THE STATE

versus

CLEVER MUDZENGERE

and

TRYMORE MUDZENGERE

and

FREDDY GIREYA

HIGH COURT OF ZIMBABWE

MUTEVEDZI J

HARARE, 28 September 2023 & 7 February 2024

Assessors: Mr Mhandu

Mr Shenje

Criminal Trial

V Ngoma, for the State

E Chimombe, for the 1st accused

Z Majena, for the 2nd accused

R Makumbe, for the 3rd accused

MUTEVEDZI J: Sibling tag teams are celebrated in sports like tennis, wrestling and football. Unfortunately they are also notorious in criminal enterprises. They become worse when brothers are alleged to have teamed up to cause the death of another person. That humans are mortal beings is unarguable but at times the way death comes about is unconscionable. The deceased in this case was celebrating Boxing Day in 2022 oblivious that it was the last he would enjoy. Prosecution alleges that he was attacked by the three accused persons Clever Mudzengerere, his sibling Trymore and their friend called Freddy Gireya. The reason why they attacked him remains abstruse but it appears they accused him of having stolen a cellphone. After the deceased's demise, the three were arrested and subsequently arraigned before this court accused of his murder. The formal charge was that on 26 December 2022 at Chikwizo Business Centre in Mudzi, the three accused, all or each of them unlawfully and with intent to kill or realising that there was a real risk or possibility that death may ensue but persisting with their conduct despite the realisation of the risk or possibility struck the deceased on the head with an empty beer bottle and stepped on him with

booted feet on the head and chest. The deceased who was mortally wounded died from his injuries a few hours later.

The background to the charge is that on the fateful day, the deceased left Zvipedzei Makina bottle store intending to go home. He met the first accused Clever Mudzengerere (Clever) who confronted him and struck him with an empty black label beer bottle. The deceased collapsed. The second accused Trymore Mudzengerere (Trymore) and the third accused Freddy Gireya (Freddy) joined in the assault by kicking and stomping the deceased viciously. They all took turns to repeatedly step on the deceased's neck and chest whilst he lay unconscious.

All the three accused denied the charge and pleaded not guilty. The first accused's defence was that on the day in question he had left home with accused 2, accused 3, Persuade Chimanga and Aleck Tomasi. They proceeded to Chimonyo shopping centre where they drank beer. Later during the day, he said he decided to go to Chikwizo business centre. He proceeded there with Aleck Tomasi and Persuade Chimanga. They left accused 2 and 3 at Chimonyo shops. The first accused further narrated that at Chikwizo his drinking spot was Tickson bottle store. Whilst he was enjoying his beer therein, the deceased, who was unknown to him approached where he was seated and took his phone which was beside him. A scuffle ensued with accused 1 battling to repossess his phone. The deceased, phone still in his custody then bolted out of the bottle store. The first accused followed in hot pursuit. He shouted that the deceased was a thief. There were many people at the shopping centre. A mob promptly gathered and cornered the deceased. The first accused caught up with the 'thief.' He managed to snatch his phone back from the deceased and moved out of the crowd. Unfortunately, the mob manhandled the deceased and continued to assault him. There were many people but amongst them he particularly noticed Persuade Chimanga and Aleck Tomasi assaulting the deceased by stepping on his neck and chest. The deceased vomited. The crowd then dispersed. It was at that moment that Biggie Kakondowe and Taurai Foroma arrived and assisted the deceased. The first accused said he went home soon thereafter. The next day he went back to the shops and heard that the person who had stolen his cellphone the previous day had died from the assault by the mob. He was surprised when in the middle of January accused 2, 3 and him were arrested on allegations of murdering the deceased. They were taken to the police station where they met Persuade and Aleck who had also been arrested for

the same crime. The two are now witnesses for the prosecution. In police custody, he said they were all heavily assaulted and forced to sign warned and cautioned statements. They were later taken to court. He denied ever assaulting the deceased and thus denied causing the deceased's death in any way.

The second accused Trymore completely denied participating in the assault in any way. He alleged that he was not at Chikwizo business centre when the fracas took place and the deceased was assaulted and later died because when first accused and his friends proceeded there he had remained at Chimonyo shops with the third accused and two other colleagues called Rust Mupini and Kuda Chimango. He also alleged that he was heavily assaulted by police to force him to admit participation in the murder.

Contrary to the first and second accused's defences, the third accused said on the day the deceased died he was at Chikwizo shopping centre. He was with accused one and two. They were drinking beer but from different bottle stores. He said he was in Tickson bar whilst accused one and two were in Makina bottle store. Later he heard commotion and saw a crowd forming outside. He approached the crowd and observed accused one, two, Persuade and Aleck heavily assaulting the deceased. He tried to intervene by restraining accused one and two. He inquired what the problem was. Accused one advised him that the deceased had stolen his cellphone. He warned both of them that the consequences of their actions could be dire as the deceased could be seriously injured. His warning apparently fell on deaf ears as the assault on the deceased by accused one and two and their colleagues continued unabated. At that time he observed accused one striking the deceased on the head with an empty beer bottle. The deceased collapsed and appeared unconscious. He vomited what looked like alcohol. He was later helped by Biggie Kakondowe (Biggie) and other persons. They rubbed his feet with salt. They revived him and he sat up complaining of severe injuries and requesting help. It was only on the next day that he heard talk in the community that the deceased had died. He said he stayed put at his residence. When the police arrested him, it was him who assisted them to locate accused one and two who had fled their residence in fear of arrest. He pointed them out as the people who had assaulted the deceased. He rounded up by reemphasising that he at no point had assaulted the deceased whom he did not know but had only approached the scene with the intention of restraining his colleagues who were beating a person who was not retaliating. He prayed for his acquittal.

The state case

The prosecution opened its case by applying to tender the post mortem report. The defence did not object. The report was thus by consent admitted as exhibit 1 in the trial. It was compiled by Doctor Yoandry Olay Mayedo at Parirenyatwa Hospital on 3 January 2023 after he examined what remained of the deceased. His conclusion was that death was a result of global subarachnoid haemorrhage which is described as an uncommon species of stroke caused by bleeding on the surface of the brain. The pathologist also noted that the deceased had suffered severe head trauma. The state then called oral evidence from the following witnesses:

1. **Biggie Kakondowe (Biggie)**

He witnessed the assault on the deceased and later assisted him to access medical care. The deceased literally died in his hands. He exhibited unparalleled civil responsibility given that the deceased was a stranger to him. Very few people would take it upon themselves to assist another in circumstances such as the deceased found himself in. His testimony was that when the commotion started, one Chief Chikwizo had mentioned that 'the boys were killing or had killed' someone. He stood up from the veranda of a shop from where he was drinking and proceeded to where a crowd had gathered. When he got to the scene, he said he noticed that the deceased had fallen to the ground. He had seen him being struck by accused one from about twenty-five to thirty metres away. He then saw a number of other people stepping on the deceased. There were about three of them who were jumping and stamping on him. He however could only identify accused one whom he knew by name. He added that accused one stamped on the deceased several times but he couldn't recount how many times it was because there were many people who also assaulted him on the neck and other parts. The deceased was badly injured. A man called Taurai Foroma who was deceased's friend tried to assist him by waking him up. The witness said he saw accused two and three at the scene but did not see them assault the deceased. He also said Persuade and Aleck were present but once again he did not see them participate in the assault. He couldn't identify any of them by name. As already narrated, he then later assisted the deceased aided by Taurai Foroma who was the deceased's friend. They took him to hospital where he passed on. The witness conceded that the crowd which had gathered in one way or another also

assaulted the deceased. It had not been easy for him and his new found colleague Tuarai to take the deceased to hospital. They had first approached a cyclist who declined their request ostensibly because the deceased could not sit on the passenger seat of the motor cycle unaided. They later found a motorist who charged them RTGS $5000 for his services. When they got to the hospital it took ages for them to find the nurse on duty. When they did, the nurse refused to attend to the deceased without a police report. They had to persuade her. She relented and accepted to examine him but on checking the deceased she advised them that he was lifeless. It was the end of the road for two gentlemen who had given their all to save the deceased's life. The witness was subjected to intense cross examination particularly by counsel for accused one. He was asked about the statement he had given to the police. He disowned it and said the signature which appeared therein was not his. He said in fact he had never officially given any statement to the police although he had accompanied them for indications. He remained resolute that he had seen the first accused assaulting the deceased. That he had told the police that he did not see the other accused or Persuade and Aleck assaulting the deceased although they were present at the scene. If they had assaulted the deceased at some point he may have missed it because he did not claim to have been omnipresent.

I wish to pause here and deal with a concerning aspect which seems to recur in many criminal trials handled in the courts. The concern is about the misrepresentations by the police in witness statements and the unreasonable expectation by many legal practitioners that a witness statement must contain virtually everything that he/she knows about the case. I am not sure if some police officers and some lawyers are not aware that a witness's statement is exactly that. It is simply an individual's recount of the facts of a case under police investigation. It is a synopsis of the witness's account of the events. The narration relates to those issues where the witness has personal knowledge or expertise. We have noted sometimes with dismay, as witnesses undergo torrid badgering about little and often inconsequential inconsistencies or supposed omissions in their statements to the police. Yet at times we have also observed witnesses completely disowning statements they allegedly made to the police. The frequency with which witnesses in different cases come to court and allege misrepresentations in their statements to the police have left us convinced that something untoward is happening at the time witnesses' statements are recorded. Police officers are reminded that investigation of a case does not mean fabricating the evidence of witnesses by

adding or subtracting what the witnesses would have told them. The duty of a police officer is not to nail suspected offenders by any means necessary. Rather it is to present the truth. That duty encompasses presenting to prosecution, evidence that may be favourable to an accused person. To achieve that police officers are required not to vet evidence but to let witnesses tell their stories as they perceived things happening. Witnesses often give their testimonies to the police in the vernacular which is then translated into English the courts' official language. English is, to almost all of us, a second language. It is a real possibility, in fact almost inevitable that some or even a significant portion of the sense of a witness's testimony may be lost in the translation. Some witness statements that we see in court just like some state and defence outlines drawn by prosecutors and legal practitioners respectively, are written in incredibly bad English through which the courts have to work hard to decipher the meaning. The issue of witness statements is compounded by the fact that when the vernacular statements are translated to English no comparison is ever made to ensure that nothing was lost. Very often witnesses who are overly questioned about these statements open up in court to say they understand no English at all and could not make any sense out of the English versions of their statements. In my view, it may be prudent for investigating officers to retain the vernacular versions of witness statements. They are the original statements. To make a person who does not understand any English sign a statement written in that language and vouch that he/she is the one who made it is to me a clear misrepresentation of facts. It is wrong and borders on an illegality. Ideally, what must happen is that the witness must sign on the vernacular statement and the English version of the statement simply shows that the witness signed on the original statement. If it is not tedious, the translation of the statements must be certified by certified translators or interpreters. Most witnesses, who would have genuinely witnessed the commission of crimes and come to court to tell exactly what happened would be made pitiful in court when they are grilled over statements made in languages alien to them. The situation is not made any better by rules of evidence which allow a court to assess the credibility or otherwise of a witness on the basis of the differences between their statement to the police and their testimony in court. Legal practitioners quickly lurch on to such artificial discrepancies and perceived inconsistences. That in turn may create court decisions that are based not on the truth of what happened but on administrative frailties from those charged with handling investigations. Legal practitioners must also be aware that courts do not expect the human memory to operate like a machine. From human experience, we are all aware that it is almost practically impossible for people observing the same event

to recount it later in exactly the same way. That is particularly so if the occurrences happened in a fluid environment. The courts do not look for the absolute truth. Rather judicial officers are only interested in substantially trustworthy evidence. As such knit picking through a witness's statement looking for little variations may not be the best form of cross examination. An astute legal practitioner is one who looks at a witness' evidence in its entirety and tries to discredit it with the realisation that if he leaves it substantially trustworthy the testimony meets the threshold of credibility.

Whilst the above problems are mundane, the allegation by the witness in this case is more intriguing. He does not say that there are misrepresentations in his statement but says he never made any statement to the police at all. The signature which appears on the statement is not his. All that he did was to narrate his story to the investigating officer and his colleagues as they went for indications. It would appear the officers then in the comfort of their offices at their own time decided to make their own statement which they never bothered to show to the witness. They either found a different person to sign it or most probably signed it themselves. That if it happened is the height of disingenuity and duplicity by the investigating officer. His level of craftiness can only be exceeded by his sense of contrivance. Yet in court, the witness was totally composed, emotionless and told his story coherently. He showed no signs of cooking up a story against any of the accused persons. He was honest that although he saw accused one and two at the scene he did not observe them do anything to the deceased, he was not known to the deceased and had no interest in the matter at all. He knew accused one and knew his name but they had no relationship of any kind -good or bad. For that reason he could have not come up with allegations that the accused assaulted the deceased. In fact as will be shown later his testimony is clearly supported the evidence of not only the other witnesses but that of some of the accused. The court therefore refuses any suggestion by the defence that this particular witness's testimony may be tainted by inconsistencies in his statement to the police and his testimony in court. He is wholly worth of belief.

2. Aleck Tomasi

He stays in the same community with the accused. They had actually gone to Chikwizo shopping centre together on the fateful day. He said he was resting on Chief Chikwizo's car when the commotion which led to the deceased's death started. He

acknowledged that he had been drinking beer for about three hours by then. He however said he could appreciate everything that occurred because he wasn't vey drunk. He was drinking a type of beer called black label the same as accused one had also be downing. It must a popular brand. He said when he checked, he saw accused two in altercation with a young man whom he did not know. He was equally unaware of the source of the problem. At that time the deceased arrived on the scene. It gave the young man with whom accused two was quarrelling the opportunity to escape. The deceased wanted to know what the problem was between the two. Accused two chased after the young man who had ran away. Accused one also suddenly came onto the scene and held the deceased by the belt. He alleged that the deceased appeared good at fighting and that the two of them would wait for accused two's return. He could not comprehend why accused one was saying that. Whilst still holding the deceased by the belt accused one knocked him with a black label beer bottle on the head. He was holding it from the neck. The witness said he observed that from about fifteen metres away. The first accused was commandeering the deceased to sit down. The deceased would not comply because he could not understand why he was being asked to do that. The first accused then hit him again on the head with more force. The deceased collapsed to the ground. The witness said he didn't see which part of the decaesed's head was particularly struck. The bottle which had some contents broke into pieces. Whilst his victim was on the ground accused one stepped on his neck. It was not possible to tell how many times he did that though it was repeatedly. Accused two and three then arrived. Accused two stepped the deceased on the face because he had fallen on his back. The deceased vomited what he had been drinking from the nose and mouth. A man called Prosper then arrived and tried to restrain the accused persons. The witness said he did not see accused three do anything to the deceased. There were about thirty people around the deceased but he equally didn't see anyone from the crowd do anything to the deceased. When Prosper restrained the accused the witness said he drew nearer to the scene. It was then that he noticed some people trying to assist the deceased by resuscitating him. They proposed using water and salt in the process. Those Good Samaritans included Biggie Kakondowe and Taurai Foroma. Soon thereafter the witness said he and Persuade left the place and went home. He admitted that when the deceased died, the police came to his place and took him for interrogation. He accompanied them to the scene but was released after a brief detention. He refuted as preposterous the allegation that it was Persuade and him who had assaulted the deceased. His explanation was that when this offence came to light accused one had visited his residence where he

threatened his wife that should the witness testify against him there would be trouble. Accused one had further said that the docket would be destroyed and he would choose whom he wanted to go to prison. The witness equally rubbished the claim by accused one and two that he (the witness) and accused two had not gone to Chikwizo shops. He said they had all gone there but simply separated when they arrived at the shops and started drinking from different bars.

Under cross examination he disputed that he was friends with any of the accused. He said he had known them for a long time because they hailed from the same community but they were not friends. When he was asked that in his statement to the police he had said when this happened he was thirty metres away yet in court he had said he was fifteen metres away, the witness stated that what he had said in court was the truth. If thirty metres appeared in the statement then it was of the police's making. He had given them his statement as he told the court. They had written it in English which he could neither read nor write and then simply asked him to sign which he did. I have already dealt with the impropriety of this police method above and would not belabour the point again. Asked by counsel for accused two how he would have heard the conversation between the accused persons on one hand and the deceased and the other young man on the other when he was fifteen metres away the witness's answer was that they were drunk and were speaking at the top of their voices. As can be seen nothing in cross examination really discredited any of the witness's evidence.

3. Gracious Domboka

He said he is the person who is also known as Prosper. He is known to all the accused. They reside in the same village. The witness's testimony was that when he saw the crowd gathered he went to inspect what was taking place. He then observed the deceased lying on his back. Accused one stepped on his chest whist accused two and three also jumped on his face with their feet. He inquired from them what the issue was about and tried to restrain them. Accused one who held an empty beer bottle in one of his hands then told him to get away. The witness said he did. At the time he was at the scene, he said he saw accused two stomp on the deceased twice, accused three once and accused one had his foot on the deceased's chest all that time. Even when he was leaving accused one was still stepping on the deceased's chest.

During cross examination, the witness insisted that Prosper and Gracious were both his names. It was suggested to him that the mob also assaulted the deceased to which the witness said he didn't see that. He also said that the empty beer bottle which accused one was holding wasn't broken. He couldn't testify on whether the deceased fell after being hit by a bottle because he said he had arrived after the deceased had already fallen. Other than that nothing more material came out of the cross examination of this witness. All that the court would point out is that in line with the substantial trustworthiness of evidence alluded to earlier, it is possible for witnesses perceiving a particular event to retell it with little variations especially where the scene was as chaotic as the one under discussion in this case.

4. Persuade Chimanga

He was present when the deceased was assaulted. He knew the accused not only because they came from the same community but that accused one and two are actually his nephews. He was however not friends with any of them. He did not know the deceased prior to this incident. On the day in question he recounted the events as follows:

He first saw accused two chasing after a certain young man who was in the company of the deceased. As he did so they went towards the Godzi area. The chase took them across the road which leads to Godzi. The deceased emerged from Makina bar intending to check his friend who had been chased. He was held by the belt by accused one who ordered him to sit. The deceased refused to comply and remained standing. Accused one then hit the deceased with a bottle on the head. The deceased collapsed. Accused three arrived and hit the deceased with a fist on the chest. He was also holding his own bottle of beer. He was standing whilst deceased was lying. Accused two returned from chasing the young man. He kicked the deceased on the head about three times. The deceased was stamped on the chest and started vomiting the beer he had been taking. It was a throw vomit which went some distance. The deceased had been raised and was seated. When the deceased fell he had landed on his occiput. He admitted that the police called him after the murder.

Under cross examination he denied ever being arrested. He had been called in because the accused were alleging that he had participated in the murder. He denied the suggestion that he had bargained with the police to be made a state witness. He protested his innocence

throughout. He added that he could not restrain the accused who appeared very drunk and were rowdy.

5. Caleb Chibvudze

He is the investigating officer in the murder case. As soon after the murder was reported he attended the scene with the assistance of Taurai Foroma and Biggie Kakondowe. He later saw the deceased's body and noted that it had bruises on the right cheek and on the back of the head. At the scene he saw small bottle fragments. He could not find the bigger pieces because the scene had unfortunately been tampered with. He collected the fragments which he later had weighed. He identified the fragments in court after. The prosecutor applied to tender the fragments as an exhibit. With the consent of all counsel, the fragments and their certificate of weight became exhibit 2 in the trial. He said after investigations which comprised interviews with some of the people who had witnessed the incident it became clear to him that the three accused had participated in the murder. Accused one then implicated Persuade Chimanga. The officer initially arrested him but his investigations showed that Persuade had not participated in the crime but rather was a state witness. He dismissed as untrue the allegation that he had bargained with Persuade for him to become a state witness. He indicated that soon after the murder on 26 December 2022 the accused had deserted their homes and went to live in a thicket. The police had only managed to arrest them on 21 January 2023. They were at the border of Mashonaland East and Manicaland in the bush. He asked them to assist him with the indications which they agreed to. Asked if Persuade Chimanga had made a statement to the police the officer said he had and if he was disowning it now it could be because he was afraid of the accused's families which had previously threatened him. He further said he could not a statement from Taurai Foroma because the witness was rumoured to have left for South Africa and no one really knew where in that country he resided.

During cross examination, the defence counsel took the officer to task about the shambolic recording of witnesses' statements. Counsel for accused one put it to him that Biggie Kakondowe had disowned the signature on his purported statement and some of the issues stated therein; Persuade Chimanga had equally disputed some of the utterances attributed to him in his statement whilst Gracious Domoboka revealed that his statement

written in English had never been interpreted to him because he could neither read nor write English. His lukewarm responses to the questions simply showed that he was at best inefficient and at worst totally unconcerned with his work. Other issues which he was asked about were not significant in our view.

With that prosecution closed its case.

Defence cases

Clever Mudzengerere

He chose to give evidence is his defence. He incorporated his defence outline into his evidence. He is a twenty-four year old gold panner. He said on 26 December 2022 he left home in the company of accused two and proceeded to Chimonyo shops where they met Aleck Tomasi, accused three and Persuade Chimanga. They bought and drank beer. It was around 1000 hours. The first accused said he then left with Persuade and Aleck going to Chikwizo shopping centre. It was around 12 noon. They arrived there and started drinking again but not together. He was drinking from Tikson bar. Persuade had gone outside. Aleck was also outside. He was sitting on a built in bench where he was leaning against a wall. He had placed his phone on the bench beside him. The deceased got in and picked the phone. They were unknown to each other. After picking the phone the deceased walked towards the entrance of the beer hall. The first accused said he followed him to ask where he was going with his phone. The deceased attempted to run away. The accused said he then thought it prudent to shout 'thief' in order to alert the public to assist him apprehend the deceased. He also announced that the deceased had stolen his phone. Persuade and Aleck responded to his shouts. Other people also joined in. Aleck and Persuade held the deceased which allowed accused one to take back his phone. Those two then assaulted the deceased. Persuade hit the deceased with a bottle on the head after accused one had already taken his phone. The deceased fell to the ground and landed in a sitting position. Aleck Tomasi also participated in attacking the deceased. He kicked the deceased on the chest when he was already on the ground. He said he was watching from about ten metres away. He stated that no one from the mob joined in to assault the deceased. Asked why he didn't intervene he pointed out that there was no reason because he had already recovered his cellphone. When his counsel

advised him that the investigating officer had alleged in court that soon after the commission of this offence he had deserted his home, the accused said indeed he had left home but he wasn't running away. He said he is a gold panner and that is his way of survival. So in essence he went to work and wasn't running away. He was also reminded that his co-accused number three was incriminating him in the commission of the offence and alleging that he assaulted the deceased. He explained that it was because just like Tomasi and Persuade, accused three wanted to exonerate himself from the commission of the offence. Further asked if he knew that the police were looking for him the accused said he didn't because the day after this incident he had gone to Chimonyo shops to pick his change where he then heard that the deceased who had been assaulted by Persuade and Tomasi Aleck had died. He denied being drunk when this occurred. Strangely he was also the only one who said the incident occurred around 1400 hours. He insisted that everyone else must have been lying that it happened around 1800 hours. He rounded off by relating his assaults at the hands of the police forcing him to implicate accused two and three yet the offence had been committed by **Persuade and Aleck.**

Under cross examination by the prosecutor, the first accused was reminded that his story was that the deceased had stolen his phone after which he shouted for help. Persuade and Aleck then came to assist him. They assaulted the 'thief' ostensibly because he had stolen the accused's phone. He was then asked if his story wouldn't be unbelievable that he would be a bystander whilst the third parties who had come to apprehend 'his thief' pounded that person. His unconvincing response was that many people were there. He equally had no explanation why his co-accused would allege that he assaulted the deceased other than that accused three wanted to exonerate himself. He could not adequately explain why so many witnesses were all saying they had seen him assault the deceased. Further during cross examination by counsel for accused two, the first accused insisted on his story that he had left both accused two and three at Chimonyo shops and never met them again that day. When asked whether this was his first time to be arrested he confessed that at one time he had been arrested for assault. He also insisted under cross examination by counsel for accused three that that he (accused three) didn't assault the deceased because he wasn't there. The court sought clarification from him as to why he had left his home in the full knowledge that there was a person who had been killed and that the police were looking for the killers yet he knew that it was Persuade and Aleck who had committed the murder. The court wanted to know

why as a responsible citizen he did not find it prudent to go and report that he knew the persons who had killed the deceased. The accused's answer was that he wasn't the one who had killed the deceased. Soon thereafter he closed his defence case.

Trymore Mudzengerere

He like accused one, incorporated his defence outline into his evidence in chief. He is twenty three year old a gold panner with little education after dropping out of school in grade seven. He said he has a brother and a sister who come after him. Accused one is an elder brother. Those indications about his siblings were important because of what he raised in his defence. He said on the day in question he never set foot at Chikwizo shopping centre. The person who was seen there must have been his younger brother. He said he had drank beer at Chimonyo shops with his friends Rust Mupini and Kudakwashe Chimanga after which he went home and slept. He further disputed the evidence of witnesses who said they had seen him at Chikwizo shops. His explanation was that the witnesses lied against me. Aleck Tomasi is his friend with whom he had at one time moulded at his place. Aleck later refused to reciprocate the gesture at accused two's place. As for Gracious Domboka the explanation for him lying against accused two was that the accused had sold him a beast which he has not paid for up to now. Accused two added that he didn't know the deceased and didn't know who had struck him. His explanation for deserting his home after the murder was similar to that of his brother. He disowned the statement he allegedly made to the police admitting being present at Chikwizo shops. Under cross examination by the prosecutor he admitted that he had known accused three for more than two years because they lived in the same village. He also admitted that he had earlier that day met both Persuade and Aleck at Chimonyo shops. Asked by the court to clarify whether Persuade and kudakwashe Chimanga his friend were related, the second accused admitted that they were cousins. The court further sought to know how he could be close friends with Kudakwashe yet he was enemies with Persuade. In answer accused two came up with a hitherto unheard story that his enmity with Persuade stemmed from the fact that Persuade was in love with his sister yet they are relatives. Persuade's father is accused two's mother's brother.

The second accused closed his case without calling any witnesses despite his claim that people like Kudakwashe Chimanga and Rust Mupini could vouch that he didn't go to Chikwizo shops that day.

Freddy Gireya

Like his colleagues ahead of him, he incorporated his defence outline into his evidence. He is twenty three years old. On the day in question he, accused one, accused two, Aleck Tomasi and Persuade had left Chimonyo shops going to Chikwizo. When they arrived he went into Tikson bar from where he heard that there were people fighting outside. He ran there and found accused one holding a bottle in one hand and holding the deceased by the belt. Accused two joined in and started kicking the deceased on the chest. He said he tried to restrain them but they were unrelenting alleging that the deceased was a thief. The deceased had collapsed and was vomiting the beer he had earlier consumed. Persuade and Aleck were also there but he didn't see them do anything to the deceased. There were others whom he couldn't identify. Biggie Kakondowe tried to resuscitate the deceased by pouring water on him and rubbing salt under his feet and in the palms. They succeeded in reviving the deceased. Under cross examination by the prosecutor, the third accused said he was barely five metres away when the first accused hit the deceased with a bottle on the head. He had clearly seen him hit the deceased on the occiput and the deceased had collapsed. Accused two arrived and stamped the deceased. He said he couldn't have been mistaken about accused two's identity because he knew him well. They had left Chimonyo shopping centre together earlier in the day. He added that the allegation that he could have mistaken accused two for his sibling is just a ruse because he knows everyone in accused two's family. None of them look alike. Accused three said he has not only known accused two for more than five years but that he is actually married to accused two's niece. He added that if accused two had the temerity to lie that he didn't go to Chikwizo shops on the day in question then he is someone who could lie about anything. Under cross examination, the third accused said the only person who had indicated that he saw him assault the deceased was Persuade and that he was lying. Persuade and himself were not in good books because Persuade thought that the third accused was in love with his brother's wife.

Common cause issues

There are issues that are either common cause or are indisputable in this murder. They are that:

1. The deceased was attacked at Chikwizo business centre
2. He sustained mortal wounds from which he later died
3. By their own admission witnesses Biggie Kakondowe, Alick Tomasi, Persuade Chimanga and Gracious Domboka were present when the assault took place.
4. Accused one and three also admitted that another man called Taurai Foroma assisted the deceased together with Biggie Kakondowe.
5. Accused one and three equally admitted that they were at the scene at the material time.
6. The deceased died from global subarachnoid haemorrhage and severe head trauma as certified by the pathologist who examined his remains. The doctor also observed surface injuries on the deceased. These were left cheek ecchymosis, forehead ecchymosis and occipital abrasion.

Given the above the only question which must be answered in this trial is who attacked the deceased. In other words, the question is did the accused persons assault the deceased and caused the injuries which led to his death. The matter, in my view, is a dry one which completely turns on the facts.

Accused two- Trymore Mudzengere

The starting point is that on one hand accused one and accused three both admit that they were at the scene when the assault took place. Their defences are simply that they did not participate in the attack on the deceased. Accused two on the other hand denies having been present at the scene. He said on that day he never set foot at Chikwizo business centre. It is easier to begin with accused two's case. The evidence and his own admissions establish that he left home with his brother accused one on the day in question. They went to Chimonyo shops where they met Persuade Chimanga, Alick Tomasi and Gracious Domboka. They drank beer at the township. Later accused one and others decided to proceed to

Chikwizo Township. He did not go. Instead he remained behind and enjoyed his day with his friends Kudakwashe Chimanga and Rust Mupini. Later he went home. Interestingly, Biggie, Persuade, Aleck, Gracious and accused three all testified that accused two was at Chikwizo and was in the thick of action when the assault took place. Biggie said although he did not see the second accused assaulting the deceased, he identified him as having been present. He did not know accused two's name then but saw him amongst the crowd. Biggie simply acted as a Good Samaritan to the deceased. He did not know him prior to the incident. He did not have any relationship with any of the accused except that they came from neighbouring communities. In their cases, all accused in fact could not possibly think of any reason why Biggie would falsely incriminate any one of them in the commission of the offence. We analysed Biggie's evidence earlier and remarked that it was coherent and dispassionate. He struck the court as a man who had given his all to ensure the survival of the deceased who had literally died in his hands. He was just honest. The purported inconsistencies between his testimony in court and his statement to the police were down to a combination of administrative bungling by the police and poor translation of the witness's statement from the vernacular to English. In the main Biggie's evidence was therefore solid in all material respects. If it needed any corroboration, plenty of that was available. Persuade and Aleck who both knew accused two very well said he was there. Accused three equally said accused two was there. They all added that accused two's story that he had stayed behind at Chimonyo shops was a red herring because they had all left Chimonyo for Chikwizo at the same time. Although they separated at the township, they had arrived there together. They discounted the second accused's allegation that they had mistaken his siblings for him because they look alike. Persuade Chimanga said that explanation was impossible because he didn't only know accused one and two. They were in fact his nephews. Accused three also said he had known accused one and two for years. The ruse about mistaken identity could not stand because he knew everyone in accused two's family. There were no look alikes. The court own its own observed that accused one and two barely looked like siblings. They did not physically resemble each other. On his part, much as the second accused had no obligation to prove anything, he at least should have called his so-called friends Kudakwashe Chimanga and Rust Mupini with whom he alleged to have spend the day at Chimonyo. They would have at least corroborated his story. The investigating officer said at the time he was arrested, accused two never raised the alibi that he had not been at Chikwizo to allow them to investigate it. My view is that an accused who wishes to raise an alibi must do so at the earliest available

opportunity. He cannot wait to raise that in his defence outline and allege that the police did not investigate it. A person who deliberately hamstrings the police from investigating his alibi cannot expect to succeed on it. In any case, the second accused must have known that his alibi was so tenuous that he then resorted to alleging mistaken identity. But as can be seen from above, both those defences were nothing but an attempt by him to clutch to straws in a raging flood. The witnesses all knew him perfectly well. It would have been different if the witnesses were seeing the accused for the first time. They had spend the greater part of the day together. They knew what he had been wearing. Most of them did not only observe him assaulting the deceased but had actually spoken to him. Our conclusion is that accused two was at the crime scene. The danger with the defences which accused two raised is that they left him without controverting any of the evidence against him relating to the assault on the deceased. It follows therefore that once the court finds that he was present when the deceased was being assaulted, the evidence of all the witnesses that he also assaulted the deceased goes unscathed. That is the predicament that accused two in this case finds himself in.

Accused one- Clever Mudzengerere

The evidence points to him as the principal perpetrator of the crime. He is the one alleged to have accosted the deceased, hit with a beer bottle whether empty or with contents. His version of events betrays the incredulity of it all. The deceased had ‘stolen’ his cellphone. He chased him to recover it at the same time shouting for the crowd to assist him apprehend the thief. The crowd assisted him and he immediately recovered his phone. He became a bystander as the crowd severely attacked the deceased. He did nothing to ensure that the person whose predicament he had caused was not fatally assaulted by his mob. I say ‘his mob’ because it was him who had recruited it if we go by his story. He cannot dissociate himself from the actions of that crowd. He remains liable for the actions of the mob. If he did not approve of their actions, he was at the very least expected to have stepped in and advised the crowd that there was no need for the assault because he had already recovered his phone. Either way we would have found the first accused liable for this murder on the basis of liability of co-perpetrators as prescribed under s 196A of the Code. That however appears beside the point in this case. There is evidence which points directly to the active participation of accused one.

Biggie, Persuade, Aleck and accused three all testified that accused one hit the deceased with a bottle on the head. The deceased fell to the ground from where accused one with the assistance of others trampled on him with booted feet. The first accused sought to discredit that evidence but without a proper explanation why the witnesses were targeting him. He particularly could not explain why accused three a person with whom he is jointly charged with the murder would say that he participated in assaulting the deceased except to say that he thought accused three wanted to exonerate himself. The truth is however that accused three did not seek to exonerate himself by falsely implicating the first accused. He had his own explanation as will be shown shortly. In addition, it was odd and certainly not a coincidence that soon after the commission of the offence, accused one and two left their homestead to an unknown place. They did not inform their parents where they were going. The two sought to explain away that disappearance on the basis that they were gold panners and their work often took them away from home. But when one goes to work, one usually informs their family where that work will be. The two accused did not. When their parents were quizzed by the police they professed ignorance as to the whereabouts of the accused. Even more interesting is that both accused one and two admitted that they knew the police were investigating this murder. Accused one particularly said he knew that witnesses Persuade and Aleck were the people who had committed the murder. He however did not find it necessary to go to the police who were puzzled as to what had happened to tell them that he had witnessed the murder being committed and knew the perpetrators. Those omissions only serve to make accused one's story more unbelievable. He sought to make the court believe that the statement he gave to the police had been made under duress. It was not an issue because the prosecutor and wisely so, after realising the allegations by the accused challenging their statements which had not been confirmed by a court refrained from seeking to produce them in court. I find it strange that when that happens legal practitioners go to town about statements allegedly made by their clients. In the process they divulge so much detail which would hitherto be unknown by the court. It is a dangerous course for an accused. Dangerous because once evidence is availed to the court, even in circumstances where that evidence would have been ordinarily inadmissible were the prosecutor to seek its admission, it cannot be ignored. See the case of *S* v *Kachipare* 1998(2) ZLR. That aside, the point is that it was needless for the first accused to expend so much energy and time to deal with the inadmissibility of a statement whose admission the prosecution was not seeking. We have already accepted the reliability of the evidence of Persuade, Gracious and Aleck. Accused

two who as stated is a sibling to accused one gave explanations as to why the various witnesses had grudges against them. Those must be dealt with because they would similarly impact on the first accused. He said that Aleck Tomasi is his friend. They had at one time moulded bricks together at his place but in an unexpected turn of events Aleck had later refused to reciprocate the gesture at accused two's place. As for Gracious Domboka the explanation for him lying against accused two was that the accused had sold him a beast which he was refusing to pay for up to now. His enmity with Persuade stemmed from the fact that Persuade was in love with his sister yet they are relatives. These appear like reasonable explanations why the witnesses would hate accused persons one and two particularly, but they are not. When those witnesses were testifying in court, nothing of that sort was ever suggested to them to enable them to comment. An accused who ignores allegations against a witness at the time that witness is still giving evidence and wait to raise them when the witness can no longer respond disables himself or herself from relying on such allegations. The only inference that a court can draw from such failure is that the accused is manufacturing the allegations and withheld them from the concerned witness because he/she was afraid that the truth would unravel. It is exactly the pitfall that confronts accused one and two in this case. We cannot therefore rely on such insinuations. They are simply untrue. We are left with no choice but to conclude that the witnesses' testimonies regarding the participation of accused one and two in the assault are entirely true. The little variations in the witnesses' evidence are immaterial in the court's view. For instance, there were contradictions as to whether the bottle used to assault the deceased by accused one had contents or not. Some witnesses said it was empty but others said it had contents. One witness said the bottle broke into fragments on impact whilst others said it didn't. We said earlier given the make –up of the human mind it is highly improbable that two human beings observing the same event will be able to entirely agree on how it panned out. There is bound to be variations particularly regarding fast flowing events where action changed in the blink of an eye. This case is no different. Many things occurred simultaneously. The situation was volatile and fluid. There was a raucous crowd to make everything even more haphazard. What is important in this case in our opinion, is not whether the bottle had contents or not but whether the deceased was struck with a bottle or not. All witnesses were in agreement that he was attacked with a bottle and that as he lay on the ground the accused persons further attacked him by stomping him on the chest and neck. He vomited some substance which they suspected was the beer he had been drinking earlier. That is what matters. In the final

analysis we are convinced that accused one participated in the assault in much the same way that the second accused did.

Accused three- Freddy Gireya

His situation is slightly different from that of his co-accused. To begin with witnesses Biggie and Aleck said although he was amongst the crowd, they had not seen accused three do anything in the form of assaulting the deceased. In contrast, witness Gracious Domboka said when the deceased collapsed after being hit with a bottle he saw accused one stepping on the deceased's chest whilst accused two and three jumped and crushed his face with their feet. His testimony brought accused three directly into the assault for the first time. Witness Persuade Chimanga also indicated that when the melee was on going he saw accused three arriving and hitting the deceased on the chest. Accused three was holding his own bottle of black label beer.

We have already indicated that we found the evidence of the two witnesses who directly implicated accused three as credible. Accused three however attacked the evidence of those witnesses as meant to falsely incriminate him. His explanation was that Persuade was the only person who had said he had seen him assault the deceased yet he and Persuade had their differences prior to this incident. Persuade thought that the third accused was in love with his brother's wife. Unfortunately, that story once again fell into the category we have already described and dealt with above in which the accused waited for the witness to be excused from further attendance at court to raise allegations against him. It is unacceptable and does not in any way assist the accused. In any case it appears the third accused waited to be arrested for him to start cooperating with the police to locate accused one and two. The expectation would have been that much as he knew that it was the two who had killed the deceased he should have walked straight to the police to advise them. He knew where the two were and led the police directly to arrest them. That omission taints whatever explanation he gave the court about his alleged participation in the commission of the crime. He still could not give any explanation why Persuade would falsely incriminate him in the assault. He erroneously thought that only Gracious had implicated him but as shown above he was wrong because Persuade had directly tied him to the assault. The fact that the other witnesses said they had not seen him do anything to the deceased only serves to prove the point which we

belaboured above. These witnesses did not allege arriving at the scene at the same time. We have described the scene as having been somewhat chaotic given the brawl which was unravelling. It is possible that some witnesses may have missed some things which the others picked up. It certainly does not mean that the witnesses who observed accused three assaulting the deceased are falsely implicating him. Their testimonies showed that they were truthful. We believed them. Their demeanour did not in any way betray witnesses who had an agenda against any of the accused. They appeared like they were just village men incapable of stitching a sophisticated web that would be consistent with evidence given by others who were independent of them.

Disposition

A conclusion that each of the three accused participated in the crime puts the matter to rest. We were left with no apprehension that the prosecution managed to prove they all assaulted the deceased on the fateful afternoon. It is against that background that the court is convinced that the state managed to prove each of the accused's guilt beyond reasonable doubt. Accordingly, **it is ordered that each of the accused persons is found guilty of murder as charged.**

National Prosecuting Authority, State's legal practitioners

Magwaliba & Kwirira, first accused's legal practitioners

Majena, Chugumba Danha Attorney, second accused's legal practitioners

Maguchu & Muchada Business Attorneys, third accused's legal practitioners