

IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

2024/HP/96

BETWEEN:

THE PEOPLE

VS

CHANDA MAJORY LULEMBO

1ST ACCUSED

AND

SMART MUMBA

2ND ACCUSED

**BEFORE THE HONOURABLE MR. JUSTICE S. V. SILOKA IN
OPEN COURT ON THE 31ST DAY OF MARCH, 2025**

For the State: Mr. Voster Munsaka – National Prosecution
Authority

For the Accused: Ms. Mushipe – Mesdamas Mushipe &
Associates

J U D G M E N T

CASES REFERRED TO:

1. *Said Banda Vs The People* (SCZ Appeal No. 114 of 2015);
 2. *Donald Fumbelo Vs The People* (SCZ) Appeal No. 476 of 2013;
 3. *Mwewa Murono Vs The People* (2004) ZR 207 (SC);
 4. *The People Vs Hamainda* (1972) ZR 310;
 5. *David Zulu Vs The People* (1977) ZMSC1;
 6. *Dorothy Mutale and Richard Phiri Vs The People* (1997) S.J.51
(S.C);
 7. *Elias Kunda Vs The People* (1997) S.J 51 (S.C);
 8. *Saluwema Vs The People* (1965) ZR 4 (CA);
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9. *Chimbini Vs The People* (1973) ZR 191;
10. *Shawaz Fawaz and Another Vs The People* (1995) S.T. (S.C);
11. *Subramaniam Vs Public Prosecutor* (1. W.L.R. 1965);
12. *Homes Vs Director of Public Prosecutions* (1946) AC 588;
13. *Liyumbi Vs The People* (1978) ZR 25;
14. *Lubinda Vs The People* (S.C.Z Judgment 16 of 1988);
15. *Peter Yotum Hamende Vs The People* (1997) XR 184;
16. *Mwalume Muyuta and Another Vs The People* (Appeal No. 23/2016);
17. *Phiri and Others Vs The People* (1973) Z.R 47;
18. *The People Vs Hosia Mulumbi* (1995) SJ (12th May, 1995);
Musupi Vs The People (1978) SCZ; and
19. *Chisembele and Others Vs Regina* (1960) Rhodesia and Nyasaland Law Repots, P.182.

LEGISLTATION REFERRED TO:

1. Section 200 of the Penal Code, Chapter 87 of the Laws of Zambia; and
2. Section 204 of the Penal Code, Chapter 87 of the Laws of Zambia.

1.0 INTRODUCTION

- 1.1 In this case, Chanda Majory Lulembo and Smart Mumba stand charged with the offence of Murder Contrary to **Section 200** of the **Penal Code, Chapter 87** of the **Laws of Zambia**.
- 1.2 The particulars of the offence are that Chanda Majory Lulembo and Smart Mumba, on unknown date but between the 28th day of August, 2023 and 30th day of August, 2023 at

Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia did murder Janet Chola Mpundu.

2.0 BURDEN OF PROOF

2.1 I warn myself at the outset, that the onus is upon the prosecution, to prove its case beyond all reasonable doubt and there is no onus on the Accuseds to prove their innocence. The Accuseds are entitled to give and call evidence or say nothing at all and if they elect to say nothing, this does not affect the burden on the prosecution. If, after considering all of the evidence in this case, there is any doubt in my mind as to the guilt of the Accuseds, then the Accuseds must be given the benefit of that doubt.

2.2 In order to establish the guilt of the Accuseds, the prosecution must satisfy me upon each and every ingredient of the offence charged.

2.3 To sustain a conviction, the State must establish the following elements:

(a) That the now Accuseds

(b) With malice aforethought

(c) Did murder Janet Chola Mpundu

2.4 I will now consider the evidence in this case.

3.0 THE PROSECUTION'S CASE

3.1 The First Prosecution Witness was Constance Mwelwa aged 35 years, herein after called **PW1**.

3.2 **PW1**'s evidence was to the effect that she was the mother to Janet Chola Mpundu, aged 14 years, now Deceased.

3.3 It was the further testimony of **PW1** that on the 7th July, 2023, she received a request through his brother, to the effect

that a certain family in Lusaka, wanted a young girl to live with as a house helper at no cost.

- 3.4 Following the said conversation, **PW1** informed the Court that she agreed that her daughter Janet Chola Mpundu goes to Lusaka as a house helper.
- 3.5 It was **PW1**'s further testimony after discussing with his brother Ronald, she then spoke to the person who wanted her daughter via a mobile phone.
- 3.6 During the discussion, **PW1** told the Court that the lady she spoke to informed her that she wanted a young girl she was to keep as her daughter, allow her to go to school while she did house chores when she knocks off from school. According to **PW1**, she came to know the lady as Ms. Chanda, who assured her that she was to keep the girl as her daughter.
- 3.7 It was **PW1**'s further testimony that following the Telephone Conversation, Ms. Chanda sent money the following day in the sum of K500.00 as transport for Janet Chola Mpundu to travel to Lusaka. Janet Chola Mpundu, accordingly left for Lusaka. The arrival of Janet Chola Mpundu in Lusaka was confirmed by Ms. Chanda, now **A1**.
- 3.8 Two months after Janet's departure from Mansa, **PW1** informed the Court that she received a phone call from Ms. Chanda. Ms. Chanda was complaining that Janet Chola Mpundu was naughty and giving her problems in that she was eating the porridge for the baby.
- 3.9 According to **PW1**, Ms. Chanda during the conversation emphasized that **PW1** must send money to Lusaka as Transport money for Janet Chola Mpundu to use to travel

from Lusaka to Mansa, or else Janet Chola Mpundu was to come back to Mansa as a dead person.

- 3.10 It was **PW1**'s further testimony that after talking to Ms. Chanda she requested to talk to her daughter Janet Chola Mpundu.
- 3.11 During the conversation, Janet Chola Mpundu informed her that she was dying and that Ms. Chanda was beating her so much. However, according to **PW1**, the discussion was cut short as Ms. Chanda grabbed the phone from Janet.
- 3.12 When Ms. Chanda got the phone, she informed her that Janet was to be taken to the Hospital the following day.
- 3.13 It was **PW1**'s further testimony that the following day she received information to the effect that Janet Chola Mpundu was dead. Following receipt of the death of Janet Chola Mpundu, **PW1** informed the Court that she then traveled to Lusaka to collect the body.
- 3.14 In concluding her evidence-in-chief, **PW1** told the Court that before her daughter came to Lusaka, she was physically fit and had no health problems.
- 3.15 Under cross-examination, **PW1** informed the Court that while Janet Chola Mpundu was in Lusaka, she received a complaint from **A1** that Janet Chola Mpundu was naughty in that she had a habit of eating porridge for the baby.
- 3.16 **PW1** also under cross-examination, informed the Court that **A1** informed her that Janet Chola Mpundu was unwell but that Janet Chola Mpundu has been physically fit since childhood.

- 3.17 In further cross-examination, **PW1** informed the Court that when she spoke to Janet, Janet told her that she was dying. **PW1** also informed the Court that her daughter never had any scars on her body.
- 3.18 The Second Prosecution Witness was Ronald Kapalaula, hereinafter called **PW2**.
- 3.19 In his evidence-in-chief, **PW2** informed the Court that on the 7th of July, 2023, he was requested by her boss to find a young girl, from Mansa who would go and live with her sister in Lusaka as a house helper at no cost and in return, she would be allowed to further her education.
- 3.20 Following the above request, **PW2** went to see **PW1** and explained what her boss had requested. After the conversation, **PW1** agreed to release her daughter Janet Chola Mpundu to Lusaka.
- 3.21 It was **PW2**'s further testimony that after **PW1** agreed to send her daughter to Lusaka, he then facilitated a discussion between **PW1** and the lady in Lusaka, now **A1**.
- 3.22 It was **PW2**'s further testimony that after **PW1** and **A1** discussed, he also spoke to **A1** to confirm that indeed the two had agreed.
- 3.23 According to **PW2**, after the above conversation, **A1** sent the sum of K500.00 as transport to facilitate the departure of Janet Chola Mpundu. The money was received after which Janet Chola Mpundu departed the following day. The arrival of Janet Mpundu Chola was confirmed by **A1**.
- 3.24 As a way of follow up, **PW2** informed the Court that after a week, he phoned **A1** to find out how they were staying with

Janet Mpundu Chola. According to **PW2**, **A1** confirmed that Janet Mpundu Chola was okay and that they were living peacefully.

- 3.25 However, after a number of weeks, **A1** phoned him complaining that Janet Chola Mpundu had started misbehaving in that she had started eating baby porridge.
- 3.26 In response to the question regarding the behavior of Janet Chola Mpundu, **PW2** responded that Janet Chola Mpundu was well behaved and that was why he picked her and sent her to Lusaka to **A1**.
- 3.27 It was also **PW2**'s further evidence that during the discussion, **A1** promised to send Janet Chola Mpundu back to Mansa if she did not reform.
- 3.28 According to **PW2**, after a week, **A1** again called to complain that Janet Chola Mpundu was found with a mouth full of porridge and that the bad behavior had worsened. During the said discussion, **A1** informed **PW2** that she was still observing Janet Chola Mpundu but stated that Janet Chola Mpundu was to be sent back if she did not reform.
- 3.29 **PW2** also told the Court that sometime in August 2023, **A1** again called him and during the phone conversation, **A1** informed him that Janet's bad behavior had worsened and that in spite of the several beatings, by her, Janet Chola Mpundu was not reforming.
- 3.30 It was also **PW2**'s further testimony that during the said telephone conversation, he was informed that Janet Chola Mpundu was taken to the clinic for medical attention because she was passing urine with blood.

- 3.31 According to **PW2** during the same conversation, **A1** requested him to facilitate a telephone conversation with **PW1** so that she informs her about Janet Chola Mpundu's bad behavior, urinating blood and how dirty Janet Chola Mpundu was. The said telephone conversation was arranged and the two discussed but that **PW2** was not privy to the said conversation.
- 3.32 According to **PW2** after **A1** and **PW1** discussed, he requested to talk to Janet Chola Mpundu. In his conversation with Janet Chola Mpundu, Janet Chola Mpundu promised to reform and be a good girl.
- 3.38 It was **PW2's** further testimony that after talking to Janet Chola Mpundu, he again spoke to **A1** and **A1** assured him that Janet Chola Mpundu was to be sent back when she recovers.
- 3.39 In his further testimony, **PW2** told the Court that the following day he received information from his boss, Ms. Chisoke informing him that Janet Chola Mpundu was found dead in the house around 06:00 hours.
- 3.40 According to **PW2**, after receipt of the death of Janet Chola Mpundu, **PW1** and other relatives were informed after which funeral arrangements were made. The body of Janet Mpundu Chola was later picked from Lusaka and buried in Mansa.
- 3.41 In cross-examination, **PW2** informed the Court that Janet Chola Mpundu was physically fit when she left for Lusaka.
- 3.42 In further cross-examination, **PW2** informed the Court that Janet Chola Mpundu was sent to the now **A1** but that he did not know the cause of her death since he was not there.

- 3.43 The Third Prosecution Witness was Joshua Marimo, a student at Cresto University herein after called **PW3**, a neighbor to **A1** and **A2**.
- 3.44 It was **PW3**'s testimony that as a neighbor to **A1** and **A2**, he used to see a girl who was doing house chores in the house of **A1** and **A2**.
- 3.45 It was **PW3**'s further evidence that the times he saw the girl, she was looking physically okay.
- 3.46 Further in his evidence-in-chief, **PW3** told the Court that on the 28th of August, 2023, at about 21:00 hours, he came home from playing football. While outside, he heard the girl in the next flat shouting but that he was not able to tell why the girl was shouting. The girl cried for about 15 minutes.
- 3.47 In his further testimony, **PW3** told the Court that between 23:00 hours to 24:00 hours, the girl started crying again, but this time the girl screamed so loudly and thereafter the scream faded.
- 3.48 It was **PW3**'s further testimony that the following morning, the girl who he used to meet early in the morning for about a month as he went to switch on the tank was nowhere to be seen.
- 3.49 It was **PW3**'s further evidence that a few days later, Police Officers came to interview him in relation to the death of the girl in the next flat.
- 3.50 According to **PW3**, he explained to the Police that he last heard the girl on 28th of August, 2023 screaming but that he did not know that the girl was dead.

- 3.51 It was **PW3**'s further testimony that though he did not know the girl very well, he knew the girl's voice very well and that from the cry of 28th of August, 2023, he never saw the girl again.
- 3.52 According to **PW3**, before the 28th of August, 2023, it was the girl who would wake up early in the morning to sweep but after the 28th, it was **A1** who was seen sweeping.
- 3.53 **PW3** further emphasized that from the last cry he never saw the girl though everything in the yard was very normal.
- 3.54 In cross-examination, **PW3** informed the Court that he knew the Deceased for a month and half, though the Deceased was not introduced to him formally.
- 3.55 In further cross-examination, **PW3** informed the Court that he heard screams from **A1** and **A2**'s flat but did not see anything.
- 3.56 It was the further evidence of **PW3** that on the 28th of August, 2023, he heard a voice shouting but could not make out what the screaming was all about.
- 3.57 The Fourth Prosecution Witness was Cordilia Maria Himwaze, herein after called **PW4** employed as a Pathologist by Ministry of Home Affairs and Internal Security.
- 3.58 It was **PW4**'s evidence that on 31st August, 2023, she received an Order of Post Mortem Examination on a 14-year-old girl by the name of Janet Chola Mpundu with a History of having died in her sleep and a back ground of an assault.
- 3.59 The body of the Deceased before Post Mortem was identified by the attending Police Officer.

- 3.60 According to **PW4**, before embarking on the actual examination, preliminary examination of the body, clothing, height and sexual orientation were carried out. Photographs of the body and clothing were accordingly taken.
- 3.61 It was **PW4** further testimony that the body was externally examined from head to toe. There after the body was opened up, by first removing the entire skin of the body to examine for injuries.
- 3.62 **PW4** also told the Court that after conducting an external examination, she went on to conduct an internal examination, where the head, chest, abdomen and pelvis were examined.
- 3.63 According to **PW4**, from the external and internal examination, she noted that the Deceased had multiple injuries to the head, abrasions and contusions to the neck, shoulders, arms, entire back, thighs, legs, chest and abdomen.
- 3.64 It was **PW4**'s further evidence that the said injuries extended deep under the skin and deep into the muscular layers.
- 3.65 According to **PW4** the Deceased had burns on the arms of up to second degree and that there was traumatic removal of the nail beds with associated bleeding all the way into the muscles.
- 3.66 **PW4** also informed the Court that when she removed the skin of the skull, the front and back had bleeding. Further that the right ear was equally burnt and had an associated laceration.

- 3.67 **PW4** also informed the Court that when she examined the internal organs of the Deceased all were normal and healthy and appropriate for the age of the Deceased. There was no disease process in the organs of the body.
- 3.68 It was **PW4**'s further testimony that after conducting the Post Mortem, she gave the cause of death as multiple blunt impact injuries to the head, torso and extremities due to assault. The mechanism of death was hemorrhage.
- 3.69 It was **PW4**'s further evidence that after conducting the Post Mortem Report, she prepared a Post Mortem Report (**P1**).
- 3.70 Further, **PW4** informed the Court that as she was doing the Post Mortem Examination, she also took photographs after which she prepared a Photo Album (**P2**).
- 3.71 In conclusion, **PW4** stated that the cause of death was multiple blunt trauma to the head, torso and extremities due to assault.
- 3.72 **PW4** further testified that the injuries sustained by the Deceased were wide spread and the object impacting trauma on the Deceased were varied.
- 3.73 Further, that the Deceased had injuries that were as a result of blunt impact trauma and also burns to the ear, right and left arms extending to the hands.
- 3.74 In cross-examination, **PW4** told the Court that according to the history of death, the Deceased died in her sleep, after an assault.
- 3.75 In further cross-examination, **PW4** informed the Court that washing of the dead body was part of the examination.

- 3.76 In further cross-examination, **PW4** informed the Court that injuries on Page 12 could not have been caused after she died because bleeding is a vital sign of life. When a person dies, no bleeding occurs because there is no life.
- 3.77 It was **PW4**'s further evidence that when a person dies, the circulation of blood ceases. It comes to a standstill. When a person dies, the vessels are not drained of the blood.
- 3.78 In further cross-examination, **PW4** stated that internal examination showed internal injuries inflicted by blunt impact trauma.
- 3.79 In further cross-examination, **PW4** informed the Court that when she peeled off the skin, no bleeding was noticed because Janet Chola Mpundu dead.
- 3.80 **PW4** in further cross-examination stated that she examined the reproductive organ of the Deceased on page 9 of the Post Mortem Report but that the reproductive organ had no abnormalities. Further that the Post Mortem Examination did not show any bleeding disorder. Further no sperms were seen in the reproductive organ.
- 3.81 Finally in cross-examination **PW4** stated that the cause of death was multiple blunt impact trauma. Bleeding was the mechanism of death.
- 3.82 The Fifth Prosecution Witness was Zicheleke Lukele, aged 41 years and employed as a Police Officer by Zambia Police Service and Arresting Officer in this matter herein after called **PW5**.

- 3.83 It was **PW5**'s evidence that on the 30th of August, 2023, he was assigned by the Officer-in-Charge at Kabwata Police to attend to a matter at UTH Police Post.
- 3.84 It was **PW5**'s testimony that this was in relation to a matter in which two adult persons who were identified as a couple, residing in Chalala had gone to UTH Police Post to obtain a Brought in Dead (B.I.D) Certificate over a female young girl who, according to the couple had died of natural causes.
- 3.85 Upon arrival at UTH Police Post, **PW5** informed the Court that he went on to interview the couple, now **A1** and **A2** as to why they wanted a BID Certificate.
- 3.86 In response, **A1** and **A2** informed him that a girl who was under their custody as a helper by the name of female Janet Chola Mpundu had died in her sleep after a sickness.
- 3.87 It was **PW5**'s further testimony that as per procedure, he went to inspect the body and noticed that the body had visible injuries that included bruises on the back, shoulders, ear and fingers. Upon noticing the said injuries, the process of issuing a B.I.D Certificate was stopped and a murder case opened for investigations.
- 3.88 It was **PW5**'s further testimony that on the same day he booked for a Post Mortem. The Post Mortem was conducted by Dr. Himwaze (**PW4**) while himself was the Attending Officer. According to the Post Mortem Examination Report, the girl died from assault.
- 3.89 According to **PW5** after receiving the Post Mortem Report, he then warned and cautioned **A1** and **A2** in connection with the

murder of Janet Chola Mpundu contrary to **Section 200** of the **Penal Code**.

- 3.90 Under warn and caution, **A1** and **A2** denied the charge and stated that the Deceased died from an illness but that no documents to prove the illness were submitted.
- 3.91 In carrying out further investigations, **PW5** told the Court that he visited the house of the suspects. Upon arrival at the house, he was informed by **PW3** that **A1** and **A2** had a helper who was brought to help them in the house whom he had not seen for the last two days, prior to her death.
- 3.92 According to **PW5**, **PW3** informed him that on the 28th of August, 2023, he heard the Deceased screaming from within the house.
- 3.93 It was **PW5**'s further evidence that armed with the above evidence he made up his mind to charge and arrest **A1** and **A2** for murder contrary to **Section 200** of the **Penal Code**. **PW5** identified **A1** and **A2** as the people he charged for the current offence.
- 3.94 When cross-examined regarding dereliction of duty and poor investigations in this case, **PW5** informed the Court that there was no dereliction of duty and that this matter was adequately investigated by visting the scene of crime.
- 3.95 In further cross-examination **PW5** informed the Court that he interviewed **PW3** and **PW3** informed him that on the 28th of August, 2023 he heard screams from **A1** and **A2**'s house.
- 3.96 In further cross-examination, **PW5** informed the Court that there were babies in the house but that he ruled out the cries

of the babies because **PW3** ascertained that the voice was that of the Deceased.

3.97 In re-examination, **PW5** told the Court that the Deceased was B.I.D on the 30th of August, 2023, after which a Post Mortem Examination was booked for the following day.

3.98 That was the case of the Prosecution.

4.0 THE CASE FOR THE DEFENCE

4.1 In their Defence the Accused called five witnesses. All the five witnesses gave sworn evidence.

4.2 The first Defence witness was Pauline Mumba, aged 43 years, herein after called **DW1**.

4.3 The brief evidence of **DW1** was to the effect that in September 2022, she came to Lusaka at the invitation of Majory Lulembo and Smart Mumba now **A1** and **A2** to come and take care of their Twins.

4.4 It was **DW1**'s further evidence that when she arrived she found another lady, Chalwe who was taking care of the Twins. However, after nursing the Twins for about five months, Chalwe left and she remained alone taking care of the Twins but found it challenging in doing so, as a result of which she asked Majory Lulembo and Smart Mumba to find another lady so that they could share responsibilities.

4.5 It was **DW1**'s further evidence that following her request in July 2023, Janet Chola Mpundu who was coming from Mansa came to give a helping hand. According to **DW1** when Janet Chola Mpundu arrived she taught her how to properly take care of the twins. After tutoring Janet Chola Mpundu, she then left and went back to Mansa.

- 4.6 In cross-examination, **DW1** told the Court that Janet Chola Mpundu was well behaved and that she was very fit as she did not complain of any ailment. Regarding circumstances leading to her death, **DW1** informed the Court that she did not know what happened since she was not present.
- 4.7 There was no re-examination.
- 4.8 The Second Defence Witness was **Smart Mumba**, aged 40 years hereinafter called **DW2 (A2)**, a resident of Chalala Rockfield and a nurse by profession.
- 4.9 It was **DW2's** evidence that after his wife gave birth to Twins through caesarian section, she developed a Medical Condition called Pulmonary Embolism which necessitated that they ask for help to look after their babies. The help came through one commuter maid and his sister, Pauline Mumba (**DW1**).
- 4.10 It was **DW2's** further testimony that after staying with Pauline Mumba (**DW1**) she requested to go back to Mansa where she hailed from.
- 4.11 Following the departure of Pauline Mumba (**DW1**) and the commuted maid, **DW2** informed that Court that he then made arrangements through **PW2** to secure a lady who would help in looking after the babies.
- 4.12 It was the further evidence of **DW2** that **PW2** then arranged for him to speak to **PW1**, who was the mother to Janet Chola. After discussing with **PW2**, it was then agreed that Janet Chola Mpundu was to come to Lusaka the following day after sending K500.00 transport money. According to **DW2**, both

Parties agreed that Janet Chola Mpundu was to be treated as their child and not as a maid.

- 4.13 After securing the approval of **PW1**, Janet Chola Mpundu travelled to Lusaka and was received at the Inter City Bus Terminus by his wife (**A1**).
- 4.14 According to **DW2**, a few weeks after arrival, it was discovered that Janet Chola Mpundu had a foul smell and was bleeding from her private parts but that when the mother was confronted she denied that her daughter had a bleeding problem. During the same conversation, **DW2** told the Court that his wife complained about Janet Chola Mpundu's bad behavior which included stealing and lying. According to **DW2** during the same conversation, the Parties agreed that Janet Chola Mpundu returns to Mansa if she did not reform.
- 4.15 In his further testimony, **DW2** told the Court that on the 29th of August, 2023 in the evening while marking papers, he heard the babies crying in the sitting room. The cries forced him to go and check what was happening. When he arrived in the sitting room, he found Janet Chola Mpundu now Deceased busy watching TV whilst holding the younger twin, and all of a sudden in front of his eyes, she dropped the younger twin. The young twin then fell in a standing position and, then fell backwards hitting his head on the floor.
- 4.16 Fearing that his son was dead coupled with the shouts of the mother to the twins, **DW2** informed the Court that he became so furious that he started whipping Janet Chola Mpundu, now Deceased with a belt.

- 4.17 It was **DW2**'s further testimony that as a result of the beating, Janet Chola Mpundu run out of the sitting room and into the kitchen where she bumped into a hot pot of porridge after which hot porridge spilled on himself and Janet Chola Mpundu.
- 4.18 According to **DW2**, the porridge fell on Janet's head, both sides of her chicks, neck, both arms and legs. The porridge also spilled on his hands and trousers. As a result of the porridge, **DW2** told the Court that he suffered burns on his right side.
- 4.19 It was **DW2**'s further testimony that as he cleaned himself of the hot porridge, Janet run outside and fell down.
- 4.20 Following the fall, **DW2** informed the Court that he then run outside with a bucket of water to go and clean Janet Chola.
- 4.21 According to **DW2** while outside he started pouring water on Janet Chola Mpundu after which Janet Chola Mpundu was asked to go inside the house but she refused. Following the refusal, Janet was then dragged on the concrete into the house. According to **DW2** after failing to drag Janet Chola Mpundu into the house, she was then lifted into the house.
- 4.22 It was **DW2**'s further testimony that while in the house a dispute ensured between himself and the wife, after which he ended up beating the wife. Following the beating, **DW2** informed the Court that his wife screamed and yelled.
- 4.23 It was **DW2**'s evidence that after eating supper Janet Chola Mpundu was asked to go and clean the plates, take a bath and later on change clothes.

- 4.24 It was **DW2**'s further testimony that Janet Chola Mpundu confirmed that she was very okay in spite of the burns and bruises she had suffered.
- 4.25 Further, **DW2**'s further testimony that after performing the house chores Janet Chola Mpundu proceeded to sleep with a view of waking up early to go for Medical Examination at UTH where an appointment was booked for her. This appointment followed the incidence of her bleeding from the private part.
- 4.26 It was **DW2**'s further testimony that early in the morning while preparing to go for work she was informed by his wife that Janet Chola Mpundu was too weak to wake up and was having breathing problems.
- 4.27 Following receipt of Janet Chola Mpundu's inability to breath, **DW2** rushed to where Janet Chola Mpundu was and went to perform resuscitation (CPR) on her to help her breath.
- 4.28 However, the resuscitation failed and Janet Chola Mpundudied.
- 4.29 It was **DW2**'s further testimony that shortly after the death of Janet, Dr. Lulembo who is his father-in-law advised that the matter be reported to the Police. The matter was accordingly reported to UTH Police Station where Mr. Sakala and Mr. Ngulube advised that the body be taken to UTH Police Station.
- 4.30 Following that guidance, **DW2** informed the Court that with the help of his wife, they put the body into their motor vehicle. According to **DW2**, as the body of the Deceased was being taken into the car, it was dropped twice, on the stairs and on the soaker way.

- 4.31 It was **DW2**'s further evidence that upon reaching the car, the door was opened and the back seat was lowered after which the corpse was put in the motor vehicle after which he drove to UTH Police Station.
- 4.32 It was **DW2**'s further testimony that upon arrival at UTH Police Station, they were received by two Police Officers namely Mr. Sakala and Ngulube.
- 4.33 According to **DW2**, upon inspecting the body, the two Police Officers advised that because of the bruises that were seen on the body, another Police Officer was to be called to come and inspect the body.
- 4.34 Following that observation, a Police Officer from Kabwata, Detective Ziche Lukule, Arresting Officer in this matter, was asked to come and carry out investigations. **DW2** and **DW1** were then remanded in custody.
- 4.35 According to **DW2**, though the cause of death was stated in the Post Mortem Report, he did not agree with the same because that was the opinion of the Doctor.
- 4.36 It was **DW2**'s further testimony that though the Post Mortem Report indicates that the nails of the Deceased were removed traumatically, that was not true because the said nails came out when Janet Chola Mpundu injured herself while cutting vegetables.
- 4.37 It was **DW2**'s further testimony that he was the only one who whipped the Deceased on the material date and that **A1** – has never beaten the Deceased.
- 4.38 In further cross-examination, **DW2** informed the Court that one of the twins was dropped between 20:00 hours and 21:00

hours but that no report was made to the Police for them to issue a Medical Report.

- 4.39 It was **DW2**'s further evidence in cross-examination that the Arresting Officer was not cross-examined as regards the falling of the twins and that the evidence only came to Court during his evidence-in-chief.
- 4.40 Further, in cross-examination **DW2** told the Court that Janet Chola Mpundu suffered burns after bumping into a pot containing hot porridge after which she got burnt.
- 4.41 When further cross-examined, **DW2** admitted that though he got burnt he did not have any medical proof. However, **DW2** told the Court that he had scars on the hands.
- 4.42 **DW2** also in cross-examination, informed the Court that at the house they were living in, there were neighbours around but that he never asked for help because he did not verify if any of the neighbours was around on the material day.
- 4.43 **DW2** also in cross-examination, admitted that he heard the evidence of **PW3** – Joshua Morimo confirming that he heard the Deceased crying which was the same time **DW2** confirmed to have whipped the Deceased but that he could not answer on behalf of **PW3** because he did not know whose voice **PW3** heard.
- 4.44 Under cross-examination **DW2** told the Court that the matter was not reported to Mary Mwango Police Station but to UTH Police Station, because UTH Police Station was convenient.
- 4.45 In further cross-examination **DW2** informed the Court that he is aware that when a person dies in the house, it is the Police who are supposed to pick the body.

- 4.46 According to **DW2**, in the case in *casu* he picked the body because the Police at UTH allowed him to do so.
- 4.47 In further cross-examination **DW2** informed the Court that as they moved the body from the house into the motor vehicle, the Deceased fell on concrete but that there was no proof of concrete submitted before Court.
- 4.48 When cross-examined as regards the Doctor's findings as to the cause of death, **DW2** told the Court that he did not agree with the Doctor's findings because the Doctor gave her opinion but that the Doctor's finding was not challenged in Court.
- 4.49 In further cross-examination, **DW2** informed the Court that the nails of the Deceased came out when she was cutting vegetables but that this was not brought to the attention of the Doctor when she was giving her testimony.
- 4.50 In further cross-examination, **DW2** admitted to have whipped the Deceased a day before she died.
- 4.51 In further cross-examination **DW2** admitted that he did not produce any evidence to show that the Deceased was suffering from any illness.
- 4.52 There were no questions in re-examination.
- 4.53 The Third Defence Witness was Chanda Majory Lulembo aged 35 years, herein after called **DW3 (A1)**; a qualified Medical Practitioner.
- 4.54 **DW3** in her evidence-in-chief told the Court that she developed complications after giving birth to a set of twins which made it difficult for her to look after the twins.

- 4.55 Faced with this challenge **DW3** told the Court that, it was decided to look for extra help by employing a commuting maid. The maid employed was Chalwe from Bauleni.
- 4.56 Further it was **DW3**'s testimony that in addition to Chalwe, the sister to Mr. Mumba (**DW2**), Pauline Mumba was also invited to come and help.
- 4.57 According to **DW3**, it was again decided to look for help when Chalwe went back to Kasama to attend a funeral; as Pauline Mumba (**DW1**) could not cope.
- 4.58 With the help of Mr. Kapalaula (**PW2**) **DW3** told the Court that, she was connected to Constance Mwelwa (**PW1**) who had a daughter by the name of Janet Chola Mpundu.
- 4.59 **DW3** informed the Court that she explained to Constance Mwelwa (**PW1**) that she needed someone to take care of the twins and in return she would look after the girl, like her own child.
- 4.60 Following the above telephone conversation, it was agreed that the sum of K500.00 be sent to Janet Chola to enable her travel to Lusaka. The sum of K500.00 was accordingly sent to Mr. Kapalaula.
- 4.61 It was **DW3**'s further testimony that the following day Janet Chola started off from Mansa and was picked at Intercity Bus Terminus by herself.
- 4.62 According to **DW3** when Janet Chola arrived, she was inducted by Pauline Mumba (**DW1**) in terms of how to take care of the babies and other house chores.

- 4.63 It was **DW3**'s further testimony that a few weeks after Janet Chola arrived, she developed a cold after which she was taken to Michael Chilufya Clinic for medical attention.
- 4.64 **DW3** further informed the Court that after a week Pauline Mumba (**DW1**) left and shortly thereafter she noticed that Janet Chola Mpundu was badly behaved in that she was stealing money from their bedroom and that she did not want to do any chores but just wanted to watch television only.
- 4.65 According to **DW3** this sad development was communicated to the mother of Janet Chola Mpundu through Mr. Kapalaula (**PW2**) and that the mother to Janet allowed her to discipline Janet Chola Mpundu just like her own child.
- 4.66 It was **DW3**'s further testimony that she later discovered that Janet Chola Mpundu had a foul smell and was passing blood in her urine.
- 4.67 It was **DW3**'s further testimony that Janet Chola Mpundu informed her that the problem was an old one and the mother was aware of the same problem.
- 4.68 According to **DW3** the bleeding problem was then communicated to the mother to Janet Chola Mpundu through Mr. Kapalaula but that the mother to Janet Chola Mpundu denied that Janet Chola Mpundu had such a problem.
- 4.69 It was the further testimony of **DW3** that following the discovery of the medical problem it was decided that she be taken to the hospital for medical attention.
- 4.70 An appointment was secured for the 29th of August, 2023. However, while cooking at home, there occurred an accident

at home in which Janet Chola Mpundu dropped one of the twins who later on fainted.

- 4.71 Following the occurrence of the accident, Mr. Mumba (**DW2**) then whipped Janet Chola Mpundu with a belt. As a result of the whipping, Janet Chola Mpundu run outside.
- 4.72 While running from the house to the outside, Janet Chola Mpundu hit into a pot of hot porridge. The porridge fell on her head, hands and back.
- 4.73 According to **DW3**, Janet Chola Mpundu had to be dragged inside by **DW2** after being beaten.
- 4.74 It was **DW3**'s further testimony that while inside, **DW2** also went on to whip her for not hiding to the directive that Janet Chola Mpundu be sent back home to Mansa for bad behaviour.
- 4.75 According to **DW3**, after the beating, Janet Chola Mpundu informed her that she was okay and thereafter the family went on to have dinner.
- 4.76 After supper Janet Chola Mpundu washed plates and was later given Panado (pain-killer) to lessen the body pains she was experiencing.
- 4.77 It was **DW3**'s further testimony that the following morning she went to wake up Janet Chola but that she was found in a weak state as she was having difficulties in breathing. CPR was administered but that failed and Janet Chola Mpundu died.
- 4.78 Upon realizing that Janet Chola Mpundu was dead, **DW3** told the Court that she phoned Dr. Lulembo (who is her father) who advised that the matter be reported to the Police.

- 4.79 Following that advise, the matter was then reported at UTH Police Post where Mr. Sakala and Ngulube advised **A1** and **A2** to take the body to UTH Police Station.
- 4.80 Following that guidance, the body of Janet Chola Mpundu was loaded in the car by the two of them though with difficulties as none of the neighbours was contacted to offer help.
- 4.81 It was **DW3**'s further testimony that as the body was moved from the house into the motor vehicle, it was dropped three times.
- 4.82 After loading, the body was then transported to UTH Police Station where it was received by Mr. Ngulube and Mr. Sakala; who were her friends as she knew them when she did her clinical attachment at UTH.
- 4.83 Upon arrival at UTH Police Station, the body was inspected. After inspection, **DW3** informed the Court that the Police informed them that a further inspection was needed because bruises were seen on the body.
- 4.84 It was **DW3**'s further testimony that a Police Officer from Kabwata, Mr. Ziche Lukele, now Arresting Officer came to carry out investigations after which they were charged and arrested for the current offence.
- 4.85 Regarding the accident, **DW3** confirmed that after falling, the leg of one the Twins got deformed.
- 4.86 Regarding the testimony of **PW1**, **DW3** informed the Court that she clearly heard what **PW1** told the Court in relation to the beatings which Janet Chola Mpundu received but that the beatings were merely for correcting Janet Chola Mpundu.

- 4.87 When asked to comment on the evidence of **PW3**, **DW3** declined to comment on Morino (**PW3**)'s evidence because she did not know what **PW3** heard.
- 4.88 As regards the charge she was facing, **DW3** denied murdering Janet Chola Mpundu. She told the Court that her intention was to look after Janet Chola Mpundu as her daughter and not to kill her.
- 4.89 According to **DW3** being a Medical Doctor, her role is to save life and not to take it away.
- 4.90 **DW3** also informed the Court that **A2**, just like herself did not murder Janet Chola Mpundu.
- 4.91 Commenting on the Post Mortem Report, **DW3** informed the Court that she did not agree with the same because she was not there during the post mortem examination.
- 4.92 In conclusion, **DW3** admitted that the death of Janet Chola Mpundu could have been caused by the beatings of **DW2** but that he never intended to murder Janet Chola Mpundu.

5.0 CROSS-EXAMINATION

- 5.1 In cross-examination, **DW3** informed the Court that Janet Chola Mpundu dropped the baby on the floor but that she did not report the matter to the Police. The baby was also not taken to the Hospital for medical attention.
- 5.3 **DW3** when further cross-examined, informed the Court that the Deceased suffered burns but that she did not produce any evidence to show that the Deceased suffered any burns.
- 5.4 In further cross-examination, **DW3** informed the Court that the Deceased was taken to the Police using their own motor

vehicle but that they had no intention of covering up the death of Janet Chola Mpundu.

- 5.5 As regards reporting the death, **DW3** informed the Court that the matter was reported to two Police Officers at UTH Police Station but that she did not inform them that **DW2** whipped Janet Chola Mpundu before she died.
- 5.6 Further, under cross-examination, **DW3** told the Court that the body of the Deceased was inspected by another Officer and that after the inspection, bruises on the body were discovered.
- 5.7 When further cross-examined as regards the cause of death, **DW1** informed the Court that she did not know the cause of death since the death was sudden.
- 5.8 In further cross-examination, **DW1** informed the Court that the body of the Deceased was dropped four times as it was being taken into the vehicle but that she did not have any proof to show that the body was dropped four times.
- 5.9 In re-examination **DW1** informed the Court that the matter was not reported to the Police because they were confused.
- 5.10 The Fourth Defence Witness was Russel Mubwende aged 34 years, hereinafter called **DW4**. The testimony of **DW4** was to the effect that he was requested by Lawyers from Mushipe and Associates to print out photos of a child to be used in Court. As regards the case before Court, **DW4** told the Court that he did not know anything because he was not present when the murder occurred.
- 5.11 The Fifth Prosecution Witness was Chalwe Musonda aged 45 hereinafter called **DW5**.

5.12 Save to the extent of admitting that at one time she worked for **A1** and **A2**, **DW5** informed the Court that she did not know what happened when Janet Chola Mpundu died because she was not present.

5.13 That was the close of the case for the Defence.

6.0 SUBMISSIONS BY THE STATE

6.1 It was Counsel's submission that though circumstantial, there is evidence pointing to **A1** and **A2** to the murder of Janet Chola Mpundu.

6.2 According to Counsel, though the evidence is circumstantial, the evidence laid before Court has taken the case out of the realm of conjecture and attained such degree of cogency which permit only an inference of guilty. In support of this proposition, Counsel drew the attention of the Court to the case of *Said Banda Vs The People*⁽¹⁾.

6.3 Counsel also submitted that there is evidence on Record that points to the fact that it was the Accuseds who murdered Janet Chola Mpundu. According to Counsel, these include the fact that the Deceased was being kept by the Accuseds, the accusation that the Deceased used to eat porridge of the Accused's children, that fact that the 2nd Accused did whip the Deceased, the fact that the Deceased was heard crying in the house of the Accused and the fact that the Deceased died as a result of being assaulted and the fact that the Deceased informed **PW1** that she was beaten by the 1st Accused.

6.4 Further, it was submitted by the Prosecution that the evidence of Defence Witness Two (**DW2**) to the effect that the

Deceased was sick was an afterthought and should not be believed.

- 6.5 It was the submission of Counsel for the Prosecution that the evidence of **DW3** (who is Accused No. 1) to the effect that the Deceased dropped one of her sons, after which her husband Accused No. 2, started whipping the Deceased who while running away went to bump in a pot which contained hot porridge, should not be relied upon because it was an afterthought. In support of the above proposition, Counsel referred the Court to the case of **Donald Fumbelo Vs The People**⁽²⁾ where it was stated:

“When an Accused Person raises his own version for the first time only during his defence, it raises a very strong presumption that the version is an afterthought and therefore less weight will be attached to such version”.

- 6.6 In conclusion, Counsel submitted that the State has discharged its legal burden as guided in the case of **Mwewa Murolo Vs The People**⁽³⁾ where it was held that:

“In criminal cases, the rule is that the legal burden of proving every element of the offence charged, and consequently the guilty of the Accused, lies from beginning to the end on the prosecution, and the standard of proof is beyond all reasonable doubt”.

7.0 SUBMISSION BY THE DEFENCE

7.1 It was Counsel's Submission that the Prosecution bears the burden to prove the alleged crime and must therefore justify their allegations. Counsel referred the Court to the case of **The People Vs Hamainda**⁽⁴⁾ wherein it was stated that:

“In all criminal trials it has to be borne in mind that the burden of proof is on the Prosecution to prove their case beyond all reasonable doubt, it is a high standard of proof that is required...”

7.2 In *casu*, Counsel submitted that the Prosecution has failed to prove its case beyond any reasonable doubt because the Prosecution has relied on circumstantial evidence, which is not sufficient to warrant a conviction. Counsel referred the Court to the case of **David Zulu Vs The People**⁽⁵⁾.

7.3 According to Counsel, the Prosecution did not call any eyewitnesses, hence the Prosecution's case cannot succeed because it is founded on circumstantial evidence.

7.4 It was Counsel's submission that only **A1** and **A2** were present throughout the incident which led to the murder of the Deceased.

7.5 It was also Counsel's submission that the two Accuseds should be acquitted because the prosecution has not established the real cause of death. According to Counsel, the cause of death could have emanated from the beating the Deceased received from **A2** or from the burns from the hot porridge that fell on her.

7.6 According to Counsel, since two or more inferences can be drawn, it has always been a cardinal principle of law that the

Court will adopt the one which is more favourable to the Accused. Counsel referred the Court to the case of **Dorothy Mutale and Richard Phiri Vs The People**⁽⁶⁾, **Elias Kunda Vs The People**⁽⁷⁾, **Saluwema Vs The People**⁽⁸⁾ and **Chibini Vs The People**⁽⁹⁾.

- 7.7 It was Counsel's submission that though **PW4** indicated the cause of death as multiple blunt impact trauma to the head in the Post Mortem Report, the Court ought to take into consideration the role of an expert witness and how such evidence should be treated. Counsel referred this Court to the case of **Shawaz Fawaz and Another Vs The People**⁽¹⁰⁾ where it was held that:

“Evidence of an expert witness is his opinion and should not replace the decision of the Court. The Court ought to consider such evidence and draw its conclusion”.

- 7.8 Further to the above, Counsel submitted that it is evident that when **PW4** was conducting the Post Mortem Examination, the Deceased's body was already in a decomposing state as per Page 6 of 11. According to Counsel, under the subheading Postmortem changes a greenish discoloration of the lower abdomen is seen; indicating that when pictures were being taken, the body of the Deceased was already in a decomposing state hence the way the body appears in the Pathology Report is not the way it was recorded.

- 7.9 According to Counsel, the Prosecution has not adduced any direct evidence to show that the Accused Persons did have

malice aforethought to cause the death of the Deceased through unlawful act.

- 7.10 According to Counsel the evidence of **PW1** and **PW2** should be treated with proper caution because they are witnesses with an interest to save.
- 7.11 It was Counsel's submission that the evidence of **PW1** should not be believed because she is still aggrieved and would want the Accuseds to be convicted at all costs.
- 7.12 It was Counsel's further submission that in respect to the statement made by **PW1** that her daughter told her that **A1** had beaten her, this statement falls in the circle of hearsay evidence as **PW1** was trying to establish the truth of the statement. For this proposition, Counsel relied on the **Subramaniam Vs Public Prosecutor**⁽¹¹⁾.
- 7.13 It was Counsel's submission that though **PW2** did admit whipping the deceased, he never had the intention to act in the way he did as he was provoked by the action of the deceased when he saw that she had dropped his child. Counsel referred the Court to **Homes Vs Director of Public Prosecutions**⁽¹²⁾, where Viscont Simon elucidated the doctrine of provocation in these words:

“The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self-control whereby malice, which is the formation of an intention to kill or to inflict grievous bodily harm is negated. Consequently, where the provocation inspires an actual intention to kill (such as

Holmes admitted in the present case) or to inflict grievous bodily harm. The doctrine that provocation may reduce murder to manslaughter seldom applies. Only one very exception has been treated as an exception to the general rule”.

7.14 It was also Counsel’s submission that the Accuseds herein should be acquitted because the case for the Defence has been prejudiced by the Arresting Officer’s dereliction of duty in that the Arresting **PW5** did seize **A1**’s mobile phone which contained the conversation between **DW2** and the mother to the deceased’s mother as regards the foul smell and that she was bleeding from her private parts. Counsel referred the Court to the case of **Lubinda Vs The People**⁽¹⁴⁾ and **Peter Yotum Hamende Vs The People**⁽¹⁵⁾ where it was held that:

“Where evidence favorable to an accused person has not been adduced on account of dereliction of duty by the Investigating Officer, it will operate in favour of the Accused and result in an acquittal”.

7.15 It was also Counsel’s submission that the story of the porridge was not an afterthought and that the case of **Donald Fumbelo Vs The People**⁽²⁾ cited by the prosecution does not apply because during Cross Examination of **PW4**, it was established that **PW4** had detected that they were water burns on the deceased body and other burns. Further that the State Forensic Report shows that the Deceased had 6.5 degree burns on the hands and 4.9 degree burns on the head on page number 10 of 11 under the summary and opinion of **PW4**.

7.16 It was Counsel's submission that **DW2** and **DW3** being the only eye witness on that material night, told the Court the truth about the hot pot of porridge having fallen on the deceased and **A2** and that is the only possible reason that explains why **PW4** stated that the deceased body had burns.

7.17 As regards the testimony of **PW3**, Counsel persuaded the Court not to consider his testimony because the Defence have established that on the material night there were cries of the Deceased, the baby and **A1**. According to Defence Counsel, with those screams it was impossible for **PW2** to have clearly depicted the cries of the Deceased.

7.18 It was Counsel's further submission that the Court should also take into account that **PW3** under Cross Examination told the Court that he used to see the deceased from afar whilst she was going about her household chores. It was therefore not possible that he could have identified a particular voice. On this premise, Counsel urged the Court to act on these facts presented before Court and not to fill up the gaps. Counsel referred the Court to the case of **Phiri and Others Vs The People**⁽¹⁶⁾ wherein the Court held that:

“The Courts are required to act on the evidence placed before them. If there are any gaps in the evidence the Courts are not permitted to fill them by making assumptions adverse to the accused. If there is sufficient evidence to justify a conviction the Courts have no option but to acquit the Accused”.

7.19 Counsel urged the Court to acquit the two Accuseds.

8.0 ISSUES FOR DETERMINATION

8.1 In order to resolve the case before me, the following questions have been framed for determination:

- i. Whether a death of a human being occurred.*
- ii. Whether the death of this human being was caused by some unlawful act.*
- iii. Whether it was the Accused(s) who caused the death of the Deceased.*
- iv. Whether the Accused had the intention to murder the Deceased.*

9.0 ANALYSIS AND DECISION

9.1 The offence of murder is provided for under **Section 200** of the **Penal Code Chapter 87** of the **Laws of Zambia**. This section provides:

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

9.2 In the case of **The People Vs Hosia Mulumbi**⁽¹⁸⁾, the Court as regards the essential elements to be established stated as follows:

“In the charge of murder, the elements are (i) with malice aforethought; (ii) causing death of another person; and (iii) by unlawful act or omission. And malice aforethought is deemed to be established by evidence proving:

(a) an intention to cause death or grievous bodily harm; (b) knowledge that the act or omission causing death will probably cause death and

grievous harm; and (c) an intent to commit a felony using violent means in the commission of that felony”.

9.3 Therefore, for the State to sustain a conviction, the elements in the ***Mulubi*** case cited above must be proved beyond any reasonable doubt.

9.4 I will now resolve the questions I posed to myself in paragraph 8.1 above.

i. Whether the death of a human being occurred.

9.5 This element is not in dispute. **PW1, PW2, PW3, PW4, PW5, A1, A2, DW1, DW3 and DW4** all confirmed that a human being Janet Chola Mpundu died.

ii. Whether the death of this human being was caused by some unlawful act.

9.6 From the analysis of the Post Mortem Report (**P1**) and the Photo Album (**P2**) it is also not in dispute that the cause of death of Janet Chola Mpundu was caused by an unlawful act. According to **P1** the cause of death and antecedent causes was:

a. Multiple blunt impact trauma to head, torso and extremities.

b. Assault.

iii. Whether it is the Accused who murdered Janet Chola.

9.7 To resolve this question coherently, the above question will further be broken down as follows:

a. Whether the Court can convict the Accuseds based on circumstantial evidence.

- b. Whether the Court can convict the two Accuseds amidst allegations of dereliction of duty.*
- c. Whether the Court can convict the two Accuseds based on the evidence of PW1, PW2 and PW3 when the said evidence is hearsay and is from witnesses with own interest to serve.*
- d. Whether considering the circumstance surrounding the death of Janet Chola Mpundu, the Court can draw a different inference.*
- a. Whether the Court can convict the Accuseds on circumstantial evidence.*

9.8 It was the submission of the State that though the evidence was circumstantial, the Prosecution had nevertheless established beyond any reasonable doubt that it was the two Accuseds who murdered Janet Chola.

9.9 On the other hand, the Defence argued that the State has failed to prove beyond any reasonable doubt that it was the two Accuseds who caused the death of Janet Chola Mpundu because the State did not bring any eye witnesses but relied on circumstantial evidence which is not sufficient to warrant a conviction.

9.10 I have considered the arguments of both Parties.

9.11 It has to be stated from the outset that the Court can convict on circumstantial evidence as long as certain requirements have been met. This was the guidance of the Supreme Court in the case of **Said Banda Vs The People** where the Court stated:

“We however wish to restate the law as regards circumstantial evidence by adding that this form of evidence, notwithstanding its weakness as we alluded to in the David Zulu case, is in many instances probably as good if not even better than direct evidence.

Where the prosecution case depends wholly or in part on circumstantial evidence, the Court is, in effect being called upon to reason in a staged approach. The Court must first find that the prosecution evidence has established certain basic facts. The Court should then infer or conclude that from a combination of those facts, that further fact or fact exist. The Court must then be satisfied that, those further facts implicates the Accused in a manner that points to nothing else but guilty.”

9.12 Similarly in the case of David Zulu Vs The People the Supreme Court guided as follows:

“It is incumbent on a Trial Judge that she 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”.

9.13 As demonstrated by the two authorities cited above, the Court can properly convict on circumstantial evidence as long

as certain basic facts have been established which facts should then trigger an inference which implicates the Accused in a manner that points to nothing else but guilty as per the guidance in ***Said Banda Vs The People*** cited above.

9.14 In the case in *casu*, the indisputable basic facts that have been established *inter alia* are the following:

- a. The Deceased lived in the house of A1 and A2.***
- b. The Deceased died in the house of A1 and A2.***
- c. The Deceased was taken to the Police by A1 and A2 when it was the Police who should have collected the Deceased from the crime scene.***
- d. The Deceased was found with numerous injuries as per P1 and P2.***
- e. A2 admitted to have whipped the Deceased a day before her death while A1 admitted to have been allowed to be whipping the Deceased by PW1 as a way of correcting her.***
- f. That the Deceased was found with no ailment and was physically fit (as per the Post Mortem Report).***

9.15 Having established the above facts, the question that lingers in the mind of the Court is who could have injured the Deceased? Looking at the basic facts established the inference that I draw is that it is the now Accuseds who murdered Janet Chola now Deceased.

9.16 I have arrived at this conclusion because Janet Chola died in the house of **A1** and **A2** and was found with numerous injuries which is a clear indication that those injuries were sustained at the hands of the now Accuseds. From the

evidence on record it has been established that when Janet Chola Mpundu arrived she had no injuries, yet when she died she was found with numerous injuries which indicate that she suffered those injuries at the hands of **A1** and **A2**. In fact **A1** admitted to have whipped the Deceased just before her death while **A2** admitted to have been beating the Deceased as a way of correcting the Deceased. **A1** and **A2** having admitted to have been whipping the Deceased, the only reasonable inference that can be drawn is that it is the now Accuseds who caused the injuries and subsequent death of the Deceased.

9.17 The inference I have drawn is further concretized by the fact that in spite of the Deceased having suffered serious injuries, she was not taken to the hospital. The failure by the Accuseds who are medical practitioners to take the Deceased to the Hospital in spite her having suffered serious injuries is a clear indication that the injuries sustained by the Deceased were caused by the now Accuseds. All these pieces of evidence when put together takes the case out of the realm of conjecture as it attains a degree of cogency which only permits one inference which is that it is **A1** and **A2** who murdered the Deceased.

b. Whether the Court can convict the two Accuseds amidst allegations of dereliction of duty.

9.18 Counsel for the two Accuseds argued that **A1** and **A2** should be acquitted because there was dereliction of duty in this Matter in that the Arresting Officer seized **A1**'s mobile phone

which contained the conversation between **PW2** and the mother to the Deceased as regards the foul smell and that there was dereliction of duty in this Matter because the Matter was poorly investigated by the Police.

9.19 On the other hand, the State argued that there no dereliction of duty and that the matter was properly investigated.

9.20 I have considered the arguments of both Parties.

9.21 In the case of ***Peter Yotum Hamenda Vs The People***, the Supreme Court guided as follows:

“Where evidence favorable to an Accused Person was not adduced on account of dereliction of duty by an Investigating Agency it will operate in favour of the Accused and result in an acquittal unless the evidence given on behalf of the prosecution is so overwhelming as to offset the prejudice which might have arisen from the dereliction of duty”.

9.22 In the light of the above guidance it is my considered opinion that in the matter in *casu*, there was no dereliction of duty because this matter was properly investigated. As regards the seizure of the phone, it is my considered opinion that the seizure in question does not amount to dereliction of duty. This is so because the message about the foul smell is irrelevant to the charge the two Accuseds are facing.

9.23 Further, even assuming there was dereliction of duty, Counsel’s argument on behalf of the Accused would not stand because as guide in ***Peter Yotum*** supra, there is overwhelming evidence that offsets any prejudice the Accuseds would have suffered in that the prosecution have

proved that it is the two Accuseds who murdered Janet Chola Mpundu. With that said, the argument as regards dereliction of duty fails.

c. Whether the Court can convict the two Accuseds based on the evidence of PW1, PW2 and PW3 when the said evidence is hearsay and from witnesses with own interest to serve.

9.24 It was Defence Counsel's submission that the evidence of **PW1** and **PW2** should be treated with caution because the two witnesses are witnesses with own interest to serve.

9.25 Further, Counsel submitted that in respect to the statement made by **PW1** that her daughter told her that **A1** had beaten her should be excluded because it is hearsay.

9.26 I have considered the arguments of the Defence.

9.27 In resolving this issue, guidance will be sought from the case of **Subramaniam Vs Public Prosecutor** where it was held:

“Oral or written statements made to a witness by a person who is not himself called as a witness is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by evidence not the truth of the statement but the fact that it was made”. (Emphasis mine)

9.28 In the light of the above guidance it is my considered view that the statement made is not hearsay because it was not intended to establish the truth of the statement but was merely made to confirm that the Deceased had told **PW1** that

A1 was beating her. On that premise the argument to treat the evidence of **PW1** as regards the beatings received at the hands of **A1** as inadmissible hearsay is dismissed.

9.29 Further, the said statement cannot be disregarded because even **A1** and **A2** admitted that the issue of beating the Deceased was discussed between **A1**, **PW1** and **PW2** when **A1** phoned **PW1** to complain about the bad behavior of the Deceased. **A1** in fact told the Court that **PW1** allowed her to be beating the Deceased as a way of disciplining her.

9.30 It was Counsel's arguments that the evidence of **PW1**, **PW2** and **PW3** should be excluded because the said witnesses fall under witnesses with own interest to serve.

9.31 In *Musupi Vs The People*, it was held that:

"The critical consideration is not whether the witness does in fact have an interest or a purpose of his own to serve, but whether he is a witness who, because of the category into which he falls or because of the particular circumstance of the case, may have a motive to give false evidence".

9.32 Analyzing the law in the light of the facts, it is my humble view that **PW1**, **PW2** and **PW3** do not fall within the category of witnesses with own interest to serve because they did not have a motive to tell lies. All the three witnesses told the truth about what they heard which was not denied by the Accuseds.

9.33 I must admit that I believe the testimony of **PW3** because he did not have any motive to tell lies. In fact his evidence fits so well with the occurrence of the murder.

9.34 **PW3** told the Court that he heard the Deceased screaming, which screams coincided with the whipping of the Deceased. Further, **PW3** informed the Court that after the 28th of August, 2023, he never saw the Deceased until when he was informed by the Police that Deceased had died.

9.35 The argument about excluding the evidence of **PW1**, **PW2** and **PW3** for falling within the category of witness with own interest to serve fails and is dismissed.

d. Whether two or more inferences can be drawn in the case to entitle the Accuseds to an acquittal.

9.36 It was Counsel's submission that **DW2** and **DW3** informed the Court that **A2** whipped the Deceased and later on a hot pot of porridge fell on the Deceased after which she suffered severe burns.

9.37 Further Counsel submitted that **DW2** and **DW3** informed the Court that the body of the Deceased was dropped three times on the way to the car hence the injuries. On that premise, Counsel urged the Court to acquit the two Accuseds because two inferences can be drawn and the explanation given by the Accuseds is reasonably possible. Counsel referred the Court to the case of **Saluwema Vs The People** where it was held that:

“If the Accused's case is reasonably possible although not probable then a reasonable doubt exists and the prosecution cannot be said to have discharged its burden of proof”.

9.38 I have considered the arguments of Defence Counsel.

- 9.39 Having carefully read through the arguments of Counsel, it appears to me that Counsel's argument is to the effect that in spite of **A1** and **A2** having beaten the Deceased, it is not the beatings that caused the death but that the death was caused by the hot porridge and/or the falling on the concrete floor.
- 9.40 I must admit that after looking at the evidence in totality I find that the **Saluwena** case referred to me is distinguishable. In the case before me it is not reasonably possible that the cause of death was the hot porridge and/or head injuries suffered as the body was being taken in the motor vehicle.
- 9.41 I have arrived at the above conclusion because **PW4** informed the Court that the injuries sustained by the Deceased were wide spread and the object impacting trauma on the Deceased were varied.
- 9.42 Since the cause of trauma were varied as demonstrated by pictures exhibited on page 13, 14, 15, 16 and 17 of **P2**, it is misconceived for the Defence to claim that the cause of death was the hot porridge and/or injuries suffered as a result of the falling.
- 9.43 I must say I agree with the State that the issue of porridge was an afterthought and that there was no porridge.
- 9.44 I find that there was no porridge because **PW3** informed the Court that on the fateful day he heard the Deceased screaming inside the house and that he did not see any one outside. Surely if the Deceased had run outside after bumping into a hot pot of porridge, **PW3** would have seen **A2** and the Deceased outside. The fact that **PW3** denied seeing

A2 and the Deceased confirms that the story of porridge was made up.

9.45 Further I am convinced that the story of porridge was an afterthought because **A2** did not suffer any serious burns in spite of him claiming that he was also burnt. The scars exhibited on his hands were so small and there was no proof to show that the same were caused by hot porridge. The scars showed to the Court could have been caused by anything else.

9.46 Further the argument that the injuries on the head could have been caused by the falling is discounted because **PW4** informed the Court that when she removed the skin on the head, she saw internal injuries which is an indication that those injuries were suffered when the Deceased was alive. According to **PW4**, blood clots could not have been seen if the Deceased fell when she was already dead, because bleeding is a sign of life and when one dies, bleeding ceases.

9.47 When all these pieces of evidence are put together, the only reasonable inference that can be drawn is that the injuries sustained by the Deceased were caused by **A1** and **A2**.

e. Whether the Court is bound to accept the evidence as presented by PW4.

9.48 It was Counsel's argument that though **PW4** informed the Court that the cause of death of the Deceased was multiple blunt impact trauma to the head and that, the Court should treat such evidence cautiously. Counsel referred the Court to the case of **Shawaz Fawaz and Another Vs The People** where it was held that:

“Evidence of an expert witness is his opinion and should not replace the decision of the Court. The Court ought to consider such evidence and draw its conclusion”.

9.49 I have considered Defence Counsel’s argument. I must first admit that the guidance in the ***Fawaz*** case is very instructive. However, in my understanding of the ***Fawaz*** case, the Court is not called upon to disregard the opinion of the Doctor. What the case instructs is that the Court should not replace its decision with that of the Doctor. What this implies is that the Court should analyze the evidence laid down by the Doctor to come to its own conclusion.

9.50 Therefore, following the guidance laid down in the ***Fawaz*** case, and having looked at the Post Mortem Report (**P1**) and the Photo Album (**P2**), the conclusion I draw is that the Doctor (**PW4**) correctly arrived at her conclusion. I have arrived at this conclusion because it is not in dispute that when Janet Chola left Mansa she was very fit. This was also confirmed by the Accuseds themselves. Further the Medical Report indicates that the Deceased did not die of any disease.

9.51 If the Deceased, did not die of any disease, what then caused the Deceased to sustain injuries as depicted by pictures on pages 13 to 19 of the **P2**?

9.52 In answering this question, I note that **PW4** told the Court the following:

1) Page 3 shows how the body was received, only wearing a green underwear;

- 2) *Page 4 shows the Deceased's body when clothing were removed;*
- 3) *Page 5 shows when the T-shirt was removed, showing multiple punctured abrasions covering the entire back;*
- 4) *Page 8 shows that the left ear had a laceration and a burn;*
- 5) *Page 9 shows the skin removed and shows bleeding under the skin of the front and back of the head;*
- 6) *Page 10 shows that the right and left arms had multiple abrasions;*
- 7) *Page 11 shows abrasions on the left and right arms;*
- 8) *Page 12 shows that the left and right arms were burnt;*
- 9) *Page 13 shows that the nails of the 2nd left finger and 3rd right finger were traumatically removed as there was bleeding where the nails were supposed to be;*
- 10) *Page 14 shows bleeding under the skin and deeper in the muscles of the left and right arms. This was after removing the skin of both arms to see the extent of the injury;*
- 11) *On page 15, the photo is showing bleeding in the front torso, under the skin and all the way into the muscles;*
- 12) *On page 16, two photos showing the initial photo of the upper back before the skin was removed and after the skin was removed – bleeding showed not only under the skin but it extends to the muscles of the back;*

13) On page 17, the photo shows bleeding into the muscles of the left and right arms;

14) On page 18 shows the left and right leg and left thigh. Again, there is bleeding under the skin; and

15) On page 19, the skin of the front of the feet was removed and there was bleeding underneath.

9.53 Looking at how clear elaborate and detailed the pictures are and considering the circumstances in which the Deceased died and having listened to the explanation of **PW4**, no reasonable Court can discount the evidence contained in **P1** and **P2** and the testimony of **PW4** to arrive at a different conclusion. This Court having analyzed the pictures and considered the evidence of **PW4** has drawn its own conclusion, which conclusion is in tandem with the findings of the Doctor as per the guidance of the case of **Fawez** supra.

9.54 It was further submitted under this argument that the Court should discount the findings of **PW4** because by the time the Post Mortem Examination was done, the body of the Deceased had decomposed.

9.55 In my considered view, this argument lacks merit in that **PW4** who is a highly qualified Medical Doctor correctly informed the Court that decomposition of a dead body starts at the point of death. Therefore, since Janet Chola Mpundu died, her body started decomposing at the point of death. However, the question is amidst that decomposing body of the Deceased, did **PW4** correctly determine the cause of death? From the evidence presented before Court, that question had

been abundantly determined. That said, the findings of the Doctor cannot be discounted as persuaded.

9.56 Under this argument, the Court was also urged not to fill in the gaps for the Prosecution as per the guidance in ***Phiri and Others Vs The People*** supra. Having looked at the evidence in totality, it is my considered view that the Prosecution filled all the gaps to prove that it is the Accuseds who murdered the Deceased.

9.57 I must emphasize that I have no doubts in my mind that the Prosecution has proved beyond any reasonable doubt that it is the Accuseds herein who murdered the Deceased, leaving no room for the Court to fill in the gaps on behalf of the Prosecution.

9.58 In *casu*, the State has demonstrated that the Deceased came from Mansa alive and kicking and as fit as a horse but a few months on, she was found dead with numerous injuries as per **P1** and **P2**.

9.59 Having looked at **P1** and **P2**, **A1** and **A2** Medical Practitioner, who save lives, should have taken the Deceased to the hospital but they never did. With this compelling evidence, there is no way the Court can fill in the gaps on behalf of the Prosecution.

iv. Whether the death of the Deceased was actuated by malice aforethought.

9.60 It was Counsel's submission that the two Accuseds should be acquitted because the State has failed to prove that they had the necessary malice aforethought when Janet Chola

Mpundu was murdered. The State on the other hand have argued that malice aforethought has been proved.

9.61 I have considered the arguments of Defence Counsel and the Prosecution.

9.62 The offence of murder is provided for under **Section 200** of the **Penal Code Chapter 87** of the **Laws of Zambia** which states that:

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

9.63 **Section 204** of the **Penal Code Chapter 87** of the **Laws of Zambia** states:

“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 probably omission will cause the death 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 may not be caused;***
- c. An intent to commit a felony; and***
- d. An intention by the act or omission to facilitate the flight or escape from custody of***

any person who has committed or attempted to commit a felony”.

9.64 As guided in the above section, can the Accuseds be said to have had the malice aforethought when they murdered Janet Chola Mpundu?

9.65 As guided in ***Chisembele and Others Vs Regina***⁽²⁰⁾:

“Intention however, is seldom if ever capable of positive proof. It can only be implied from overt facts. As a general rule every man is taken to intend the natural and probable consequences of his own acts.”

9.66 The question is, from the evidence presented can the Accused herein be said to have malice aforethought. Having considered the evidence in totality I am satisfied that the Prosecution has established that the two Accuseds had the necessary malice aforethought when they murdered Janet Chola Mpundu. I have arrived at the above conclusion because of the following:

- i. **A1** and **A2** both admitted to have beaten Janet Chola Mpundu. **A2** admitted to have beaten Janet Chola using a belt a day before she died;
- ii. In beating/assaulting Janet Chola Mpundu, **A1** and **A2** had knowledge that the act or omission will probably cause the death of or grievous harm to Janet Chola Mpundu;
- iii. The tempering of the crime scene is a clear indication that the two Accuseds had intention to murder Janet Chola Mpundu. From the evidence it has been

established that it is the Accuseds who picked the body from their house to UTH Police Station; when it is the Police who should have come to pick the body from the crime scene. The body was taken to UTH Police Station by the Accuseds because the crime scene was tempered with.

- iv. The failure by the Accuseds to take Deceased to the clinic is a clear indication that they had the necessary malice aforethought. In spite of being medical practitioners the Accuseds decided to keep the Deceased home even when she had sustained serious injuries. The question is why? The answer is that the Accuseds knew that it was them who caused the injuries and did not want to take the Deceased to the Hospital because problems were going to arise.
- v. The nature of the injuries as per the Post Mortem report are a clear indication that the act or omission would cause death. The Post Mortem Report and the Photo Album indicate the injuries suffered, for example the picture on page 8 of the Photo Album, shows a laceration on the left ear and burn on the bottom ear. The picture on page 9 shows bleeding under the front and back of the scalp. The picture on page 10 shows abrasions on the right and left arms. Picture on page 11 shows abrasions on the right and left shoulders and back. Picture on page 13 shows nails of the 2nd left finger and 3rd right finger traumatically removed, picture on page 14 shows bleeding under the skin and

into the muscles of the left and right arms, while picture on page 15 shows removal of the skin on the front torso with bleeding underneath, while picture on page 16, shows abrasions with punctate injuries on the back and bleeding under the skin. All these injuries confirm that the Deceased suffered serious injuries which were life threatening, yet she was not taken to the hospital.

- vi. The total silence surrounding the death of the Deceased speaks volumes. The Court will take Judicial Notice that when someone dies in this country the neighbours are made aware and the nearby families mourn together with the bereaved family. In *casu*, the unusual happened. The bereaved family never informed the neighbours but secretly took the Deceased to UTH. Further there was no sign of any mourning but that **A1** as confirmed by **PW3** went about her life after the 28th of August, 2023, as if nothing happened. The question is why was there secrecy around the death of the Deceased? The answer is because the Accuseds herein had the malice aforethought to murder the Deceased. As guided by **Section 22** of the **Penal Code Chapter 87** of the **Laws of Zambia**. **A1** and **A2** formed a common intention to prosecute an unlawful purpose when both loaded the Deceased secretly into their motor vehicle and took the Deceased to UTH

9.67 As clearly indicated by the Post Mortem Report and Photo Album, the injuries suffered by the Deceased were

systematically inflicted overtime which is an indication that the Accuseds herein had the necessary malice aforethought.

v. Whether Accused 1 was provoked?

9.68 It was Defence Counsel's submission that **A1** was provoked when he whipped the now Deceased. Counsel referred the Court to the case of **Homes Vs The Director of Public Prosecutions** cited above.

9.69 I have considered Defence Counsel's argument.

9.70 In my considered view, the argument of provocation cannot stand because firstly there is no evidence that **A1** was provoked. The story of one of the twins having fallen down was not established as there was no medical evidence.

9.71 Further the nature of the injuries suffered by the Deceased shows that the Deceased died a slow and painful death where her skin and nails were removed traumatically as shown by pictures on "**P2**". The injuries suffered confirm that the Deceased did not die of one act but it was a cumulation of various acts which finally led to the death of the Deceased. This having been established the argument regarding provocation cannot stand. For provocation to stand, the elements as explained in the case of **Liyumbi Vs The People** should have been met. In the case in *casu* those elements have not been met.

10.0 CONCLUSION

10.1 Having considered the evidence in totality, I have found that the State as guided in **Mwewa Muroho Vs The People** have proved its case against the two Accuseds beyond any

reasonable doubt and I find them **GUILTY** as charged and I will **CONVICT** them accordingly.

**DELIVERED AT LUSAKA IN OPEN COURT THIS 31ST DAY OF
MARCH, 2025.**



**S. V. SILOKA
HIGH COURT JUDGE**

