

**IN THE HIGH COURT FOR ZAMBIA**

**HK/44/2020**

**AT THE DISTRICT REGISTRY**

**HOLDEN AT KITWE**

**(Criminal Jurisdiction)**



**BETWEEN:**

**THE PEOPLE**

**AND**

**PATRICK MWANSA**

**Before Lady Justice Abha N. Patel, S.C.**

*For the State:*

*Mrs. M.G. Kashishi-Ngulube, Mr. B. Siafwa, Mr. B.Z. Tembo, & Ms. Sara Shawa I.*

*of Messrs National Prosecutions Authority*

*For the Accused:*

*Ms. M. Nzala & Mr. P. Chavula of Messrs Legal Aid Board*

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**JUDGMENT**

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Cases Referred to:

1. *Woolmington vs DPP* (1935) 1 All E R 1
2. *Mwewa Murono v The People* (2004) ZR 207
3. *The People v Njobvu* (1968) ZR 133
4. *Chimbini vs The People* (1973) Z.R 191
5. *Donald Fumbelo vs The People* SCZ No. 476/2013
6. *Kwechele vs The People* CAZ Appeal No. 140/2018
7. *Joseph Mulenga and Another vs The People* (2008) SC Z.R vol 1
8. *Kombe v The People* (2009) ZR 282
9. *Ilunga Kabalu and John Masefu v. the People* (1981) Z.R. 102 (S.C.)
10. *Saidi Banda v The People* SCZ No. 30 of 2015
11. *Mulwani v The People* SCZ Appeal No. 44 of 2015
12. *David Zulu vs The People* (1977) ZR 151
13. *Yokonia Mwale v The People* SCZ No. 258/2014
14. *Peter Yotamu Haamenda v The People* (1977) Z.R 184 (SC)
15. *George Musupi vs The People* (1978) ZR 271
16. *Andrew Mwenya vs The People* Appeal No. 640 of 2013 (SC)
17. *Machipisha Kombe v The People* (2009) Z.R. 282
18. *Charles Lukolongo & Others vs The People* (2004) Z.R 207 (SC)
19. *Dorothy Mutale & Richard Phiri vs The People* (1997) S.J. 51 (SC)

Legislation and Other Materials Referred To:

1. *The Penal Code, Chapter 87 of the Laws of Zambia;*
2. *The Criminal Procedure Code, Chapter 88 of the Laws of Zambia*

## **1. Introduction**

- 1.1 **Patrick Mwansa**, of House No. 3761 Ipusikilo Compound at Kitwe, also known in his community as '**50**', the accused person, stands charged with one count of the offence of murder contrary to **section 200 of the Penal Code, Chapter 87 of the Laws of Zambia**.

The particulars of the offence allege that Patrick Mwansa, (the accused) on dates unknown but between the 2<sup>nd</sup> day of November 2019 and the 5<sup>th</sup> day of November 2019 at Kitwe in the Kitwe District of the Copperbelt Province of the Republic of Zambia, did murder one **Elinah Lungu** (the deceased).

When called upon to plead, he denied the charge. The Court entered a plea of not guilty, and the matter proceeded to trial.

- 1.2 From the outset, I warn myself that the Prosecution bears the burden of proving all the elements of the offence of murder beyond reasonable doubt. The Accused person bears no burden of proving his innocence. If, after considering all the pieces of evidence in this case, I entertain some reasonable doubt in my mind as to the guilt of the Accused person, then the Accused must be given the benefit of that doubt.

- 1.3 The prosecution's case rested on the evidence of **seven (7)** witnesses. I will state their evidence briefly, in the knowledge that the Record is comprehensive.

## **2. Evidence of the Prosecution**

2.1 **PW1, ESTHER MWILA**, was a 71-year-old business lady, a resident of house No. IP 3689, Ipusikilo Compound in Kitwe, where she had resided for a period of 15 years. It was her evidence that she had known the accused as her neighbour for a period of 15 years, as she found him in that neighbourhood at the time that she moved there. She narrated that his house was approximately 15 to 20 metres from hers. It was her evidence that the accused and the deceased, who was his wife, both stayed in the house next to hers, and that although they lived well, there were often fights in that household. She narrated that she had last seen the deceased on a Saturday afternoon, on 2<sup>nd</sup> September 2019. She described the clothes worn by the deceased as yellow chitenge wrapper and a brown color T-shirt.

2.2 She testified that on 5<sup>th</sup> November 2019, she heard that the deceased had died and that the accused was suspected of having killed her. She narrated the events that followed and described that the body of the deceased was found in a room about 6 to 7 metres from the accused's house. She saw that the Police had entered the house for the accused and that they had removed some clothes and a container which looked like it had some blood stains on it. She described the house where the body had been found as an empty house which had no lock on the door and it had been sold by the owner. She did not see the body of the deceased and narrated that the Police came and recorded statements, including from her. It was her evidence that she had counselled the accused and the deceased several times after their fights and that she had known the deceased for about one year.

2.3 Under cross examination, she confirmed that the deceased was a habitual drinker and that it was common for her to go away for several days on a drinking spree and that she was often found passed-out, at various drinking places. She confirmed that she had not identified any clothes or the container that the Police took from the house of the accused's house.

3. **PW2 Beatrice Daka** was a 62-year-old marketeer, of House No. 1270 Ipusikilo Compound. She narrated that the deceased was her niece and that sometime in 2019, she had met them together at the market in Ipusikilo, where the deceased introduced the accused as her husband. She testified that a few months later, on 5<sup>th</sup> November 2019 she came to learn that her niece, the deceased, had been murdered by the Accused, whom she referred to as '50'. She narrated that she saw him regularly at the market, after the first time of having been introduced to him.

3.1 It was her evidence that she followed the Police to the house and found they had removed the body of the deceased and that she went with the Police to the hospital and witnessed the post-mortem being conducted on 7<sup>th</sup> November 2019. She described the body as being decomposed, with a foul smell and the body was swollen with extensive injuries. She also identified the Accused in Court.

3.2 Under cross examination, she confirmed that apart from the first time that she saw her niece in the market, she had not seen her again. She equally did not know where the deceased had been in the days preceding her death. She

also did not know if the house where the body was found belonged to the accused.

4. **PW3** was 24-year-old male **Kunda Chipili** of Kapoto Compound, and a vendor at Chisokone Market. He narrated that he knew someone called '50', who had married a lady called *Rachel*, also known as *Elinah Lungu*, the deceased, who he confirmed used to be his girlfriend for a period of 6 months or more, and that he had stopped seeing her after she was married to the Accused.

- 4.1 He narrated that he had last seen her on Sunday morning, at about 06:00 hours on 3<sup>rd</sup> November 2019 when he was going into town. He said she asked him for some money to buy beer and that he bought some kachasu which they both drank. He narrated that they used to drink beer at a place called *Nazen*. He further narrated that '50' would come to find her drinking, drag her home while beating her and that he witnessed such behavior on 4 different occasions on dates he could not recall. He described her as wearing a chitenge, trousers and a top with flowers on the last day that he saw her on 3<sup>rd</sup> November 2019, and that she was in good health. He subsequently heard that she has been killed by '50'.

- 4.2 Under cross examination, he confirmed that he used to interact with the deceased frequently and that as he was the last person to have been seen with her, and that he had gone into town after he heard that she had been killed. He was not able to identify the accused and also maintained that he left the deceased after he had some kachasu with her.

5. **PW4 Peter Mulenga** was a 32 year old garden boy of House No. 571 Ipusikilo Kapoto Compound. His evidence was that he heard on the morning of 5<sup>th</sup> November 2019, that a female body had been found in a house which was not too far from where he stayed. He narrated that he discovered it was the wife of the accused and that he knew the accused as his friend, and he had known him for about 3 years and was able to identify him in Court. He had often seen the accused and the deceased together and confirmed that her body was found in a house about 5 metres away from the house of the accused. He narrated that upon discovering that the deceased was the wife to the accused, he and **Beatrice Daka** PW2 and the father to Mono went to start looking for the accused whom they found at a Bar called '*Dada*' where he was seated drinking beer. They took him to Ipusikilo Police Post.

5.1 Under cross examination, he confirmed that he was informed that the accused was at the Bar and that he could not recall when he had last seen the accused and the deceased together. He also confirmed that there are several houses near where the body was found and that there are no boundary walls to separate the houses.

6. **PW5 Detective Sergeant Nyambe Kakoma** was a 37-year-old Police Officer. His service number was 37285 and he was the scenes of crime officer at Kitwe Police Headquarters. He described his duties as a crime scene specialist and that he was mandated to investigate crime and he had over 6 years' experience in this department. He explained his qualifications and narrated the events of the day on 5<sup>th</sup> November 2019. He testified that he received a call from Detective Inspector Sinkamba at 09:00 hours, who was

then the Chief Investigation Officer at Riverside Police Station, who informed him that he was required to process a scene of crime.

6.1 He narrated that he went with Detective Inspector Sinkamba and other Officers to Ipusukilo compound to process the same. He described the body as being found inside a house, with no apparent signs of struggle. He described the house as House No. IP 3760, which was un-occupied and had 3 doors and that each apartment had 2 rooms. He described the body and the clothes worn by the deceased and said that the body was discovered in the first stage of decomposition. He described the deceased as wearing a maroon top on the breast area and that she was half naked. She wore a red shirt and black and white spotted skirt. The body was lying in the northern direction. She had a sore on her right eye, cuts on both lips and multiple bruises all over her body and a cut on her left hand, biceps area. There was little blood visible and no blood where she was lying.

6.2 It was his evidence that he discovered that the deceased used to reside at House IP 3761 which was 5 metres away. He narrated that he went to her house and found things in a disarray and scattered around. It looked like there had been a struggle. He saw some blood on a material on a table and also on a plastic container and that there were suspected drops of blood on the floor, which was believed to be human blood. He testified that this was a shanty compound with scattered houses and that he did a scene documentation by way of photographs.



6.3 He further narrated that he attended the post-mortem on 7<sup>th</sup> November 2018, conducted by Dr Olga at the Kitwe Teaching Hospital. He described the post-mortem findings as there being a hemorrhage on the inner tissue below the abdomen, and also on the skull. Blood clots were discovered on the skull. The pathologist concluded the exam and mentioned the cause of death as inter cranial damage with brain hemorrhage. He produced the photographic album, which was subsequently admitted into evidence and marked '**P1**'. He also showed the cloth with suspected human blood and which was identified and marked as '**ID2**'. It was his evidence that the cloth was not subjected for further forensic testing as there were no resources to cover the cost of processing. He also said fingerprints were lifted from the primary and secondary scene of crime but that nothing conclusive was detected.

6.4 Under cross examination, he confirmed that a large number of people had gathered at the scene. He was not able to confirm who had told him that the accused stayed at House No. 3761 and he did not know if any of the other Officers had recorded statements from the people who were there. He was not aware that the accused had not stayed at the said house. He also admitted that he had not visited the house before to know whether it was in disarray on that particular day.

7. **PW6 Detective Sergeant Shadreck Simutanda** was a 40-year-old Police Officer, of House L5 Riverside Police Camp, and based at Ipusukilo Police Post. His evidence confirmed the evidence of **Peter Mulenga PW4**, that the Accused had been brought to the Police Post from a tavern, at about 10:50 hours on the morning of 5<sup>th</sup> November 2019. He confirmed that he charged

- the accused and subsequently went to the scene of the crime with **PW4**, **Beatrice Daka PW2** and other Police Officers.
- 7.1 He narrated that they were led to the scene where the body was found and confirmed the injuries seen on the deceased. He also stated that he observed dried blood on the body but none on the floor. He testified that he and other officers then went to the house of the accused at House No. 3761 and could see signs of a struggle and scattered things. He described a table-cloth with blood stains and more blood stains on a container. He observed plates on the floor and scattered clothes.
- 7.2 He narrated that back at the Police Post, he interviewed the accused who informed him that the deceased had a boyfriend, **Kunda Chipili PW3**. He testified that he apprehended the said **Kunda Chipili** and interrogated him but that there was no evidence to charge him. He also produced the table cloth with the suspected blood stains on it and the Post Mortem report and described the injuries suffered by the deceased as confirmed by the Report. Both these items were admitted into evidence and marked **P2** and **P3** respectively. It was his evidence that as the deceased did not die a natural death, and as she was his wife and the fact that he did not report her missing, was conclusive that he caused her death.
- 7.3 Under cross examination, he admitted that the post-mortem report, **P3** did not state that the deceased died as a result of the beatings as the main cause of death was intercranial hemorrhage. He also admitted that the alleged blood stains were not subjected to forensic examination, and he was not

aware that **Kunda Chipili PW3** is alleged to have married the deceased and was living with her for the past 2 months. He also admitted that there were 5 houses in the same vicinity where the body was discovered, and that he had no reason to suspect the house owner as she was not staying there.

8. **PW7 Dr Olga Sadkovska** was a 55-year-old Consultant Pathologist, based at Kitwe Teaching Hospital. She gave evidence and her conclusions and confirmed that the weapon used or date of death could not be determined with certainty. She was able to identify the Post-Mortem Report **P3**, and was also able to identify the pictures taken by Detective N Kakoma **PW5** and confirmed that they were of the deceased person and which matched with her observations of the deceased during the conduct of the post mortem report. She testified that the picture marked **No. 21** was the main proof that the deceased received impact on the head which in clinical terms is referred to as *subdural hemorrhage* and was the main cause of death.

- 8.1 The State closed its case and the Accused was found with a case to answer.

## 9. The Defence

The Accused, **Patrick Mwansa** in the exercise of his legal rights, opted to remain silent and the defence closed their case accordingly.

At the close of the defence, both parties opted to file written submissions on dates which were agreed. These have been received in a timely manner on 29<sup>th</sup> March 2022 and 4<sup>th</sup> April 2022 respectively. The Court is grateful to and acknowledges the industry of counsels.

## 10. The submissions of the defence

10.1 The defence has submitted that there is no evidence connecting the accused to the offence. It is their submission that none of the Prosecution witnesses have connected the accused to the offence and that based on the purely circumstantial evidence placed before the Court, the Court cannot arrive at the conclusion that it was the accused who committed the offence of murder.

10.2 The Defence have relied on authorities in an attempt to persuade the Court that doubt if any, should be resolved in favour of the accused.

10.3 The defence have submitted that there was dereliction of duty on the part of the investigations team by not subjecting the alleged blood stains for forensic examination to ascertain if it was blood and further if it was the blood of the deceased. It was their submission that the accused person be acquitted and set at liberty as the prosecution have failed to discharge the burden of proof in accordance with the standard set out by the case of **Mwewa Muroño vs The People**.

## 11. The Prosecutions submissions

11.1 The Prosecution's starting point is that the State had to prove every element of the offence beyond reasonable doubt and cited **Mwewa Muroño v The People** in support of the required standard of proof.

The Prosecution has also submitted authorities in support on the issues of circumstantial evidence and on odd coincidences, to convince the Court that though circumstantial, the evidence points to, and implicates the accused, in a manner that points to nothing but his guilt.

## 12. The Law

12.1 The Court has considered the evidence of all the Prosecution witnesses. I have also painstakingly scrutinised the submissions, which have not been recast here, save for emphasis where required.

12.2 The offence of murder is created under **section 200 of the Penal Code** as follows:

**“ Any person who of malice aforethought causes the death of another by unlawful act or omission is guilty of murder.”**

It is pertinent that for the offence of murder to be proved, the Prosecution must establish, beyond reasonable doubt the following:

- i. That the accused caused the death of the deceased
- ii. That it was by an unlawful act
- iii. That the accused did so with malice aforethought.

They have referred to the case of **The People vs Njobvu** in support of the submission.

**12.2** It is trite that to establish the offence of murder, the prosecution must prove malice aforethought. Malice aforethought is defined in **Section 204 of the Penal Code** as follows:

**“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 intention to commit a felony....”**

**12.3** Going by **Section 204**, malice aforethought is a state of mind of the accused at the time the accused is alleged to have caused the death of the deceased. Therefore, in order to establish malice aforethought, the prosecution must make out a case indicating that the accused either expressly intended to kill or to cause grievous harm to the deceased or knew that what he was doing would likely cause the death or grievous harm to the deceased. There must be overt acts done by the accused to establish his intention.

**12.4** With respect to the ingredients for murder, the questions for this Court to establish on the evidence on record are the following:

- 1. Did a person die?
- 2. Of malice aforethought at the hands of the accused person?
- 3. Was the act of the accused person unlawful?

12.5 In examining the evidence placed before the Court, I take pause to caution myself that the burden of proof is on the prosecution to establish the charge against the accused, and the standard of proof which must be attained before there can be a conviction, is such a standard as satisfies me of the accused's guilt beyond all reasonable doubt. This has been long settled by cases such as **Woolmington vs Director of Public Prosecutions** and **Mwewa Murono vs The People**.

### 13. Findings of Fact

I have carefully and painstakingly considered the evidence on record and the submissions of both parties. From the record, the following are the findings of fact:

1. Patrick Mwansa, the accused, aka "50" and Elinah Lungu, the deceased cohabited as husband and wife and lived together at House No. 3761 Ipusikilo Compound in Kitwe District.
2. The deceased was last seen by Esther Mwila, PW1 on the morning of 2<sup>nd</sup> November 2019, and by Kunda Chipili PW3 on Sunday 3<sup>rd</sup> November 2019 at about 06:00 hours in the morning at a drinking place called *Nazen*, where Kunda Chipili bought more kachasu and they both drank together.

- 3. The body of Elinah Lungu, the deceased was discovered, in the first stages of decomposition, on 5<sup>th</sup> November 2019 at a nearby un-occupied house No. IP 3760 close to the house she occupied with the accused. **I therefore make a finding of fact of the offence of murder.**
- 4. The aunt of the deceased, **Beatrice Daka**, PW2 identified the body of the deceased and attended the post mortem at Kitwe Teaching Hospital on 7<sup>th</sup> November 2019.
- 5. The Post-Mortem report admitted into evidence and marked **"P3"** is conclusive of the fact of her death, which clinical findings are to a large extent supported by the Photographic Album which was also admitted into evidence and marked **'P 1'**
- 6. The exact date of her death, location of her death, the cause or the weapon used to inflict the fatal injuries are not known.
- 7. The evidence against the Accused is purely circumstantial.

Given the undisputed facts, the only issue for determination is whether the accused was the perpetrator. The question that I must answer is this:

*Is there any evidence linking the accused to the crime charged?*

#### **14. Analysis of the evidence before the Court**

14.1 As rightly submitted by the State in their final submissions, the Prosecution evidence, as to whether it was the Accused person who killed the deceased,



is purely circumstantial. It is clear from the evidence before me that none of the Prosecution witnesses saw the Accused kill the deceased or do anything to the deceased that could have inflicted the injury that led to the death of the deceased.

I am guided that in cases that depend on circumstantial evidence, the Supreme Court has provided the following guidance in the case of **David Zulu V. The People**:

***"It is therefore incumbent on a trial Judge that he should guard against drawing wrong inferences from the circumstantial evidence at his disposal before he can feel safe to convict. The Judge in our view must, in order to feel safe to convict, 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 of an inference of guilt."***

- 14.2 The evidence of the Prosecution witnesses has been narrated and will be considered in the context of its relevance and application to the settled principles of law as established above. PW1 **Esther Mwila**, confirmed that she had known the accused for a period in excess of 15 years as her neighbour. She also testified that it was known that the accused and the deceased had matrimonial problems and that the deceased was in the habit of disappearing for days on end on a drinking spree, only to come back after some time. This behaviour is what led to the domestic disputes and on which, she and other neighbours had counselled the accused. This line of evidence

was not challenged or contradicted by any of the other witnesses. She also appeared credible and had no cause to fabricate her testimony.

14.2 The only point of relevance of the evidence of PW2 **Beatrice Daka**, the aunt of the deceased, was to confirm that the deceased and the accused were living together, and that she had last seen the deceased several months before her death. She was also the person who identified the body on the 5<sup>th</sup> day of November 2019 and was present when the post-mortem was conducted. In essence, her evidence added little or no value in making any findings against the accused. It is common cause that she heard of the death of the deceased and heard that it was the accused who killed her.

14.3 The evidence of PW3 **Kunda Chipili**, apart from admitting that he was the former lover of the deceased, served to confirm that he in fact was the last person to have been seen with the deceased, at 06:00 am, on the morning of 3<sup>rd</sup> November, 2019 when he bought and drank kachasu with the deceased at a Bar called '*Nazen*'.

14.4 The evidence of **Peter Mulenga** PW4 only served to confirm that he was a friend to the accused and found him drinking beer at a place called "*Dada*" on the morning of 5<sup>th</sup> November 2019, and that he took the accused to Ipusikilo Police Post for his own safety, and after the discovery of the body of the deceased.

14.5 **Detective Sergeant N Kakoma** and **S. Simutanda**, PW5 and 6, the scenes of crime officer and investigating officer have attempted to lead evidence to

- the guilt of the accused. The former was the scenes of crime officer and spoke of the scatter and disarray discovered in the house of the accused, and also testified of the alleged blood found on a tablecloth and on a plastic container in the house of the accused. It was his evidence that there was signs of a struggle. It was further submitted that the accused did not challenge the evidence of how the things were found scattered in the accused's house and PW1's evidence of having seen the accused with the deceased on 2nd November 2019, in support of which the Prosecution relied on the cases of **Joseph Mulenga and Anor v The People**, **Donald Fumbelo v The People** and **Kwechele v The People**.

14.6 However, and to the contrary, under cross examination, he admitted that he had not been to the house of the accused, prior to that day and could not really say if what he saw was disarray and signs of a struggle, or just an untidy house. It is also glaring that the blood was not subjected to any forensic or other form of expert testing to see if it was indeed human blood, or blood of a farm animal or to see if it matched the blood of the deceased. It is also noteworthy that no fingerprints were lifted to match with the accused from either his house or where the body was discovered. I am guided by the decision of the Supreme Court in the case of **Charles Lukolonge & Others v The People** that doubts, if any, must be resolved in favour of the accused. The Supreme Court in the cited case stated as follows:

***"To the extent that the prosecution did not give such evidence we hold that there was a dereliction of duty not to adduce it, we must hold further that***

- *there is a resulting presumption from the failure that had the relevant evidence been given it must have been favourable to the appellant."*

14.7 **Detective Simutanda** also dismissed the possibility of the involvement of **Kunda Chipili PW3**, in the offence, although it is on record that he was the last person seen with the deceased and before her body was discovered. It is also **Kunda Chipili's** evidence that the deceased was his girlfriend and that he ended his affair with her after she got married to the Accused. He also admitted that he was informed that his '*girlfriend*' had been killed. There was no suitable explanation offered in his evidence to convince the Court that he was not a suspect at all. There was no alibi, and in fact his own evidence was that he had some drinks with her and then left Elinah Lungu, drinking after having bought kachasu for her at 06:00 hours in the morning, and went on his way. He did not seem credible and appeared evasive in his evidence. His evidence left the Court with more questions than answers.

14.8 **Dr Olga PW7**, the Pathologist was equally firm in her evidence and which supported the post mortem report. She was categorical that she could not identify the cause, the time or the weapon used in the death of the deceased. All she could refer to was the clinical term '*death due to intercranial haemorrhage (subdural) with brain damage*, and which findings were supported by the photographic evidence in the album produced '**P1**'.  
I have had occasion to reflect on the contents of the post mortem report and the photographic album, as being the only two tangible pieces of evidence brought before the Court.

14.9 Although I am guided and the prosecution has submitted, that odd coincidences amount to something more as stated in the cases of **Machipisha Kombe v The People**.

In the case of **Ilunga Kabalu and another vs The People** it was held that:

*"it is trite law that an odd coincidence, if unexplained, may be supporting evidence. An explanation which cannot reasonably be true, is in the connection, no explanation."*

The Prosecution have submitted that the fact of the accused person running off to the bar after committing the offence, and the blood stained clothes and the disarray found in his house showing signs of struggle, as the odd coincidences they refer to.

14.10 Although this Court is familiar with the principles espoused by these notable authorities, I do not see how they are applicable in making the causal link in *casu* and on the facts before this Court. The aspect of disarray was successfully challenged by the defence in the cross examination of **Detective Simutanda PW6**, the habit of the deceased disappearing for days on end, and hence the accused not being worried at her disappearance was stated by **Esther Mwila PW1**, and confirmed by other witnesses, and more importantly the lack of forensic or other form of testing leaves the evidence of the alleged blood stains found on the material in the house of the accused, discredited and unreliable.

- There is also the possibility of PW3 **Kunda Chipili** having married the deceased months before her death, or at the least, in a continuing affair with her, which though may be a *red herring* on the part of the defence, was also within the realms of conjecture in this case.

## 15. Conclusion

- 15.1 In *casu*, in light of the above, I ask myself if I am convinced beyond reasonable doubt of the guilt of the accused, such that I must return a verdict of guilty.

To the contrary, I find that the facts as proved confirm the evidence of PW1 **Esther Mwila**, of the deceased being a habitual consumer of alcohol and disappearing for days on end from her home. This could explain why the accused was seemingly not worried by her absence, although the Police were quick to use that as an unexplained coincidence and something that ought to point at his guilt.

- 15.2 The evidence also established that there were at least 5 houses in what was known as a shanty compound, they were not separated by boundary walls, and the house where the body of the deceased was found was un-occupied, also had other rooms, had no locks on the door, which suggests that anyone could have had access to it.

I am also not convinced that the proximity of this house to the house of the accused, is sufficient to return a verdict of guilty or for it to be considered as an odd coincidence in the circumstantial evidence against the accused.

15.3 It is pertinent to note that **Kunda Chipili** PW3, was not able to identify the accused in Court and stated that he remembered the accused wearing his hair in dreadlocks. The Court has noted that none of the other prosecution witnesses mentioned this, and neither did they have any difficulty identifying the accused.

The demeanour of this witness was suspect as he was not forthcoming and changed his version of events by firstly referring to the deceased as his girlfriend, and subsequently changed his evidence and said that he had stopped his affair with the deceased after she had gotten married to the accused.

He also said he had witnessed the accused having dragged her away from several drinking places, on at least 4 occasions and that he used to beat her. And when questioned further, he could not however give any dates or names of places where he is alleged to have seen such behaviour. If indeed he had witnessed such events with that frequency, is it likely that he was not able to identify the accused, dreadlocks or not?

He also had no satisfactory explanation as to how he met with the deceased at 06:00 hours in the morning on 3<sup>rd</sup> November 2019, or where he was coming from at such an early hour in the morning. He further narrated that having bought Kachasu for the deceased, he had one cup with her, and then left for work. His evidence as to why he '*vanished*' upon learning of her death, also did not sit well with the Court and his explanation that he did not

run away, but went off, at 06:00 hours on a Sunday morning, allegedly to work, again leaves more questions than answers.

15.4 The defence have also submitted that there was a dereliction of duty by the failure of the investigating team, for failing to conduct a forensic test on the alleged blood stains on the tablecloth produced and marked 'P2', and that such omission to conduct vital investigations, should result in favour of the accused, if the accused was prejudiced as a result of that failure.

15.5 On the totality of the evidence before the Court, I am of the considered view that several questions linger in my mind, and answers to all, or even one of which, must lead to the finding that the Prosecution has not discharged the burden of proof per the required standard.

On a serious reflection of the evidence adduced, I am not satisfied beyond reasonable doubt that the accused murdered the deceased. I am further not satisfied that he had the requisite *mens rea* or the intent to kill the deceased. He was found by **Peter Mulenga** PW4, at a drinking place called 'Dada' on the morning of 5<sup>th</sup> November 2019.

I ask myself, if he had in fact killed the deceased in cold blood, and perhaps after a domestic dispute, would he have placed her body in a house almost adjoining his house, leaving visible signs of struggle and alleged blood stains, and go to continue drinking at a Bar.

15.6 To the contrary, I find that it is most likely, as confirmed by the evidence of **Esther Mwila**, PW1, that he was unconcerned as to the whereabouts of the deceased,



as a pattern of her deserting the matrimonial home for several days had been established. I have no reason to disbelieve the evidence of **Esther Mwila**, and she had no need to come and tell lies to the Court.

15.7 Further and in terms of the conduct of the Police, I come to the inescapable conclusion that they have well and truly messed up this investigation. **Detective Simutanda** PW6 spoke of the alleged *disarray* in the house of the accused, which according to him was conclusive of a struggle between the Accused and the deceased. Under cross examination, he admitted that he did not know how things were kept in that house and that disarray and signs of struggle, without further testing, are not conclusive of any of the conclusions that he arrived at.

No positive fingerprints were lifted from either the house of the accused, or where the body was found. No forensic examination was conducted on the table cloth produced and marked 'P2' or on the container to ascertain if at all there was blood stains, and that too, if it was blood of a human being, specifically the deceased, or indeed any other stains, not necessarily being blood.

15.8 The only sad fact remains is that **Elinah Lungu**, the deceased lost her life, and that she must have had a painful and gruesome death as confirmed by the photographic album and the report on the post-mortem.

I am mindful of the old adage that it is preferable that 100 guilty men are set free, than 1 innocent man be charged for a crime that he did not commit.

With the above analysis, and on the facts before me, and having had the opportunity to assess and analyse the evidence of all 7 Prosecution witnesses, am I convinced that from all the circumstantial evidence placed before the Court, by the Prosecution, that the accused should be found guilty of murder contrary to **section 200** of the Penal Code?

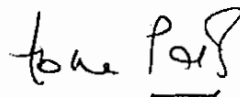
The answer is a resounding No.

I find and hold that the prosecution did not prove the case beyond all reasonable doubt as guided in the case of **Mwewa Murogo v The People**.

I accordingly acquit the accused of the offence of murder and order that he be released from custody forthwith.

Leave to appeal is granted.

Delivered in Open Court at Kitwe, the 21<sup>st</sup> day of June, 2022



**JUDGE ABHA PATEL, S.C.**