

BETWEEN:

THE PEOPLE

AND

NYAMBE MUSAKANYA

Before the Hon. Mr. Justice Dr. P. Matibini, SC, this 20th day of November, 2012.

For the People: Ms. F. Nyirenda, State Advocate, Director of Public Prosecutions chambers.

For the Defence: C. Chanda of Messrs Chanda Chizu and Associates.

JUDGMENT

Cases referred to:

1. *Fleet v Metropolitan Asylum District [1881] 6 A.C. 193.*
2. *Attorney General v Corporation of Nottingham [1904] Ch.D 673.*
3. *Woolmington v Director of Public Prosecutions [1935] A.C. 482.*
4. *The People v Sitali (1972) Z.R. 139.*
5. *Tembo v The People (1972) Z.R. 220.*
6. *Simutenda v The People (1975) Z.R. 294.*
7. *Haonga and Others v The People (1976) Z.R. 200.*
8. *Tabo v The People (1985) Z.R. 158.*
9. *Njunga and Others v The People (1988-1989) Z.R. 1.*
10. *Chola and Others v The People (1988-1989) Z.R. 163.*
11. *Kaunda v The People (1990-1992) Z.R. 215.*
12. *Mutale v Phiri (1995-1997) Z.R. 227.*
13. *Murono v The People (2004) Z.R. 207.*
14. *Njobvu v The People S.C.Z. Number 17 of 2011 (to be reported in the 2011 Zambia Law Reports).*

Legislation referred to:

1. *Penal Code, cap 87, ss 200 and 207(a).*

Works referred to:

1. Hodge M Malek, Phipson on Evidence, Seventeen, Edition (Thomson Reuters Legal Limited, 2010).
2. Steve Uglow, Evidence: Text and Materials, 2nd Edition (London Sweet and Maxwell 2006)

The accused; Nyambe Musakanya, stands charged with the murder of Harriet Mulungwe, on 17th May, 2010, contrary to section 200 of the Penal Code. I will continue to refer to her as the deceased. The prosecution called five witnesses to prove the commission of the offence.

The first witness was Memory Chibale, aged 27 years. I will continue to refer to her as PW1. PW1 testified that she lives in Kafue. And shared quarters with the accused, and the deceased. On the material day; 17th May, 2010, PW1 accompanied the deceased to the market, around 14:00hours. Whilst at the market, the deceased suggested to PW1 that they watch the television at a bar near the market. In the course of watching the television, the duo began to imbibe some beer. And only returned home around 22:00 hours.

When they returned home, the accused was in the house, and had locked them out. The duo knocked on the door. When the accused opened the door, he started shouting at the deceased; his wife. In the meanwhile, PW1 quickly retreated to her quarters. And the accused continued shouting at the deceased. In due course, the accused began beating and kicking the deceased repeatedly. As the beating continued, the deceased lay on the floor helplessly.

After the beating, PW1 testified that the deceased complained of stomach pains. And was bleeding from the nose. The deceased requested for some Panado from PW1 to ease the pain. At that juncture, the deceased had taken refuge in an adjacent unoccupied room, as the accused had ejected her from the main bedroom.

Later, the deceased started vomiting. And also continued to complain about stomach pains. PW1 returned to her quarters. And heard the deceased continue to complain about stomach pains. And also plead for help with the accused. The accused retorted that she should leave, and die elsewhere. Further, PW1 testified that the deceased requested for some salt from the accused. The accused replied that if the deceased dared enter the house, he would beat her again. The deceased continued lamenting about stomach pains.

The following day, around 06:00 hours, PW1 prepared some hot water to enable her massage the deceased. When the accused woke up, he informed the deceased and PW1, that he was going out for business. And would return home in two days time. The accused left home about 06:00 hours. The same morning, PW1 went to notify the deceased's cousin, popularly known as *Bana Flora* (Flora's mother), about what transpired. PW1 returned home with *Bana Flora*. When *Bana Flora* arrived, she massaged the deceased. In due course, PW1 sent her daughter to call deceased's younger sister, also popularly known as *Bana Shadreck* (Shadreck's mother). *Bana Shadreck* came home around 08:00 hours. *Bana Shadreck* continued massaging the deceased. And she also prepared some porridge for the deceased. However, the deceased refused to eat the porridge. And continued to lament about the stomach pains.

In the evening of the same day, *Bana Shadreck* decided to look for money to take the deceased to the Hospital. Thus, she went to see *Bana Chimunya* (the mother of Chimunya). When she returned home, PW1 found that her neighbour, *Bana Golden* (the mother of Golden) had booked a taxi. Eventually, PW1 took the deceased to Kafue District Hospital. When PW1 arrived at the hospital, the deceased was attended to by a doctor. The doctor advised that an x-ray should be carried out. After the x-ray, the deceased was given a blood transfusion. Thereafter, an ambulance was arranged to transfer her to the University Teaching Hospital (UTH). At UTH, the deceased was admitted to the general ward. And the doctors immediately administered two drips.

One for water, and the other for blood. The doctors also inserted some tubes both in the nose, as well as the private parts of the deceased.

In the small hours of 19th May, 2010, the deceased was taken for an operation. PW1 testified that although she was unaware of the nature of the operation, the operation was done on her abdomen. After the operation, the deceased was transferred to G.12. While in G12, the condition of the deceased deteriorated. And on 19th May, 2010, the deceased passed on at around 19:00hours. PW1 was at her bed side as she died. Eventually, the matter was reported to the police on 20th May, 2010.

The second prosecution witness was Matildah Mukongwe. And I will continue to refer to her as PW2. PW2 recalled that on 18th May, 2010, around 06:00 hours, she was awakened by the accused. The accused requested her to visit the deceased; her sister. PW2 was hesitant to do so. But later, a young girl came and informed her that the deceased had been severely beaten by the accused the previous night. PW2 then made up her mind to visit the deceased. When she arrived at deceased's home, she found her. And she complained to her that the accused had beaten her. At the time, she was still bleeding from her nose. PW2 got some water and started bathing the deceased. PW2 noticed that she had bruises on the right side of her abdomen. PW2 prepared some porridge for the deceased. However, she refused to eat it.

Around 15:00 hours, PW2 left the deceased in the company of PW1. And went to search for some money to take her to the hospital. PW2 did not come round to take the deceased to the Hospital. PW2 was informed the following morning that the deceased had been taken to Kafue District Hospital, and later transferred to UTH. When PW2 visited the deceased on 19th May, 2010, at around 21:00 hours, she was informed that the deceased had died. The following morning. PW 2 reported the matter to the police. PW2 recalled that she had previously seen the deceased on 17th May, 2010. And was then enjoying good health. But when she later met her the following day, on 18th May, 2010, the deceased was complaining and groaning about stomach pains. And was bleeding from the nose as a result of the beating she suffered at the hands of the accused.

The third prosecution witness was Enesi Lutulula. I will continue to refer to her as PW3. PW3 recalled that on 19th May, 2010, she was informed by PW2; her daughter, that the deceased was hospitalised following the beating she suffered at the hands of the accused. PW3 decided to travel to Lusaka to visit her daughter at UTH. PW3 arrived at UTH at around 21:00 hours. And was informed that the deceased had passed on the same evening around 19:00 hours. The following day; on 20th May, 2010, in the company of other relatives, PW3 reported the matter to the police.

The fourth prosecution witness was Dr. Dennis Musonda. I will continue to refer to him as PW4. PW4 has Bachelor of Science degrees in: biology and chemistry; human biology; surgery; and medicine. All these degrees were obtained from the University of Zambia. PW4 has also practiced medicine for a period of 14 years. And as a pathologist for 10 years. PW4 testified that he carried out a post mortem on the deceased. And the findings of the post mortem were reduced into a report. PW4 recalled that the deceased was a referral case from Kafue District Hospital. Her medical history revealed that she had been assaulted by her husband; the accused, the previous day. At the material time, the deceased complained about abdomen pains. The surgeons who attended to her on the material date observed that she had a distended or enlarged abdomen. And had multiple bruises on her body. The diagnosis of the surgeons was that the deceased had suffered an injury in the abdomen which required to be operated on.

After the operation, the surgeons observed the following: that there were two litres of blood stained fluid, together with faecal matter in the abdomen. In addition, two sides of the intestines were perforated. There was also a fibrous and membrane inflammation of the intestines. That is, the body was reacting to the contents that flowed from the bowels. The liver and spleen were normal. So were all other internal organs. The surgeons proceeded to mend the two perforated intestines. And to remove the blood stained fluid, and faecal matter. On completion of the operation, the abdomen was sealed.

Following the operation, the doctors commenced administering medication consisting of triple anti-biotics; *cystapens*; *gentamycin*; and *metropidazote*. The doctors also administered pain killers and injected the deceased with fluids. The deceased was thereafter monitored very closely. However, around 16:20, hours the deceased's condition deteriorated. Her temperature fell below the normal reading. And her blood pressure could not be read at all. At that juncture, a dire diagnosis was made; she had suffered from *scepticaemic shock*. And the deceased died the same day.

Six days later; on 24th May, 2010, PW4 conducted the post mortem. Externally, PW4 observed that the deceased was a young adult female, who was well nourished. And had suffered from central and referral *cyanosis*. That is, a condition of reduced amount of oxygen saturation of blood. PW4 also made the following observations: the deceased had a healing wound on the left side of the abdomen. She also had reparatory of a wound. (a wound arising from the operation conducted by the surgeons.) The wound measured 30cm, and carried 15 stitches. The soft tissue in the neck area and chest showed signs of bleeding.

During the post mortem, PW4 opened the whole body. PW4 observed that the brain, mouth, tongue, esophagus, and most of the organs of the chest were intact and healthy looking. In the abdomen area, PW4 noticed that the reaction to the injury had continued. There was pus overlying the intestine. The rest of the bowels both small and large, had clumped; a condition known as a "frozen abdomen." As a result of the operation, PW4 also noticed signs of repair of the small bowels. The liver, pancreas, and other organs of the abdomen were intact, and healthy looking.

Following, the post mortem, PW4 concluded that there were two causes of death. First, was the *scepticaemic shock*, or overwhelming infection. Second, was perforated bowels, or intestines. PW4 recalled that before the deceased died, the intestines were perforated. As a consequence of the perforation, bacteria leaked into the abdomen cavity, and caused the infection. PW4 also pointed out that when bacteria gains access to the circulatory system, it causes speticeamic, and expands the circulatory system,

resulting in reduced circulatory volume. Granted the medical history of the deceased, DW4 opined that the perforation was caused by the injury to the stomach. He also attributed the bleeding around the neck area to the assault.

The fifth prosecution witness was Detective Constable Fred Jimaima. I will continue to refer to him as PW5. PW5 recalls that on 24th May, 2010, he was assigned a docket to investigate a case of murder contrary to section 200 of the Penal Code. The docket, contained a statement by PW1, that on 17th May, 2010, around 22:00 hours, they returned home from the Market with the deceased. Upon reaching home, the deceased picked a quarrel with the accused. In due course, she was beaten by the accused. After the beating, the deceased complained of stomach pains and bled from the nose.

On 18th May, 2010, the deceased was taken to Kafue District Hospital. And shortly thereafter transferred to UTH. And on 19th May, 2010, she passed on. PW5 testified that on 24th May, 2010, he attended the post-mortem, which was conducted by PW4. During the post-mortem, PW5 observed that the deceased had reddish skin on the joint of the left hand.

Upon concluding the post-mortem, PW5 interviewed the accused. The accused denied having beaten his wife. The accused maintained that he simply pushed her. And in the process she fell down on the verandah. PW5 was not satisfied with the explanation offered by the accused. And therefore decided to charge him of the offence of murder. A warn and caution was administered. And the accused gave a free and voluntary reply, denying the charge.

At the close of the prosecution case, I formed the opinion that the prosecution had established a *prima facie* case. Accordingly, I put the accused on his defence.

However, the accused elected to remain silent, and not to offer any evidence. I must mention here that there is no obligation on an accused person to give evidence. And where an accused person elects not to give evidence, the Court should not speculate as

to possible explanations for the event in question. The Court's duty is to draw the proper inference from the evidence it has before it. (*See Simutenda v The People (1975) Z.R. 294 at page 297, per Baron D.C.J.*).

On 21st April, 2011, Ms Nyirenda filed into Court the prosecution's final submissions. In the submissions, Ms Nyirenda pointed out at the outset that in criminal matters the burden of proof lies on the prosecution to prove a criminal charge beyond reasonable doubt. After reciting the evidence of PW1 to PW5 referred to above, Ms Nyirenda submitted as follows: that in a case of murder, the prosecution has to prove that the accused murdered the deceased. And also that in doing so, had the intention to commit the murder. The intention can either be express, or imputed. Imputed intention can be inferred from the actions of the accused, and the type of injuries that are inflicted on the deceased.

Ms Nyirenda pointed out that malice aforethought; an essential ingredient of the offence is in terms of section 204 of the Penal Code, expressed in these words:

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

- a) An intention to cause 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 had committed or attempted to commit a felony."*

Ms Nyirenda argued that from the evidence of PW1, it is clear that the accused beat the deceased several times. And particularly kicked her in the abdomen area with his shoes. It was his actions that caused the grievous bodily harm to the deceased. And thereafter qualified as malice aforethought. Ms Nyirenda pressed that the accused should have known or actually knew the consequences of his actions. And thus did intend to cause grievous bodily harm to the deceased.

In the course of the submissions, Ms. Nyirenda drew my attention to the case of *The People v Sitali* (1972) Z.R. 139, where Muwo, J, observed at pages 147 – 148 as follows:

“The act was done with the knowledge that he would inflict grievous bodily harm, taking into account the manner in which he executed this assault upon this woman. I find that the prosecution has discharged its burden of proof to the hilt. There is nothing that would have persuaded me to find him guilty of manslaughter.”

Further, Ms Nyirenda argued that the severity of the assault can also be discerned from the evidence of the medical doctor; PW4, who testified that the deceased sustained several bruises on her body, and suffered a perforated bowel. In the circumstances, Ms Nyirenda reiterated that the accused formed the intention sufficient for him to be convicted of the offence of murder. In the end, Ms. Nyirenda argued that the prosecution has discharged its burden to prove that the accused caused the death of the deceased by committing an unlawful act with malice aforethought. And thus must be convicted of the subject offence.

On 26th April, 2011, Mr. Chanda filed into Court the final submissions on behalf of the accused. Mr. Chanda prefaced the submissions by stating that if there is one thing more than anything else that has been established in criminal law which requires no elaboration, is that for there to be a conviction on any offence, the prosecution always bears the onus to prove the guilt of an accused person throughout the trial. And that proof must be beyond all reasonable doubt. There is no onus whatsoever on the accused to prove his, or her innocence.

Mr. Chanda submitted that the preceding principle was enunciated in the celebrated case of *Woolmington v Director of Public Prosecutions* [1935] A.C. 462, at page 481. This fundamental principle, Mr. Chanda submitted, has in the Zambian context been affirmed by the Supreme Court in the case of *Murono v The People* (2004) Z.R. 2007, where it was held at page 210 as follows:

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

Mr. Chanda submitted that in this case, the prosecution was required to prove beyond reasonable doubt that the accused by an unlawful act or omission, and with intention to kill, did in fact kill the deceased. Mr. Chanda pointed out that where there is any lingering doubt of the guiltiness of the accused, that doubt must be resolved in favour of the accused.

Mr. Chanda argued that from the totality of the evidence, the only material witnesses are PW1 and PW4; the pathologist. In analysing PW1's testimony, Mr. Chanda was struck as to how detailed PW1 was about her testimony. Yet when the events were still very fresh in her mind; when giving her statement to the police, she did not disclose that she saw the accused kick the deceased. But rather, she was told by the deceased herself that the accused kicked her.

Mr. Chanda also argued that it is doubtful that PW1 saw the accused kick the deceased because it was dark in the living room. Even assuming that there was sufficient light in the living room from the neighbour's premises to enable PW1 witness the accused kick the deceased in the abdomen; then they would have been no need for PW1 to ask the accused to give her the light. It was only after she had been given the light that she saw the deceased bleeding. Thus Mr. Chanda maintained that PW1 did not see the accused kick the deceased in the abdomen because it was dark.

Mr. Chanda pointed out that when PW1 was pressed in cross-examination on the prior statement she gave to the police regarding the accused kicking the deceased, and contrasted that statement with what she testified in Court, PW1's explanation was that although she signed the statement, it was never read back to her by PW5; the arresting officer. Mr. Chanda argued that this explanation cannot be accepted because she did not demonstrate the motive of PW5 in not reading the statement back to her. Mr. Chanda argued that in fact PW5, both in cross-examination, and re-examination maintained that after taking the statement from PW1, PW5 read back the statement before she signed it. Mr. Chanda submitted that this was clearly a lie. And was intended not only to misled the Court, but also to demonstrate that this witness was not being truthful.

Furthermore, Mr. Chanda, argued that PW1 in her statement to the police, concealed the fact that the deceased and herself had been drinking beer. Mr. Chanda submitted that PW1's testimony on this material fact to the charge was a concocted version of the events to suit and serve her personal interests, since she was the last person who had stayed with the deceased before the incident happened.

Mr. Chanda argued that given the peculiar circumstances, and the friendship PW1 enjoyed with the deceased, it was not safe to convict the accused on the basis of her testimony. Her evidence needed to be corroborated with another independent witness. In advancing this submission, Mr. Chanda drew my attention to the case of *Chola and Others, v The People (1988-1989) Z.R. 163*, in which the Supreme Court made the following observation at page 166:

"In the case where the witnesses are not necessarily accomplices, the critical consideration is not whether the witnesses did in fact have an interest or purpose of their own to serve, but whether they were witnesses who because of the category into which they fell or because of the particular circumstances of the case, they may have had a motive to give false evidence. Where it is reasonable to recognise this possibility, the danger of false implication is present and it must be excluded before a conviction can be held to be safe."

Mr. Chanda also drew my attention to the case of *Kaunda v The People (1990-1992) Z.R. 215*, where the Supreme Court held at page 224 that:

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

In view of the foregoing, Mr. Chanda argued that there is a real likelihood of PW1 falsely implicating the accused of having kicked the deceased, when she did not witness that fact. And yet her statement to the police which she gave freely and voluntarily indicated that it was the deceased who told her that she was kicked by the accused. In light of the counsel from the *Chola* (supra) and *Kaunda* (supra) cases, Mr. Chanda submitted that the testimony of PW2 equally falls within that category of tainted evidence which is not safe to rely on. Mr. Chanda also pointed out that PW2, who is not a medical or

health practitioner does not qualify to attest to the health condition of the deceased whom she saw before the alleged beating.

As regards PW4, Mr. Chanda observed that his findings were recorded in the post-mortem report which was admitted in evidence as P1. In this report, Mr. Chanda noted, is a summary of the medical history of the deceased, and the treatment she received until the time of her death. PW4 also recorded his findings after conducting the examination of the body; both externally and internally. Mr. Chanda submitted that the length and breadth's of PW4 evidence is that the deceased complained of abdominal pains, and disclosed a history of an assault. When the operation was done, Mr. Chanda submitted, the surgeons discovered two perforation of the small intestines, while the other organs of the chest were intact. Mr. Chanda noted that according to the findings of PW4, the cause of death was *septicaemic* shock, which was due to the perforated bowels, and also cardiac arrest. PW4 Mr. Chanda noted, defined *septicaemic* shock as an overwhelming infection in the blood. PW4, also suspected that the assault as presented in the medical history of the deceased could have caused the bowels to perforate. And that the abdominal trauma in turn caused the perforation. Mr. Chanda submitted that under the pain of cross-examination, PW4 became evasive when answering certain simple and straight forward questions.

In analysing the evidence of PW4, Mr. Chanda focused on the opinion of PW4, that the death of the deceased was due to *septicaemic* shock, owing to perforated bowels. Mr. Chanda observed that during cross-examination, PW4 conceded that *septicaemic* shock was treatable. However, Mr. Chanda noted that PW4 opined that such treatment was rarely carried out because it took time to diagnose the condition. And is, in any event, preceded by several tests. Mr. Chanda argued that with the greatest respect to PW4, his opinion was questionable because in this case, the surgeons were able to diagnose *septicaemic* shock immediately the symptoms presented themselves. And PW4 was also during the post-mortem able to form the opinion that the cause of death was *septicaemic* shock without conducting a battery of tests as earlier on claimed by PW4.

Mr. Chanda also pointed out the following : that PW4 when cross-examined on what caused the perforation of the bowels, he insisted that it was the trauma or blow to the stomach. However, he conceded that it was not easy to cause a perforation by a blunt trauma. Further, PW4 admitted that it required a severe blow to cause perforation. But was not able to state the magnitude of the impact that was inflicted on the deceased for him to state categorically that in this case, the perforation was caused by a blunt trauma.

Mr. Chanda pressed that PW4's opinion that the blunt trauma caused the perforation is highly doubtful, because it cannot be suggested that once a blunt trauma is inflicted with such severe impact, it can cause perforation. Mr. Chanda argued that logically speaking, a blunt trauma, as opposed to a sharp trauma, can only cause a laceration. Further, Mr. Chanda opined that even assuming that the accused kicked the deceased in the abdomen, it is doubtful that the kicks could have caused the bowels to perforate. The least that was expected was for the bowels to lacerate or rupture as opposed to perforate. The perforation, Mr. Chanda submitted, implies that the bowels were punctured. And could only have been punctured by a sharp trauma.

Mr. Chanda also argued that if the trauma was the cause of the death, the spleen, the liver, the kidneys, and the pancreas would also have been affected. However, according to the surgeons who operated on the deceased, these organs were found to be normal and healthy. Similarly, during post-mortem PW4 also found these organs to be normal and healthy. Mr. Chanda maintained that it is incredible that these findings could be consistent with a blunt trauma. And it is a wonder, Mr. Chanda submitted, that such an impact could have been so selective that it by passed all these organs, and only perforated the intestines. In view of the foregoing, Mr. Chanda opined that the perforation was not caused by the trauma. Mr. Chanda suggested that the perforation was caused internally.

Mr. Chanda also submitted that when PW4 was asked in cross-examination whether the perforation could have been caused by other factors other than the trauma, he replied

there were none. However, when PW4 was reminded that the perforation could be caused by typhoid; which is an infection of the stomach, and also causes stomach pains, PW4 conceded that typhoid also causes perforation of the bowels. In light of the foregoing, Mr. Chanda submitted that it is possible that the deceased could have suffered from typhoid, which also causes the perforation of bowels. Mr. Chanda argued that he was fortified in making this suggestion, because the deceased not only complained of stomach pains, but more importantly, all the other organs, the spleen; liver; kidneys; and the pancreas, were intact, normal, and healthy.

Further, Mr. Chanda submitted that the suggestion that the deceased may have suffered from typhoid is fortified by the presence of pus which PW4 detected, and admitted that it signified an infection. Mr. Chanda opined that the infection could have been caused by the typhoid. In this regard, Mr. Chanda urged me to take judicial notice of the fact that surgeons use sterilized instruments in order to avoid infections during the course of the operations. Therefore, Mr. Chanda suggested that the presence of pus confirms that the infection of the bowels took place long before the alleged assault, and the operation. Mr. Chanda contends that the medical history of the deceased, and the reference to the assault in particular, may have prejudiced the diagnosis, and the findings by PW4. Mr. Chanda was inclined to make this assumption, because PW4 constantly referred to the medical history of the deceased to support his opinion. Mr. Chanda reiterated, and pressed that it is highly probable that the deceased may have suffered from typhoid which was not diagnosed.

Mr. Chanda also observed that PW4's diagnosis that a cardiac arrest may have been a secondary course of death, relied on the swelling of the diaphragm, and on how the intestines may have adversely affected the breathing. But with the greatest respect to PW4's opinion, Mr. Chanda contends that there is no evidence to show that the deceased had difficulties in breathing; a situation if it had arisen, would have been remedied by supplying the deceased with oxygen. Mr. Chanda further observed that PW4 indicated that *septicaemic* shock is evidence of overwhelming infection in the blood stream. And as conceded in cross-examination, PW4 explained that in this case

there was a reduced supply of oxygen to the brain. And hence the cardiac arrest. Mr. Chanda submitted that from a lay point of view, all deaths regardless of their cause are connected in some way with the heart failing to pump blood. Lastly, Mr. Chanda submitted that the suggestion during cross-examination by PW4 that the death of the deceased may have been due to typhoid, or the presence of pus as a result of an infection, and not blunt trauma, was not seriously challenged or explained during re-examination.

After analysing the evidence of PW4, Mr. Chanda proceeded to consider the law relating to murder. Mr. Chanda submitted that the issue that exercises the minds of the Courts in cases of murder, and attempted murder is proof of the intention of the accused to kill. Mr. Chanda submitted that in this case none of the prosecution witnesses testified that the accused had the intention to kill the deceased. In fact, Mr. Chanda argued that the prosecution in their final submissions relied on section 204 of the Penal Code to suggest that the accused had the requisite malice aforethought to sustain the charge of murder by focusing on the character of the injuries sustained. In this regard, Mr. Chanda noted that the prosecution drew my attention to the case of *the People v Sitali (1972) Z.R. 139*, where Muwo J, observed at pages 147-148 that:

“The act was done with the knowledge that he would inflict grievous bodily harm taking into account the manner in which he executed his assault upon this woman. I find that the prosecution discharged its burden of proof to the hilt...”

Mr. Chanda noted that in the *Sitali* case (supra) the prosecution sought to prove malice aforethought on the basis of the alleged beating. Mr. Chanda posited that the cardinal question in this case is whether or not the accused intended to kill the deceased. The answer to this question, Mr. Chanda submitted, is in the negative. Mr. Chanda argued that the accused cannot be said to have intended to cause grievous bodily harm when he never used any weapon to execute such intention.

In summary, Mr. Chanda submitted that the evidence on record shows that there is possibility that the perforation of the bowels could have been caused by typhoid; granted the presence of pus, and the fact that the other internal organs were intact and

healthy. The existence of this possibility, Mr. Chanda argued, demonstrates that the prosecution has not discharged its burden of proving the guilt of the accused beyond reasonable doubt. In view of the lingering doubt, Mr. Chanda submitted that the doubt must be resolved in favour of the accused. In aid of this submission, Mr. Chanda relied on the case of *Mutale v Phiri (1995-1997) Z.R. 227*, where it was held that: where there are lingering doubts, the Court is required to resolve such doubts in favour of the accused.

I am indebted to counsel for the spirited arguments and well researched submissions. It is trite that in criminal matters the burden of proof lies on the prosecution to prove a charge beyond reasonable doubt. In the case of murder, the prosecution has to prove that the accused murdered the deceased, and did so with malice aforethought. If upon the whole of the evidence the Court is not satisfied that the guilt of the accused has been proved to the requisite standard, then an accused is entitled to an acquittal.

Section 204 of the Penal Code defines “malice aforethought” in the following terms:

“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 death 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 or a 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.*

In this case a key witness was PW1, a friend and neighbor to the deceased. Generally, Mr Chanda, counsel for the accused, has impeached the truthfulness of the testimony of PW1. I will in due course deal with the arguments and submission relating to the

testimony of PW1. At this juncture I will proceed to outline the approach adopted by Courts when considering the evidence of a witness.

When considering the evidence of a witness, who is proved to have lied in material respects, it is essential to bear in mind that unless the untruthful portions of the evidence go to the root of the whole story to such an extent that the remainder cannot stand alone, such remainder is entitled due consideration. It must however be noted that the weight of the remainder is of course affected by the fact that the witness has been shown to be capable of untruthfulness. But the remainder must still be considered to see whether it might reasonably be true. It cannot be rejected out of hand. (See *Tembo v The People (1972) Z.R. 220 at page 226, per Baron J.P.*) I must however hasten to add that where the remainder of the evidence is able to stand alone, there must be very good reason for accepting the evidence of such a witness. (See *Haonga and Others v The People (1976) Z.R. 200 at page 205, per Baron D.C.J.*)

In this case, I have also been urged by Mr Chanda to treat the evidence of PW 1 with caution because she may have some interest to serve. In this respect it is instructive to recall the counsel of Ngulube D.C.J in the case of *Chola and Others v The People (1988-1989) Z.R.163, at page 166*, that the critical consideration is not whether the witnesses did in fact have interest or purposes of their own to serve. But whether they were witnesses who because of the category into which they fell, or because of the particular circumstances of the case, may have had a motive to give false evidence. Ngulube, D.C.J., went on to counsel that where it is reasonable to recognise this possibility, the danger of false implication is present, and it must be excluded before a conviction can be held to be safe. In other words, once this is a reasonable possibility, their evidence falls to be approached as of accomplices. In view of the foregoing, I warn myself in this case against the danger of false implication of the accused.

Mr Chanda submitted that on the facts of this case, the only material and key witnesses are PW1 and PW4; the deceased friend and pathologist respectively. Mr Chanda impeached the testimony of PW1 on the following grounds: First, when given an

opportunity to give statement, she did not disclose to the police that she saw the accused kick the deceased. Second, that it is doubtful that PW1 saw the accused kick the deceased because it was dark. Third, that PW1 concealed to the police the fact that she had been drinking beer with the deceased because she had a personal interest to serve. Lastly, that given the peculiar circumstances and friendship PW1 enjoyed with the deceased, it was not safe to convict the accused on the basis of the testimony of PW1.

I believe the testimony of PW1 that she saw the accused beat the deceased because, first, the scuffle began in the verandah where PW1 was present. Second, PW1 was able to see the accused beat the deceased because there was some light from the neighbour's premises.

Mr Chanda equally impeached the testimony of PW4 on the following grounds. First, that PW4 opined that the death of PW4 was due to *septicaemic* shock, owing to perforated bowels. Yet during cross-examination, PW4 conceded that it was not easy to cause a perforation by a blunt trauma – it required a severe blow to cause a perforation. Second, even assuming that the accused kicked the deceased in the abdomen, it is doubtful that the kicks could have caused the bowels to perforate. The least that was expected, he submitted, was for the bowels to lacerate or rupture, as opposed to perforate. Because perforation implies that bowels were punctured. Third, if the trauma was the cause of the death, the spleen, liver, kidneys; and the pancreas would also have been affected. However, during the post mortem, these organs were found to be normal and healthy. Thus it was incredible that these findings could be consistent with a blunt trauma.

Fourth, during cross-examination, PW4 conceded that the perforation could have been caused by typhoid; which is an infection of the stomach, and also causes stomach pains. Thus Mr Chanda maintained that it was possible that the deceased could have suffered from typhoid, which also causes the perforation of bowels. In addition, he argued that the suggestion that the deceased may have suffered from typhoid was

reinforced or fortified by the presence of pus which PW4 detected, and admitted that it signified an infection. And the presence of pus also suggested that the infection of the bowels took place long before the alleged assault and the operation. At any rate, I was urged to take judicial notice of the fact that surgeons use sterilised instruments in order to avoid infections during the course of the operations. Lastly, it was noted that PW4 diagnosed that a cardiac arrest may have been a secondary cause of death because of the swelling of the diaphragm. And the intestines may have adversely affected the breathing. Yet there was no evidence to show that the deceased had difficulties in breathing; a situation it had arisen would have been remedied by supplying the deceased with oxygen.

It is quite clear from the preceding submissions that the resolution of this matter to a large extent depends on opinion evidence of PW4. It is therefore necessary to devote sometime to consideration of the subject of opinion evidence. According to Steve Uglow, Evidence: Text and Materials, 2nd Edition, (London, Sweet and Maxwell, 2006), at page 675, witnesses are expected to give evidence of what they have seen, heard, smelt, felt or touched; direct evidence of their own perceptions. The learned author goes on to observe still at page 675, that the inferences or conclusions that witnesses draw from those perceptions are not their perceptions, but their opinions or beliefs. These are not admissible to prove the truth of what is believed or inferred.

Hodge M Malek, in Phipson on Evidence, Seventeen Edition, (Thomson Reuters (Legal) Limited, 2010), explains the exclusionary rule, in paragraph 33-01, at page 1070, in these words:

“The opinions, inferences or beliefs of individuals (whether ingresses or not), are inadmissible in proof of material facts. Evidence of this nature is sometimes said to be excluded by the hearsay rule; but it, in general inadmissible whether delivered on oath or not.”

The learned author goes on to state in paragraph 33-01 at page 10-70 that:

“The grounds commonly assigned for the rejection of the opinion evidence are that the opinions in so far as they may be founded on no evidence or inadmissible evidence are

worthless, and in far as they may be founded on admissible evidence tend to usurp the functions of the tribunal whose province alone is to draw conclusions of law and fact.”

The learned author of Evidence: Text and Materials, (supra) explains the rationale for the exclusionary rule in the following terms at page 675:

1. Lack of probative weight.

Opinions are seen as having little probative weight. A bare opinion by itself has little if any probative weight. But an opinion can acquire weight. First, a witness may base an opinion on knowledge and such a witness may be able to testify to those facts on which the opinion is based. Second, the very status of the witness may cause the Court give greater credence to an opinion – but it is only the status as an expert that will allow that opinion to be heard in Court. Third, the opinion may be commonly held by a number of people.

2. Usurping the function of the finder of fact.

A further reason for excluding a witnesses opinion is that such testimony usurps the function of the finder of fact whose task is to draw the necessary inferences from the evidence. The trier of fact is free to reject an opinion. The policy behind the rule is to ensure that the trier of fact is not deduced into an easy acceptance of a convincingly presented opinion.

3. The risk of inadmissible evidence.

A third reason for exclusion is that a witnesses' opinion can often be based on evidence which if stated expressly would be inadmissible for one reasons or another.

The learned of author of Evidence: Text and Materials (supra), concludes at page 680, that the key exception to the rule excluding opinion evidence is that regarding expert witnesses where an issue in front of the Court calls for special skill or knowledge which a judge does not posses, an expert witness will be allowed to present technical information and express an opinion on its significance.

To illustrate the point made by the learned authors of Phipson on Evidence (supra), and Evidence: Text and Materials (supra), above, in the Zambian context, I will advert to the case of *Mwelwa v The People* (1975) Z.R. 166; a decision of the Supreme Court. The facts of the case were that the appellant a driver of a truck, was convicted in the High Court of causing death by dangerous driving. During the journey giving rise to the case, and eventual conviction, the appellant stopped at a bar to imbibe some beer. He thereafter continued with the journey. And at a bend, the truck veered off the road, and after travelling a further 292 feet; including crossing a side road, overturned. One of the passengers died as a result of the injury received in the accident. The trial judge found that:

- (1) the appellant was driving too fast to control his vehicle;
- (2) he had taken more beer than he should have done and was not sober as he should have been; and
- (3) that he disregarded a road warning sign.

On appeal, counsel for the appellant advanced two grounds of appeal. First, that the witness who gave evidence as to the amount of alcohol did not accompany the appellant to the bar, and the therefore were giving opinion evidence as to his sobriety. Second, that the witnesses were equally giving opinion evidence as to speed. In respect of both aspects, counsel submitted that first, the evidence in question being opinion evidence was not admissible and should not have been relied upon. Second, that the accident may have happened as a result of some mechanical defect, or because of a skid.

In delivering the judgment on behalf of the Supreme Court, Baron D,C.J, observed at page 169, that it is quite clear that witnesses who do not qualify as experts should not be permitted to give their opinion on the very issues which the Court is called upon to decide; but in order to arrive at its decision, the Court is entitled to rely on factual evidence, by non – expert witnesses. Thus an expert must help the Court to achieve

the overriding objective of giving unbiased opinion on matters within his expertise. In essence, an expert is a servant of the Court.

In another case of *Attorney General v Corporation of Nottingham [1904] Ch.D 673*, Farewell, J, in dealing with a case where the medical profession was divided into two camps on a scientific question, adopted the statement by Bowen, L.J., in *Fleet v Metropolitan Asylum District [1881] 6 A.C. 193* as follows:

“It would be most dangerous to form an independent opinion on a scientific question from the smattering of science that might be picked up during a hearing of a case.”

In this particular case there are insufficient facts and reasoning given by PW4 to enable me to base or refute the inferences and conclusions that Mr Chanda has suggested in *extensio*. And conversely, it would not be prudent for me to form an independent opinion on complex medical subjects, on the basis of submissions by counsel. Rather than proffer the various opinions in the submissions on complex medical subjects, Mr Chanda should have in my considered opinion summoned competing medical testimony to buttress his submissions, as well as to provide me factual material on which I could base an independent opinion. In a word, I do not accept the suggestions put forward by Mr Chanda as to the cause of death of the deceased.

In my opinion, the death of the deceased followed the assault inflicted by the accused. And in this regard it is instructive to note that in terms of section 207(a) of the Penal Code, a person is deemed to have caused the death of another person although his act is not the immediate and sole cause of the death, if he inflicts bodily injury on another person in consequence of which that person undergoes surgical or medical treatment which causes death. In such a case it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith and with common knowledge and skill; but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith or was so employed without common knowledge or skill.

In this case, there is no suggestion or allegation that the death of the deceased was caused by treatment which was not employed in good faith or was employed without common knowledge or skill.

Further, it is equally instructive to refer to the case of *Njunga and Others v The People (1988-1989) Z.R. 1*. In the *Njunga* case (supra) the Supreme Court laid down at page 3 that where there is evidence of assault followed by death without the opportunity for a *novus actus intervenies*, a Court is entitled to accept such evidence as an indication that the assault caused the death. This principle was recently affirmed by the Supreme Court in *Njobvu v The People S.C.Z Judgment Number 17 of 2011*.

In this case it is also self-evident that the prosecution relied on section 204(b) of the Penal Code to press for the conviction – section 204(b) enacts that:

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

- (a) [Not relevant]*
- (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) [Not relevant]*
- (d) [Not relevant]*

In addition to section 204 (b) of the Penal Code, the prosecution also relied quite heavily on the case of *The People v Sitali* (supra), where Muwo, J, observed at page 147 that:

“The act was done with the knowledge that he would inflict grievous bodily harm taking into account the manner in which he executed this assault upon this woman. I find that the prosecution has discharged its burden of proof to the hilt. There is nothing that would have persuaded me to find him guilty of manslaughter. I convict him under section 177 of the Penal Code. As this is a capital offence of death, to hang by the neck until he is dead, accordingly passed.”

In considering the *Sitali* case (supra), it is instructive to note also the observation of Muwo, J, at page 147 as follows:

“In this case I find that the accused did not only kick the deceased in the face with a booted foot, causing her to fall to the ground, he severely applied greater force with a kick to the head of the deceased. He proceeded on ferociously and violently and struck her with the stick and brick exhibited in Court. In doing so, the accused should have realised that his act would probably cause the death or a grievous harm to the deceased, though he may not have had intention to cause the death of or to do grievous harm to her.”

Clearly, in the *Sitali* case (supra), not only did the accused kick the deceased with a booted foot, but proceeded on ferociously and violently to strike the deceased with a stick and a brick. To this end, the extent and nature of violence inflicted on the deceased in the *Sitali* case (supra) by the accused is in my opinion clearly distinguishable from the present case.

On the facts of this case, I am however satisfied that the death of the deceased followed the assault inflicted by the accused. I am also satisfied that on the facts of this case malice aforethought has not been proved. Accordingly, I find that the accused is guilty of the offence of manslaughter, contrary to section 199 of the Penal Code. And I accordingly convict him.

**DR P MATIBINI, SC.
HIGH COURT JUDGE**