

IN THE HIGH COURT FOR ZAMBIA

HP/ 257/2021

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BETWEEN:

THE PEOPLE

V

PAUL MULAIKA



Coram: Chigali Mikalile J. this 29th day of September, 2023

For the State: Mr. B. Mwewa & Ms. M. Muchimba – National Prosecution Authority

For the Accused: Mr. J.K. Matende – Legal Aid Board

JUDGMENT

Legislation referred to

The Penal Code Chapter 87

Cases referred to:

1. The People v. Njovu (1968) ZR 132
2. Kasebya Mwaba v. The People, CAZ 135/2018
3. Dickson Sembauke & Another v. The People (1988-1989) ZR 144
4. Saidi Banda v. The People, SCZ Appeal No. 114/2015
5. Charles Phiri v. The People, SCZ Judgment No. 53/2014
6. State v. Gardner 54 N.J 37 (1969)
7. Mwewa Muroso v. The people (2004) ZR 207

8. Chimbini v. The People (1973) ZR 191
9. David Zulu v. The People (1971) ZR 151
10. Ivess Mukonde v. The People, SCZ Judgment No. 11/2011
11. Mbomena v. The People (1967) ZR 89
12. Peter Banda v. The People, Appeal No. 126/2020

Introduction

1. The accused, Paul Mulaika, stands charged with one count of murder contrary to section 200 of the Penal Code, Chapter 87 of the Laws of Zambia. Particulars of the offence are that the accused on 23rd November, 2021 at Kafue in the Kafue District of the Lusaka Province of the Republic of Zambia did murder Abinala Sumili. The accused pleaded not guilty

Prosecution's case

2. To establish the guilt of the accused, the prosecution called a total of ten (10) witnesses.
3. The first prosecution witness (PW1) was Eunice Mungule aged 38 years, who testified that on 22nd November, 2021, she and her grandmother Abinala Sumili, the now deceased were visited by relatives. These were Isaac (PW7 herein) and his two young sisters. They came to ask for meal mealie but the deceased asked PW1 to cook them a meal instead. The children ate and played until around 18h00 when they decided to return to their home. According to PW1, the deceased suggested that they spend a night but the children insisted on returning home as they had to secure the chickens. The children informed them that their mother, Evelyn

Shakwambwa, had taken Paul their elder brother, the now accused, to the hospital.

4. On 23rd November, 2021 PW1 woke up at 05h00 and got ready for work. As she bade farewell, the deceased informed her that she would visit the children to check on them since they were on their own. Around 12h00, PW1 received a call from Levy Mweemba who told her to go back home as her grandmother was unwell. After getting permission from work, PW1 went to accused's house. She arrived between 13 and 14h00 and found people gathered there.
5. According to PW1, she found the deceased lying in the middle of the yard whilst people were watching. When she got close to the deceased and lifted her, she observed that blood was oozing from the mouth. The deceased's head wrap was displaced and her dress had surged upwards. Her lower body was covered only with a petticoat. She also observed that the deceased's arm had no skin as if hot water had been poured on it. PW1 emphasized that her grandmother was fine when she left for work.
6. She was then informed that her grandmother was already dead and was advised to just leave her there as they were waiting for the police. PW1 stated that the accused was present within the yard and his hands and legs were tied. He was wearing a short but was shirtless. According to PW1, only the accused, his younger siblings and the mother stay at that place. She identified the accused as her brother whom she grew up with in the same area.

7. In *cross examination*, PW1 confirmed that she not only spoke to the deceased that morning as she left for work but also saw her. She conceded that she did not see anyone beat up or burn the deceased. She just found her dead at the accused's place. It was Levy Mweemba that informed her that the deceased had been beaten by the accused.
8. According to PW1, she used to hear from the deceased that the accused was behaving like someone who was insane or not normal. She only confirmed that the accused was sick when she heard that he had been taken to Situmbeko. PW1 was not re-examined.
9. PW2 was Chapman Mayaba aged 50 years whose testimony was that on 23rd November, 2021 between 09h00 and 10h00, Evelyn Shakwambwa, came to his house to ask for help. She said her son, the accused, was behaving as if he was running mad. PW2 suggested that they seek help from the police.
10. Around 11h00, the accused arrived at PW2's residence and he was naked. He begun attacking PW2 and other family members. At that point, his mother was still around. She was advised to run away. PW2 explained that when he and the other family member armed themselves with sticks, the accused stopped attacking them and left. Thereafter, PW2 proceeded to the headman's place to report the incident. He later learnt that everyone had gone to the police station, and he thus made his way there. He was informed

that the accused was in cells because he had murdered the deceased.

11. It was PW2's evidence that the deceased used to live in Chikupi village with her grandchildren. The village is 4 kilometres from his residence.
12. In *cross examination*, PW2 confirmed that he was living in the same village as the accused and that the said village was 4 kilometres from Chikupi. PW2 stated that the accused was not wearing a short but was actually naked when he attacked them. He added that he was surprised when he heard that the accused was in police cells as such a thing had never happened before. It was also the first time to see the accused behave in such a manner.
13. PW2 clarified that the accused's mother came to ask for assistance between 9 and 10h00 and it was between 10 and 11h00 when the accused attacked PW2 and the other people who were around.
14. In further cross examination, PW2 confirmed that he heard about the demise of the deceased at the headman's place from his daughter, Lace Mayaba. When queried further, PW2 acknowledged that he did not personally see the accused attack anyone at Chikupi village and he did not know what upset him. According to PW2, he knew the deceased only as Mrs

Chingangauka. He did not know her age. The witness was not re-examined.

15. PW3 was Lick Mwindi aged 72 years, the headman of Mwanachingwala village. His evidence was that on 23rd November, 2021, a boy came to his residence to inform him of a murder in Bamba village.
16. According to PW3, he followed up the matter and when he arrived at the named place, he found that his sister, Sumili Abinala, was dead and covered with a chitenge material. After a round of mourning, he uncovered his sister and discovered that her left hand was burnt. She also had a head injury and her leg was broken. She was, however, not bleeding. PW3 said he closely inspected the surrounding but did not observe any stone, stick or metal that could have been used to injure the deceased.
17. PW3 testified that he asked the people present as to who the murderer was and where he was and he was informed that it was Paul and that he had been taken to the police station at Chikupi. PW3 explained that Paul, the accused, was his grandson. PW3's mother and the accused's grandmother were born from the same parents. When the police arrived, they took pictures of the crime scene.

18. PW3 told court that Sumili Abinala was married to the late Chingangauka. Before her demise, she was staying with her granddaughter Eunice, also known as Elita.
19. In *cross examination*, PW3 confirmed that he did not see the accused killing the deceased. He conceded that he did not see any fire or sharp object at the scene that could have been used to injure the deceased. He also stated that at the time the incident happened, PW1, whom the deceased was living with, was at work and she found him at the scene.
20. In further cross examination, PW3 stated that he does not know the person that informed him of his sister's death. That person did not mention that it was the accused that killed the deceased. He further stated that no one claimed to have been present when she was killed. PW3 clarified that he was not sure if it was the accused that killed his sister but he was certain that she died at his residence. There was no information that the deceased died somewhere else and was moved where she lay. Everyone present found her at the very spot. PW3 explained that it took him 45 minutes to move from his house to the crime scene. He said he did not know the accused's whereabouts around 10h00 on the material day.
21. PW4 was Evelyn Shakwambwa aged 46 years, the mother to the accused. It was her testimony that on 23rd November, 2021 she was awakened by her mother, the now deceased whom she heard calling for Isaac. They exchanged greetings and PW4 informed the

deceased that she had returned the previous night. She also informed her that she had taken the accused to his father's family.

22. The deceased told her that she had come to see the accused. However, PW4 asked the deceased not to wake him up as they had a restless night. She stated that the accused had acted as if he was seeing things and had aimlessly moved around the house. PW4 said the accused was generally looking abnormal at the time.
23. PW4 narrated that the deceased insisted that she wanted to see the accused and proceeded to wake him up. The accused begun screaming as if he had seen something scary. According to PW4, she grabbed hold of the accused and struggled with him. As they struggled with each other, the deceased begun shaking and crying. The accused then addressed the deceased saying "so it is you grandmother? I see you with your friend holding medicines." The accused then demanded that the deceased tells him the truth as the Lord in heaven was watching.
24. PW4 testified that she asked the deceased to leave after observing the way the accused was acting. She continued struggling with the accused as the deceased left the yard. She did not know where the deceased went. Eventually, the accused overpowered her and wiggled out of his T-shirt. She grabbed his short but the accused also wiggled out of it. She then grabbed his underwear which tore apart and the accused remained naked. The accused was screaming throughout this ordeal.

25. According to PW4, she realised that she was in danger and decided to seek help from her neighbour, Mr. Chapman Mayaba (PW2). She narrated to him that the accused was not well and she had left him naked in her yard. While she was narrating, the accused arrived in his naked state and started chasing PW2 around. PW4 said she went on to hide. This was between 11 and 12h00.
26. It was her further evidence that after sometime, her son Isaac came and informed her that he was not sure if the grandmother was still alive. Upon hearing this information, PW4 went back home and found the now deceased lying dead in her yard. She did not go closer to the body. She found people around the body. At a distance, the accused was tied with a cloth on his legs and hands.
27. In *cross examination*, PW4 stated that she observed accused's mental instability in July 2021. She did inform her family members about his mental problem but they did not take any action or take the situation seriously.
28. PW4 clarified that when the deceased left her home, she remained with the accused. They were just the two of them. She stated that she did not see the deceased lying anywhere on her yard as she headed to PW2's residence. PW4 was not re-examined.
29. PW5 was PW4's cousin, Godwin Mulilo aged 61. It was his testimony that on 23rd November, 2021 around 10h00, he received

a phone call from PW4 saying his nephew, the accused, was being troublesome. He proceeded to PW4's residence and upon arrival, he found the deceased, who was his mother, lying on the ground. There was no one else present. He went to the nearby village to inform family members of his discovery.

30. According to PW5, when he returned to PW4's residence in the company of family, he found that a lot of people had gathered and the accused had been tied up. Thereafter, the matter was handled by the neighbourhood watch. The accused was then taken to the police post by the neighbourhood watch. The police later took the body of the deceased to the mortuary.
31. In *cross examination*, PW5 stated that he did not know if he was the first person to see the dead body. He reiterated that there was no one else when he found the body lying on the ground. Even the accused was not present at the time. PW5 was not re-examined.
32. PW6 was Dt. Constable Kabeya Nyundu of Kafue Police Station who testified that the station received a report of murder on 23rd November, 2021 from PW4. She reported that her son, the now accused, had murdered his grandmother aged 76 years. PW6 was assigned to visit the crime scene. He went to Chikupi with two other officers and found a lot of people staring at the body of the deceased. He asked the people to move away from the body and proceeded to take pictures. The inspection of the body revealed that the left arm was partially burnt as if hot water had been used. PW6 further observed that the deceased was bleeding from the

mouth and had minor bruises on the face. In addition, the shin on the left leg was broken.

33. According to PW6, he searched for the tool or weapon which could have been used but unfortunately did not find any. Thereafter, the body was taken to Kafue general hospital mortuary.
34. The photos taken at the scene were later compiled into a photo album which he produced in evidence as P1. He explained that the first picture depicts the house that PW4 and the accused used to occupy. Also captured is the body of the deceased. The second and third pictures show the body at a close and much closer range respectively. In the closer range picture, blood can be seen coming out of the deceased's mouth. The fourth and fifth pictures depict the burnt arm. The sixth picture captures the broken left shin.
35. It was PW6's further testimony that although the second image shows an axe in the background, he was satisfied from his examination of the body, as an experienced investigator of such cases, that the injuries were not inflicted using an axe. The axe is sharp and had it been used, deep injuries and a lot of blood would have been observed at the scene.
36. In *cross examination*, PW6 stated that he did not interact with PW4. The matter was officially reported and recorded in the occurrence book by another officer.

37. PW6 also stated that there were a lot of people at the crime scene and the scene had already been contaminated by the time he got there. When referred to the first photo in the photographic album, PW6 confirmed that there was a bicycle in the picture although he did not find out who it belonged to. He explained that whilst at the scene, he spoke to the accused's young brother. He, however, could not recall interviewing a Godwin Mulilo or indeed any witness that stated that there was no blood on the body when it was discovered.
38. In further cross examination, PW6 confirmed that he had attended a number of crime scenes and that after some hours purge fluid comes out of a body and it is red in colour. He admitted to not testing the fluid to confirm if it was purged fluid or blood. He also stated that he was sure that where the deceased was found was the actual crime scene. This is because the accused's young brother confirmed that it was the crime scene. He, however, conceded that the accused's young brother did not tell him that he witnessed the murder. He only informed PW6 that the body was not moved from one point to another. He said he did not observe anything to make him conclude that the body was moved from elsewhere. PW6 was not re-examined.
39. PW7 was Isaac Mulandula who told court that he was 15 years old. He testified that on 23rd November 2021, he knocked off from school around 13h00 and found his grandmother dead. He said he knew this because of the way she was lying down. According to PW7, the accused who is his biological brother, was standing nearby and was naked. He emphasized that there was no one else present.

40. PW7 testified that he went to the neighbour's place where he found his mother (PW4). He asked her whether she left his grandmother (the deceased) at home. Her response was that she did not as she had instructed her to leave. When he went back home, he found a lot of people and the accused had been restrained.
41. Under *cross examination*, PW7 reiterated that he knocked off from school at 13h00 and stated that it takes about 30 minutes for him to walk from school to home. He told court that Godwin Mulilo (PW5) is his uncle. He said he was not aware that PW5 found the deceased alone.
42. In further cross examination, PW7 acknowledged that he did not see the accused beating anyone. He conceded that he lied when he told the Court that he was 15 years old because the truth was that he was 17 years old.
43. In re-examination, PW7 clarified that the reason he initially gave the Court the incorrect age was because he did not count his age properly.
44. PW8 was Sonny Kasande, aged 29 years, a member of the neighbourhood watch. His evidence was that he was at Babula police post when a man filed a report that a person had been beaten at Bamba. PW8 and one Esaya were tasked by the officer in-charge of the station to pick up the perpetrator. According to PW8, they

passed through the headman's place to inform him of the report received. Whilst at the headman's, someone arrived with information that Chinganguka's wife had been killed. Upon arrival at the scene and confirming the death, PW8 called the Officer in Charge to update him.

45. It was his testimony that they found the accused tied up at the scene. They proceeded to question PW4 regarding what had happened. PW4 narrated the altercation and further informed them that the accused beat up the deceased. When she tried to stop him, he turned on her and she ran away. According to PW8, they picked up the accused and took him to the police post. He stated that the accused was unknown to him until this incident.
46. Under *cross examination*, PW8 stated that he went to the crime scene around 14h00. He also stated that he was not aware that PW4 did not testify on the issues he attributed to her in his testimony. PW8 further stated that he was not certain if the accused was the one responsible for the deceased's demise. He was not re-examined.
47. PW9 was Sylvester Mikaba aged 46 years, also a neighbourhood watch member. His evidence was that on 23rd November, 2021, he was at the deceased's farm around 10h00. The deceased informed him that she was going to check on her grandson, the now accused. Between 11 and 12h00, he was accosted by people with information that the accused was beating up his grandmother. When he and the people who came looking for him arrived at the accused's

residence, they found the accused standing with two sticks. He had on a short and nothing else. Immediately he noticed their presence, the accused threw the sticks away. PW9 said he had known the accused for about 20 years.

48. PW9 and the others tied accused's hands with a rope. Apart from the accused, they found the deceased lying on the ground. PW9 excused himself so that he could bath and eat and promised to return later. He, however, learnt that Kafue police had picked up the body as well as the accused person.
49. When *cross examined*, PW9 stated that he did not see the accused beat up the deceased. He also stated that as a member of his community's neighbourhood watch, he assists the police. When referred to an unidentified document, he confirmed that that was the statement he gave to the police. The document was tendered in evidence through him and it was marked D1. When further queried on his statement, PW9 reiterated that they found the body of the deceased between 11 and 12h00 and the accused person was not tied up at the time.
50. PW9 denied the assertion that he told the police that accused had one stick and he was the one who grabbed it from him. He confirmed that he tied the accused with a rope and not a neck tie. He explained that at the time the police arrived at the scene, he had gone home. As a result, he did not show them the two sticks that he found the accused person holding. He reiterated that when he

was called, he was told that the accused was beating the deceased and that was the reason he tied up the accused upon arrival.

51. In re-examination, he clarified that PW4 and the deceased lived at different farms. He was at the deceased's farm at the time.
52. PW10 was retired Dt. Constable Jessica Mumba, the arresting officer who informed Court that she was stationed at Kafue Police Station under the Criminal Investigations Department. She testified that on 23rd November, 2021, she was assigned the docket of murder to investigate in which the victim was Abinala Sumili of Chikupi area. She learnt that the accused person was already in police custody and was suspected to be mentally unstable. She proceeded to Chikupi for investigations and learnt that the deceased was found dead at PW4's residence.
53. According to PW10, she interviewed the accused who did not answer any of her questions. She concluded that he was still in shock from what had happened and so decided to give him time. After some days, she made another attempt to interview the accused but he remained mute. She then summoned his mother hoping he would say something in her presence. When his mother came on 29th November, 2021, the situation was worse as he could not even look at her. Thereafter, PW10 decided to charge the accused so that the court could make a determination in the matter. Under warn and caution, the accused did not say anything and it was the mother who signed for the charge.

54. PW10 further testified that she came across the postmortem report and photos taken at the crime scene. There was no murder weapon picked up. By the time the police got to the scene, the scene had already been disturbed by members of the public. PW10 produced the postmortem report and it was marked P2.
55. When *cross examined*, PW10 stated that she was the one who recorded statements from witnesses except PW9's statement produced in evidence as D1. The statement she recorded from PW9 went missing thus D1 was the second statement. She also stated that she charged the accused with the offence of murder premised on the statements from witnesses who had testified before court.
56. In continued cross examination, PW10 stated that the mother to the accused (PW4) was the only one who saw the accused violently attack the deceased. However, no one saw the accused assault the deceased. She explained that the body of the deceased was discovered by PW7, the young brother to the accused.
57. PW10 further stated that she recorded a statement from Mulilo and he stated that he just found the body of the deceased at 10h00 and no one else was around. She said she was not aware that PW9 found the body between 11 and 12h000 although she was aware PW7 discovered it around 13h00. According to PW10, the body of the deceased was discovered between 11h00 and 13h00.
58. Still in cross examination, PW10 stated that she did not consider PW9 a suspect in this matter because the deceased left him at her farm and went to PW4's house where she was violently attacked.

PW4 informed her that it was the accused that violently attacked the deceased. She conceded that only PW4 knows the truth.

59. PW10 accepted that it was not a crime to have an unstable mind. She said she arrested the accused because of what PW4 told her that he attacked the deceased and he was the only person found there. PW10 further admitted that this evidence contradicted that of Charles Mulilo who said he did not find anyone at the scene.
60. PW10 was not re-examined.
61. At the close of the prosecution's case, the accused was placed on his defence and he opted to remain silent.

Submissions

62. The state filed its final submissions on 14th June, 2023. It was submitted that it is not in dispute that Abinala Sumili died. The issue in contention was whether the accused caused the death. To establish this fact, there was need to show if the accused had the mens rea envisaged by section 204 of the Penal Code.
63. The state advocates relied on the case of **The People v. Njovu**⁽¹⁾ in which the Supreme Court held that to establish malice aforethought, the prosecution must prove either that the accused person had actual intention to kill or to cause grievous harm to the deceased or that the accused knew that his actions were likely to cause death or grievous harm to someone.

64. It was submitted that PW7 and PW9 testified that the accused person was seen at the scene of the crime with a big stick in his hands at his home where the deceased had gone to check on how he was fairing as he was not feeling well as attested by PW4. It was acknowledged that there were discrepancies in the time stated by the prosecution witnesses. Nevertheless, this did not go to the root of the case as held in the case of **Kasebya Mwaba v The People**⁽²⁾ that:

We have demonstrated through detailed scrutiny of the evidence of each witness for the prosecution that the discrepancies in their evidence were not fatal to the prosecution's case. No doubt was raised in the prosecution's evidence. The discrepancies cannot militate against the veracity of the core of the testimony provided by the four key prosecution witnesses. There is an impress of truth in the substantial fabric of the testimony delivered by the witnesses.

65. Court was urged to take note of the postmortem examination conjoint with the other evidence on record and find that there is a core fabric of truth. It was contended that although there was no eye witness, PW4 confirmed that she ran away from her home to PW2's house after the accused started attacking the deceased and later turned on her.

66. It was submitted that malice aforethought being a mental element is difficult to prove. However, it can be inferred from surrounding circumstances such as the manner in which the deceased was assaulted and subsequently killed. Reliance was placed on the case

of **Dickson Sembauke & another v. The People**⁽³⁾ in which the Supreme Court observed that:

It is a question of fact whether a reasonable person must know or foresee that serious harm is a natural consequence of throwing someone out of a moving train. If armed with this realization and foresight, knowing that serious harm could result, an intent founded on knowledge of the probable consequences will be sufficient to satisfy section 204 of the Penal Code.

67. It was submitted that the accused ought to have known or foreseen that death or grievous harm would result from his act of attacking the deceased in the manner he did. In addition, the facts and circumstances under which the deceased died only point to the accused person as the perpetrator as he was the only one who confronted the deceased in a violent manner on that fateful day.
68. The submissions then dealt with the issue of circumstantial evidence and relied on the cases of **Saidi Banda v. The People**⁽⁴⁾ and **Charles Phiri v. The People**⁽⁵⁾ where it was stated that:

It is settled law that the Court is competent to convict on strong circumstantial evidence. The exception to the general rule is where the circumstantial evidence does not take the case out of the realm of conjecture so that it attains the degree of cogency which can permit only an inference of guilt.

69. It was submitted that the deceased met the accused at his home and upon seeing the deceased, the accused charged at the deceased as testified by PW4. It was not in dispute that the accused was found naked standing with a stick in his hands just next to the deceased's body which, from the evidence, had fractures on the leg and arm.

70. According to the prosecution, the fact that PW8 and PW9 were erroneously in Court while PW7 was testifying does not prejudice the accused in anyway. In cross examination, the witnesses remained constant and truthful, it was argued. In addition, their testimonies were not challenged for being inconsistent with their depositions. As was held in the case of **State v. Gardner**⁽⁶⁾ failing or refusing to exclude a witness from the courtroom has generally been held to be reversible error unless prejudice can be shown.
71. It was submitted that although the evidence presented by the prosecution witnesses was not direct evidence as none of the witnesses testified to the effect that they saw the accused attacking the deceased, the circumstances under which the ordeal took place only point to the accused.
72. In conclusion, it was submitted that taking into account all the circumstances of the case, there was no doubt that the deceased met her demise at the hands of the accused. Thus, the prosecution had proved beyond reasonable doubt that the deceased died and the accused caused her death.
73. At the time of writing the judgment, the defence had not filed its submissions despite making an undertaking to do so.

Consideration and decision

74. I have considered the evidence presented as well as the exhibits produced. I remind myself that in criminal cases, the rule is that the legal burden of proving every element of the offence charged,

and consequently the guilt of the accused lies from beginning to end on the prosecution. **Mwewa Murono v. The people**⁽⁷⁾ refers. There is no onus on the accused to prove his innocence.

75. The offence of murder is set out in section 200 of the Penal Code Chapter 87. It provides as follows:

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

76. Malice aforethought is described as follows in section 204 of the Code and quoting the relevant paragraphs only:

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

- a. An intention to cause death 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 death 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. –*
- d. --*

77. Thus, the following ingredients have to be proved in order to establish the guilt of the accused:

(a) That death occurred.

(b) That the accused caused the death of the deceased.

(c) That the cause of such death was an unlawful act or omission.

(d) That the death was caused with malice aforethought.

78. From the evidence before me, I find the following facts not in dispute:

(a) The deceased was last seen alive on the morning of 23rd November, 2021.

(b) On that morning, she visited the accused at his home where he lived with his mother (PW4).

(c) The accused was said to be mentally unstable and the deceased's presence aggravated him. He displayed erratic behaviour.

(d) The deceased was later found dead at accused's residence.

(e) The deceased suffered a burn on her arm and a broken leg.

(f) The post mortem report reveals the cause of death as traumatic shock due to multiple blunt force traumatic injuries.

79. Clearly, the first ingredient has been established. Death occurred. The issue for determination, therefore, is whether the accused caused the death by an unlawful act with malice aforethought.

80. I will now consider the evidence.

81. As established, the deceased's death was as a result of traumatic shock due to multiple blunt traumatic injuries. The record shows that the deceased was generally in good health and was able to visit the accused at his house which was quite a distance. According to PW2, the distance between the deceased's village and the village

where he and the accused lived was about 4 kilometres. From a review of the postmortem report, I am satisfied that the injuries which resulted in the deceased's traumatic shock were inflicted on the deceased. Clearly, therefore, the deceased did not die of natural causes. She died as a result of an unlawful act or omission.

82. The evidence is clear that there was no eye witness to the death. The evidence of the witnesses, particularly, PW4, PW7 and PW9 collectively establishes that on the fateful day, the accused was deeply agitated by the deceased's presence and became violent or irrational in his behaviour. He attacked the deceased verbally by accusing her of using medicines against him together with her friend. This attack left the deceased in tears and PW4, who was all the while restraining the accused from physically attacking the deceased, advised the deceased to leave. She left and PW4 continued struggling with the accused and in the process, he wiggled himself out of all his clothes. His violent behaviour caused PW4 to flee to her neighbour's house (PW2's house). Within minutes, the deceased was found dead and nearby was the accused holding a stick or two in his naked state.

83. I note the discrepancy in the evidence arising from the testimonies on the time when the body was found. PW5 is on record as saying he received the call that accused was being troublesome around 10h00 and he proceeded to PW4's house. He did not state the time he got there but he told court that he found the deceased lying on the ground. No one else was there at the place. Meanwhile PW2 is on record as saying the accused came to his residence around

11h00 and begun attacking him and his family. I opine that PW5 did not find the accused at the scene because this was the time he had gone to PW2's residence.

84. The evidence of PW7 was that he found the body of the deceased around 13h00 after knocking off from school and accused was standing nearby. PW9 told court that he found the body between 11 and 12h00 and proceeded to tie up the accused.
85. When looked at holistically, the evidence establishes that the deceased met her death anywhere between 11h00 and 13h00. The discrepancy in the time stated by the witnesses arises from the fact that each one of them came across the body at a different time and could also be attributed to the human error of forgetfulness. It is to be noted that the body was not immediately picked up by the police but rather a couple of hours elapsed. Thus, I am of the firm view that the discrepancies do not establish untruthfulness on the part of the witnesses. They cannot affect the reliability of the core evidence provided by the witnesses to the effect that the accused was upset by the deceased's presence, he became violent and shortly after, the deceased was found dead and further that accused was seen near her body armed with sticks.
86. The same reasoning applies to the conflicting evidence given by PW7 regarding his age. I am satisfied that he did not necessarily intend to lie when he gave his age as 15 and not 17 years. This could be attributed to forgetfulness. This is quite common among people that do not normally celebrate their birthdays. PW7 was

from a rural set up and it is common cause that birthdays are rarely celebrated in such settings.

87. Reverting to the main issue, as rightly submitted by the prosecution, the evidence against the accused is circumstantial. That being the case, I must warn myself of the danger of convicting the accused purely on circumstantial evidence. In the case of **Chimbini v. The People**⁽⁸⁾, the Supreme Court guided that:

Where the evidence against an accused person is purely circumstantial and his guilt entirely a matter of inference, an inference of guilt may not be drawn unless it is the only inference which can reasonably be drawn from the facts shown.

88. In the landmark case of **David Zulu v. The People**⁽¹⁰⁾ the Court expressed itself in the following terms:

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.

89. What stands out from the evidence is that the accused had the opportunity to commit the subject offence. Further, the evidence does not suggest any other person that could have possibly caused the death.

90. In the case of **Ivess Mukonde v. The People**⁽¹⁰⁾ the Supreme Court guided that:

Whether evidence of opportunity is sufficient to amount to corroboration must depend upon all the circumstances of a particular case. The circumstances and the locality of the opportunity may be such that in themselves amount to corroboration

91. In this case, the deceased was found dead in PW4's yard which was accused's residence. This is a place she had visited that morning and it is unknown how far she had gone upon being told to leave by PW4, if at all she left the place. There is no indication that the accused was ever at a different location at the time. I opine that the evidence of opportunity is sufficient to amount to corroboration.
92. Further, the Postmortem report shows that the deceased suffered traumatic subdural hematoma which simply means a pool of blood between the brain and its outermost covering. She also suffered upper ribs fracture, lateral side ribs fracture among other injuries. I am without a doubt in my mind that the multiple blunt force traumatic injuries suffered could have been inflicted by a stick and any other means. There was after all no eye witness.
93. Upon holistic consideration of the evidence, I am satisfied that the accused became violent that morning and viewed the deceased as a person that was out to harm him. He thus caused grievous bodily harm to her which resulted in death. I am of the view that the circumstantial evidence has taken the case out of the realm of conjecture.

94. The question nevertheless remains whether the prosecution proved to the satisfaction of the court that the accused had the necessary mens rea for the offence of murder.
95. I note that the prosecution in their submissions did not address the issue of mental instability. On the part of the defence, at the inception of the matter, defence counsel asked that accused be examined for purposes of determining if he was fit to take plea and stand trial. It was determined that he was fit to plead. The cross examination conducted sought to establish reasonable doubt, which am disinclined to accept for reasons I have given. That being said, the issue of the accused's mental state cannot be ignored or glossed over.
96. In addressing this issue, it is cardinal to look at the medical doctor's concluding remarks in his report dated 19th October, 2022 which read as follows:

On the basis of the above information, observations and findings, there is no evidence currently that PAUL MALAIKA has any mental illness.

Paul was vulnerable to developing mental illness because of the family history and more importantly because of the history of abuse of alcohol and cannabis in increasing amounts and frequency.

It is thus my opinion that at the time of the alleged offence he had a DRUG INDUCED PSYCHOTIC DISORDER. He is currently asymptomatic. It is further my opinion that he is FIT to make a plea, stand trial and follow proceedings of the Court.

97. I have had occasion to peruse the case of **Mbomena v. The People**⁽¹¹⁾ in which it was held that where there is evidence supporting a defence not raised by the accused, that defence must be considered by the trial court.

98. According to PW2 and PW4, the accused was acting abnormally. The evidence of PW4 indicated that the accused was shouting and acting irrational and this was the reason she went to look for help from PW2. PW2 told court that the accused appeared at his house, stark naked and begun attacking him and his family. The arresting officer further revealed that the accused could not answer her questions during interviews. This evidence, including the medical report, points to the fact that the defence of diminished responsibility may be available to the accused.

99. Section 12A of the Penal Code on the defence of diminished responsibility provides as follows:

(1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or is induced by disease or injury) which has substantially impaired his mental responsibility for his acts or omissions in doing or being party to the killing.

(2) The provisions of subsection (2) of section thirteen shall apply with necessary modifications to the defence of diminished responsibility under this section:

Provided that the transient effect of intoxication as described in that subsection shall be deemed not to amount to disease or injury for purposes of this section.

(3) On a charge of murder, it shall be for the defence to prove the defence of diminished responsibility and the burden of proof shall be on a balance of probabilities.

(4) Where the defence of diminished responsibility is proved in accordance with this section, a person charged with murder shall be liable to be convicted of manslaughter or any other offence which is less than murder.

100. In the case of **Peter Banda v. The People**⁽¹²⁾, the Court of Appeal adopted the following definition of abnormality of the mind:

A state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form rational judgments whether an act is right or wrong, but also the ability to exercise will power to control physical acts in accordance with that rational judgment. The expression 'mental responsibility for his acts' points to consideration of the extent to which the accused's mind is answerable for his physical acts, which must include consideration of the extent of his ability to exercise will power to control this physical act.

101. Subsection 3 of section 12A clearly states that the burden of raising the defence of diminished responsibility rests on the accused. As earlier alluded to, the defence in this matter did not lean on this defence but on the basis of the **Mbomena** case and the evidence available on record, the view I take is that the accused was suffering abnormality of mind. His state of mind at the material time was clearly different from that of ordinary human beings. An

ordinary human being would not walk around without clothing and attack people randomly.

102. In the **Peter Banda** case cited above, the Court of Appeal stated that the uncontested psychiatric report showed that the appellant suffered from an atypical seizure disorder which was not a mental illness. He attacked his wife and daughter in that manner because of his predisposition to that condition. The Court then stated as follows:

“It is our view that properly directing herself, the trial Judge would have found that the defence of diminished responsibility was available to the appellant.”

103. The Court went on to set aside the conviction for the offence of murder and convicted the appellant of a lesser offence of manslaughter contrary to section 199 of the Penal Code.

104. In the matter at hand, the doctor found that at the time of the offence, the accused had a drug induced psychotic disorder. However, at the time of the medical examination, there was no evidence that accused had a mental illness. He was nevertheless vulnerable to developing mental illness. Thus, taking a leaf from the Peter Banda case, I am satisfied that the defence of diminished responsibility is available to the accused.

Verdict

105. In the circumstances, I find the accused **NOT GUILTY** of murder but I find him **GUILTY** of manslaughter contrary to section 199 of the Penal Code and I CONVICT him accordingly.

Delivered at Lusaka in open court this 29th day of September, 2023



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M.C Mikalile
HIGH COURT JUDGE