

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

HP/21/2015

BETWEEN:

**THE PEOPLE
Vs
EVARISTO MULUNDU**



Before the Hon. Lady Justice F.M. Chisanga in Open Court

**For the State: Mrs. C. M. Chitundu, Mrs. S. Kachaka, National
Prosecutions Authority.**

For the Accused: Mr. K. Mweemba, Ms. M. Kalela, Legal Aid Board

JUDGMENT

Cases referred to:

1. **George Nswana v. The People (1988-98) ZR 1742.**
2. **Mambwe v. The People (Judgement No. 8 of 2014)**
3. **Kabuiki and Others vs The People 1974 ZLR P78**
4. **Tapisha vs The People (1973) ZR P222**
5. **Mulenga and Another vs The People (2008) 2 ZR P1**
6. **Hadoko vs The People 1975 ZLR P6**
7. **Mbinga Nyambe vs The People 2011 1 ZLR P246**
8. **Danny Zyambo vs The People 1977 ZR P53**
9. **Banda vs The People (1988 -89) ZR P129**
10. **Kabwiku and Others vs The People (1974) ZR 78,**

Legislation referred to:

1. **Phipson on Evidence, Thirteenth Edition, London Sweet & Maxwell
1982 P2**

2. Section 4 of the Penal Code CAP 87 of the Laws of Zambia

3. Section 292 of the Penal Code

Evaristo Mulundu, the accused person herein, stands charged with two offences. The first count is Murder contrary to Section 200 of the Penal Code Chapter 87 of the Laws of Zambia. The particulars of offence are that Evaristo Mulundu on the 8th day of January, 2013 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia did murder Hatambu Hambulo.

The second count is Aggravated Robbery contrary to Section 294(1) of the Penal Code Chapter 87 of the Laws of Zambia. The particulars of offence are that Evaristo Mulundu on the 8th day of January, 2013 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, did steal from Hatambu Hambulo, a motor vehicle namely, Honda Fit registration number ALC 4598, a Camera and two Cell phones all together valued at K36, 100.00, the property of Hatambu Hambulo.

The accused has denied both counts and it behoves the prosecution to prove the charges beyond reasonable doubt. The prosecution called eleven witnesses in support of the charge.

PW1 was Michael Chibonga of Ibex Hill Lusaka. He testified that on 8th January, 2013, between 5:30 and 06:00 hours, as he was about to take his bath, he heard a loud cry from the direction of the deceased's residence which went on for about 15 seconds. He described the cry as a distressed, helpless one, like that of a person who had been overpowered. His dogs thereafter

started barking and the neighbours' dogs followed suit. When PW1 enquired from his wife, she told him that she did not hear anything but his brother-in-law confirmed that he too had heard the cry.

PW1 testified further that as he was driving to work, about to join the main road, he saw a silver Honda Fit, abandoned in a ditch but did not stop to enquire. Later that day, at around 19:00 hours, police came to question him about his neighbour. As he was being interviewed, another police officer called out saying the body had been found. The witness stated that he did not know his neighbour but believed she was at her residence as the place was illuminated.

In cross examination, PW1 testified that he did not know what activities were taking place in the deceased's yard; it was about 15 metres away. He was unable to recognize the person who cried out as it was a cry he had never heard before. He did not find it prudent to go and enquire what the cry was about as it only went on for about 15 seconds

PW2 was Duduzile Nachula of Lusaka. She testified that on 8th January, 2013, she received a phone call from a colleague informing her that the deceased, her friend, had not reported for work. She tried to call her but her phones were off. The witness said it was unusual for the deceased to abscond from work and switch off her phones. After work, at around 16:30 hours, PW1 went to the deceased's house. She found the gate closed and did not know how to open it from outside so she knocked several times. When she peeped inside the yard,

she noticed that the deceased's vehicle was not there and the security lights were still on. She said that the deceased had a grey Honda Fit registration number ALC 4598.

At around 17:00 hours, PW1 received a phone call from the deceased's mother informing her that she was headed for the deceased's house. The deceased's mother was accompanied by police officers who managed to slide the gate open. She noticed that a lock was hooked on the grill door and it was locked. Through the bedroom window, she was able to see that the deceased's bed was not made and things were scattered. According to her, this was strange because the deceased was a very neat person. PW2 then proceeded to enquire from the neighbour if they had heard the deceased leave in the morning. She spoke to a man, who told her that he had heard someone scream early that morning but did not check as he thought it was a domestic issue and further that even his brother-in-law, had heard the screams while he was taking his bath. It was at this point that PW2 heard the officers saying they had found the deceased's body in a manhole. The fire brigade was called to assist remove the body from the manhole. When they finally removed the deceased's body, she was naked and PW2's mother covered her with a chitenge material.

PW2 testified further that she worked with the deceased at Food Reserve Agency (FRA). They were also close friends. The deceased often complained that her garden boy, the accused, and the three people that were doing some piece work were stealing building materials and that she had reported them to

Melissa Police Station. PW2 said that she last saw the deceased on the 7th January, 2013, at around 10:00 hours.

In cross examination, PW2 testified that it was odd to find the gate open because the deceased always locked it. The other times when PW2 visited, the deceased would open the gate for her. From the state of things in the house, it was possible that someone had broken into the house.

PW3 was Sepiso Esnart Lubundu Nalumango, the deceased's workmate. She testified that on 7th January, 2013, they knocked off between 19:00 and 20:00 hours. The deceased left in her vehicle, a Honda Fit ALC 4598, and PW3 left in hers. The following morning, the deceased did not report for work. It was unusual for her to abscond from work. She usually reported early. At around 13:00 hours, PW3 got worried and phoned the deceased's father as the deceased's phones were off. The father did not know her whereabouts.

Later that evening, PW3 was in constant communication with PW2, and the deceased's father and mother. At around 19:00 hours, PW3 phoned the deceased's mother who said she was worried as they found the gate open and the car was not in the yard. A few minutes later, PW2 phoned her and told her that they found the deceased dead. She phoned the deceased's mother who confirmed that Hatambu Hambulo was dead. The deceased did not have a personal driver.

In cross examination, PW3 testified that she was aware that the deceased had a garden boy who used to do errands. She never met him.

PW4 was Edith Zewelani Nawakwi, the deceased's mother. She testified that on the 8th January, 2013, she received a phone call from the deceased's father, Mr. Hambulo. He informed her that the deceased had not reported for work that day and her phones were off. He asked her to check on her daughter. She tried to get in touch with the deceased but failed. She hurriedly prepared herself and started off for the deceased's residence. On her way, her husband phoned again and informed her that the deceased's friends had proceeded to the house to check on the deceased.

The witness testified that she was alarmed because the previous Saturday, the deceased was at her home and was in good health. She was a type of child who let people know what she was doing. Her friends were worried because it was unusual for her to abscond from work. PW4 went on to testify that she first went to Woodlands Police Station, picked up three officers and then proceeded to the deceased's residence. They found PW2 and her friend waiting at the gate. The Police pushed the gate and it opened. The deceased's vehicle was not in the yard. She peeped in the deceased's bedroom through the window and noticed that it was in a mess. PW4 explained that the deceased used to live with her aunty who had recently left for the Copperbelt. She was alone at the time. When they got into the house, she observed that the rest of the house was neat. She then sent PW1 to enquire with the neighbours whether they had seen the deceased drive out. PW2 informed her that the neighbours heard the deceased screaming early that morning.

PW4 stated that after a search, the officers found the deceased's body in a septic tank. The police officers explained that they saw a head sock which led them to open the lid for the septic tank. They found the body of the deceased covered with a strange jersey as though to hide the deceased's innocence. The fire brigade came and removed the body from the tank and it was taken to the University Teaching Hospital. The deceased's mouth was tied with a masking tape and her legs were tied together with a high tensile wire all the way to her neck.

The following morning, PW4 went to Woodlands Police Station to give her statement and was informed that the deceased's motor vehicle was there and the person who was driving it had been apprehended. She identified the vehicle. There was found in the vehicle a small silver Samsung camera, a green Zamtel phone and a Nokia phone which the witness identified to the Court. She also identified the head sock, jersey and the motor vehicle, registration number ALC 4598. She went on to testify that she saw the accused who was said to have been driving the vehicle. She was informed by the police that the phones had the accused's sim cards.

In cross examination, PW4 stated that she was not present when the deceased was attacked and killed. The bedroom lights were on. The gate appeared locked but was actually open. The kitchen door also appeared locked but was open. Items in the bedroom were scattered; it was possible that somebody had been in that room. PW4 testified that she was not aware that the accused had been

in front of her vehicle and landed in a ditch. Being a traffic officer, she went to the vehicle and found a man coming out of the vehicle holding two phones. Upon seeing her, he attempted to run away but PW7 managed to apprehend him, and drove to woodlands Police Station, where she was based at that time. She phoned her superior and arranged for a tow truck to get the vehicle out of the ditch.

While at Woodlands Police Station, she detained the accused for dangerous driving without a licence and proceeded for presidential duties. PW7 identified the accused and the vehicle which was towed to the Court. She also identified the two phones the accused was holding when she apprehended him.

PW8 was Robam Mwamba, a crime technician based at Woodlands Police Station. He testified that on 8th January, 2013 at around 19:00 hours, he received a missing person report from PW4. He and other officers visited the residence of the deceased with PW4. He testified that on arrival at the deceased's residence, they found the gate, kitchen door and sitting room window and bedroom door wide open. When he checked the surrounding of the house, he noticed a black foreign object near an open manhole and discovered it was a head sock. When he checked the manhole, he saw an object covered with a blue cloth. When they uncovered the object, PW8 noticed that it was a human body which was identified to be that of Hatambu Hambulo by PW4. PW8 testified that the body was tied with a white cable and the mouth covered with a red cloth. When he examined the body, he noticed some bruises

indicating that the deceased was dragged to the manhole. He took photographs of the entire scene and compiled a photographic album which he identified and produced in Court.

In cross examination, PW8 testified that he found the gate and doors wide open. Anyone could have had access to the house. The doors had no sign of force. He testified that he did not lift any fingerprints, neither did he test for DNA.

In re-examination, PW8 testified that he did not consider it necessary to lift fingerprints and take DNA samples because the body was covered with a cloth which the relatives of the deceased could not identify as belonging to the deceased.

PW9 was Christopher Hambote of Lilayi, Lusaka. He identified the body of the deceased as that of Hatambu Hambulo before the postmortem was conducted at the University Teaching Hospital. He was in the company of police officers from Woodlands Police Station. He stated that before the incident, the deceased was alive and full of life.

PW10 was woman constable Lynette Namangala, Service Number 35481. She attended the postmortem of the deceased. She testified that the arms of the deceased were tied together with a cable that extended to the neck. She noticed bruises around the neck and at the back of the left shoulder.

PW11 was detective inspector Lewis Mwila, Service Number, 9108 based at Chelstone Police. He testified that on the 9th January, 2013, he was allocated a docket of murder and aggravated robbery to investigate. He discovered that the Honda Fit which was the subject of the aggravated robbery was already at Woodlands Police Station. It corresponded with the particulars of the lost vehicle that belonged to the deceased. PW11 interviewed the accused and recovered a camera and two cell phones; one Nokia and a ZTE Zamtel phone from him. PW11 identified the accused person to the court as Evaristo Mulundu, who he interviewed and from whom he recovered those items. When he switched on the camera, it had pictures of the deceased. When asked about those items, the accused said they belonged to the deceased. PW11 identified the phones, camera and the vehicle and tendered them in evidence. He stated that during investigations, he came across a letter confirming the sale of a grey Honda Fit by Matilda Karimamusama to the deceased. This letter confirmed that indeed the vehicle belonged to the deceased. He tendered it as part of his evidence as well.

PW11 testified further that when he visited the scene, he found a white cable, a black pair of stockings, a navy blue jersey with grey and white stripes and a small towel. He explained that the cable was used to tie the deceased's hands, through the legs and the neck and the towel was tied over her mouth. The jersey was used to cover the deceased's body after it had been deposited in the sewer. PW11 identified the white electric cable, the black stocking, the blue

and white jersey and the red towel to the Court. He tendered them in evidence. PW11 stated that the jersey belonged to the accused.

PW11 testified further that he warned and cautioned the accused in connection with the murder and aggravated robbery. He gave a statement which PW11 recorded. PW11 identified the statement, read it to the Court and produced it as part of his evidence. He stated that after he recorded the statement from the accused, the accused led him to the deceased's residence.

PW11 went on to testify that a postmortem was conducted by Dr. Telendiy and a report was written to that effect. He produced the postmortem report in evidence.

In cross examination, PW11 testified that he was one of the officers who accompanied PW4 and PW8 to the scene of the crime. At the time he took the accused to the scene, the body of the deceased had already been found and taken to the mortuary. No fingerprints were lifted from the sewer tank and cable. He was not aware that the deceased had taught the accused to drive and used to allow him to drive her vehicle. He testified that there were no groceries in the vehicle. The deceased did not send the accused to Melissa to buy groceries. PW11 could not confirm whether the deceased and the accused had a good relationship. He did not know how long the accused had worked for the deceased. He stated that one of the witnesses informed him that the deceased complained that the accused was giving her problems. He was not aware that

the accused had lost control of the vehicle because he was trying to avoid a cyclist.

Having considered the evidence led by the prosecution, I found the accused with a case to answer and put him on his defence.

Evaristo Mulundu, the accused, testified that on the 8th of January, 2013, he started off from Mtendere, his residence at around 05:50 hours for the deceased's home, where he was employed as a garden boy. He arrived between 06:20 and 06:30 hours and the deceased opened for him. She instructed him to quickly complete the slashing task he had been given the previous day. After completing that task, he washed the vehicle. Thereafter, the deceased gave him K400 and directed him to buy some groceries and other things that were needed for the home. At around 07:30 hours, the accused drove off and went to Melissa Supermarket. He testified that prior to the 8th January, 2013, he often drove the deceased's vehicle.

As he was driving back after purchasing the groceries, after Hilltop in Kabulonga, he met a drunk old man riding a bicycle. This man lived in Bauleni but the accused did not know him very well. As he was driving, this man hit the car with his bicycle on the rear causing him to go straight into a ditch. The accused then came out of the car and started shouting at this man. He later started looking for people to help him remove the vehicle from the drainage. It was at this point that two traffic police officers approached him and asked him what had happened. When they asked for his driving licence and the owner of

the vehicle, he told them that he had no driving licence and that the owner of the vehicle was at home. The Police then picked him and drove him to Woodlands Police Station.

The accused testified further that at the time of his arrest, he had his Samsung slide phone and a Zamtel phone. He had K270 in his wallet and his NRC. Before being taken to the cell, the accused requested to call the deceased but he was told that he would call her later.

On the 10th January, 2013, he was taken for questioning. At around 17:00 hours, he was again questioned over the death of the deceased. He was beaten but he maintained that he did not know anything. The following day, he was taken to an office where he met PW6. On the 12th January, 2013, he was beaten again but still maintained that he did not kill the deceased. He testified further that after being heavily tortured, he gave a statement so that he could be left alone.

He stated that the jersey that was produced in Court did not belong to him. The deceased's phones and the camera were retrieved from the deceased's home by the police and not from him. He disputed having put his sim cards in the deceased's phones.

In cross examination, the accused testified that when he gave his statement, he was just talking from without for fear of being killed. The statement he gave did not conform to what was found at the scene of the crime. He stated that he was sent to Melissa Supermarket at around 06:50 hours. He left the Supermarket

at around 07:20 hours. The officers found him after the accident. He later learned that it was an offence to drive a motor vehicle without a licence. He testified that PW5 did not see him. He however later stated that PW5 saw him and helped him out of the vehicle because the accident occurred near his place of work.

He testified further that he arrived at the deceased's place, for work at around 06:10 hours. He was not there when PW1 heard the cry. He left the deceased alive at around 06:50 hours. He did not cross-examine the witnesses about the groceries because he knew he would bring it up in his defence. He never told PW7 that he was headed for the airport. He denied putting his sim cards in the deceased's phones. The jersey found on the deceased was not his. He had no problems with his boss. She used to pay him on time.

He testified that there were initially four accused persons in the matter but three were released. He denied having told the police to release the others because he had committed the offence alone. They were released after his confession statement. He stated that the morning he drove the motor vehicle was not his first time to do so. He denied having caused the accident because of inexperience.

The accused stated that the deceased used to leave for work at around 07:20 hours. That there was nothing special about that day for her to report late for work.

In re-examination, the accused testified that there was a considerable distance between the deceased's house and PW5's place of work. It was therefore impossible for PW5 to have seen him. The deceased was good hearted and helped him whenever he needed anything.

Submissions were filed by the prosecution on the 10th June, 2016. It has been submitted on behalf of the State that the circumstantial evidence in this matter has taken the case out of the realm of conjecture, thus attaining a degree of cogency which can only permit an inference of guilt on the part of the accused. The case of **David Zulu v. The People (1977) ZR 151** has been relied upon. It is argued that the only inference that can be drawn from the evidence is that the accused committed the offences of aggravated robbery and murder.

The Court has been invited to take judicial notice of the fact that Melissa Supermarket opens at 08:00hours.

The Court's attention has been drawn to the case of **George Nswana v. The People (1988-98) ZR 174**, which case was affirmed by the Supreme Court in the case of **Mambwe v. The People (Judgement No. 8 of 2014)**. In that case it was held that:

"The inference of guilt based on recent possession, particularly where no explanation is offered which might reasonably be true, rests on the absence of any reasonable likelihood that the goods might have changed hands in the meantime and the consequent high degree of probability

that the person in recent possession himself obtained them and committed the offence. Where suspicious features surround the case that indicates that the applicant cannot reasonably claim to have been in innocent possession, the question remains whether the applicant, not being in innocent possession, was the thief or a guilty receiver or retainer."

It is argued that the accused was found with the deceased's vehicle within an hour of the deceased's death only a short distance away from her residence. It is submitted that this is a proper case to warrant a conviction for both counts on the basis of strong circumstantial evidence of being found in recent possession. It is also submitted that the accused confessed having committed the subject offences in his warn and caution statement which was produced in evidence as P8 and confirmed the confession under cross examination.

As indicated above, the accused person stands charged with two counts. The first count is that of murder. The elements that require to be established on this count is that the person alleged to have been murdered has died, at the hands of the accused person, by an unlawful act, and of malice aforethought. Regarding the charge of aggravated robbery, the prosecution must prove that the accused was armed with an offensive weapon or was with one or more persons and threats of violence or actual violence was used in order to obtain or retain the thing stolen.

The evidence led by the prosecution should prove the elements of the charges preferred against the accused person beyond reasonable doubt, as by law required.

Consideration of the evidence leads to several conclusions, which I shall proceed to outline. I find as a fact that Hatambu Hambulo, the deceased, lived in Ibex Hill, next door to Michael Chibonga, PW1. PW1's testimony to that effect was not refuted in cross-examination. It therefore stood accepted by the accused person himself.

I further find as a fact that PW1 heard a cry from the direction of the deceased's residence on the 8th January 2013. He said it was a very distressing cry, one of hopelessness as though a person had been overpowered. PW1 heard this cry around 06:00 hours. I so find because his testimony was that as per his usual routine, he woke up at 05:30 hours, read for 20 minutes and thereafter went to have his shower. He heard the cry just when he was about to take his shower. That places the time the cry was heard about 06:00 hours in the morning. That PW1 was neighbours with the deceased is confirmed by the testimony of PW2, who said she was instructed by the police to enquire from the neighbours if they heard the deceased leave. She said one man said he had heard some noise in the early hours of the morning, and that his brother in law heard the same cry. This testimony is confirmed by that of PW1 who said he asked his wife and brother-in-law whether they had also heard the cry. His brother-in-law, since deceased, confirmed having heard

the cry. This testimony was not challenged in cross-examination. It therefore stands accepted.

I find as a fact that on the 8th January 2013, the deceased, who was usually very early, did not report for work. This finding is premised on PW3's testimony. This witness called Mr. Hambulo, PW6, the deceased's father, so as to find out if he knew where the deceased was, upon learning from Hatambu's boss that the deceased had not reported for work, around 10:00 hours. This testimony was not challenged in cross-examination and was confirmed by PW6, who said he received a call from Sepiso Nalumango, PW3, on the 8th January 2013. She informed him that Hatambu, the deceased, had not reported for work. When he called PW3 later, she informed him that, Duduzile, PW2, would pass through Hatambu's house at 17:00 hours, to check on Hatambu.

I find as a fact that Duduzile Nachula, PW2, went to check on the deceased at her home in the afternoon, after 16:30 hours. She did not enter the yard as the gate was closed. She was later joined by Ms. Nawakwi, PW4, who had been requested by Mr. Hambulo, PW6, her husband, to check on Hatambu as she had not reported for work. PW4 reported the matter at Woodlands Police Station and officers were assigned to the case. PW4 left for the deceased's home with the officers. She had in the meantime communicated with PW2 who met her, and led her to the deceased's home.

I find as a fact that the group entered the deceased's premises after an officer had pushed the gate. PW2 said she could not open the gate, but when the

police came, they managed to slide the gate and enter the yard. PW8 on the other hand said the gate was wide open. I note the disparity in the testimony of the witnesses. However, it is immaterial, as entry to the premises was gained by the party, and access was gained to the deceased's house, through a door that was not locked.

It is an established fact that the body of the deceased, Hatambu Hambulo was discovered in a manhole, in the evening of the 8th January 2013, by PW8. It was covered with a blue garment. The body was later retrieved from the manhole by the fire brigade. The body was tied with a white cable on the hands, and the neck, and the mouth covered with a red cloth which was tied at the back. PW8 photographed the deceased in the manhole. The second photograph in the photographic album produced in evidence shows the deceased tied with a cable on her hands, with a red cloth tied over her mouth. The third photograph depicts the deceased tied with a white cable around the neck as well as her hands. The fifth photograph depicts the body of the deceased with blood on the lower part of her bottom.

It is a fact that a post mortem was conducted on the body of the deceased. It was witnessed by PW9, the deceased's uncle, and attended by Woman Constable Lynette Namangala PW10. This witness also saw a white electric cable tied around the arms of the deceased and extended round the neck. The post mortem report produced in evidence indicates that both hands of the

deceased were tied with an electric cable which was also around the neck. The cause of death was stated as mechanical asphyxia due to strangulation.

It is established on the evidence that the deceased owned a motor vehicle, namely Honda fit, registration number ALC 4598. It was sold by one Matilda Karimamusama of 95 Chudleigh, Lusaka to Hatambu Hambulo of house number 7731 Ibex Hill Lusaka on 7th December 2012.

It is undisputed that Evaristo Mulundu, the accused person herein, drove the said motor vehicle on the morning of the 8th January 2013, barely a month. According to PW7 she was driving along the American Embassy, from the east to the west, around 06:30 hours. She was rushing for presidential duties and had been instructed to arrive exactly around 07:00 hours. As she was driving on the road, a vehicle came from her left hand side, cut in front of her vehicle and went straight into the drainage. PW7 and her colleague, both traffic officers, went to the vehicle in the drainage. When PW7 got to the vehicle, she found accused getting out of the vehicle with two phones in his hands, and upon seeing PW7 and her colleague, he wanted to run away, and started running backwards, only stopping after being told that he should not run away as the law would visit him. He stopped, and was later apprehended and taken into custody.

I find as a fact that at the time he was apprehended, the accused person had a Zamtel phone and a Nokia phone in his hands. These are the same phones that were produced in evidence by PW11, the arresting officer.

I should emphasise here that a failure to challenge the testimony of prosecution witnesses amounts to acceptance of their evidence by an accused person. An accused person, as earlier remarked, should set forth his case, or version, during the cross-examination of the witnesses on the issues concerning which they attest to. If he fails to challenge the prosecution version in cross-examination, and advances his version in his own testimony, the trier of fact would be entitled to treat his version as an afterthought.

In **Joseph Mulenga and Another vs The People (2008) ZR P 2**, the Supreme Court held inter alia that the evidence of gunshots, recovery of ammunition and spent cartridges having not been challenged, the trial judge was entitled to find armed aggravated robbery proved. The court stated, at page 5:

“.....During trial, parties have the opportunity to challenge evidence by cross examining witnesses. Cross examination must be done on every material particular of the case. When prosecution witnesses are narrating actual occurrences, the accused persons must challenge those facts which are disputed.”

Turning to the present case, the accused testified in his defence that he hit into an old man who was riding (a bicycle) at high speed. He said upon being asked where the owner of the vehicle was, he said she was at home and even suggested that they go home, but the police refused. At the police station, he requested that the owner of the vehicle be called, but the police refused to accede to his request. All these assertions were not suggested to PW7 during

cross-examination. It was never suggested to her that the accused landed in the drainage after hitting an old man who was riding at high speed, or that accused suggested that they go home to the owner of the vehicle. Nor did he suggest that he proposed that the owner of the vehicle be called. Having not challenged the version advanced by PW7, he is deemed to have accepted it. Accordingly, I accept PW7's version as true, and discount accused's claims as an afterthought.

I further find as a fact that at the time accused was apprehended, no mention whatever was made of his having been sent on an errand by his employer to go and purchase groceries. It was not suggested to PW7 that at the time of the accident, there were groceries in the motor vehicle.

I have accepted PW7's evidence that the accused person had a Nokia and Zamtel phone at the time he got out of the vehicle after crashing into the drainage. PW11 testified that accused said the two phones belonged to the deceased, and his testimony went unchallenged in cross-examination. It was not suggested to the witnesses that the phones belonged to the accused. Accused person testified that he had phones with him, a Samsung and a Zamtel phone. He thus concedes that he was found with two phones at the time he was apprehended. He never challenged the assertion that he was found with a Nokia phone as well as a Zamtel phone by PW7. Therefore, he accepted that evidence. His claim that he had a Samsung phone, and a Zamtel

phone, which belonged to him is therefore an afterthought and I dismiss it as such.

It is a fact that a sim card that belonged to the accused person was found in the Nokia phone that belonged to the deceased. This finding is premised on PW11's testimony which was not challenged by accused person in cross-examination. In his testimony, the accused said his sim card was not found in Hatambu's phone. He said it had gone missing and he was surprised that his lost sim card was in Hatambu's phone. Accused said the following in his defence, when asked to comment on PW11's testimony that accused's sim card was found in the deceased's phone:

"A. They got the sim cards from my phones. Even when they were giving the same phones to my mother they gave them the phones which were opened, the cover was on its own and the battery of the same phone. I thought that maybe it got lost my lady. To my surprise when I came here in court only to discover that the sim card that I lost was now put in Hatambu's phone to be given here as evidence that I stole the same phones, things which I did not do. That sim card was in my phone. They just removed it."

This statement is conflicting. At first accused asserts that he had thought the sim card in question had gone missing. He was surprised to discover that it was in Hatambu's phone. Thereafter accused says the sim card was in his phone and that the police just removed it. The first suggestion put across is

that the accused had lost his sim card, and someone put it in the deceased person's phone, most likely the deceased herself. This absurd suggestion is negated by the second one, as the accused in effect retracts the first suggestion when he states that the sim card was in his phone, but was removed by the police. I have no difficulty discounting this suggestion as it was never put to PW11. It is an afterthought. I find as a fact therefore that at the time the accused was found with the deceased's phones, he had inserted his sim card in one of the phones.

I now turn to consider the question whether or not the accused person gave a confession statement to the police. In determining this question, I bear in mind that it is not the truthfulness of the confession statement that is of essence. Rather, it is the voluntariness or otherwise of a confession statement that a court is called upon to determine. See **Kabwiku and Others vs The People (1974) ZR 78**, where it was held that:

- (i) *The condition of admissibility of an incriminating statement is not truth but voluntariness.*
- (ii) *The basis upon which evidence of an incriminating statement is excluded in the absence of proof of voluntariness is not that the law presumes the statement to be untrue in the absence of such proof, but because of the danger which induced confessions or admissions present to the innocent and the due administration of justice.*

I should equally point out that the standard of proof cast upon the prosecution in relation to the voluntariness or otherwise of a confession is that of beyond reasonable doubt. Similarly, the prosecution must prove, to this same standard, that an accused person made the statement in question. The prosecution must thus prove beyond reasonable doubt that the accused person gave the statement voluntarily. PW11 testified that accused gave a statement in December 2013, after a nolle prosequi had been entered, and he had been re-arrested. The statement allegedly given by the accused person was incriminating. PW12, who was called as a witness in the trial within a trial stated that the accused person denied the charge. As the accused had denied making an incriminating statement, I reserved determination of the question whether or not accused made a statement to the main trial. In his defence in the main trial, the accused said he gave the incriminating statement in December because he was tortured.

PW12, who was PW2 in the trial within a trial, stated that the statement given was voluntarily made, the accused denying the charge. He also said he translated the statement into Bemba. If PW12 witnessed the recording of a statement from accused, then accused must have denied the charge on the instance PW12 witnessed the recording. It appears however that accused made an incriminating statement which he signed, according to him, after being tortured. On the evidence as it stands, I am not persuaded of the voluntariness of the incriminating statement made by the accused person because no other officer who was present was called. PW11 said the accused was surrounded by

three officers at the time the statement was recorded. No attempt was made to call the other officers who were present when the incriminating statement was made because clearly, it was not made in the presence of PW12, as he said the accused denied the charge.

I am reminded, by these circumstances of the views of the Supreme Court in **Hadoko vs The People 1975 ZLR P 6**. It was held inter alia there that where an accused person is alleged to have made a confession in the presence of a police officer and the prosecution does not call that police officer, the magistrate should be very wary of attaching any weight to this evidence. This direction equally applies to a trial judge.

I earlier stated that it is not the truthfulness of the contents of a statement that matters, but its voluntariness. Due to the deficiencies I have observed on the evidence relating to the making of the confession statement, I am not persuaded it was voluntarily made, and will thus not rely on it in determining this case.

Thus far the evidence has revealed that Hatambu Hambulo was murdered. She was mechanically strangled. The electric cable, found round her neck leads to the inference that the said cable was employed to strangle her. Her mouth was covered with a towel, obviously in a bid to prevent her from screaming. The conclusion to be drawn is that she was over-powered, gagged and an electric cable tied round her hands, and used to strangle her. Whoever

perpetrated the attack clearly intended to kill her, as it should be clear to any sane person that death is likely to ensue from strangulation.

On these facts, the first element stands satisfied, that Hatambu Hambulo died, as proved by the post mortem report. She met her fate through an unlawful act, and of malice aforethought. These elements have been established on the evidence. The question now remaining to be determined is; who murdered Hatambu Hambulo?

The evidence relating to the murder is circumstantial. According to **Phipson on Evidence, Thirteenth Edition, London Sweet & Maxwell 1982 P. 2**, circumstantial evidence is indirect evidence which proves facts from which the existence of the given fact may be logically inferred.

It has been stated that circumstantial evidence can be powerful evidence but it is important that it is examined with care, and consideration made whether the evidence upon which the prosecution relies in proof of its case is reliable and whether it does prove guilt. Further, before the evidence is relied upon, it should be considered whether it reveals any other circumstances which are or may be of sufficient reliability and strength to weaken or destroy the prosecution case.

The nature of circumstantial evidence was highlighted by the Supreme Court in **Mbinga Nyambe vs The People 2011 1 ZLR P 246**. The Court re-stated that a trial judge must be satisfied that the circumstantial evidence has taken the

case out of the realm of conjecture so that it attains such a degree of cogency which can permit only an inference of guilt.

In proceeding as guided in **Nyambe vs The People supra**, one should keep in view the earlier case of **Zulu vs The people 1977 ZLR P 151**, where the Supreme Court remarked as follows:

“It is a weakness peculiar to circumstantial evidence that by its very nature, it is not direct proof of a matter at issue, but rather, is proof of facts not in issue but relevant to the fact in issue and from which an inference of the fact in issue may be drawn.”

In the present case, the accused person was in possession of the deceased's property. That evidence is the evidence that connects the accused person to the offence. It is sought to draw an inference of guilt from that possession. In seeking to draw that inference, sight must not be lost of the guidance rendered on that aspect of evidence by the Supreme Court in **Danny Zyambo vs The people 1977 ZR 53**. The Court stated:

“Inference of guilt cannot be drawn from possession of stolen property unless it is the only inference that can reasonably be drawn. Where an innocent explanation might reasonably be true, the inference of guilt is not the only reasonable inference.”

In a later decision rendered in **Banda vs The People (1988 -89) ZR P 129**, the Supreme Court stated, regarding possession of stolen property that the Court

is under a duty to consider various alternative inferences which can be drawn when the only evidence against the accused is that he was in possession of stolen property.

With these guidelines, I now turn to consider the question as to who murdered the deceased. The deceased did not report for work on the morning of 8th January 2013. PW3 did not find the deceased at her desk when she reported for work. PW1 said he heard a cry of hopelessness, from the direction of the deceased's house, when he was about to have a shower around 06:00 hours. It is an odd coincidence that a person would be later found dead with a piece of cloth tied over her mouth, obviously in a bid to stop her from screaming for help, in the place from which the scream PW1 heard came from.

The accused person said he reported for work, at the deceased's residence at 06:20 hours or 06:30 hours. According to him, he did some work on her instructions and she later sent him to buy groceries from Mellisa Supermarket. Before that, he got the car keys from the deceased and washed the vehicle.

I earlier found that it was never put to PW7 who went to the scene of the accident that there were groceries in the deceased's motor vehicle nor was it put to PW5, who heard a crash and went outside to check what had happened. I can only attribute the failure to raise this issue in cross-examination with those witnesses to the fact that it was an afterthought. Granted, it was put to PW11. But that witness was not the first one to go to the ditch where the motor

vehicle was. He only saw the vehicle after it had been retrieved from the scene of accident and taken to the police, on the following day.

It is established on the evidence that the accused person's sim card was found in the Nokia phone that belonged to the deceased. On the evidence, it is a fact that the Nokia phone was identified as having belonged to the deceased. In fact accused person himself confirmed this, because he said those items were taken from her handbag and later brought by the police so as to implicate him. This claim was an afterthought, as he never challenged the evidence that he was found with a Nokia phone at the scene of accident by PW7. He therefore accepted that he was found with the Nokia phone. He as a result could not assert a version contrary to the one he had earlier accepted.

Further, it was never suggested to PW11 in cross-examination that the phones and camera were retrieved from the deceased's handbag, and brought to implicate the accused. It is an afterthought, and I dismiss it as such accordingly. The truth of the matter is that the deceased person's phones and camera were found with the accused after the accident.

PW11 testified that the track top that was found on the deceased's body in the manhole belonged to the accused person. This evidence was not challenged in cross-examination. It was thus accepted by accused person as true. It was therefore an afterthought to later deny ownership of the track top. I find as a fact that accused person's track top was found on the body of the deceased in the manhole.

It is established on the evidence that accused person who was employed by the deceased, reported for work very early in the morning of the 8th January 2013. He has confirmed that he got the car keys from the deceased. The inference to be drawn from this is that the deceased had opened her home. It is also clear that she did so when she was still in her night dress, before she had changed into other clothes. This accounts for the absence of any signs of forced entry into the deceased's home. Shortly after 06:30 hours but before 07:00 hours, accused left the home of the deceased in her motor vehicle, a Honda Fit bearing registration number ALC 4598, silver in colour. He cut in front of PW7's motor vehicle and landed in a ditch. This accident occurred about 100 metres from the residence of the deceased, as stated by PW11, which evidence was not challenged.

At the time of the accident, the accused person had two phones that belonged to the deceased. A Samsung camera that belonged to the deceased, was also found in the vehicle. A sim card that belonged to the accused was found in the Nokia phone owned by the deceased, and found with the accused person. A track top that belonged to the accused was found thrown on the body of the deceased in the manhole.

The question that arises is, what inferences can be drawn from those circumstances?

I will start with the scream or cry heard by PW1 around 06:00 hours from the direction of the residence of the deceased. I am mindful that it can be said that

the cry could have come from anyone. However, the fact that the deceased was found with a towel tied over her mouth suggests that this was in a bid to prevent her from crying for help. The cry that PW1 heard was one of hopelessness. That kind of cry could only have come from a person in hopeless circumstances. Those are the circumstances in which the deceased was found. It is very odd that PW1 would hear a distressing cry of hopelessness, from the direction of the residence of the deceased, and the deceased later found gagged over her mouth to prevent her from crying out for help. The inference that the cry came from her is inevitable.

Accused person was involved in an accident after 06:30 hours, but before 07:00 hours, going by PW7's testimony. She said she started off at 06:30 hours and had to report by 07:00 hours. On her way she witnessed the accident. Therefore, accused could not have left the residence of the deceased person around 07:30 hours or 07:35 hours as he claims. That claim is a lie and I discount it as such. He left the residence earlier, as indicated above.

Secondly, when coming out of the motor vehicle at the scene of the accident, he had two phones that belonged to the deceased in his hands. He admitted in evidence that his sim card was found in the deceased person's Nokia phone. At first he said it had gone missing and he was surprised it was in her phone, but later amended his statement by saying the sim card was removed from his phone by the police and inserted in the deceased's phone. The only inference I can draw from the prosecution testimony, as confirmed by accused person

through his lies, is that accused put his sim card in the Nokia phone that belonged to the deceased.

I have found as a fact that the track top that belonged to the accused person was thrown over the body of the deceased in the manhole where it was concealed after the murder.

On the authority of the cases cited above, I am required to consider whether other inferences can be drawn on the facts of this case, other than that of guilt, and whether accused's story could be reasonably true. Accused says he was sent by the deceased to buy groceries at Mellisa Supermarket. While it is reasonably possible that a domestic servant can be sent on an errand to buy groceries as claimed, the said inference is not drawable on the facts because it is not reasonable that an employer would send a domestic servant on an errand, and surrender her phones and camera to him when sending him. It can be said she might have forgotten those items in the vehicle. This suggestion is negated by the fact that the accused person assumed ownership of the phones. He removed his employer's sim card that was in her Nokia phone, and replaced it with his own. It is not reasonably possible that she just forgot the phones in the vehicle because accused's conduct is consistent with ownership in that he took the phone and began to use it; by inserting his own sim card into the phone as though it was his phone. His conduct was inconsistent with innocence. He has offered no explanation as to why he inserted his sim card in the phone that belonged to his employer.

Secondly, the accused informed the court that he used to live elsewhere, and reported for work on the 8th of January 2013 at the residence of the deceased. It is a very odd coincidence that his track top would be found on the body of the deceased. Accused did not challenge that evidence in cross-examination as earlier noted when PW11 testified. He accepted that the track top was his as a result. He has not offered any explanation as to how his personal track top could be found on the body of the deceased. In the absence of an explanation that he left his track top at the deceased's residence at the time he left the premises, the conclusion that he threw the track top on the deceased's body is inevitable.

Additionally, the fact of inserting his sim card into the phone of the deceased, assuming ownership thereof, leads to the inevitable conclusion that he is the one who threw his track top on her. It was said no fingerprints were lifted from the white cable found round the neck of the deceased. The accused used to work for the deceased and it must be assumed he would have handled the items in the home. It is not known where the white cable used to tie her hands and strangle her came from. Even if it could be said that there was dereliction of duty by the police in that respect, thus raising a presumption in favour of accused that his fingerprints were not on the cable, this presumption has been displaced by the evidence of inserting his sim card in the phone that belonged to the deceased, and the track top found on her body. The guilty knowledge is manifest from the fact of inserting his sim card in the phone that belonged to the deceased. He could have only done that if he knew she could not ask for

the phone. She obviously could not ask for it as she was dead. The guilty knowledge of the death is manifest from the accused person's conduct.

A phone is a personal item and not interchangeable. Accused had two of the deceased person's phones, as found on the evidence. He has offered no explanation as to how he came into possession of the phones. Before the body of the deceased was even discovered, he inserted his sim card into her Nokia phone. The inference that he knew she was dead is irresistible. He was in contact with the deceased early in the morning on that fateful date. He had the opportunity to commit the murder, and he did murder her by mechanical strangulation, dumped her body in the manhole, and threw his track top on her body. His guilt is confirmed by his conduct as earlier stated. His motive is revealed by the articles he took. He took her car, phones and camera. He hid her body in the manhole so that it could not readily be discovered. The circumstances point only to him as the culprit.

On the circumstantial evidence led, no inference consistent with innocence can be drawn in favour of the accused person. The prosecution has thus proved beyond reasonable doubt that the accused person murdered his employer Hatambu Hambulo in cold blood, of malice aforethought. I therefore find the accused person guilty of murder as charged and convict him accordingly.

I now turn to consider whether the elements of aggravated robbery have been proved by the prosecution. For the offence of aggravated robbery to be satisfactorily established against an individual, it must be shown that he was

armed with an offensive weapon or instrument, and used or threatened violence to obtain or retain the thing stolen. 'Offensive weapon' is defined in **Section 4 of the Penal Code CAP 87 of the Laws of Zambia** as:

“any article made or adapted for use for causing or threatening injury to the person, or intended by the person in question for such use and includes any knife, spear, arrow, stone, axe, axe handle, stick or similar article.”

There is no evidence that accused was armed with any of these articles at the time he murdered the deceased, and took her property. The offence of aggravated robbery is also established against an individual if he is with one other person or more, and they employ violence to obtain or retain the thing stolen.

Again, there is no evidence that accused was with another person at the time the offence was committed.

However, the offence of robbery has been disclosed by the evidence led by the prosecution. The relevant **Section** is **292 of the Penal Code**. It provides:

“292. Any person who steals anything, and at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty

of the felony of robbery and it liable on conviction to imprisonment for fourteen years."

Evaristo Mulundu murdered the deceased and thereafter took her motor vehicle, the Honda Fit bearing registration number ALC 4598, her Nokia phone, Zamtel phone and Samsung camera. There was evidence that some things were thrown around in her bedroom. I infer that accused person threw the deceased's effects around. He could only have driven the motor vehicle away after murdering the deceased and dumping her in the manhole. Therefore, I infer, he used force in order to obtain her motor vehicle and the phones, as well as the camera. As earlier found, the deceased did not allow the accused to drive the motor vehicle on the morning in question. She was already dead, at his hands. Where a minor offence is disclosed by the evidence, and the accused has had opportunity to defend himself against it, a court can competently convict an accused person of the lesser offence. I therefore find the offence of robbery proved against the accused person beyond reasonable doubt. I thus find Evaristo Mulundu guilty of the offence of robbery and convict him accordingly.

Dated the^{30th}.....day of^{August}..... 2015



F. M. CHISANGA
HIGH COURT JUDGE

employed by the deceased for 9 months prior to her death. She was also not aware that he was allowed to drive her motor vehicle. She hardly visited her daughter because she was always at PW4's home. During her visits, the deceased never complained about her garden boy. She was aware that the deceased had someone to help her cut the grass. She was not aware that the deceased's workers were stealing from her and neither did she know that the deceased was not paying her workers.

PW5 was Patrick Katwe of Kalikiliki Compound, a gardener. He testified that on 8th January, 2013 he reported for work in Ibex Hill at around 06:30 hours. Whilst on duty at his place of work, he heard a loud bang outside and went to check. He found a vehicle in the drainage near the wall fence. He noticed someone struggling to come out of the vehicle but the door could not open. When he managed to come out, he asked him how he got into the drainage and his response was that he too was surprised how he got there. PW5 went into the house to inform his boss and when they came out, the vehicle was there but the person had left. He identified the accused as the person whom he saw driving the vehicle. He also identified the vehicle to the Court.

In cross examination, PW5 testified that he was meeting the accused for the first time and depended on his memory to identify him.

PW6 was Jeffrey Hambulo, the father of the deceased. He testified that on 8th January, 2013, at around 15:00 hours, he received a phone call from PW3 informing him that the deceased had not reported for work and her phones