

IN THE HIGH COURT FOR ZAMBIA

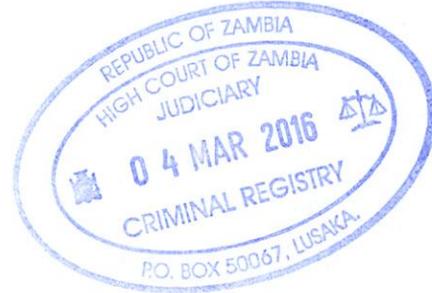
HP/124/2015

AT PRINCIPAL REGISTRY

LUSAKA

(Criminal Jurisdiction)

THE PEOPLE



VERSUS

YOTAM SAKALA

Before the Honorable Mr. Justice C.F.R. Mchenga SC

For the People: C. Soko, Acting Senior State Advocate, National Prosecution Authority

For the Accused: C. Siatwinda, Legal Aid Counsel, Legal Aid Board

J U D G M E N T

Cases referred to:

1. **Bwanausi v The People [1976] Z.R. 103**

Legislation referred to:

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

Yotam Sakala, the accused person, stands charged with the offence of Murder contrary to **Section 200 of the Penal Code**. The particulars of offence allege that on 13th October 2014, at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia jointly and

whilst acting together with other persons unknown they murdered Martha Phiri. He denied the charge and 5 prosecution witnesses were called.

Rhoda Sakala was the first prosecution witness (Pw1). Her evidence was that on 12th October 2014, around 06:00 hours, she was woken up by a neighbour and Alick's wife. They told her that her friend Martha had left her child and they were taking it to the police station.

She went to sleep and not long thereafter, she was called and told that Martha had been found dead. She went to where her body was and found her lying facing downwards. She was wearing a skinny jeans and the front button was open. It was below the buttocks. She was found four (4) houses from where she stays.

It was her evidence that the previous evening, she had gone drinking with Martha and they ended up at Lloyds Bar. She left her at that bar between 20:00 to 21:00 hours. She knows the accused person because he used to refer to Martha's husband as a brother and was her neighbour. He is the only Yotam that Martha she used to refer to as "brother in law".

When she was cross-examined, Pw1 said she did not see the accused person at the bar that evening.

The second prosecution witness Lloyd Sichilima (Pw2), a bar attendant at Twiza bar. On 12th October 2014, he closed his bar around 22:50 hours. Before that, Martha was in the bar and she approached him for a cup. After he closed, she left like everyone else. The following day, he found the accused person being pulled around by members of the public who were accusing him of having killed someone. He helped apprehend him and thereafter left. He has known him for 5 years.

When he was cross-examined, Pw2 said Martha was alone when she approached him for a cup.

The third prosecution witness was Queen Nswana (Pw3). Her evidence was that on 13th October 2014, she was asleep in her house in Jack Compound. Around 03:00 hours in the morning, she heard a woman saying why are you following me, you are my brother in law, I cannot have sex with you. There was a sound of something falling and a baby started crying. It continued crying for a long time.

Around 04:00 hours, the baby started crying again. She then called out and asked what was going on. A man answered saying the baby was alone and that is how she went outside. Some people came and identified the baby as being that for a friend of Pw1. Pw1 was called and she said she left the mother at the bar the previous evening.

They went to the police station and she was asked if she knew Yotham. She told them that she did not and they were advised to look for him and Pw1.

When they got back home, they found a body at a plot next to her house.

When she was cross-examined, Pw3 said she was listening to a radio at the time she heard voices outside the house. She switched it off soon after hearing them. She failed to go outside because she was alone in the house. She asked the people outside to leave around 04:00 hours.

Constable David Zimba was the fourth prosecution witness (Pw4). His evidence was that on 12th October 2014, while on duty at Chawama police Station, he received a report from members of the public who had picked up a baby. He went with them to Jack Compound and they found a body 15 to 20 meters from where the baby had been picked. The body had bruises on the neck and its clothes were dirty and torn. They took it to the University Teaching Hospital (UTH).

Under cross examination, Pw4 said it was not brought to his attention that Martha had been drinking. It was his view that the injuries could

not have been caused by the drinking. He was not aware that she had a fight with her husband prior to going to the bar.

The last prosecution witness was Constable Moses Kafita (Pw5). He is the arresting officer and his evidence was that on 13th October 2014, while on duty at Chawama Police Station, he was allocated a docket of murder in which the deceased person was Martha Phiri. He was also informed that the accused person, who was a suspect in the case, was in custody. He interviewed the accused person who told him that he did not know anything about the death.

On 15th October 2014, a post-mortem was conducted on the body of Martha Phiri by Dr. Telendiy at the UTH after her mother identified it. The cause of death was found to be asphyxia. He produced the report which was admitted into evidence as Exhibit P1. He made up his mind to arrest the accused person when he failed to give him a satisfactory explanation.

When he was cross-examined, Pw5 said he discovered that the Martha Phiri was drinking beer the night before she was found dead. In the course of his investigations, he did not come across any information about her husband beating her. He visited the scene of the crime and

was informed she had a brother in law called Yotam. The accused person is well known in Jack Compound because of his reputation.

At the close of the prosecution case, I found the accused person with a case to answer and I placed him on his defence. He elected to give evidence but did not call any witnesses.

In his defence, the accused person said he knows Martha Phiri's husband because they grew up together. On 12th October 2014, he went home around 19:00 hours. He is a caretaker and stays alone. He did not know anything about how Martha Phiri died or where her body was found.

When he was cross-examined, the accused person said he is a neighbour of Martha Phiri's husband. He denied the suggestion that Martha Phiri referred to him as his brother in law or that he was the only person called Yotam in the area.

From the evidence before me, I find that it is not in dispute that on 13th October 2014, in the morning, the body of Martha Phiri was discovered in Jack Compound. Prior to that, her baby was recovered 15 to 20 meters from where her body was found. I also find that it is not in dispute that on 15th October 2014, a post-mortem was conducted on her body by Dr. Telendiy at the UTH and he found the cause of death to

be asphyxia due to strangulation. I accept the doctor's findings and find that Martha Phiri did not die of natural causes but was killed by someone.

Section 200 of the Penal Code provides that the offence of Murder is committed when:

"Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder"

Malice aforethought is defined in Section 204 of the Penal Code which provides that:

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

- (a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- (c) an intent to commit a felony;
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

Though direct evidence has not been presented to court, I am satisfied that whoever strangled Martha Phiri intended to cause her death. I find no reason why a person would have strangled her other than to

cause her death or do grievous harm to her. Consequently, it is my finding that Martha Phiri was murdered.

The question that remains to be determined is who murdered Martha Phiri? The prosecution evidence linking the accused person to the offence is mainly that provided by Pw3. It was her evidence that she heard a lady say she was not ready to have sex with a man who had been following her because he was her brother in law. A baby fell and the lady then blamed the man for being responsible for the child's falling. The following morning, a baby was recovered and it was identified as being Martha Phiri's baby. There was also evidence from Pw1 that Martha Phiri referred to the accused person as her brother in law and he is the only person who was known as Yotam in that area.

The evidence against the accused person is best described as being circumstantial because no one saw him attack Martha Phiri. In the case of *Bwanausi v The People (1)*, it was held, *inter alia*, that:

"Where a conclusion is based purely on inference that inference may be drawn only if it is the only reasonable inference on the evidence; an examination of alternatives and a consideration of whether they or any of them may be said to be reasonably possible cannot be condemned as speculation".

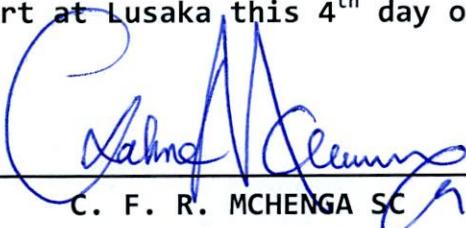
The only way the accused person can be convicted is if the only inference that can be drawn from the evidence that has been recounted in the last preceding paragraph is one of guilty. While Pw3 has not indicated that the female person who was talking to the man was Martha

Phiri, I am satisfied that it was her because it would be too much of a coincidence that her body and her baby were found near the place where Pw3 heard people talk and a baby was crying. But is the person Martha Phiri was talking to the accused person?

I have considered Pw1's testimony that the accused person is the only person Martha Phiri referred to as her brother in law. Given that the accused person was not Martha Phiri's brother in law, but she referred to him as such, I find that it is possible that she could have referred to other men by the same term. This being the case, I find that it cannot be said with any degree of certainty that the accused person is the man Martha Phiri was talking to especially that he was not seen in the vicinity that evening.

Consequently, it is my finding that the prosecution have failed to prove the case against the accused person beyond all reasonable doubt. I find him not guilty and I acquit him. I direct that he be set at liberty forthwith.

Delivered in open court at Lusaka this 4th day of March, 2016


C. F. R. MCHENGA SC
JUDGE