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**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION
CRIMINAL CASE NO. 164 OF 2018**

**THE REPUBLIC
VS
HUMPHREY ELIA
MARY NANKHUKU**

CORAM: THE HON. JUSTICE MR S.A. KALEMBERA

Mr Chisanga, Principal State Advocate, of Counsel for the State

Mr Kayira, of Counsel for the 1st Accused

Mr Panyanja, of Counsel for 2nd Accused

Mrs Chanonga, Official Interpreter

Mrs Msimuko, Court Reporter

JUDGMENT

Kalembera J

The accused, Humphrey Elia and Mary Nankhuku, stand jointly charged with the offence of murder contrary to section 209 of the Penal Code. The particulars of the offence allege that **HUMPHREY ELIA and MARY NANKHUKU**, on or about the 6th day of July 2018, at Lungazi Village, T/A Jenda in Phalombe District, with malice aforethought caused the death of **JOSEPH KACHINGWE**. They pleaded not guilty to the charge.

The accused persons having pleaded not guilty to the charge, it became incumbent upon the Prosecution to adduce evidence to prove the charge against the accused persons. In a criminal case, like this one, the burden lies with the Prosecution to prove the case against the accused person beyond reasonable doubt. To discharge that burden, the Prosecution paraded four witnesses.

PW I was Agness Kwenyengwe of Lungazi Village, T/A Jenala, Phalombe. She told the court that she is a subsistence farmer. She knows Joseph Kachingwe. He was her young sister's child. He was a boy with albinism. He was living with his parents but sleeping at her house. Four boys, Jonas Lisimbwa, Zitha Chibalo, Japhet Joseph and Joseph Kachingwe, were sleeping in one room. Joseph Kachingwe disappeared during 6th July 2018 celebrations. He went to the celebrations around 5 pm with his friends and did not return with them. On the 7th that's when she knew of his missing. The matter was reported to the police that the boy was missing. The 1st accused had disappeared and the 2nd accused was at home.

It was her further testimony that she has known the 1st accused since July 2016. He married her younger sister, the 2nd accused and found her with three children. After the incident he fled to his home village. It was her further testimony that when she realized that Joseph was missing, the 2nd accused was at home.

In cross-examination she told the court that she did not go to the celebrations and she was at home. Around 7 pm Joseph Kachingwe returned to the house and later went back to the celebrations. She did not go with him. The accused persons did not come to her house that evening. On 7th the 2nd accused came to inquire about Joseph. On the 6th of July she was asleep and did not see Joseph come to the house

and have not seen him since. His dead body was not found. She neither saw the 1st accused person nor the 2nd accused person cause the death of Joseph Kachingwe.

PW II was Jonas Lisimba, aged 17 years old. Upon undergoing voir dire examination, he testified under oath. It was his testimony that Joseph Kachingwe was his brother. He last saw him on 6th July 2018 at Chief Kotamu's ground. He was with Yaphet and Joseph at Kotamu's place. He went home around 7 pm. All of them went to eat. After eating they went back to the celebrations. Later in the night they went back home minus Joseph. He had indicated that he would come with his father who was near some house. They left Joseph with his father. Joseph did not come back. He knows his father (points at the 1st accused). He further informed the court that Joseph was a boy with albinism.

In cross-examination he reiterated that they went to the Independence Day celebrations with Joseph Kachingwe. At some point they went to eat together with Joseph and went back to the celebrations. He told the police that Joseph said he would come back on his father's bicycle. He never saw the 1st accused carrying Joseph on a bicycle. He went with him to the shop. He didn't see the 2nd accused cause the death of Joseph. He didn't know where Joseph was now.

In re-examination he told the court that he saw the 1st accused taking Joseph to Chinawa's shop. This was after their second coming. He bought frozy. He didn't know who he gave it to.

PW III was Frank Kumchenga from Lungazi Village, T/A Jenda, Phalombe. He told the court that the 1st accused married the 2nd accused early 2017, and that the 2nd accused is his relation. They are basically cohabiting as the family was never involved. They didn't want them to get married such that there were no marriage advocates. They knew the 1st accused as a conman who had duped several women hence they didn't want him to marry her. He found the 2nd accused with three children. They did not know where Joseph Kachingwe was. He left the house on 6th July 2018, and he had albinism. On 6th July 2018 the 1st accused was home. When they heard of the missing of Joseph on the 7th, they went to report to the police. At this time the 1st accused had gone to his other family. On the 8th they went to apprehend the 1st accused as they suspected that he had committed the

offence for he had been bragging that he sleeps with millions in his house and wanting to buy expensive things. He was used to checking prices of motorcycle.

In cross-examination he reiterated that his bragging about sleeping with millions meant since there was a boy with albinism he could sell him. The uncle said they should chase him away but the 2nd accused was totally against that.

PW IV was Detective Inspector Amos Mdzinga of Criminal Investigation Department based at Phalombe Police. He told the court that upon receiving a report from the 2nd accused, of a missing child with albinism, Joseph Kachingwe, he followed up the matter and the accused persons were picked up for questioning. The 1st accused revealed that he conspired with his wife, Beaton Tabwali (uncle to 2nd accused), and Eniphath Chinawa to sell the boy. They conspired on two occasions and resolved to do the deed on 6th July. On 6th July 2018 there were some dances at Patrick Chinawa's shop at night. Joseph Kachingwe went there with his friends. Whilst there he, 1st accused, told the friends to go and that he will remain with the child. He gave the boy poisonous bottle of frozy. Later they took the child on a motor bike to a place near the graveyard. He further alleged that at the graveyard they cut the private parts of the child; and were later approached by Steve Chauma and Julius Nkhwayi and they took the body to unknown destination.

It was his further testimony that another vehicle arrived and he was told by Chinawa that the vehicle belonged to Mankhokwe. And in the course of enquiries a cap (hat) won by the boy was found at Chinawa's place (Ex P 1). In total eight people were arrested. The 2nd accused denied the charge whereas the 1st accused admitted the charge. The rest of the suspects denied the charges.

In cross-examination he told the court that he has served as a detective for 18 years and 23 years in total as a policeman. It is not strange for the accused to admit everything. No force was used otherwise the woman would have also admitted the charge. (1st accused removed his shirt and scars were observed on his backside). It was his further testimony that he could not tell where the 1st accused got his scars from. He repeated that no force was used. Joseph's cap was found at the scene where there were dances. The frozy bottle was never recovered. Joseph's body was never recovered.

With the testimony of this witness the prosecution closed its case. The court found the accused persons with a case to answer. The accused persons were reminded of their constitutional right to remain silent and call witnesses; or testify on their own defence and call witnesses; or remain silent and not call any witnesses.

On the day appointed for defence case, Mrs Sibale, of Counsel for the accused persons, informed the court that upon obtaining witness statements from the accused persons, it was discovered that it would be hard for the Legal Aid Bureau to continue representing both. This was on account that their witness statements were contradictory. The Legal Aid Bureau opted to continue representing the 2nd accused person. And that the Malawi Law Society do provide counsel to represent the 1st accused person pro bono. I granted the prayer. Thus, both accused persons opted to testify in their defence.

DW I was the 1st accused Humphrey Elia of Mileme Village, T/A Jenala, Phalombe. It was his testimony that he is a subsistence farmer. He grows rice, maize, pigeon peas (nandolo) and chana. By 6th July 2018 he had 30 bags of rice, chana and nandolo had not been packed in bags yet, and 5 bags of maize. He had 60 plus chickens and two goats. He married the 2nd accused in 2017 and found her with four children, two girls and two boys. First child was Fatsani who lives in Mozambique and he didn't find her, Esther Mbalame (about 14 years old) is the 2nd born, Joseph Kachingwe (about 12 years old) is the 3rd born, and Estere Bauleni (7 years old). Joseph was living with Mai Subaila, elder sister to his wife. He was however responsible for provision of food and clothes for Joseph. He was also providing for his needs at school.

On the 6th of July 2018 from morning till afternoon he was at home. Late afternoon he woke up and was given food by his wife, the 2nd accused. Kid Kumchenga and his wife were sitting nearby on their verandah. Around 7-8pm Mavuto Sonje came, knocked, and was inviting him for beer. He refused. In the morning he woke up, took his bicycle and went to check on his chana in the garden which is in another village. He reached his home at sunset. Kumchenga told him that his wife had gone to the police because Joseph was missing. On 8th July 2018 a police vehicle came and picked them. At the police he was interrogated in a different room. He was asked if he had been to the 6 July celebrations. Then he was assaulted with panga

knives. He woke up in the cell. He was later assaulted again (he took off his shirt and showed the court scars on his backside).

On the 12th of July they threatened to take him to the mountain and kill him. They then took him to the pit and again assaulted him with panga knives. They then poured water on him and asked him to thumbprint some statement on the pretext that it was something about Nzika (national ID). Upon being shown his caution statement he said he did not remember that document. He did not know who wrote his name on it. He denied the charge. He was taken to Mulanje Prison and kept in a cell where prisoners are kept.

In cross-examination by counsel for the 2nd accused he reiterated that on the evening of the 6th July he slept at home with his wife. He left the house very early in the morning and left his wife sleeping. He came back in the evening. He did not see his wife cause the death of Joseph Kachingwe. He did not conspire with his wife to cause the death of Joseph Kachingwe.

In cross-examination by counsel for the State he conceded that his particulars are on his caution statement and that he had given those particulars to the police when they came to his house. They did not write anywhere. He was told by the police to thumbprint but he did not give any statement. He didn't sign anything other than the thumbprint. He suffered injuries at the back. He could move his arms after the assault but he wouldn't have managed to write anything due to pain. He was really assaulted by the police. He did not know any of the people mentioned in his caution statement. He did not know who gave the police those names. King Kumchenga is his in-law, he knows a Kumchenga but not the first name.

He further told the court that he has two wives, and the 1st wife lives at Njovu Village. It's all lies that he was arrested at his 1st wife's place. He knows Jonas Lisimba, he is the son to where Joseph was living. It's not true that he found him at Chinawa's house. It's also not true that he had promised to carry Joseph on his bicycle when going home. On 6th and 7th July he slept at his wife's place (2nd accused's place), and on the 8th July was taken by the police. It was not true that from 6th – 8th he was not at his second wife's home. As regards his caution statement whatever its contents are not true. He knows how to read, write and sign. He was just instructed to thumbprint. He doesn't remember if he signed on any

Nzika card. He does not know any relationship between the Chinawa's and his wife. He knows Beaton Tabwali. It's far between his 2nd wife to the 1st wife. It's a long time since he stopped drinking alcohol.

In cross-examination by the court he informed the court that the person who came knew that he stopped drinking alcohol although he was inviting him for a drink. In re-examination he reiterated that he thumb printed plain paper. He denies the contents of the statement.

In re-examination he insisted that he does not know the document. He didn't sign on it.

DW II was the 2nd accused, Mary Nankhuku, of Lungazi Village, T/A Jenala, Phalombe. She told the court that Humphrey Elia is her husband and have been together for one year. They have four children. Joseph Kachingwe is missing She went to the garden near their house. She was alone. Around 9:00 am she came back from the garden. She prepared food for the children. Around 5 pm Joseph took a bath. Around past 5 pm the children went to 6 July celebrations. They came back around 7 pm. Jonas is the one who came back, Joseph was still at the celebrations. He never came back. The 1st accused was not home that evening. She went to sleep around 9 pm and was alone with the small child. She does not know where the 1st accused was. She woke up around 6 am the next day and the 1st accused was not there. She went to the garden and came back around 2 pm. She did the usual chores and thought Joseph was with her sister.

Jonas told her that he could have come back with Joseph but Joseph had said his father would pick him up. She started looking for the 1st accused at his mother's house but she was informed that he was at his first wife's place. He was picked from his house to their house and they found the police vehicle there since she had reported to the police that her son was missing. The police called Jonas who told the police that Joseph was with his father. Together with the 1st accused boarded the police vehicle. They had their statements recorded. She thumb printed her statement and went back home. The police picked her up again because the 1st accused had implicated her. She was taken to Phalombe Police and she denied the charge. The 1st accused admitted that he had indeed picked up Joseph and bought

him frozy. And that he put some poison in the frozy to weaken him. He further said Mankhokwe is the one who misled him. He placed Joseph in Mankhokwe's car.

In cross-examination by counsel for the 1st accused she reiterated that on the evening of 6th July the 1st accused was not in the house. Their house has one bedroom. She did not call out the 1st accused or search the house. He was not found in the house. She saw the scars he has shown the court and that they were sustained at the police. She wouldn't know if he had these scars on arrest. He was assaulted on the day they went to the graveyard. She heard him tell the police that he was involved in the crime. At that time he had not been assaulted. The police did not compel him to admit that he committed the offence. She further told the court that she thumb printed her caution statement but it was not read over to her. She did not agree with her husband to sell Joseph. She was forced to sign. What was recorded from her husband was true. He found her with her own food and he was cruel to her children. He caused the death of her child.

In cross-examination by counsel for the State she reiterated that early morning of 7th July she left for the garden. The 1st accused was not there. She does not know Patrick and Eniphath Chinawa. She does not know Mrs Chinawa. The evening of 6th and 7th July the 1st accused was at his 1st wife's home. She did not know that he had another wife. She has been with him for a year and he drinks alcohol. She still loves him and she cannot tell lies just to put him in trouble. There are no chickens at their house and they also do not have goats. She does not know about his chana garden and as regards harvesting maize, maybe at his other wife. King Kumchenga, her brother, lives near them, whereas Frank Kumchenga lives in another village. She saw King on the 6th of July at his house. She next saw her husband on the 8th.

In cross-examination by the court she reiterated that her house has two rooms and that the courtroom was bigger than the house.

In re-examination she informed the court that she was sleeping with the 1st accused in the same room. The police did not read over her statement to her. She does not know how to read or write.

After her testimony, the defence closed its case. The parties were directed to submit their written submissions by 1st April 2019. Only the State filed their submissions.

I am mindful that this being a criminal matter, the burden of proving the guilt of the accused person lies with the State or prosecution –section 187(1) of the Criminal Procedure and Evidence Code (Cap 8:01) of the Laws of Malawi. It has been held that for the prosecution to discharge its burden it must prove the elements of the offence to the required standard which is, proof beyond reasonable doubt. There is no burden laid on the accused person to prove his/her innocence except in exceptional circumstances. In the famous and commonly cited case of **Woolmington –v- DPP** (1935) AC 462 at pp 487 Viscount Sankey, L had this to say:

“But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence.

Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception.....No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the Common Law of England and no attempt to whittle it down can be entertained.....It is not the Law of England to say as was said in the summing up in the present case: ‘if the Crown satisfy you that this woman died at the prisoner’s hands then he has to show that there are circumstances to be found in the evidence which has been given from the witness-box in this case which alleviate the crime so that it is only manslaughter or which excuse the homicide altogether by showing that it was a pure accident....”

In the case of **Miller –v- Ministry of Pensions** (1947) 2 ALL ER 372 at 373 Denning, J buttressed the point as regards the burden of proof required when he stated as follows:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence ‘of course it is possible, but not in the least

probable' the case is proved beyond reasonable doubt, but nothing short of that will suffice."

This statement by Denning, J was approved by Smith, Ag. J. in the case of **Rep –v- Banda** (1968-70) ALR Mal. 96 at p. 98.

It is therefore the duty of the State or prosecution to prove each and every element of the offence of murder. As has already been stated herein, the accused persons are charged with murder contrary to section 209 of the Penal Code which provides as follows:

"Any person who with malice aforethought causes the death of another person by an unlawful act or omission shall be guilty of murder."

For the accused persons to be found guilty of murder therefore, the prosecution must establish or prove through evidence, that the accused persons by an unlawful act or omission, caused the death of the deceased person; and that they did so with malice aforethought. As regards proof of availability of malice aforethought, section 212 of the Penal Code gives the following guidelines:

"Malice aforethought shall be deemed to be established by evidence proving any of the following circumstances-

- (a) An intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;*
- (b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;*
- (c) An intent to commit a felony;*
- (d) "*

In order for the state to prove its case against the accused persons, it must therefore be established that the accused persons had the requisite intention to cause the death of the deceased or to do him grievous harm. This can be established by direct or indirect evidence (circumstantial evidence). Most often times it is difficult to prove a charge through direct evidence, and the State most often times will rely on circumstantial evidence. In the case of **R –v- Taylor** (1928) 21 Cr. App. R 20 Hewart, C.J had this to say:

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.”

Thus, one can be found guilty and convicted on circumstantial. And in the case of **Republic v Given Visomba, Confirmation Case No. 627 of 2007 (HC) (MZ)** Chikopa J (as he was then) had this to say:

“But as was acknowledged in the case of Nyamizinga v Rep 6 ALR Mal 258 a conclusion of guilt will only be acceptable from circumstantial evidence if that conclusion is the only one to be had from the said evidence. So that if the circumstantial evidence is capable of being explained other than by the guilt of the accused then a finding of guilt is not sustainable.”

In the matter at hand, the prosecution has relied on circumstantial evidence. There is no witness who saw the accused persons cause the death of Joseph Kachingwe. Furthermore, the body of the said Joseph Kachingwe was never recovered. Regardless of the body not being found, it does not mean that the accused persons cannot be convicted of murder. If the evidence proves beyond reasonable doubt that they caused the death of Joseph Kachingwe this court would be at liberty to convict them.

It is prudent that at this moment I must deal with the issue of the caution statements tendered herein. The 1st accused contends that his caution statement was not freely given. He even showed the court scars on backside which he claimed were occasioned by police beatings. In other words, he is retracting his caution statement. The 2nd accused only alleged that her statement was not read over to her. I am mindful of section 176 of the Criminal Procedure & Evidence Code which provides as follows:

“s.176 –(1) Evidence of a confession by the accused shall, if otherwise relevant and admissible, be admitted by the court notwithstanding any objection to such admission upon any one or more of the following grounds (however expressed) that such confession was not made by the accused or, if made by him, was not freely and voluntarily made and without his having been unduly influenced thereto.

(2) No confession made by any person shall be admissible as evidence against any other person except to such extent as that other person may adopt it as his own.

(3) Evidence of a confession admitted under subsection (1) may be taken into account by a court, or jury, as the case maybe, if such court or jury is satisfied

beyond reasonable doubt that the confession was made by the accused and that its contents are materially true. If it is not so satisfied, the court or the jury shall give no weight whatsoever to such evidence. It shall be the duty of the judge in summing up the case specifically to direct the jury as to the weight to be given to any such confession.

(4) Nothing in this section except subsection (2) shall apply to any confession made by an accused at his trial or in the course of any preliminary inquiry relating thereto.”

According to this provision any caution statement or confession is admissible regardless of how it was obtained. In other jurisdictions, a confession must be made voluntarily and freely for it to be admissible. That seems not to be the position in this country though with our current section 42 (2) (c) of our Republican Constitution one would have expected the position to be like in those other jurisdictions. The position before our current Constitution and prior to this Constitution has not changed. In the case of **Chiphaka v. Rep** [1971-72] ALR Mal. 214 the majority decision of the Supreme Court of Appeal confirmed the High Court’s decision in **Rep v. Nalivata** [1971-72] ALR Mal 101 . Chatsika J added at page 219:-

“At common law, proof of physical violence or inducement would be a ground to exclude a confession altogether. In Malawi, after the enactment of S. 176 of the Criminal Procedure and Evidence Code, proof of threats, ill-treatment, inducement and the like, go not to admissibility but to weight, and if any allegation of any of these factors is established, it is difficult to conceive of any reasonable court accepting a confession to be materially true in the absence of pointers of such cogency as virtually to amount to corroboration as that term is understood in law. Conversely, of course, and at the other extreme, if the court is satisfied that a confession has been spontaneously volunteered – free and voluntary in the language of the old law – the pointers would not require to be anything like as strong.”

And in the case of **Nyasulu and Others v Rep** [2008] MLR 243 the MSCA confirms the said provision post the current Constitution when it stated as follows:

“Furthermore, section 176 (3) of the Criminal Procedure and Evidence Code provides that evidence of a criminal confession admitted under subsection (1) of the said Code may be taken into account by a court, or a jury, as the case may be if such court or jury is satisfied beyond reasonable doubt that the confession was made by the accused and that its contents are materially true. If it is not so satisfied, the court or jury shall give no weight whatsoever to such evidence.”

And in the case **Maonga v. Republic** [2002-2003] MLR 175 the Supreme Court of Appeal dismissed the appellant’s appeal against his conviction because his caution statement although retracted was sufficiently detailed and elaborate and there was external evidence confirming some details stated in his confession statement.

In the matter at hand, I am satisfied beyond reasonable doubt that the caution statements herein were obtained from the accused persons. What is required is to look for pointers or corroborative evidence, with regard to the 1st accused person’s caution statement to determine whether the contents in the said caution statement are materially true. As regards the caution statement of the 2nd accused it was given freely and voluntarily, it is therefore admissible against the 2nd accused person. The 1st accused person’s caution statement is very detailed. It explains that the 1st accused and other named individuals conspired on two occasions to sell the deceased and that this should happen on the 6th July 2018 during the independence celebrations. On the said day and at the place where main celebrations were taking place, Chief Kotamu’s ground, the 1st accused was with the deceased and he bought him frozy drink which he poisoned. The evidence of PW I, PW II and PW III is also to the effect that the deceased went to the celebrations and when his

siblings were going back home he remained with the 1st accused who promised to bring him home. That was the last time he was seen alive.

It is also in evidence of PW 1 and PW III that when the deceased was discovered missing, the 1st accused was not home. This was also corroborated by DW II who told the court that the 1st accused only re-appeared on 8th July 2018. PW IV also testified that the 1st accused confessed that he poisoned the deceased and he was present when his private parts were removed. And the 1st accused despite earlier denials he admitted in court that he knew some of those mentioned in his caution statement. Furthermore, it is the testimony of PW III that the 1st accused used to brag that he was sleeping with millions in the house, referring to the deceased since he had albinism. Thus, I am satisfied that the 1st accused person's caution statement is materially true.

It is therefore clear from the evidence before this court that the deceased was last seen alive with the 1st accused who had promised to take him home. The deceased has never been seen since. It is also in evidence that the 1st accused had conspired with other named individuals to poison the deceased by mixing the poison in a frozy drink. This was done. PW II saw that the 1st accused bought a frozy drink. It is also in evidence that the private parts of the deceased were removed and the 1st accused, who was present, does not know where his body was taken to. It can therefore not be doubted that Joseph Kachingwe is deceased and that he was actually killed. The court cannot ignore, and it takes judicial notice of the fact that we have had some people with albinism in this country killed for their body parts. It is therefore safe to conclude that, on the evidence herein, the deceased met the same fate.

Was the deceased's death caused by the accused persons? In his confession statement, the 1st accused alleged that he conspired with the 2nd accused to sell the deceased. Of course the 2nd accused has denied that. Hence, in accordance with the

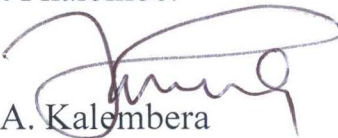
provisions of section 176 (2) of the CP&EC which stipulates that no confession made by any person shall be admissible as evidence against any other person except to such extent as that other person may adopt it as his own, the confession by the 1st accused cannot be evidence against the 2nd accused since she did not adopt it. Nevertheless, the 2nd accused, in her caution statement, admitted to have conspired with her husband, the 2nd accused to sell the deceased. Although, she did not play any active part in the execution of the evil conspiracy, she is a party to what happened to Joseph. She confessed that she agreed to the proposal to sell Joseph when the 1st accused pitched the idea to her. It is really sad that as parents they connived to sell their own son just because he had albinism.

It is clear from the evidence, even if the caution statement of the 1st accused was to be disregarded, that the 1st accused was the last person to be seen with the deceased, and he had promised the deceased's siblings that he would bring the deceased home. It is also very clear from the evidence of PW III that the 1st accused had been bragging that he was sleeping with millions just because he had a child with albinism in the house. And because of these braggings the family had wanted to chase him away but the 2nd accused was against that. It is also very clear from the caution statement of the 2nd accused that there was an agreement to sell the deceased.

All in all, on the evidence before this court, even if the caution statement of the 1st accused was to be disregarded, that the prosecution has established and proved that the accused persons, with malice aforethought, caused the death of their deceased son, Joseph Kachingwe. The accused persons acted upon their agreed plan although the 2nd accused did not play an active role. In accordance with sections 21 and 22 of the Penal Code each of the accused persons having formed a common intention to prosecute an unlawful act resulting in the commission of the offence charged, they are guilty of the offence charged. It is therefore the court's finding

that the prosecution has proved beyond reasonable doubt that the accused persons with malice aforethought caused the death of Joseph Kachingwe. I therefore find Humphrey Elia and Mary Nankhuku guilty as charged, and I hereby convict each one of them forthwith.

PRONOUNCED in open court this 26th day of April 2019, at the Principal Registry, Criminal Division, sitting at Phalombe.



S.A. Kalembera

JUDGE