

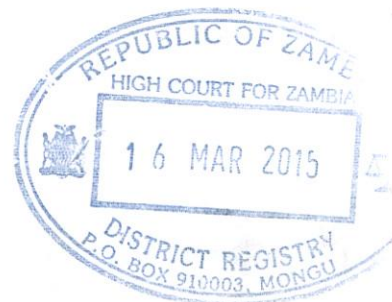
(Criminal Jurisdiction)

**BETWEEN**

**THE PEOPLE**

**Vs.**

**GIVEN PHIRI**



***Before: Hon. Judge B.M.M. Mung'omba on this 13<sup>th</sup> day of March, 2015.***

*For the Prosecution: Mr.B. Mpalo, Senior State Advocate & Mrs. P. Nyangu, State Advocate – NPA*

*For the Defence: Mr. I. Yambwa, Legal Aid Counsel – Legal Aid Board*

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**JUDGMENT**

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**Cases Referred To:**

1. ***Mwewa Muroso vs The People (2004) ZR. 207***
2. ***David Zulu vs. The People [1977] Z.R 151***
3. ***Dorothy Mutale and Richard Phiri vs. The People (1997) S.J. 51***

**Legislation Referred To:**

1. ***The Road Traffic Act, 2002; Cap 464.***

The accused in this case, **Given Phiri**, was charged with the offence of Causing Death by Dangerous Driving contrary to **Section 161(1) of the Road Traffic Act No. 11 Of 2002** of the Laws of Zambia.

The Particulars of the offence are that the accused herein on 2<sup>nd</sup> May, 2014 at Lukulu in the Lukulu District of the Western Province of the Republic

of Zambia, did cause the death of **Alex Kang'ombe Bilyanga** by driving a motor vehicle namely Lifan unregistered from east to west direction on a public road namely Lukulu – Katunda road in a manner which was dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be, expected to be, on the said road.

When called upon to plead, the accused denied the charge and the Court entered a plea of not guilty.

I warn myself that the burden of proof lay, throughout these proceedings, on the prosecution to establish the guilt of the accused person beyond reasonable doubt. Any proof falling short of that standard is not sufficient as any resulting doubt has to be resolved in favour of the accused, who, thereby becomes entitled to an acquittal. (see **Mwewa Muroso vs The People (2004) ZR. 207.**)

The case for the prosecution is supported by evidence from six (6) witnesses who all testified on oath. The accused elected to remain silent, to which he is constitutionally entitled, and called one witness.

The following is a summary of the evidence I heard in the course of the proceedings.

**Precious Mahongo Chisola (PW1)** was the first witness for the prosecution who was the wife to the deceased. Her testimony was that on 2<sup>nd</sup> May, 2014, the deceased, the accused and one Andrew Phiri left her home on a motor bike belonging to the deceased. It was her testimony that the accused was the one riding the said motor bike while the other two persons were pillion riders. Between 21 hours and 22 hours on the same day, PW1 received a report of an accident involving the deceased and his two colleagues.

This witness was categorical that she did not witness the accident happening.

**PW2** was **Kakoma Mayunda**. His testimony was that on 2<sup>nd</sup> March, 2014, he was coming from Chimbanda area. It was around 20 hours. When he reached near the 'Welcome to Lukulu' Poster, he met three people who were pushing a motor bike. Its engine was off after hitting the pothole but the said people were still on the motor bike pushing it using their legs. He conversed with the deceased. According to this witness, the accused, whom he said was wearing a red T-shirt, was the one riding the motor bike. One Andrew Phiri (DW) was sitting in the middle while the deceased was the last pillion rider.

PW2 then proceeded with his journey to his home. Later around 02 hours the next day, he learnt of the accident in which the deceased died. PW2 testified that he did not witness the accident.

**PW3** was **Derrick Kamizhi**. His testimony was that he was alerted of the accident by a taxi driver whom he booked to take him home. He was busy with his cell-phone. The taxi driver stopped the motor vehicle and they visited the scene of the accident. At the scene of accident PW3 found three people; the accused, Andrew Phiri (DW) and Precious Kamba Masangu (PW3) standing beside the deceased who was laying on the ground, still alive but gasping. The deceased was then taken to Lukulu Hospital. He was later referred to Chitokoloki Mission Hospital where he died.

PW3 testified quoting his words that *"at the time, those two gentlemen informed me that he (the deceased) was the one riding the motor bike."* However, it was his testimony, again quoting his words, that *"..When I arrived [at the scene of accident] Given Phiri (accused) was the one who told me that he was the one who was riding the motor bike.."*

PW3 told Court that he was testifying as to what happened from the time he reached the scene of the accident. In short, he did not see the accident happen. He was only told that three people were on the motor bike; the one laying on the ground, now the deceased, and the other two who stood beside the deceased.

**Precious Kamba Masangu (PW4)** testified that on 2<sup>nd</sup> May, 2014, around 20 hours, she heard the loud sound emanating from the main Lukulu road. Then it went quiet. The road was three minutes' walk from where she heard the sound from; at her home. She decided to cross the road and in the process found two men at the roadside; the accused and Andrew Phiri who informed her of the accident. The deceased was not dead at the time.

According to PW4, the accused told her that he had been riding the said motor bike. She also testified seeing the accused remove the keys to the motor bike from his pocket.

However, in cross-examination, PW4 informed me that it took 15 minutes for her to reach the accident scene from her home. PW4 was not there when the accident happened. She did not know whether the keys to a motor bike are kept in the pocket or in the ignition when an accident occurs. PW4 testified that her evidence is based on what she was told. Therefore, she could not sufficiently testify that it was the accused who was riding the motor bike at the time of the accident. In sum, PW4 did not see the accused ride the motor bike in question. She is simply a witness of what transpired when she arrived at the scene of the accident.

**PW5** was **Morgan Nyirenda**, the Motor Vehicle Examiner at the Road Traffic and Safety Agency based in Lusaka. After describing his duties, he testified that he did examine the motor bike in relation to this case. He examined the said motor bike and his findings were that (1) it had no

mechanical fault and (2) the rider had no experience. The report was admitted into evidence and marked P1.

The last witness (**PW6**) for the prosecution was **No. 10738 Inspector Nyangwali** of Lukulu Police Station. He is the arresting officer in this case. He testified that on 3<sup>rd</sup> May, 2014, while on duty, he found a report about an accident that was made around 23 hours the previous day. The accident involved a motor cycle. As he was trying to find out what happened, he learnt that one of the persons who were involved in the said accident had died. The deceased's name was Alex Kang'ombe who had been taken to Chitokoloki Mission Hospital.

According to the earlier report, PW6 testified, it was male Alex Kang'ombe who was riding the bike when the accident happened. The said report was made by Given Phiri, now the accused. Thereafter, another report was brought to PW6 that the person who was riding the motor bike was the one who died. As a consequence, PW6 did not do much concerning the case.

However, PW6 testified that afterwards, the relatives to the deceased made inquiries as to the status of the case. PW6 was informed that their deceased relative died in a motor cycle accident that was being driven by Given Phiri, the accused. PW6 then asked the relatives to the deceased to bring forth the witnesses. Later he arrived at a conclusion that male Given Phiri was the one who was riding the motor bike. Thereafter PW6 charged and arrested the accused person for the offence of Causing Death by Dangerous Driving.

After PW6 was shown the scene, he drew a sketch plan of the scene of accident which was produced and marked P2.

When cross-examined, PW6 testified that there was only one report made about the accident. However, he expressed suspicion because the report was made by a relative to the accused, Andrew Phiri (DW), who was on the said

motor bike at the time of the accident. When he interviewed Andrew Phiri, PW6 was informed that the deceased was the one riding the motor bike. PW6 testified that he disbelieved the evidence given by Andrew Phiri. He therefore went ahead to charge and arrested the accused for the subject offence.

As the cross-examination progressed, the accused asked PW6 the following question; *'why did you reject the evidence of someone who was there on the motorcycle and you admit the evidence of someone who was not there?'* PW6 responded as follows *'that is the evidence that I thought was the truth unlike the other evidence which was given by Andrew Phiri'*. According to PW6 he rejected the evidence from Andrew Phiri because it was supporting the accused.

In re-examination, PW6 testified that in the first place, he did believe the statement from Andrew Phiri. It was however only when he received the information from his witnesses that he decided to do away with Andrew's statement. According to him, the statement may have supported the accused because Andrew Phiri is related to the accused.

The forgoing was the case for the prosecution.

Upon hearing the evidence adduced by the prosecution witnesses, I was satisfied that the prosecution had adduced sufficient evidence to warrant putting the accused on his defence. I accordingly found him with a case to answer and placed him on his defence.

As I stated earlier in this judgment, the accused opted to remain silent and called one witness. DW was Andrew Phiri who testified on oath. His testimony was that on 2<sup>nd</sup> May, 2014, at about 20.00 hours, DW, the accused, and the deceased started off from Jimbu going to Lukulu Boma. They were the three of them on a motor bike. When they reached a place called Kupeleka, they stopped. Later they proceeded with their journey and they had an

accident. According to DW, at the time of the accident, the deceased was the one riding the motor bike.

DW confirmed that the deceased was alive and was taken to the hospital. The matter was reported on the same night to Lukulu Police and he gave a statement. Then six days later, he was taken to the scene of the accident by the Police.

In cross-examination by Mr. Mpalo, DW stated that when they left Jimbu village, the accused was riding the motor bike. DW was sitting at the middle with the deceased sitting at the back of the motor bike.

DW denied meeting Kakoma Mayunda before the accident happened because it was at night. This witness informed me that they did not stop at any point other than at Kupeleka village to answer to the call of nature. He also denied that the accused confessed to Derrick Kamizhi (PW3) of having been the one riding the motor bike at the time of the accident. He maintained that the deceased, who was the owner of the motor bike, was riding it at the time of the accident. The deceased started riding the said motor bike at Kupeleka.

This witness further told Court he was actually testifying to what happened and not merely to save the accused, his uncle. In re-examination, he maintained that it was the deceased who was riding the motor bike at the time of the accident.

At this point the defence closed their case. Both parties opted to rely on the evidence on record. I then adjourned the case to 13<sup>th</sup> March, 2015 for judgment; which I now deliver.

The offence of causing death by dangerous driving is to be found under Section 161 (1) of the Road Traffic Act, 2002, Chapter 464 of the Laws of Zambia. It provides as follows:

*“161. (1) Any **person who causes the death of another person by the driving of a motor vehicle** on the road recklessly, or at a speed, or manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road commits an offence and shall be liable, upon conviction, to a fine not exceeding thirty thousand penalty units or to imprisonment for a period not exceeding five years, or to both”. (Emphasis mine)*

It is important to note that it is an ingredient of the offence of causing death by dangerous driving that the identity of the person who was driving the motor vehicle, as defined by the Act, which includes a motor bike or cycle, is sufficiently known. As I earlier stated, the onus is on the prosecution to prove this ingredient.

Coming to the present case, the facts that are not in dispute in this case are narrow in compass. It is not in dispute that the deceased, **Alex Kang’ombe Bilyanga** died on 3<sup>rd</sup> May, 2014 at Chitokoloki Mission Hospital following a motor bike accident that happened on 2<sup>nd</sup> May, 2014. What is crucially in dispute, however, is who caused the death of the deceased? In other words, who was riding the motor bike at the time of the accident? This question can only be answered by means of evidence adduced in this case.

It is imperative to mention, from the outset, that I did not find, among the six (6) prosecution witnesses, anyone who testified as to have been present at the time of the accident. Or to have sufficiently seen the rider of the motor bike immediately before the accident happened. In short, there was no direct evidence, from any of the witnesses called by the prosecution as to who really was riding the motor bike at the material time.



All the witnesses called by the prosecution in this case testified from what they either heard or were told had transpired. **Precious Mahongo Chisola** who testified as PW1 clearly told Court that she did not witness the accident happening.

**PW2, Kakoma Mayunda** merely informed me that he met the trio at a pothole near the 'Welcome to Lukulu Poster.' The three people were pushing a motor bike using their legs because its engine was off after hitting the said pothole. He stated that it was around 20.00 hours and the three people had lit a torch to help them see the pothole. He conversed with the deceased and that the accused, whom he said was wearing a red T-shirt, was the one riding the motor bike. One Andrew Phiri (DW) was sitting in the middle while the deceased was the last passenger.

The evidence of PW2, unfortunately, I have found it to lack consistency thereby affecting its credibility. This is seen from the comparison of the statement PW2 gave Inspector Nyangwali, who testified as PW6 in this case, on 13<sup>th</sup> May 2014 and his testimony in Court. I have decided to quote what PW2 said about the meeting at the pothole; he goes on to say;

*"...when I reached at a place where there is that WELCOME POSTER, there was a motor cycle which was coming in the opposite direction that was from eastern to western and the people who were on the same motor cycle saw me and **they slowed down** and called me. **They did not stop** but only called me by name saying 'Kakoma, Kakoma uze' and at that **I was able to identify them by their clothes** they were putting on and even the voices....**still the motor cycle did not stop but only slowed down** as there was also a pothole at the same place where we met and they proceeded with their journey and I also went ahead with mine..."*

As I have already observed the testimony by PW2 lacks consistency. While he told me during his testimony that the motor bike's engine was off and the three people were pushing it using their legs, the above quote shows that the said motor bike did not stop it only slowed down. This to me reveals that the motor bike engine must have been running since it just slowed down and did not stop. How then can the riders be said to have been pushing it with their legs?

PW2 further testified that he saw accused wearing a red T-shirt while at the police he did not state the color of clothes the three people were putting on. To make matters worse, PW2 testified that the time was around 20 hours when he met the trio and that the only source of light was the torch that was lit by the trio to enable them see the pothole. How possible can it be that around 20 hours, with only the light from a torch, (obviously pointing away from the bodies of the trio on the motor bike towards the pothole), that PW2 was able to see a red T-Shirt worn by the accused?

No doubt PW2 was at a distance from the motor bike, also in motion, such that to positively identify a red T-Shirt in darkness is manifestly improbable; even when PW2 was to have telescopic eyes. He did not even tell the police or the Court what color of clothes the other two were wearing other than a red T-Shirt seen on the body of the accused. I find his testimony full of inconsistencies. In fact, PW2 only heard of the accident around 02 hours the next day. Equally he did not witness the accident.

**Derrick Kamizhi** who testified as **PW3** informed me that he was busy with his cell-phone when suddenly he saw the taxi driver stop the motor vehicle. Then he was alerted of the accident that the taxi driver had seen. PW3 testified quoting his words that "*at the time, those two gentlemen informed me that he (the deceased) was the one riding the motor bike.*" However, it was his testimony, again quoting his words, that "*...when I arrived [at the scene of accident] Given Phiri (accused) was the one who told me that he was the one*

*who was riding the motor bike...*" It is strongly evident that PW3 was testifying to what happened from the time he reached the scene of the accident. In short, he did not see the accident happen. He also was told two different versions as to who really was riding the motor bike when the accident happened; the deceased and later the accused.

**Precious Kamba Masangu (PW4)** testified that it took her about 15 minutes to reach the accident scene from her home. She was not there when the accident happened nor could she testify that it was the accused who was riding the motor bike at the time of the accident. In sum, PW4 did not see the accused ride the motor bike in question. She is simply a witness of what transpired when she arrived at the scene of the accident.

It is clear to me that PW1 to PW4 only gave speculative evidence as to who was riding the motor bike immediately before or at the time of the accident. Even the arresting officer's testimony was not helpful in this respect.

He was PW6 and in his investigations of this case he first established that male Alex Kang'ombe, the deceased, was riding the bike when the accident happened as reported by Given Phiri, now the accused.

However, the relatives to the deceased, (of course who were not there when the accident happened or immediately before it happened), later informed PW6 that the accused was the one riding the motor bike when the accident happened. PW6 decided to believe that information and did away with the statement given by the eye witness, the accused. He also decided to disbelieve the statement given by Andrew Phiri (DW) merely because he was related to the accused.

I find this conduct by the arresting officer a bit odd because if relationship was material in his investigation, then he should not have believed either side. They were all related to either the accused or the deceased. I cannot

stress too strongly that it is the obligation of the police to investigate the case as reported and obtain all the available evidence and to place it before the court, whether that evidence be favorable to or prejudicial to an accused person.

It is not the duty of an investigation officer to decide which evidence or statement to collect in a case. It is indeed unusual for the police to believe a witness who did not witness the event and choose to disbelieve the eye witness of the event. The conduct of PW6 in investigating this case, I must say, compels me to infer that he was seeking a conviction at all costs - a highly improper and reprehensible attitude.

Having found that all the six prosecution witnesses failed to identify, with certainty, the person who was riding the motor bike immediately before or when the accident happened, vis-à-vis causing death of the deceased, I am constrained to believe the story told by the only witness for the defence. DW, in his testimony, brought out two key pieces of evidence which, I must state, went unchallenged by the prosecution.

First, DW stated that when they reached at a place called Kupeleka, the deceased opted to ride the motor bike. In short he changed from being a pillion rider to the motor bike rider. No prosecution witness challenged that indeed there is such a place called Kupeleka between Jimbu and the accident scene.

Further, DW testified that the deceased was the owner of the motor bike. This evidence was also confirmed by the wife to the deceased who testified as PW1. My view, obviously, is that by being the owner of the motor bike, the deceased knew how to ride it. I did not hear any of the prosecution witnesses deny, or challenge, the fact that the deceased knew how to ride the motor bike.

As for me, the foregoing evidence creates doubt in my mind as to who really was riding the motor bike between the accused and the deceased

particularly that only these two knew how to ride the motor bike. An accused is not required to satisfy the Court as to his innocence but simply to raise a reasonable doubt as to his guilt.

I find that this is a case in which a great deal of suspicion attaches to the accused, but there is a presumption in his favor concerning the identity of rider of the motor bike immediately before or when the accident occurred. There was neither an eye witness nor circumstantial evidence to take this case out of the realm of conjecture so that it attains such a degree of cogency which can permit only an inference of guilt (see **David Zulu vs, The People [1977] Z.R 151**).

On the prosecution evidence, there are a lot of doubts, as I have already observed, as to whether it is the accused that caused the death of the deceased or not. I have no alternative but to resolve the doubt, created in my mind, in favor of the accused.

As the Supreme Court guided in **Dorothy Mutale and Richard Phiri vs. The People (1997) S.J. 51** where two or more inferences are possible, it has always been a cardinal principle of the criminal law that the Court will adopt the one, which is more favorable to an accused if there is nothing in the case to exclude such inference. The circumstances in the case at hand point to a conclusion that either the accused or the deceased was riding the motor bike when the accident happened. The evidence in this case did not exclude the more favorable reference in favor of the accused.

At the expense of repetition there is lingering doubts in my mind on account of the various factors hereinbefore discussed. I am required by the criminal law to resolve such doubts in favour of the accused since the conviction is then rendered unsafe and unsatisfactory.

There being no cogent evidence subsisting against the accused I have come to a inescapable conclusion that the prosecution have failed to prove their case against the accused beyond reasonable doubt. I grant the accused the benefit of doubt and he therefore stands **acquitted** of the offence of causing death by dangerous driving contrary to section 161(1) of the Road Traffic Act, 2002.

**DELEVERED AT LUSAKA THIS 13<sup>TH</sup> DAY OF MARCH, 2015**



**Hon. Judge Betty Majula Mung'omba**  
**HIGH COURT**