

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

HJ/83/2016



B E T W E E N :

THE PEOPLE

VERSUS

TEDDY MUNTANGA

ENOCK MPELEMBE BANDA

Before Honorable Mrs. Justice M. Mapani-Kawimbe

For the People:

*Mrs. A.N. Sitali – Deputy Chief State Advocate
Ms. C. Lupili – Senior State Advocate
Mr. M. Libakeni – State Advocate
Mr. W. Silwimba – State Advocate*

For the Accused:

*Mr. J. Phiri – Senior Legal Aid Counsel.
Mrs. S.C. Lukwesa – Senior Legal Aid Counsel*

JUDGMENT

Cases Referred to:

1. *George Lipepo & Others v The People* (Appeal No. 389,390,391,392 of 2013)
2. *Chimbini v The People* (1973) Z.R. 191
3. *R v Exall and Others* (1866) ALL ER 850
4. *R v Ball* (1911) A.C 47
5. *The People v Evaristo Banda* (1990-1992) Z.R. 194
6. *Mwanaute v The People* (Appeal No. 200/2011)
7. *Joseph Mulenga and Albert Joseph Phiri v The People* (SCZ No. 28 of 2008)

8. *Barrow and Young v The People* (1966) Z.R. 43 (H.C.)
9. *David Zulu v The People* (1977) Z.R 151
10. *Patrick Sakala v The People* (1980) Z.R 205 (S.C.)
11. *Chabala v The People* (1976) Z.R 14 (S.C.)
12. *Kalonga v The People* (1976) ZR 124 (H.C.)
13. *Daudi Phiri v The People* (SCZ Appeal No. 192 of 2014)
14. *Dorothy Mutale and Richard Phiri v The People* (1997) S.J 51 (S.C.)
15. *Jack Chanda and Kennedy Chanda v The People* SCZ judgment No. 29 of 2000

Legislation Referred to:

1. *Penal Code, Chapter 87*
2. *Criminal Procedure Code, Chapter 88*

By information filed by the Director of Public Prosecutions, the two accused persons, stand jointly charged with one count of murder contrary to section 200 of the Penal Code, Chapter 87 of the Laws of Zambia. It is alleged in the particulars that **Teddy Muntanga** and **Enock Mpelembe Banda** on a date unknown but between 8th and 9th August, 2016 in the Chipata District of the Eastern Province of the Republic of Zambia jointly and whilst acting together murdered **Rose Phiri**.

The accused persons **Teddy Muntanga (A1)** and **Enock Mpelembe Banda (A2)** pleaded not guilty to the charge. The prosecution's case was supported by the evidence of seven witnesses. **PW1** was **Anna Moyo** the owner of Kwa Mutonyo bar in

Chipata. She testified that on 8th August, 2016 at around 20:00 hours she was seated at her bar when A1, A2 and Rose Phiri (**the deceased**) arrived in a Nissan X-trail motor vehicle.

It was her evidence that A1 wore a yellow short sleeved T-shirt and a pair of trousers, while A2 wore a black suit. The deceased was clad in a black sleeveless top, a black mini skirt, and wore a pair of black sneakers with grey socks. PW1 went on to testify that the trio walked right up to her and she exchanged pleasantries with them. The deceased however did not respond. She told the Court that she knew A1 because he was a regular customer at her bar, while she did not know the other two persons.

It was her evidence that the trio entered her bar and after a short while, A1 came out holding a bottle of Autumn Harvest wine. He went to sit next to PW1 and told her that he intended to move the Nissan X-trail vehicle to the back of the bar so that A2 could have sexual intercourse with the deceased. He also told PW1 that the deceased was deaf and dumb.

PW1 further told the Court that after parking the vehicle behind the bar, A1 ushered A2 and the deceased to the vehicle, where they stayed for a while. After sometime, she saw A1 and Petros Nyirongo going to the vehicle. Mr. Nyirongo and A1 went back to the bar and later A1 returned to the vehicle. A1 later went back to the bar with the deceased. After spending sometime in the bar A1, A2 and the deceased left the bar and bade farewell to PW1. The trio drove off in the vehicle and went in the direction where there was a deep drainage. In fear, PW1, screamed at them and A1 stopped the vehicle. He avoided tipping over the edge of the drainage.

PW1 testified that she was able to observe the activities of the trio because the place where the events were occurring was well lit with bulbs. PW1 went on to testify that after A1 stopped the vehicle near the drainage, she asked one of her clients Menyani Mumba to reverse the vehicle, so that it could face the direction of Chipata town, which he did. It was PW1's testimony that she was very alarmed with A1's driving and that he was visibly drunk. According to PW1, after Menyani Mumba parked the vehicle, he gave the car keys to A1.

A1 went into the vehicle and sat at the driver's seat. The vehicle remained stationary. PW1 told the Court that she later saw A1, A2 and the deceased all standing beside the vehicle and appeared to be in a physical altercation. A1 and A2 were pulling and pushing the deceased away from the vehicle. PW1 told the Court that she asked Petros Nyirongo, Menyani Mumba and Andisen Banda to find out what was happening with the trio. They went to the vehicle and came back after a short while later to tell her that there was a physical altercation between A1, A2 and the deceased, which had been resolved. Thereafter, PW1 testified that A1, A2 and the deceased drove off into the direction of Chipata town.

PW1 told the Court that she learnt the next day from Mr. Banda, her landlord, that the deceased's body was found lying along Chadiza road. PW1 also told the Court that A1 was a regular customer at her bar. Further, that she knows where A1 stays because he was a colleague of her friend Mr. Zulu who is deceased. PW1 did not know A2 and the deceased but saw them for the first time at her bar on 8th August, 2016. PW1 identified A1 and A2 in Court.

In cross-examination, PW1 stated that the distance between her bar and the place where Menyani Mumba parked the X-trail vehicle was about 30 meters. She maintained that she was able to witness the activities of the trio, because there are electric bulbs outside her bar as well as the place where Menyani Mumba parked the vehicle. PW1 testified that although there is a big tree near her bar, this did not obstruct her ability to view the events.

PW1 maintained that she was told that the deceased's body was picked up near Domondo area, along Chadiza road, by her landlord. She told the Court that she realized that the deceased was deaf and dumb after A1 told her. PW1 stated that she did not see A1 or A2 beating the deceased but noticed that the trio were tugging and pulling one another at the place where Menyani Mumba parked the vehicle. PW1 repeated that A1 was very drunk on 8th August, 2016 as well as A2.

The witness was not re-examined.

PW2 was **Petros Abel Nyirongo** a security supervisor at Safety Security Services, Chipata. He told the Court that he went to Kwa Mutonyo bar area in the evening of 8th August, 2016 to check on

the guard who was stationed there. He went inside Kwa Mutonyo bar and found A1 and other patrons in the bar. PW2 testified that A1 told him to salute him because he was a police officer, but he refused to do so.

According to PW2, A1 told him that he was with his friend, A2, who was having sexual intercourse in the vehicle with the deceased who was deaf and dumb. The vehicle was parked behind the bar. A1 led PW2 to the vehicle where they found A2 sleeping. According to PW2, when A1 told him that A2 was the one who was having sexual intercourse with the deceased, A2 retorted that A1 equally had sexual intercourse with her. PW2 went back to the bar leaving A1, A2 and the deceased by the vehicle. Later he saw the trio going back to Kwa Mutonyo bar.

PW2's description of A1 was that he was of medium build and light in complexion, while A2 was slim and dark. He described the deceased as being short, fair in complexion and of medium build. PW2 told the Court that the deceased wore a stripped black top and could not remember the rest of her apparel.

A1 and A2 obliged and left Kwa Mutonyo bar with the deceased. It was PW2's evidence that he was able to witness the activities of the trio because the place where the events were happening was well lit with electric bulbs. PW2 went on to testify that the next day he heard that the deceased's body was dumped along Chadiza road. PW3 identified A1 and A2 in Court.

In cross-examination, PW2 testified that he went to check on the trio because he heard the deceased screaming and not because he heard the vehicle wheels that A1 was driving spin due to his bad driving. PW2 testified that he saw A1 and A2 beating the deceased because there was good lighting and was able to observe the events as they unfolded.

In re-examination, PW2 maintained that from his position he was able to see that A1 and A2 were beating the deceased by the vehicle.

PW3 was **Menyani Mumba**. He told the Court that on 8th August, 2016, he went with his friend Juma Nyirenda to a place called Kwa Mutonyo bar, which is located along Chipata - Malawi road, opposite Magwero turn off. They got to the bar at about

17:00 hours and had some drinks. At around 20:00 hours, PW3 went outside to get some fresh air when he saw A1, A2 and the deceased walking towards the bar. PW3 testified that he has known A1 for close to 8 months.

It was PW3's evidence that A1 walked towards him and told him that A2 and the deceased, who was deaf and dumb, wanted to have sexual intercourse. A1 told PW3 that he would park the vehicle behind the bar so that A1 and the deceased could execute their plan. A1 went ahead to park the vehicle as he had proposed and later walked into Kwa Mutonyo bar, where he chatted with PW3 and his friends for approximately 30 minutes. Thereafter, the deceased walked into the bar and started communicating with A1 using sign language. After a while A1 announced his departure and went to his vehicle with the deceased.

According to PW3, A1 was very drunk and failed to drive the vehicle towards the main road and instead drove it along the diversion on Malawi road where there was a deep drainage. He testified that PW1 screamed when she saw the direction that A1 was heading to, so that she could alert A1 of the danger.

A1 managed to stop the vehicle before the danger. Thereafter, PW3 went up to the vehicle at the request of PW1 so that he could move the vehicle to the direction of Chipata town, which he did. Afterwards PW3 went back to Kwa Mutonyo bar. He had hardly reached the bar when he saw a physical altercation that ensued between A2 and the deceased by the vehicle.

According to PW3, PW1 asked him to inquire the source of the altercation, which he did with two others. PW3 testified that when they got to the vehicle, they found A2 dragging the deceased with both hands and pushing her away from the vehicle. When he inquired from A2 the reason for his manhandling of the deceased, A2 told him that the deceased did not want to get out of the vehicle. Further, that A1 and A2 wanted to go home because they were drunk. PW3 confirmed that PW2 told A1 and A2 to take the deceased back to the place where they had picked her from. Further, PW2 told A1 and A2 that if anything happened to the deceased he would hold them responsible. They obliged and drove off towards the direction of Chipata town.

PW3 told the Court that the deceased wore a black skirt and a sleeveless top. She had short black natural hair and had not applied any make up on her face. He also stated that A2 was dark in appearance, slim and wore spectacles. The next day PW3 testified that he heard that the deceased who was with A1 and A2 was found dead in Domondo area, which is about 500 meters from Kwa Muntonyo bar. PW3 identified A1 and A2 in Court.

In cross-examination, PW3 denied that he had been drinking beer from the time that he went to Kwa Mutonyo bar, up to the time that he saw the trio. He testified that he did not see A1 pulling the deceased outside the vehicle. He further testified that he heard that there are some bars in Domondo area but had never been there.

The witness was not re-examined.

PW4 was **Juma Nyirenda**. His evidence was that on 8th August, 2016 he was at Kwa Mutonyo bar at about 20:00 hours when A1, A2 and the deceased entered the bar. He testified that he was drinking beer by the counter with PW3 and other friends and A1 joined them at the counter for a while. He told the Court that he has known A1 for some time. He also testified that he saw A2 and the deceased walk

out of the bar and later went back after 20 minutes. It was also his evidence that after sometime he saw A1 and the deceased walk out of the bar and later returned after 10 minutes. He told the Court that he was able to observe the activities of A1, A2 and the deceased in the bar, which was well lit by an electric bulb. After a while A1, A2 and the deceased left the bar and that was the last time he saw them.

PW4 further told the Court that he knew the deceased prior to 8th August, 2016, because she was a regular patron of Kapata Market, and at pubs found along Devil's street and the down shops. PW4 also told the Court that he knew that the deceased was deaf and dumb. He further stated that on the material day the deceased was clad in a black sleeveless top, a black skirt and a jacket. PW4 described A2 as dark in complexion, slim and wore spectacles on 8th August, 2016. He identified A1 and A2 in Court.

In cross-examination, PW4 maintained that he knew the deceased who was deaf and dumb and had seen her in pubs around Chipata town.

The witness was not re-examined.

PW5 was **Aaron Phiri**. He told the Court that after receiving the news of his niece's death, the deceased, he went to Chipata General Mortuary where he identified the body to the pathologist and police for the purpose of a post-mortem examination. He later carried the body of the deceased for burial to Mabvuto Village, in Chief Mushaba's area, Chipata.

The witness was not cross-examined.

PW6 was **Detective Inspector Elijah Njovu** based at Chipata Central Police Station. His testimony was that on 9th August, 2016 at about 06:00 hours, he received information from members of the public in Mchenga Compound, near Domondo area that there was a dead body of a woman who was suspected to have been murdered. PW6 told the Court that he went to the scene in the company of other officers. When they reached the scene they found the deceased's body on the ground facing upwards.

PW6 also told the Court that the deceased was wearing a black sleeveless top and a black skirt. He noticed a cut on the right side of her head and blood which had clotted on her face, with ants walking on it. PW6 testified that he found two underpants one striped black

and blue and the other blue and red, near the deceased's head. The underpants were identified by PW6 and collectively marked as ID1. At the request of PW6, they were admitted into evidence as P1. PW6 further told the Court that he photographed the deceased's body and compiled a photographic album, which he identified and was marked by the Court as ID2. It was later admitted in evidence at his request as P2.

It was his evidence that after photographing the body of the deceased, he and other Police Officers deposited it at Chipata Central Mortuary. On 18th August, 2016, PW6 took photographs of the place where A1 and A2 allegedly dropped off the deceased alive near Chadiza turn off. The photographs were included in P2.

In cross-examination, PW6 conceded that there are houses in the area where A1 and A2 dropped off the deceased. He testified that a sharp object could have been used to hit the deceased's head. He stated that he did not recover anything sharp from A1 and A2 because he was not the investigating officer. He also stated that he did not examine the vehicle.

The witness was not re-examined.

Detective Chief Inspector Kenneth Chihana of Chipata Police Station testified as **PW7**. He told the Court that on 17th August, 2016 he was allocated the docket for the murder of Rose Phiri, whose death occurred on 9th August, 2016 between 01:00 and 06:00 hours in Mchenga Compound, Domondo area. He told the Court that his investigations led him to A1 and A2 because they were the last persons seen with the deceased at Kwa Mutonyo bar.

He apprehended A1 and A2 who led him to Chadiza turn off where they allegedly dropped off the deceased alive. He confirmed that PW6 took photographs of A1 and A2 at the scene near Chadiza turn off. It was PW7's evidence that on 18th August, 2016 he charged A1 and A2 with the offence of murder. He produced the post-mortem report, which was marked ID3 and at his request admitted in evidence as P3.

In cross-examination, PW7 told the Court that he did not encounter information that the deceased was taken back to Devil's street, where some prostitutes directed A1 and A2 to her relative's home near Chadiza turn off. He denied having knowledge that the

deceased was a prostitute. PW7 stated that he received information that A1 and A2 were very drunk on the material day.

PW7 told the Court that the evidence indicated that the deceased bled profusely before her death. Further, that he did not find anything linking A1 and A2 to the deceased's death. In addition, PW7 stated that he examined the vehicle the accused persons were using and did not find any traces of blood but a police short baton.

The witness was not re-examined.

After the close of the prosecution's case, I found the accused persons with a case to answer and put them on their defence in compliance with section 291 (2) of the Criminal Procedure Code. Both accused persons elected to give sworn evidence and did not call any witnesses.

Teddy Muntanga (A1) in his defence told the Court that on 8th August, 2016 at about 18:00 hours, he went with A2 to Mature Night Club to drink beer. From there they proceeded to Devil's street where they were having fun. They later decided to go home at about 20:30 hours. As they were driving out of Devil's street, the deceased appeared in the vehicle's path, and jumped into their vehicle. She

went to sit on the back passenger seat. It was A1's evidence that the deceased had a bottle of Castle larger beer in her hand.

A1 testified that he greeted the deceased but she did not respond. Thereafter, A1 drove towards Chadiza turn off and as they approached, A2 asked if they could pass through Kwa Mutonyo bar area because he wanted to see his uncle Mr. Chileshe, who sold him the vehicle.

A1 further explained that when they reached the area, he parked the vehicle adjacent to Kwa Mutonyo bar and proceeded inside the bar with A2 and the deceased. He bought himself some Autumn Harvest wine and a Castle larger beer for A2. He told the Court that the deceased also entered the bar and sat somewhere but not with him.

A1 testified that he discovered that the deceased was deaf and dumb when A2 tried to talk to her. She responded using sign language. After a short while A1 and A2 decided to go home and to drop off the deceased where they had picked her from. A1 told the Court that as he was about to drive out, he failed to negotiate the road at Kwa Mutonyo bar because it had a bad slope. As a result,

the spinning of the wheels attracted some onlookers from Kwa Mutonyo bar and not because the deceased screamed for help.

A1 told the Court that he came out of the vehicle and asked PW1 if she knew anyone who could help him move the vehicle. According to A1, PW3 moved the vehicle near Malawi road. When A1 and A2 got into the vehicle the deceased followed them and screamed because she was happy to see them and wanted to go with them.

A1, A2 and the deceased drove off and went back to Mature Night Club, which is located near Devil's street. Whilst there, a group of prostitutes told A1 and A2 that the deceased's relatives home was near Chadiza turn off. At about 22:00 hours, A1 and A2 decided to go to his home and took the deceased with them so that they could drop her off near her relative's home as it was on their way. A1 told the Court that they dropped off the deceased alive at Chadiza turn off and proceeded home. On 17th August, 2016, A1 testified that he received a phone call from PW7 who asked him about the deceased's death. He denied causing the deceased's death and was later arrested with A2 and charged for murdering the deceased.

In cross-examination, A1 admitted that he was with the deceased on 8th August, 2016, whom he met for the first time on the material day. He testified that as a Police Officer he regularly patrolled Devil's street to apprehend rogues and vagabonds as well as prostitutes after 22:00 hours. He told the Court that a prostitute could be identified from the way she dressed and her conduct.

A1 admitted picking up the deceased at about 20:00 hours in the vehicle and stated that he did not know where she was going because she was deaf and dumb. He also testified that driving from Mature bar to Kwa Mutonyo bar takes approximately 3 minutes on a clear road. A1 told the Court that he drunk beer with the deceased at Kwa Mutonyo bar. He denied telling the prosecution's witnesses that A2 was having sexual intercourse with the deceased in the vehicle. He also denied that A2 had sexual intercourse with the deceased in the vehicle. He further denied knowing PW3 and stated that he only saw him for the first time at Kwa Mutonyo bar on the material date.

A1 explained that he went with the deceased to Kwa Mutonyo bar because she did not tell him where she was going. A1 confirmed

that he was a regular patron at Kwa Mutonyo bar and enjoys a good relationship with PW1. A1 testified that PW1, PW2 and PW3 all lied when they told the Court that they saw him and A2 in a scuffle with the deceased. He also testified that although the deceased was in the company of prostitutes, he did not know whether she was one of them.

A1 told the Court that he did not arrest any prostitutes on that material day because he was very drunk. He denied picking up the deceased for the purpose of having sexual intercourse with her. He also denied knowing that the deceased was a prostitute even though she was in the company of prostitutes. He further, denied that he had a disagreement with the deceased and did not drop off the deceased as he claimed. A1 admitted driving whilst drunk and maintained that he dropped off the deceased near her relative's home because it was on his way home. He admitted it was odd that PW2 testified that he had sexual intercourse with the deceased when he did not know him.

In re-examination, A1 testified that he did not have training in sign language. He maintained that he did not know PW2 and PW3.

Further, he denied that he bragged that A2 was having sexual intercourse with the deceased in the vehicle.

A2, Enock Mpelembe Banda testified that on 8th August, 2016 he travelled from Muzeli Clinic, along Mfuwe road to Chipata to drop off suspects at Chipata Central Police Station, since he was a Police Reserve. He met A1 his friend who he has known since 2012 at the Police Station. He told the Court that they went to A1's home and later to Mature Night Club along Devil's street to drink beer. As they were about to go to A1's home after having fun, A2 testified that the deceased appeared in the vehicle's path. A1 stopped the vehicle and the deceased jumped in to the passenger back seat without telling them where she was going.

A2 went on to testify that when the deceased got on to the vehicle, he tried to greet her but she did not respond. When they approached Chadiza turn off, A2 asked A1 to pass through Kwa Mutonyo bar area, so that he could collect the remaining car key for his vehicle from his uncle Mr. Chileshe.

According to A2, when they reached the place, A1 parked the vehicle and they all went into Kwa Mutonyo bar. A2 testified that

after trying to converse with the deceased, he discovered that she was deaf and dumb. A1, A2 and the deceased continued drinking in the bar until they decided to go home. A2 stated that he and A1 were both very drunk on the material day. A2's evidence was no different from that of A1 on how A1 almost plunged the vehicle into a deep drainage and was thereafter assisted by PW3, who parked the vehicle in the direction of Chipata town.

A2 denied beating the deceased and testified that they left Kwa Mutonyo with her to Mature Night Club. After they arrived at Mature Night Club, they spent a few minutes, when some prostitutes who were with the deceased, told them that the deceased lived near Chadiza turn off. According to A2 they left Mature Night Club with the deceased so that they could drop her off near her relative's home, as it was on the way to A1's home. A2 testified that they dropped off the deceased alive near Chadiza turn off and went to A1's house to rest. It was A2's evidence that on 17th August, 2016, he and A1 were apprehended and charged with the offence of murdering the deceased herein.

In cross-examination, A2 told the Court that he could not tell the exact time when they left Kwa Mutonyo bar as he did not have a wrist watch. He told the Court that the deceased did not know that A1 and A2 were going to A1's house. Further, that he did not know where the deceased was going when she got into the vehicle. He also told the Court that he knew that the deceased was a prostitute and wanted to have sexual intercourse with her, but he did not have enough money to pay her. He also told the Court that he was very drunk and did not know what he was doing. He further stated that he could not deny if the people who were sober on the material day testified that he manhandled the deceased.

A2 confirmed that he and A1 were the last persons seen with the deceased at Kwa Mutonyo bar. He maintained that they dropped her off near Chadiza turn off in Mchenga Compound. He told the Court that Chadiza turn off separates Mchenga and Mchini Compounds. Further, that the deceased's body was picked up in Mchenga Compound near Domondo area.

In re-examination, A2 maintained that he and A1 dropped off the deceased near Chadiza turn off. He denied remaining in Chipata

to speculate what would stem out of the deceased's death, but that he was vying to be selected as an electoral agent in the 2016 general elections.

Learned Counsel for the Prosecution filed written submissions. The gist of the submissions was that the post-mortem report confirmed that the deceased died from the wounds inflicted on the right side of her head. By maiming a person in such manner, Counsel contended that it was undeniable that death would result and there was malice aforethought. Counsel submitted that the principles as espoused in the case of **George Lipepo and Others v The People**¹ were instructive.

Counsel conceded that the evidence adduced in this case was circumstantial and submitted that it is trite that in order to convict on circumstantial evidence, the Court must be satisfied that the evidence has taken the case out of the realm of conjecture, and it has attained such a degree of cogency which can permit only an inference of guilty. Counsel relied on the case of **Chimbini v The People**² for the assertion.

Counsel drew my attention to the *locus classicus* of **R v Exall and Others**³ in which it was held that a combination of factors could warrant a conviction on circumstantial evidence.

On that basis, Learned Counsel contended that the evidence on record revealed several factors from whose combination the Court could make an inference sufficient to convict the accused persons. Counsel submitted that the circumstantial evidence was that A2 believed that the deceased was a prostitute. The actions of A1 and A2 of picking up the deceased for the second time that night and the fact that she was a prostitute were all strands of evidence that supported the weight of the circumstantial evidence in *casu*.

Further, Counsel argued that these strands of evidence supported by the evidence of PW1, PW2 and PW3 who testified that A1 was boasting that he had gone with A2 to Kwa Mutonyo bar so that he could have sexual intercourse with the deceased who was deaf and dumb in the vehicle fortified the assertion. Learned Counsel submitted that the only reasonable conclusion that could be drawn from the facts was that the accused persons carried the deceased along for her services and ultimately murdered her.

Counsel argued that it was inconceivable that A1 and A2, a Police Officer and Police Reserve respectively, would allow a complete stranger to simply enter their vehicle and drive off with that person without inquiring her destination. It was equally inconceivable that a hitchhiker as they made her out to be, would fail to give her destination.

Counsel asserted that in cross examination, A2 admitted that he wanted to have sexual intercourse with the deceased, but had no money to pay her. Thus, a scuffle ensued at Kwa Mutonyo bar which illustrated the initial indication of trouble between the deceased and the accused persons. Counsel submitted that the accused persons' claim that the deceased screamed to show that she was happy to see the accused persons at the vehicle was not true.

Counsel further submitted that it was odd that the unusual behaviour of the accused persons who, having dropped off the deceased where they picked her up from, yet again, proceeded to carry her along with them despite professing, for the second time that night, that they had a desire to go home.

Counsel argued that it was odd that the accused persons, who had earlier tried to leave the deceased in a strange place and had had an altercation with her would proceed to pick her up again on the pretext of dropping her off at home. Counsel contended that it was equally perplexing that the accused persons who dropped off a prostitute at her 'place of business' proceeded to pick her up so that they could take her home with no intention of having sexual intercourse with her.

Learned Counsel submitted that, the factors stated above were relevant to the fact in issue, namely, whether A1 and A2 murdered the deceased. Counsel fortified the argument with reference to the case of **R v Ball**⁴ cited with approval in the case of **The People v Evaristo Banda**⁵. In Ball, the House of Lords opined thus:

"Surely in an ordinary prosecution for murder you can prove previous acts or words of the accused to show he entertained feelings of enmity towards the deceased, and that this evidence not merely of the malicious mind with which he killed the deceased, but of the fact that he killed him. You can give in evidence the enmity of the accused towards the deceased to prove that the accused took the deceased's life. Evidence of motive necessarily goes to prove the fact of homicide by the accused, as well as his "malice aforethought", in as much as it is more probable

that men are killed by those who have some motive for killing them than those who have not."

Counsel further cited the case of **Mwanaute v The People**⁶ where the Supreme Court held that where an accused person is last seen with the deceased, this fact takes the case out of the realm of conjecture. Learned Counsel submitted that the two accused persons were the last persons to be seen with the deceased. They harbored some enmity towards her as proved by the altercation between them and her. Despite professing to take her back to Devil Street area, they picked her up again and dumped her body where it was found. Learned Counsel concluded with a prayer to this Court to find that the accused persons murdered Rose Phiri.

In response, Learned Counsel for the accused persons filed submissions on their behalf. Learned Counsel submitted that the Prosecution bore the brunt responsibility of proving this case beyond all reasonable doubt citing the case of **Joseph Mulenga and Albert Joseph Phiri v The People**⁷.

Counsel argued that the evidence of Andisen Banda clearly exonerated the accused persons herein by corroborating their

defence that they did not beat the deceased, but simply wanted to leave the deceased at Kwa Mutonyo bar. Counsel submitted that this could have led the deceased into protesting by making the noise which was heard by the other witnesses.

Learned Counsel further contended that the evidence of the prosecution showed material inconsistencies on what transpired at the vehicle when PW2, PW3 and Andisen Banda went there. Counsel submitted that PW1 saw three people outside the vehicle pulling each other as if they were fighting but in cross-examination, it turned out to be untrue. Counsel also submitted that the sound from the deceased was that which deaf and dumb people make when communicating in sign language.

Counsel further submitted that this fact was confirmed by PW4 who had known the deceased for some time before he saw her at Kwa Mutonyo bar. In addition, Counsel stated that the evidence of PW2 was that he saw the accused persons pulling, pushing and dragging the deceased when he reached the vehicle. In cross-examination, PW2 stated that he saw the two accused persons beating the

deceased because the accused persons wanted to leave her at Kwa Mutonyo bar.

Learned Counsel argued that the evidence of PW3 and Andisen Banda did not show that the deceased was beaten at all by the accused persons. Counsel wondered how all the witnesses could recount the events differently, which they saw at the same time. Counsel further wondered why the Prosecution opted not to bring the evidence of Andisen Banda before Court thereby creating a great prejudice on the defence's case.

Learned Counsel contended that since there was such conflict in the Prosecution's evidence, the outcome of this case should be resolved in favour of the accused persons, that is they did not beat the deceased.

Counsel referred me to the case of **Barrow and Young v The People**⁸ where it was held that:

"Where one prosecution witness gives evidence in favour of the defence, and one against, then in the absence of any good reason for rejecting the evidence of the one and accepting the evidence of the other, the Court should resolve the doubt in favour of the accused."

Learned Counsel further submitted that on the totality of the evidence on record, there was no person who saw the accused persons killing the deceased. Further, no one saw the accused persons near to where the body of the deceased was found which was 900 metres from the place where the accused persons left the deceased alive.

It was Counsel's submission that both the accused persons were very drunk and this evidence was confirmed by the prosecution witnesses. Counsel contended that since the deceased bled a lot and that she was not killed where her body was found, according to PW7, then two very drunk people could not have killed her and later carried her body to another location, using the only mode of transportation they had, which was a Nissan X-trail vehicle, without leaving any traces of blood in the vehicle.

Counsel submitted that the evidence against the accused persons was circumstantial and that it was not direct proof. Counsel argued that for such evidence to qualify to have the accused persons convicted, it has to meet the test laid out in the case of **David Zulu v The People**⁹ on circumstantial evidence.

Counsel also cited the case of **Patrick Sakala v The People**¹⁰ where the Supreme Court held that circumstantial evidence should be so cogent and compelling that no rational hypothesis other than murder could on the facts in the case be accounted for.

Learned Counsel contended that the facts of this case had not taken the it out of the realm of conjecture, to a point where it had attained a degree of cogency such that only an inference of guilt could be drawn. Further, that the evidence on record was not compelling beyond all reasonable doubt to the extent that no other rational hypothesis other than that the accused persons committed the offence could be arrived at.

Counsel contended that the witnesses at Kwa Mutonyo bar saw the accused persons leaving the bar with the deceased. There was nothing on record to prove beyond all reasonable doubt that there was malice on the part of the two accused persons. Further, the motive for the killing was not established by the prosecution's evidence beyond dispute to exclude any other reasonable alternative.

Counsel submitted that the accused persons told PW6 and PW7 outrightly that they dropped off the deceased alive near Chadiza turn

off and proceeded to A1's home. Counsel argued that Chadiza turn off being a place near to where the relatives of the deceased lived and there being other houses in that area, could lead to a reasonable inference that the deceased was killed by anyone in that area as she went home; or that the deceased having been in a habit of patronizing bars, went to patronize the bars near to the place where her body was found and she met her fate there.

Counsel contended that the accused persons did not deny leaving Kwa Mutonyo bar with the deceased. However they gave an explanation which might reasonably be true that they left the deceased near Chadiza turn off and proceeded to A1's home after being so advised. It was Counsel's submission that the accused persons should not be convicted of murder because the evidence was purely circumstantial and a number of inferences could be drawn. Counsel cited the case of **Chabala v The People**¹¹.

Counsel argued that the reasonable explanation given by the accused persons even if not believed by the Court entitled the accused to an acquittal as long as it might reasonably be true, as

held in the case of **Kalonga v The People**¹². In that case the Court held that:

“The test is, that an explanation which might reasonably be true entitles an accused to an acquittal even if the Court does not believe it; an accused is not required to satisfy the Court as to his innocence but simply to raise a reasonable doubt as to his guilt.”

Counsel concluded with a prayer to the Court to find that the Prosecution failed to prove the offence of murder against the accused persons beyond all reasonable doubt.

I must hasten to state that I am greatly indebted to Learned Counsel of both sides for their industrious submissions. I have seriously considered the evidence on record and the submissions filed herein.

The offence of murder is created by section 200 of the Penal Code and provides thus:

“200. 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 by 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 intent to commit a felony;*
- (d) An intention by the act or omission to facilitate the flight or escape from custody or any person who has committed or attempted to commit a felony."*

In the case of **Daudi Phiri v The People**¹³ the Supreme Court defined murder as follows:

"Murder is simply the killing of a person by another person with intention. It is committed when a person causes the death of another person by an unlawful act or omission with malice aforethought".

The Supreme Court went on to state that:

"Malice aforethought or simply intention is established by showing that an intention to cause the death of or to do grievous harm to any person, or knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, and an intent to commit a felony among others existed on the part of the suspect."

From the evidence before me, I find that it is not in dispute that on 8th August, 2016, A1 and A2 were at Mature Night Club, in Chipata Central Business District, at about 20:00 hours where they met the deceased who was deaf and dumb. They picked up the deceased in a Nissan X-trail vehicle and proceeded with her to Kwa Mutonyo bar, which is situated along Chipata – Malawi Road. It is also not in dispute that A1, A2 and the deceased went into Kwa Mutonyo bar to have alcohol and were seen dotting in and out of the bar at different intervals.

It is further not in dispute that A1, A2 and the deceased had a physical altercation at Kwa Mutonyo bar. Furthermore, that the deceased was last seen at Kwa Mutonyo bar with A1 and A2 and they drove off with her. On 9th August, 2016 Rose Phiri was found murdered by unknown people along Chadiza road in Domondo area near Mchenga Compound.

From the evidence, a post-mortem report was conducted by Dr. Odimba on 10th August, 2016 on the body of the deceased Rose Phiri, at Chipata Central Hospital. He found that the cause of death was head injury. In accepting the doctor's findings, it occurs

to me that Rose Phiri did not die of natural causes but was killed by someone.

Though direct evidence was not presented in Court, I am satisfied that whoever killed Rose Phiri intended to cause her death. There is no reason why a person would have caused her head injury other than to cause her death or to do grievous harm to her. As a consequence, my finding is that she was murdered.

The question that remains to be determined is who murdered Rose Phiri? The evidence linking the accused persons to the offence is mainly provided by PW1, PW2, PW3 and PW4. In brief the evidence is that PW1 saw A1, A2 and the deceased who went to her bar, Kwa Mutonyo, to have alcoholic beverages. She knew A1 very well and was a regular patron at her bar. She did not know A2 and the deceased who were with A1. She later came to learn from A1 that the deceased was deaf and dumb.

A1 told her that A2 wanted to have sexual intercourse with the deceased in the vehicle. At the conclusion of a tumultuous evening between A1, A2 and the deceased, she saw A1, A2 and the deceased in a physical altercation at a distance. She asked PW2

and PW3 to find out the source of conflict. PW1 testified that she last saw the deceased at Kwa Mutonyo bar in the company of A1 and A2 and they left with her.

PW2 testified that A1 bragged to him that A2 was having sexual intercourse with the deceased in the vehicle. PW2 further testified that when he went to the vehicle with A1 to confirm A2's sexual exploit, A2 told PW2 that A1 also had sexual intercourse with the deceased. While at Kwa Mutonyo bar, PW2 testified that he saw A1 and A2 beating, pulling and tagging the deceased away from the vehicle. PW2 also testified that the deceased was deaf and dumb. Just like PW1, PW2 told the Court that he last saw the deceased in the company of A1 and A2 at Kwa Mutonyo bar and they drove off with her.

PW3's evidence was that he saw A1, A2 and the deceased at Kwa Mutonyo bar. A1 is a person whom he knows quite well. PW3 testified that A1 told him that A2 wanted to have sexual intercourse with the deceased, whom they had picked up on their way to Kwa Mutonyo bar. A1 told him that the deceased was deaf

and dumb. PW3 told the Court that he and PW2 intervened in a physical altercation that occurred between A2 and the deceased.

PW4's evidence was that he knew the deceased who was deaf and dumb. He saw her on 8th August 2016, at Kwa Mutonyo bar in the company of A1 and A2. PW4 saw A1 and A2 leave the bar at different intervals with the deceased and later returned to the bar.

In rebuttal, the evidence of A1 was that he went with A2 and the deceased to Kwa Mutonyo bar on 8th August, 2016 because A2 wanted to see his uncle Mr. Chileshe in that area. The deceased jumped into A2's vehicle uninvited from Mature Night Club and they took her along. He met the deceased for the first time on the material day and did not know if she was a prostitute.

A1 testified that while at Kwa Mutonyo bar, he was not in the company of the deceased. However when he and A2 decided to leave the bar the deceased followed them to the vehicle. He stated that he and A2 never beat the deceased at Kwa Mutonyo bar. They drove off with her and went back to Mature Night Club. A1 testified that he felt obligated to carry the deceased with them so that they

could drop her off where they picked her up from at Mature Night Club.

According to A1, while at Mature Night Club some prostitutes gave them the deceased's residential address. A1 told the Court that since the deceased lived on his way home, he and A2 decided to drop her off near her home, at Chadiza turn off in Mchenga Compound. When they left her, she was well and alive. A1 denied beating or causing the death of the deceased.

A2's testimony was no different from A1. He repeated how he and A1 met the deceased. He however, testified that at Kwa Mutonyo bar, he tried to make conversation with the deceased and learnt that she was deaf and dumb. He also told the Court that he knew for a fact that the deceased was a prostitute and wanted to have sexual intercourse with her, but he did not have enough money.

A2 told the Court that he and A1 went back with the deceased to Mature Night Club after leaving Kwa Mutonyo bar, where some prostitutes gave them the deceased's residential address. He also testified that he and A1 dropped off the deceased near Chadiza

turn off in Mchenga Compound. She was well and alive at that time. A2 further told the Court that since he was very drunk he could not dispute if a sober person testified on the material day that he had beaten the deceased.

In my considered view, I find that the evidence against the accused persons can best be described as being circumstantial. There is no one who saw the accused persons attacking the deceased. In the case of **David Zulu v The People**⁹ the Supreme Court held *inter alia* that:

“(i) 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.

(ii) It is 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 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 that case the Supreme Court went on to state that:

“As to the current case, in the first place while we accept the learned commissioner's finding that the appellant was with the deceased until midnight on the relevant date, it is by no means easy for us to

agree with the inference that the appellant was the murderer. The time lag between midnight, when the appellant was last seen with the deceased and the discovery of the deceased's body was at least six hours. In that time it is quite possible that the appellant might have parted with the deceased and that while the deceased was alone on her way back home she was attacked and killed by unknown people."

In the case of **Dorothy Mutale and Richard Phiri v The People**¹⁴, the Supreme Court held *inter alia* that:

"Where two or more inferences are possible, it has always been a cardinal principle of criminal law that the Court will adopt the one that is more favourable or less favourable to an accused if there is nothing to exclude that inference. Where there are lingering doubts, the Court is required to resolve such doubts in favour of the accused."

In my considered view therefore, the only way the accused persons can be convicted in this case, is if the only inference that can be drawn from the evidence before me is one of guilty. I must not have any lingering doubt on their involvement or participation in the crime. If I have any lingering doubt, then I must resolve this case in favour of the accused persons.

From the evidence, I am satisfied that A1 and A2 picked up the deceased from Mature Night Club knowing fully well that she

was a prostitute. A1 and A2 took the deceased to Kwa Mutonyo bar so that they could park at a spot where they would both take turns in having sexual intercourse with her. After their sexual exploits, I find that A1, A2 and the deceased failed to agree on payment. As a result, the misunderstanding culminated into a physical altercation. PW2, PW3 and Andisen Banda intervened in the altercation which appeared to be resolved. Thereafter, A1 and A2 and the deceased left Kwa Mutonyo bar.

Given their state of drunken stupor, it is quite possible that A1 and A2 cannot fully recollect their actions and were unable to tell if they were involved in a physical altercation with the deceased. However, the other witnesses who were sober that is PW1 and PW2, confirmed that there was a physical altercation between A1, A2 and the deceased. Thus, I find nothing inconsistent with the evidence of the prosecution witnesses and declare that the case of **Barrow and Young v The People**⁸ is distinguishable to the facts in *casu*.

I do not believe that A1 and A2 took the deceased back to Mature Night Club along Devil's street where some prostitutes gave

them the deceased's residential address. This strand of evidence can best be described as an afterthought and a late fabrication in the accused persons defence.

If at all they were given information by the prostitutes about the deceased's residential address, why didn't they call any of them to corroborate their evidence? Surely, it could have been easy for A1 who patrols Devil's street quite frequently on duty, to have reached out to one of the prostitutes who could have given evidence on their behalf.

In the **David Zulu** case the Supreme Court found difficulty in agreeing with the inference that the appellant in that case was the murderer, because the time lapse when the appellant was last seen with the deceased and the discovery of the deceased's body was at least six hours. The Supreme Court took the view that it was quite possible that the appellant could have parted company with the deceased and then met her fate.

In the instant case, A1 and A2 were last seen with the deceased between 22:00-23:00 hours. The body of the deceased was discovered at 06:00 hours. There was a time lapse of about seven

hours. Be that as it may, I find that it is too much of an odd coincidence that the post-mortem report described the external injuries on the deceased as a deep cut on the labia majora, bruises on both hands and in the uterus. The evidence of PW1, PW2 and PW3 was that they saw A1, A2 and the deceased in a scuffle. PW1, PW2 and PW3 testified that A1 and A2 told them that A2 wanted to have sexual intercourse with the deceased. Further, A2 told PW3 that A1 also had sexual intercourse with the deceased.

I am inclined to the case of **R v Exall and Others**³ where Pollock CB, stated the following:

“.....thus it might be in circumstantial evidence there may be a combination of circumstances, one of which would raise a reasonable conviction or more than a mere suspicion but that the whole taken together may create a strong conclusion of guilt...”

It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength.”

From the evidence, I have no doubt that the injuries on the deceased resulted from the hands of A1 and A2 given that they had a physical altercation with the deceased. They tagged, pulled and pushed the deceased at Kwa Mutonyo bar. According to PW2 he saw A1 and A2 beating the deceased. I further, have no doubt that A1 and A2's sexual exploits of the deceased in their drunken state could have caused injuries to her labia majora and uterus. Placing reliance on the principles in **R v Exall and Others**³, I find that these strands of evidence greatly support the prosecution's case against the accused persons. Thus, the explanation given by A1 and A2 that they dropped off the deceased well and alive near her home is quite inconceivable.

In the case of **Chabala v The People**¹¹ the Supreme Court held that:

"If an explanation is given, because guilt is a matter of inference, there cannot be a conviction if the explanation might reasonably be true, for then guilty is not the only reasonable inference. It is not correct to say that the accused must give a satisfactory explanation."

Even though I am bound to accept a reasonable explanation from the accused persons, which I have no belief in, I find that the

accused persons' explanation did not meet the test laid out in the **Chabala case**. As a result, I am drawn to infer that the accused persons participated in the murder of the deceased. Their alleged philanthropic act of dropping off the deceased a prostitute at a place near her home well and alive holds no attraction to this Court. All I can say is that the explanation is incredulous.

I also find that A1 and A2's time between 23:00 hours and 06:00 hours is unaccounted for. I find that is quite possible that the accused persons could have used the time to cover up their tracks in order to conceal the death of the deceased. It is also quite possible that A1 and A2 could have murdered the deceased immediately after leaving Kwa Mutonyo bar and never went home at all.

I am fortified by the fact that A1 and A2 did not call evidence from any member of A1's household to confirm if A1 and A2 slept at A1's house. One wonders why they did not call any witness from A1's home? What were they afraid of? Only the accused persons can answer that question. That being the case, I infer that the accused persons did not go back home after they murdered the deceased because they wanted to make sure that there was no one who

witnessed their crime. The accused persons were the last persons to be seen with the deceased and are in my considered view, the best persons to account for her death. In the case of **Mwanuate v The People**⁶, the Supreme Court held that:

“Applying the above principles to the facts of this case, we are satisfied that the learned trial Judge was on firm ground when he drew the inference of guilty on the basis of the circumstantial evidence before him. The totality of this circumstantial evidence which is that the appellant was the last person seen with the child before the child wound up dead in the bush, takes this case out of the realm of conjecture”.

I opine, therefore, that the prosecution’s evidence has taken this case out of the realm conjecture, where I can say with certainty, that the accused persons A1 and A2 murdered Rose Phiri and I convict them.

The punishment for a person convicted of the offence of murder is set out in section 201 of the Penal Code. It states thus:

- “(1) Any person convicted of murder shall be sentenced –**
(a) to death: or
(b) where there are extenuating circumstances, to any sentence other than death:

Provided that paragraph (b) of this subsection shall not apply to murder committed in the course of aggravated robbery with a firearm under section two hundred and ninety -four.

(2) *For the purpose of this section-*

(a) an extenuating circumstance is any fact associated with the offence which would diminish morally the degree of the convicted person's guilt:

(c) in deciding whether or not there are extenuating circumstances, the Court shall consider the standard of behaviour of an ordinary person of a class of the community to which the convicted person belongs.

In the case of **Jack Chanda and Kennedy Chanda v The People**¹⁵, the two appellants were sentenced to death upon being convicted of murder by the High Court sitting at Kasama. The appellants appealed against their conviction, arguing that there was no postmortem conducted to establish the cause of death and in failing to find that there was an extenuating circumstance.

The Supreme Court held *inter alia* that:

"In this case there was evidence of drinking. The appellants had been drinking for about five hours. The learned trial Judge should have considered this evidence when deciding whether to impose the death sentences or a sentence other than death in terms of Section 201 (1) (b) of the Penal Code. Failure by the learned trial Judge to consider the evidence of drinking, which in fact was common cause,

amounted to a misdirection. We must, therefore interfere with the sentence."

From the **Jack Chanda case**, it is trite that evidence of drinking can amount to an extenuating circumstance, which entitles the sentencing court to met out any sentence other than death. In *casu* there is strong evidence that A1 and A2 were very drunk. The evidence is overwhelming from the prosecution witnesses as well as the accused persons themselves. Consequently, I find that there are extenuating circumstances in favour of the accused persons. I will not impose the death penalty.

Leave to appeal is granted.

Delivered at Chipata in open Court this 19th day of December, 2016.


M. Mapani-Kawimbe
HIGH COURT JUDGE