also stated that he did not see A1 beating the deceased.
103. When cross examined by Mr. Phiri, A2 clarified that some people entered the premises through the opening in the fence and others entered through the gate. He conceded that it was still dark around 04h40 hours but stated that there were people on the move. He denied the assertion that there was minimal traffic then as compared to 07h00 and maintained that the road is always busy.
104. Further in cross, A2 stated that he was desirous to help even though he went back into his house whilst the suspect was being beaten. He said he had to brush his teeth and lock the door. He explained that at the time he went to brush his teeth, he could not tell what condition the deceased was in as he was lying on the ground and there were a lot of people then. Some of those people came when they heard A1 shouting for help while others came because the neighbours he called in turn called them. A2 acknowledged that he did not hear A1 shout for help as he was asleep at the time and was only awakened by his phone call. He admitted that A4 is captured holding something that looked like a fan belt in the video.
105. In continued cross examination, A2 stated that he did not recognize A3 from the video and neither does he remember

seeing him at the scene. Therefore, he does not know what time he entered the premises.

106. In *re-examination*, A2 reiterated that there were a lot of people on the premises and that is why he felt the need to leave the scene and lock up.

107. **A3**, Johnson Musukuma aged 27 testified that on 4<sup>th</sup> November, 2022 he knocked off from his job as a security guard around 05h00 and went home. On 8<sup>th</sup> November, 2022, around 22h00, he was at his usual post in Kalundu when he was accosted by police officers. It was his evidence that he was not wearing his uniform on that day but had on plain clothes and his boots. He was taken to the cells at Ng'ombe Police Post. He was surprised to find three other guards from Kalundu in the cells.

108. On 9<sup>th</sup> November, 2022, during interviews, he informed Dt. Insp. Chikatula, PW13, that he did not hear any noise on 4<sup>th</sup> November. He was later transferred to Chelstone Police Station where he found his co-accused. Subsequently, he was charged with the subject offence which he denied. He explained that he was not informed about the video whilst at Chelstone Police and he only learnt about it in court.

109. According to A2, he is not the one in the video wearing the security guard's uniform and beating the deceased. The police mistakenly thought that it was him.

110. In *cross examination*, A3 confirmed that he used to work for JSPS Security Company. He admitted to being on duty in Kalundu along Magoye Road on 4<sup>th</sup> and 5<sup>th</sup> November. He confirmed that he was guarding the tenant in the smaller house. He stated that he did not know the landlord who lived in the main house.
111. In further cross examination, he confirmed that he heard the testimony of the neighbours and the police officers that he was the one captured in the video.
112. **A4**, Julius Patson Daka, aged 62 years told court that on 3<sup>rd</sup> November, 2022, he was taken to the hospital by his wife in order to change his catheter. On that day, he retired to bed early. Early the following morning, he heard the dog barking viciously and also heard the sound of something dropping. He got up but did not immediately go outside as he had to empty the urine bag. He then heard the grill door open as his son, A1, went outside.
113. When A4 finally went out, he found A1 dragging the now deceased from the truck area to a more illuminated place. At the time, A1 was shouting and calling A2. A2 subsequently emerged from the servant's quarters where he resided and according to A4, at this point, he developed pain in his bladder and decided to go back into the house to lie down. After a while, the noise outside got louder indicating that there were now more people. He has no idea how those people entered the premises.

He explained that part of his night routine was checking if the gate was locked. On the material day, however, he did not check due to ill health.

114. It was his evidence that when he went out, he saw a group of people on the left and another group of boys and women exiting the yard through the gate. He also noted the presence of the neighbourhood watch officers. He then told A2 that the intruder, who was then lying on the ground and not moving, needed to be taken to the police.

115. A4 testified that some women at the scene mentioned that they knew the deceased and told him to call his aunt. After some time, he went back in the house to lie down. He stayed inside until he was called back and informed by the good Samaritan who had come to pick up the intruder that the intruder had died. The good Samaritan left.

116. A4 further testified that he phoned A1 and asked him to return home because the man who was beaten had died. According to A4, a group of people beat up the deceased although he did not witness the beating.

117. When PW13 arrived at the scene, A4 tried to explain to him that a few things were missing but the officer would not have it saying they had a dead body on their hands. According to A4, he overheard PW13 telling the other police officers to leave him alone as he was weak and couldn't have beaten anyone.

118. On 7<sup>th</sup> November, the police returned to his house to ask a few more questions and told him to report to Ng'ombe Police Post the following day. When he got to the police station, he was shown a short video wherein he was holding a cable for an electric kettle. He emphasized that he never used it for anything. He told the police that he was just holding it. He was detained and charged with the subject offence which he denied.

119. In *cross examination*, A4 stated that he didn't initially suggest that the suspect be taken to the police because he was in pain and went back into the house to lie down. He narrated that when he went out the second time around, he saw someone in uniform moving around the deceased and he also saw a boy holding a stick. There were other people – men, women, boys and girls at the scene.

120. A4 further stated that he did not know if his co-accused participated in beating the deceased as he kept going back inside the house. He denied the assertion that the possibility was high that his co-accused beat him since they caught him trying to steal.

### **Submissions**

121. On behalf of A1 and A4, counsel highlighted the principle that the burden of proof in criminal matters lies throughout criminal proceedings on the prosecution and that proof is beyond reasonable doubt.

122. Counsel, relying on the learned author of the text Criminal Law in Zambia: Doctrine Theory and Practice, 2020, submitted that there are two types of manslaughter. The first category is voluntary manslaughter where an accused kills someone but is not guilty of murder because of provocation or diminished responsibility. The second category is involuntary manslaughter where the accused kills without the requisite elements for the offence of murder. It was submitted that the common law test for criminal liability was expressed in the latin maxim *actus non facit reum, nisi mens sit rea*. In other words, an act does not make a person guilty unless the mind be also guilty. The case of **Sweet v. Parsley**<sup>(1)</sup> was used to underscore this principle.
123. The learned author, Kulusiku, was also relied on in arguing the element of mens rea. It was submitted that an accused should be held criminally liable for events or consequences which he/she intended or knowingly risked.
124. Counsel highlighted the definition of intention by the learned authors of Clarkson and Keating Criminal Law (7<sup>th</sup> edition; 2010) who opine that an intention is called direct intent where it is the aim, purpose or objective of the accused to realise a particular consequence.
125. Counsel submitted that both elements of the offence have to be present for one to be found guilty. It was contended that the prosecution had failed to establish intent or mens rea on the

part of A1 and A4 to cause the death of the deceased. This is owing to the fact that there is no evidence to link the accused to the crime save that the deceased met his fate in their yard where he went to steal.

126. Counsel argued that the deceased was beaten in the night and there was no evidence on record indicating that the two accused persons were identified as having beaten the deceased person. To further buttress the argument, counsel emphasised that the police did not conduct any identification parade. To this end reliance was placed on the cases of **Ilunga Kabala & John Masefu v. The People**<sup>(2)</sup>, **Kateka v. The People**<sup>(3)</sup>.
127. In the former case the court emphasized that the sole object of an identification parade was to test the ability of an identifying witness to pick out a person he claims to have seen on a specified occasion. Further that those charged with the duty of conducting the identification parade must ensure that such parades are free from unfairness. The latter case highlights that where the accused is not previously known to the witness, it is important that the features or clothes by which the alleged culprit is identified should be canvassed for it to be reliable.
128. In addition, the case of **Ali & Another v. The People**<sup>(4)</sup> was referenced to underscore that although it is at the discretion of the court, court room identifications have little or no value particularly where there is no satisfactory explanation for failure to have an identification parade and where there is no other

evidence incriminating the accused. That in the circumstances, the identification of A1 and A4 which was not backed by law should be resolved in their favour.

129. The upshot of the submissions was that the state failed to tender into court evidence to secure the conviction of the accused persons.
130. Counsel for A2 and A3 also filed submission. He highlighted the elements of the offence of manslaughter as firstly the act of killing; secondly, that the act directly relates to the outcome of death; thirdly, harm and; lastly, that the accused did the act of killing.
131. He then contended that the prosecution does not have direct evidence of who beat the deceased except the video. It was argued that the video only depicts one person in a security uniform beating the deceased. A2 was standing observing and had nothing in his hand. A3 on his part denied being the person depicted in a uniform beating the deceased. The testimony of A1 and A2 exonerate A2. The evidence shows that A1 is the one who caught the deceased and called his father. Once A2 was informed, he took the initiative to go and call the police for help. Ultimately, there was no evidence to link A2 to the beating that led to the death of the deceased.
132. As for A3, it was submitted that there was no identification parade held to ascertain that the person seen wearing a uniform was indeed A3. The gist of the submissions on behalf of A2 and

A3 was that it was unsafe to convict them, consequently they should be found not guilty and be acquitted forthwith.

### **Decision**

133. Throughout the trial I have borne in mind and still remind myself that the burden of proving every element of the offence lies from the beginning to the end on the prosecution and that the accused has no onus to prove his innocence. Should I harbour any doubt as to the guilt of the accused, I am required by law to resolve that doubt in his favour and consequently acquit him. (see **Murono v. The People**<sup>(5)</sup>).

134. I have considered the evidence presented in this case as well as the submissions by counsel for which I am indebted. Indeed, it is trite law that the prosecution must prove the case against the accused beyond all reasonable doubt.

135. Section 199 which provides for the subject offence states as follows:

*Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed "man-slaughter". An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm.*

136. Thus, to prove manslaughter, the following ingredients have to be established:

- *That an unlawful act was committed;*
- *The unlawful act was intentionally or recklessly committed;*

- *That the unlawful act caused death;*
- *That the accused committed the unlawful act.*

137. I find the following facts not in dispute: the deceased entered A4's premises or yard illegally as a trespasser on 4<sup>th</sup> November, 2022; the deceased was apprehended by A1, A4's son; the deceased was assaulted whilst in A4's yard and suffered injuries to his person; he died within A4's yard on the very 4<sup>th</sup> November, 2022; A2, A4's tenant reported the matter to the police.

138. The learned authors of Halsbury's Laws of England 4<sup>th</sup> Edition, Volume 11 paragraph 444 discuss involuntary manslaughter as follows:

*Where death is caused by an unlawful act, the person doing that act is guilty of manslaughter only if any reasonable person would inevitably recognize that the act would expose the victim to the risk of at least some harm. Where the victim is killed by one or other of two different acts, each of which if it caused the death is sufficient to establish manslaughter, it is not necessary to prove which act caused the death.*

*Although it need not be proved that the accused himself intended, or even foresaw harm to another, the requirement of an unlawful act will ordinarily require proof that he had the requisite mens rea to render that act unlawful. Thus, where for example, the unlawful act alleged is assault, a verdict of manslaughter cannot be supported unless it is shown that the accused had the mens rea for an assault.*

139. As found, the deceased herein was assaulted on 4<sup>th</sup> November, 2022. The medical evidence in the form of a post-mortem report indicates several injuries including clusters of bruises, contusions, abrasions, burns on the feet and further

that the deceased bled in the muscles. This evidence corroborates the testimonies of prosecution witnesses such as PW2, PW7, PW9 and PW13 who all attested to seeing burn marks on the deceased's feet and marks all over his torso indicative of the fact that he was beaten.

140. Assault occasioning actual bodily harm is an offence contrary to section 248 of the Penal Code and is thus an unlawful act.

141. In the English case of **R v. Larkin**<sup>(6)</sup> Humfrey, J stated as follows:

*Where the act which a person is engaged in is unlawful, then if at the same time it is a dangerous act, that is, an act which is likely to injure another person, and quite inadvertently the doer of the act causes the death of that other person by the act, then he is guilty of manslaughter.*

142. Beating and inflicting burn wounds on a person is unlawful act as envisaged by section 248 of the Penal Code and also dangerous. In this instance, the harmful act resulted in death.

143. I will now deal with whether the harmful act or assault was committed recklessly or intentionally and whether it caused the death of the deceased simultaneously.

144. The evidence before court is clear that the deceased was a trespasser who entered the premises of A4 illegally and was a suspected thief. The reasonable action in such circumstances would be to restrain the trespasser and hand him over to the

police for prosecution. In this case, whoever assaulted the deceased went beyond restraining him.

145. The prosecution witnesses such as PW1, PW2, PW3 and PW5 testified that the deceased, before his demise, lay helplessly on the ground. This entails that all his strength was depleted. The assailants no doubt recognised that repeatedly beating and burning him was exposing him to the risk of serious harm. This leaves me with no doubt that the injuries on the deceased were inflicted recklessly and intentionally and this resulted in his death. The post mortem report is categorical that cause of death is blunt impact trauma to torso due to assault.

146. I have not lost sight of the guidance of the Supreme Court in a number of authorities regarding expert evidence. In the case of **Justine Soko v. The People**<sup>(7)</sup>, the Court reiterated its earlier position in the case of **Shawaza Fawaz & Prosper Chelelwa v. The People**<sup>(8)</sup> that a court should always bear in mind that the opinion of an expert is his opinion only. It is the duty of the court to come to its own conclusion based on the finding of the expert witness.

147. In the matter at hand, there is available the video evidence and testimonies of witnesses to the effect that the deceased was assaulted on that fateful day.

148. I note that the defence impugned the video evidence asserting that such evidence was capable of being distorted. However,

it is to be noted that A2 and A4, who do not deny being captured in the video, did not raise issue with any part of the video. Further, PW11 and PW13 testified to the effect that the video was not obtained from WhatsApp but from the camera folder itself which is indicative that the very phone (P5) captured the video. I am therefore satisfied that there is no distortion worth dwelling upon and I find that the integrity of the video evidence remained uncompromised.

149. In the result, the video evidence and testimonies on record have been confirmed by the findings of the Pathologist.

150. I am alive to the fact that the law allows a person to use reasonable force to defend their property. Section 17 of the Penal Code provides thus:

*Subject to any other provisions of this Code or any other 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.*

151. What can be gleaned from the above provision is that the force used in defence of one's property should not be out of proportion to the necessity of the situation.

152. As already established, the deceased entered the premises recklessly as a trespasser. The accused persons, the inhabitants of Plot 5556 Magoye Road, Kalundu, were

therefore within their rights to defend their property by use of reasonable force as defined by section 17 of the Penal Code.

153. I have already found, however, that the assailants herein went beyond what can be considered reasonable. The deceased suffered injuries all over his torso and limbs. The video evidence is insightful in that it shows a person beating the deceased who was clearly motionless and not a threat at the time of the assault.
154. I do not consider beating someone and burning them with plastics and other flammable materials until they are unconscious to be use of reasonable force. The injuries, at the very least were meant to cause grievous harm. As was stated in the case of **Mbuyu Kaito v. The people**<sup>(9)</sup> the evidence speaks to the proportion of force used being excessive and cannot be said to be reasonable.
155. The assailants went beyond defending person or property. They went beyond the act of restraining the trespasser in order to prevent him from fulfilling his illegal mission. The inevitable conclusion from the foregoing is that the assailants had the necessary mens rea for assault.
156. I now address the pertinent question of whether it is the accused that assaulted the deceased to death. In so doing, I am mindful that the evidence is mostly circumstantial. The Supreme Court in the case of **Nyambe v. The people**<sup>(10)</sup> reaffirmed its position on circumstantial evidence. This is to

the effect that as a trier of facts, I must satisfy myself that the evidence has taken the case out of the realm of conjecture so as to attain a degree of cogency.

157. To recapitulate on the defence, A1 testified that he was the first person to find the deceased and subdued him. He then called A2 for help. It was also his testimony that a mob entered the yard and beat up the deceased.
158. A2 on his part confirmed being called by A1. He also testified that a mob entered the yard while he was in his house brushing his teeth and beat up the deceased. The decision was then made to report the matter to the police and he filed a complaint at Ng'ombe Police Post.
159. A3 denied taking part in the assault and denied being the one captured in the video wearing a security guard's uniform. He, however, conceded in cross examination that he was guarding along Magoye Road at the material time.
160. The gist of A4's defence is that he was unwell and had been to the hospital the previous day. As a result, he was mostly inside his house resting as events unfolded outside.
161. I have carefully scrutinised the opposing evidence of the prosecution and defence. It is common cause that A1 was present at the scene and the first one to use force as he subdued the deceased. A4 testified that he saw A1 drag the

deceased from where he was found to a place with better lighting. This clearly amounted to an assault at law.

162. Apparently, A1 was present when the deceased was allegedly assaulted by a mob. Pertinently the evidence on record indicates that A1 only left the scene much later, that is, long after the arrival of CCPU officers (PW1 and PW2) who suggested that the deceased be taken to the hospital.
163. Similarly, A2 was present when the deceased was assaulted. He was the first person that A1 called. Whether A2 was complicit or participated in the assault is, however, unclear. In the video, he is captured holding only his phone and no witness testified to the effect that they saw him beat up the deceased.
164. Furthermore, A2 left the crime scene to report the matter to the police. Thus, the fatal blow to the deceased could have been inflicted whilst he was away. In other words, A2 cannot be held accountable for what transpired in his absence.
165. As for A3, although he endeavoured to disassociate himself from the offence, the evidence on record does not support his position. PW8 confirmed that A3 worked for JSPS security company and had the employment record (P2) to prove this fact. PW8 also confirmed that A3 was issued with the uniform for the company. A3 admitted in his defence that he was on duty on 3<sup>rd</sup> into 4<sup>th</sup> November at a house on Magoye Road in Kalundu. With these facts in mind, the possibility

that he was present at the scene on the material day, therefore, cannot be ruled out.

166. PW11 and PW12 both testified that they saw A3 beat the deceased at the scene. PW11 identified A3 as the person that used to guard at his house. PW11 lived at plot 5559, Magoye Road Kalundu with his grandmother PW3 at the material time. It was PW11's further evidence that A3 in fact prompted him and his grandmother to leave the scene because he said he wanted to urinate on the deceased. It is to be noted that this evidence was not in any way challenged.

167. Further, I have no qualms accepting that A3 uttered those words as I do not see any reason why PW11 would be motivated to tell a blatant lie against the accused. Besides, those are very specific words and could not have been randomly made up by the juvenile.

168. In any case, PW11's testimony was corroborated by the testimony of PW12 who also identified A3 as the security guard working at his grandmother's friend's place. The evidence on record has established that PW12's grandmother, PW5, is friends with PW3, the landlady at plot 5559 where A3 was deployed. There is no evidence on record to suggest that any other security guard from JSPS was deployed to plot 5559 Kalundu on the material day.

169. Furthermore, A3 was identified by PW11 as the person in the video seen whipping the deceased several times as he lay motionless.
170. In light of the direct evidence against A3, I have no difficulty concluding that he partook in inflicting the injuries suffered by the deceased. I find no merit in the submission that A3 was not identified at a parade not only because of the video evidence available but because two people that knew A3 all too well before the incident occurred identified him as the person that beat up the deceased in their presence.
171. As it concerns A4, the evidence is clear that he was present at the scene. Although A4 painted himself as a patient, he is plainly seen holding what appears to be a fan belt as A3 beat the deceased and he is also seen laughing. This is suggestive of the fact that he was not averse to what A3 was doing which was assaulting the deceased.
172. Indeed, A4's presence at the scene and the fact that he watched A3 assault the deceased is circumstantial evidence. However, the fact that he was captured holding a fan belt or a cord of some sort is a factor not to be overlooked.
173. I state so because the medical evidence clearly shows that the deceased had bruises on his torso and limbs and the injuries were described as having been inflicted by blunt force. The fan belt or cord that A4 had in his possession is capable of inflicting such injuries. Further, there is no reasonable

explanation as to why he was holding a fan belt or cord and laughing as the deceased was being whipped.

174. I am, therefore, satisfied from cumulative consideration of the evidence that A4 participated in assaulting the deceased.

175. I have not overlooked the defence that the deceased was beaten by a mob. It is noteworthy that the evidence of A1 was inconsistent as it pertains to how the said mob entered the yard. Initially he testified that the people entered through the gate which was not locked. Under cross examination, he stated that the fence at the back had collapsed and that may have been the access point.

176. I have carefully gone over the prosecution's evidence on this aspect. The CCPU officers, PW1 and PW2, testified that when they got to the scene, they only found the accused persons and a few neighbours. This evidence was corroborated by the said neighbours, PW3 and PW4, both of whom testified that they found the accused persons at the scene. These witnesses did not attest to the presence of a mob or a group of people they did not know.

177. PW12 testified that there were more than five but less than ten people at the scene. There are four accused persons in this matter. Three neighbours came and two of them came with a grandchild (PW11 and PW12). This essentially adds up to about ten people.

178. I might add that I found the evidence of the neighbours and their grandchildren to be credible. None of them appeared bent on seeing to it that the accused were convicted. They simply said it as it was. Interestingly, the accused persons did not implicate any of them in the assault.
179. Furthermore, there is no evidence that A4, at whose residence the assault took place, tried to contain the alleged mob. Assuming there was a mob, A4 could have demanded that the deceased be restrained and not beaten. Further, the mob being illegally on the premises, A4 had every right by law to demand that the mob leaves if he did not agree with its actions. The evidence, however, is devoid of any such efforts.
180. I must mention also that I find the evidence that the accused persons left the deceased alone with strangers in their yard very odd. A1 claimed that he went to get ready for his trip, A2 allegedly to brush his teeth and A4 to check on his catheter and lie down. Leaving the yard full of strangers to go and perform these acts, is in my view outlandish and I find it quite incredible.
181. In addition, a scene recently accosted by many people whose sole mission is to beat up a suspect will have tell-tale signs. As stated earlier, the injuries on the deceased show that blunt force was used and yet only 3 weapons or instruments were found on site (a stick, a fan belt or cord and wigs). I would have been swayed to believe that there was indeed a mob had

there been many stick or stones or indeed a considerable number of other instruments near the body.

182. Moreover, even the video evidence that was taken without the knowledge of the accused persons does not show the presence of a mob. It corroborates the testimony of the prosecution witnesses that the people present were the accused persons. Any other person in the picture can be identified by some of the witnesses who appeared before court and who were neighbours and knew one another.

183. Tersely put, I find the evidence regarding a mob to be an afterthought by the accused in the aftermath of the demise of the deceased. That being the case, I am satisfied that the deceased was assaulted by only a handful of people. I am without a doubt in my mind that A1 went to town on the deceased once he caught him and that is how come he sustained the injuries recorded. The same can be said about A3.

184. A4 on the other hand is pretty advanced in age so it is safe to conclude that not so much energy was exerted by him in the assault. He is however liable even if his own hidings were not fatal because they were accompanied by the hidings or blows of the other accused. Further, as found, he watched A3 assault the deceased with approval. There was absolutely no effort on his part to stop A3 and from his own evidence regarding the first time he went outside to investigate the

noise, he also made no effort to stop his son, A1, from assaulting the deceased.

185. Clearly, A4 is a principle offender within the meaning of section 21 of the Penal Code.

186. To summarise, I am satisfied based on the circumstantial as well as the direct evidence that A1, A3 and A4 assaulted the deceased. I am also satisfied that A1, A3 and A4 prosecuted a common purpose in the assault.

187. According to section 22 of the Penal Code:

*When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.*

188. In a case of manslaughter of **Mwaba & Others v The People**<sup>(11)</sup> the Supreme Court held that:

*i. Where joint adventurers attack the same person, then, unless one of them suddenly does something which is out of line with the common scheme, and to which alone the resulting death is attributable, they will be liable.*

*ii. Where the evidence shows that each person actively participated in an assault then they were all crimines participes. The fact that other persons may have also assaulted the deceased at one stage can make no difference where the nature of the assault was such that their cumulative effect overcame the deceased.*

189. In the case of **Mutambo & Others v. The People**<sup>(12)</sup> it was stated that:

*The formation of common purpose does not have to be by express agreement or otherwise premeditated; it is sufficient if two or more persons join in the prosecution of a purpose which is common to him and the others and each does so with the intention of participating in the prosecution with the others.*

190. In another case of **Haonga & Others v. The People**<sup>(13)</sup>, the Supreme Court held inter alia that “*if a death results from the kind of act which was part of the common design, then if the offence be murder in one then it is murder in all.*”

191. In the matter at hand, the assault by A1, A3 and A4 resulted in grievous harm and eventual death. As seen from the foregoing authorities, the fact that the three accused persons did not meet to agree on the action taken and that other persons may have assaulted the deceased at one point or another is immaterial. As was held in the Haonga case cited above “*if a death results from the kind of act which was part of the common design, then if the offence be murder in one then it is murder in all.*”

192. All in all, I find that the prosecution has proved all the elements of the offence of manslaughter in relation to A1, A3 and A4. As such, I find them GUILTY and I CONVICT them accordingly.

193. As regards A2, I find that he is the only one that displayed some level of human decency by reporting the matter to the

police. He cannot be held accountable for what transpired in his absence. As found, there is no proper evidence upon which I can determine that he participated in the assault. As stated earlier in the judgment, when in doubt, that doubt ought to be resolved in favour of the accused.

194. In the circumstances, I find him NOT GUILTY and I ACQUIT him and forthwith set him at liberty.

Delivered in open court this 15<sup>th</sup> day of April, 2024



*M.C. Mikalile*

**HIGH COURT JUDGE**