



**IN THE HIGH COURT OF MALAWI**  
**LILONGWE DISTRICT REGISTRY**  
**CRIMINAL CASE NO. 21 OF 2020**

**REPUBLIC**  
**VERSUS**  
**TIMOTHY MTILOSANJE**  
**GILBERT UFULU KAMALIZA**  
**EKAREE DANIELLA CHAWEZA**  
**DIANA BHAGWANJI**

**CORAM: HON. JUSTICE T.R. LIGOWE**

Dr. S. Kayuni and R. Nayeja, Counsel for the State

K. Mchizi, Counsel for the 1<sup>st</sup> Accused

C. Mhone, Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Accused

M. Theu, Counsel for the 4<sup>th</sup> Accused

D. Mtaya, Court Reporter

Zulu, Court Clerk

**JUDGMENT**

Ligowe J

**Introduction**

- 1 The four accused persons stand charged with murder contrary to section 209 of the Penal Code. They are alleged to have caused the death of Kotanna Chidyaonga with malice aforethought during the night of 3<sup>rd</sup> January 2020 at Area 3 in Lilongwe. They all pleaded not guilty and the State brought in Esther Mphungela, Zackia Chiristable Montersino, Elasimu Lusiyo, Rafick E. Mustaphar, Bahutath Sarif Babu Hussain, Catherine Mwale, Dr Ruth Chimutu, Thokozani Richard Kaunda, Dr Gladys Ngondo, Dr Charles Patrick

Dzamalala, Prof N.G. Liomba, Fallison Kaponda, and Detective Sub Inspetor Blessings Chimaliro to testify on the case.

- 2 The State having closed its case, the accused persons have made submissions that no case has been made out against them sufficiently to require them to make a defence, and so, they should be acquitted. The State however insists that the case has been made out against them sufficiently to require them to defend.

### **Procedure for Trials in the High Court**

- 3 The procedure for trials in the High Court is provided for under Part X of the Criminal Procedure and Evidence Code. Ordinarily, according to section 294 (1) criminal trials before the High Court should be by jury. But subsection (2) also provides that the Minister may by Order published in the Gazette direct that any case or class of case shall be triable by the High Court without jury, and in any such case or class of case instead of the procedure set out in Part X, the High Court shall, with any necessary modification follow the procedure set out in Part VII, for trials before subordinate courts.
- 4 This trial was without jury following the Criminal Procedure (Trial Without Jury) (Amendment Order, 2020).
- 5 The only significant difference in the processes between Part VII and Part X is the involvement of the jury. Everything else is more less the same. For this reason, having reached this stage of the of the case, I have noted interchangeable reference to section 254 and section 313 of the Criminal Procedure and Evidence Code in the submissions Counsel for all parties have made before this court.
- 6 The import of the provisions is the same. It is in recognition of the accused persons right to adduce and challenge evidence and not to be a compellable witness against himself or herself, as provided for under section 42 (2) (f) (iv) of the Constitution. An accused person should only be called to defend after the prosecution has sufficiently made out a case against him or her. The law does not expect the accused to trip into the offence in his or

her defence. In *Gwazantini v The Republic* [2004] MLR 75 (HC) at page 80 Chipeta J as he then was said:

“I am and have equally been throughout, poignantly aware that I should not and ought not to call upon the accused to enter on her defence on the chance that she might augment the prosecution case and thereby implicate herself.”

7 Section 254 provides:

- (1) If, upon taking all the evidence referred to in section 253 and any evidence which the court may decide to call at that stage of the trial under section 201, the court is of opinion that no case is made out against the accused sufficiently to require him to make a defence, the court shall deliver a judgment in the manner provided for in sections 139 and 140 acquitting the accused.
- (2) If, when the evidence referred to in subsection (1) has been taken, the court is of opinion that a case is made out against the accused sufficiently to require him to make a defence in respect of the offence charged or some other offence which such court is competent to try and in its opinion it ought to try, it shall consider the charge recorded against the accused and decide whether it is sufficient and, if necessary, shall amend the same, subject to section 151.

8 Section 313 provides:

- (1) If, when the case for the prosecution is closed, and upon hearing any evidence which the High Court may decide to call at that stage of the trial under section 201, the High Court is of the opinion that no case is made out against the accused sufficiently to require him to make a defence, the High Court shall discharge the jury and record an acquittal.
- (2) If, when the case for the prosecution is closed, and any evidence called under section 201 has been taken, the High Court is of the opinion that a case is made out against the accused sufficiently to require him to make a defence, the High Court shall inform the accused that he has the right to remain silent or to give evidence on oath, and thereupon call on him to enter his defence and to give evidence.

- 9        However though, in view of section 294 (2), the most appropriate provision to cite, where the trial is without jury is section 254 which falls in part VII of the Criminal Procedure and Evidence Code.

**Principles for establishing a sufficient case**

- 10       The rules for consideration at this stage of the case are very clear, stemming from the fact that you would like to assess if no case has been made out sufficiently to require the accused to make a defence. The cases of *Rep v Dzaipa* [1975–77] 8 MLR 307, *DDP v Chimphonda* [1973–74] 7 MLR 94, *Namonde v. Rep* (1993) 16(2) MLR 657 and *Gwazantini v The Republic* [2004] MLR 75 (HC), all agree that no case will have been sufficiently made out if the evidence has not proved the essential element of the alleged offence, if the evidence has been so discredited as a result of cross-examination and if it is so manifestly unreliable that no tribunal could safely convict on it.
- 11       Applying this in *Gwazantini v The Republic* [2004] MLR 75 (HC) Chipeta J as he then was stated at page 83:
- “Considering section 254 of the Criminal Procedure and Evidence Code side by side with the material practice direction on the matter, it is clear beyond per adventure to me, that if indeed I find that either an element of the offence charged has not been covered in evidence, or even if I observe that all elements of the offence charged have been covered by the evidence, I at the same time consider the said evidence as being so discredited by cross examination or as being so manifestly unreliable, I have no choice but to acquit the accused. Conversely it is equally my very clear understanding of the law that if I otherwise find all the elements of the offence charged covered by the evidence proffered by the prosecution and if at the same time I find that the said evidence has neither been so discredited nor shown to be otherwise so manifestly unreliable, I ought to put the accused on her defence.”
- 12       It is the same principles this court has to apply to the present case.

### **The elements for murder**

- 13 The offence of murder is provided for under section 209 of the Penal Code. It states:  
“Any person who of malice aforethought causes the death of another person by an unlawful act or omission shall be guilty of murder.”
- 14 Counsel for all the parties to this case agree in their submissions on the three basic elements of the offence - (a) death caused by (b) an unlawful act or omission of the accused person done (c) with malice afore thought.
- 15 According to section 215 of the Penal Code, a person is deemed to have caused the death of another person although his act is not the immediate or not the sole cause of death in any of the following cases—
- (a) if he inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes death. In this case it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith and with common knowledge and skill; but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith or was so employed without common knowledge or skill;
  - (b) if he inflicts a bodily injury on another which would not have caused death if the injured person had submitted to proper surgical or medical treatment or had observed proper precautions as to his mode of living;
  - (c) if by actual or threatened violence he causes such other person to perform an act which causes the death of such person, such act being a means of avoiding such violence which in the circumstances would appear natural to the person whose death is so caused;
  - (d) if by any act or omission he hastened the death of a person suffering under any disease or injury which apart from such act or omission would have caused death;
  - (e) if his act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons.

16 According to section 212 of the Penal Code malice aforethought is deemed to be established by evidence proving any one or more of the following circumstances—

- (a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- (c) an intent to commit a felony;
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

### **Parties to offences**

17 Regarding parties to criminal offences, section 21 of the Penal Code provides:

“When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—

- (a) every person who actually does the act or makes the omission which constitutes the offence;
- (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
- (c) every person who aids or abets another person in committing the offence;  
and
- (d) any person who counsels or procures any other person to commit the offence.

In the fourth case he may be charged with himself committing the offence or with counselling or procuring its commission.

A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.

Any person who procures another to do or omit to do any act of such a nature that if he had himself done the act or made the omission the act or omission would have constituted an offence on his part, is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with himself doing the act or making the omission.”

18 Section 22 of the Penal Code further provides:

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

19 And section 23:

“When such a person counsels another to commit an offence, and an offence is actually committed after such counsel by the person to whom it is given, it is immaterial whether the offence actually committed is the same as that counselled or a different one, or whether the offence is committed in the way counselled or in a different way, provided in either case that the facts constituting the offence actually committed are a probable consequence of carrying out the counsel. In either case the person who gave counsel is deemed to have counselled the other person to commit the offence actually committed by him.”

20 It is against the above mentioned elements that this court will assess the evidence of the witnesses to establish whether a case has been made out sufficiently against each of the accused persons to require them to defend.

### **The facts and analysis**

- 21 As I gather it from the evidence, there is no dispute at all about the death of Kotanna Chidyaonga in the early hours of 4<sup>th</sup> January 2020. It is the cause of her death that is in dispute.
- 22 The facts as I find them, simply, are that the late Kotanna Chidyaonga was girlfriend to Timothy Mtilosanje (1<sup>st</sup> accused) and best friend to Diana Bhagwanji (4<sup>th</sup> accused). Gilbert Kamaliza (2<sup>nd</sup> accused) is Timothy Mtilosanje's best friend, and Ekaree Chaweza (3<sup>rd</sup> accused) is his girlfriend. The deceased was therefore related to the four accused persons in that manner. She was working as a Manager at Khala Restaurant at Four Seasons in Area 12. Esther Mphugela and Zackia Christable Montersino were also working there at the material time, as Cashier and Manager respectively. From their evidence I find that in the morning of 3<sup>rd</sup> January 2020, Diana Bhagwanji came to Khala before her best friend reported for work. After she came, Diana was still around waiting for her friend until she knocked off around 22.00 hours. Kotanna took no meal at the Restaurant that day except for a glass of wine served on her by Joseph the Bar Tender.
- 23 Upon knocking off, Kotanna together with Diana went to Timothy Mtilosanje's house at Area 3 on invitation of Ekaree, as she was there chatting together with her boyfriend. From the accused persons statements recorded at police exhibited by Detective Sub Inspector Blessings Chimaliro, Kottana and Diana decided to leave after about an hour at Timothy's house. It is at the time she was stepping out of the house that Kotanna felt something moving on her foot and she flicked it off. When they checked they found that it was a snake. Timothy then called for the guard, Elasimu Lusiyo to come and kill it. It appears Kotanna felt no pain as she responded negatively when she was asked whether the snake had bitten her. The 1<sup>st</sup> and 4<sup>th</sup> accused state however in their statements that they saw some kind of a snake bite mark and a very small amount of blood on her foot. So they took her to Care Polyclinic in Area 3, along with the snake, for treatment. Elasimu Lusiyo did not see the snake biting her nor the snake bite wound, but he killed a red snake at the car park, about 60 cm long, as thick as the big toe, which he said was Njokadzuwa in vernacular. At the time he killed it Timothy had just driven in with Kotanna and Diana in his car.



- 24 At Care Polyclinic, the patient was seen by Dr Ruth Chimutu, assisted by Catherine Mwale as the Nurse and Rafick Mustaphar was the Pharmacy Technician on duty. The history provided to her was that Kotanna had been bitten by a snake about 30 minutes prior to presenting at the clinic. On physical examination of the patient Dr Chimutu found that she presented with normal pulse rate, normal blood pressure and normal respiratory rate. Her airway was patent, she was breathing spontaneously and her chest movements were symmetric. Her Glasgow Comma Scale was 15/15. She had a pinhole wound on the dorsum of her right foot. According to Dr Chimutu all the vital signs of the patient were, otherwise, within the normal range. She however made a diagnosis of a snake bite and directed the Nurse to give the patient an anti-snake venom.
- 25 It turned out that what was given was *Vecuronium Bromide*, a muscle relaxant, normally used for anaesthetic purposes in the theatre. Catherine Mwale testified that after giving the patient less than half the dose, she started convulsing. Dr Chimutu ordered the medication to be stopped as she noted the patient had cardiac and respiratory arrest. Immediately she began cardio pulmonary resuscitation and ordered the patient to be given adrenaline and hydrocortisone. After the patient regained pulse but not respiratory effort, she ordered her to be transferred to Kamuzu Central Hospital to get respiratory support.
- 26 At Kamuzu Central Hospital, the patient was seen by Dr Gladys Ngondo. She continued with Cardio Pulmonary Resuscitation together with her team for at least 40 minutes before she declared the patient dead when she found that it was not working. Dr Ngondo also testified that together with her team she inspected the right foot where it was said the deceased had been bitten by a snake, but she was unable to appreciate any mark portraying a snake bite. She also inspected the snake and observed its fangs were still intact.
- 27 It appears the deceased family was so suspicious with the death of their daughter. Thokozani Richard Kaunda is a cousin brother to the deceased and owner of Khala Restaurant. The deceased's father's sister got married to Thokozani Richard Kaunda's father when Thokozani was about 11 years old. He testified as to the grounds for his suspicion. As he came at the hospital he found all the accused persons crying, but after he

briefly got into the casualty room and came out to inquire what had actually happened, he found they had stopped crying and were talking normally. What he was told by Diana Bhagwanji as was different from what Ekaree Chaweza said. Diana said the snake bit her as she came out of the house and Ekaree said it was at the car park. Dr Gladys Ngondo could not locate the snake bite. As the body was taken to the mortuary, he noticed that the cloth covering the head was soaked in blood at the bottom. He reported the matter to Area 18 Police Station the same day. Area 18 Police referred it to Lilongwe Police Station as the incident occurred at Area 3.

28 Detective Sub Inspector Blessings Chimaliro was the lead investigator. He testified that the matter was initially treated as a sudden death and not murder. The deceased's family engaged Dr Charles Patrick Dzamalala, a forensic pathologist at Malmed Healthcare Services in Blantyre, to carry out a medical investigation in to the death. He did the forensic autopsy on 5<sup>th</sup> January 2020 at the Mortuary at Kamuzu Central Hospital. It came out in the cross examination of Dr Dzamalala that the examination was in the absence of the accused persons or any of their representatives, and that Dr Dzamalala delivered samples to the Central Veterinary Laboratory in Lilongwe without the presence of the Police. It was clear to me that the accused persons are doubtful if indeed it was Kotanna Chidyaonga's body that was examined, and samples from her body that were tested at the Central Veterinary Laboratory. We have assurance however in the evidence of Detective Sub Inspector Blessings Chimaliro because he was there at the time the autopsy was carried out. I also have no doubt from the demeanour of Dr Dzamalala in presenting his evidence that it is the same samples that were tested at the Central Veterinary Laboratory. Let me observe however, that in situations where the cause of death is contentious like the present one, it is proper that the accused person or their representative and the Police be present at every process possible to enhance confidence.

29 Dr Dzamalala sought a second opinion on the specimen obtained from the stomach, liver, lungs, kidneys, heart, brain and the suspected snake bite wound of the deceased, from Professor Ndalama George Liomba, also of Malmed Healthcare Services in Blantyre. It was also clear in cross examination that the accused persons questioned the independence

of the Professor, being from the same firm as Dr Dzamalala. If the accused persons or their representatives were part of the process, that second opinion should have been sought from a different pathologist or if indeed there was or is no other, upon agreement with them. As earlier said though, I also have no doubt in the independence of Professor Liomba considering his demeanour as he presented his evidence, in the manner he made his examination of the slides presented to him for the second opinion and his conclusion on the same.

- 30 Dr Dzamalala released his report on 13<sup>th</sup> January 2020. He had examined the whole body and found no mark of a snake bite. To him the purported snake bite wound was a semi fresh wound of at least three days old, on the anterior or inner aspect of the right foot. There was no evidence of a fresh injury or swelling on any part of the body. He also examined the internal organs consisting the central nervous system, cardiovascular system, respiratory system, gastrointestinal system, genitourinary system and musculoskeletal system. He took samples of tissues the brain, heart, liver, lungs, kidneys, stomach and spleen for histological examination at the College of Medicine Histopathology Laboratory. He also took specimens of blood, body organs and body fluids (blood, urine and stomach contents) for routine toxicological and alcohol testing at the toxicological laboratory in Lilongwe (Central Veterinary Laboratory). He also meant to use the same samples for drug analyses if index of suspicion would emerge. And he collected the snake purported to have bitten the deceased.
- 31 Of interest in his report is that from the peritoneal cavity he drained a few millilitres of haemolysed blood and no other fluids were seen from there.
- 32 As regards histology, “no any evidence of any natural disease was seen. The body organs sampled showed either autolysis or normal histology. Wound on right aspect of foot demonstrated granulation tissue reaction, indicative of an aged, rather than a fresh wound. No other special features on histology.”

- 33 As regards toxicology on tissue and blood samples, “a toxic/ poisonous substance which matched with the laboratory samples for Termik, an Organophosphate compound, was detected from the sample extracts ... which were submitted to the ... toxicological laboratory in Lilongwe.”
- 34 As regards drug and venom analyses on the tissue and blood samples, he deliberately delayed submission of the samples to Lancet Laboratories in South Africa after he noticed lack of strong index of suspicion after thorough examination of the body. He wanted to give chance to discovery or confirmation of poisonous substance from the first round of testing. He eventually abandoned the need for these tests after finding a clear toxic/ poisonous substance of the Organophosphate group of compounds called Termik which is immediately fatal if swallowed directly or with food or drink.
- 35 As regard analytical evaluation of the snake, he had plans to submit it to experts at Chancellor College in Zomba to examine it for specific species, fangs and possibly the venoms, but he also abandoned this after the results from the first round of testing.
- 36 Dr Dzamalala’s conclusion is that death was due to “generalised haemolysis following acute poisoning with a pesticide called Termik, an organophosphate compound that is found in many hardware/ flea market shops in the country. In human beings Termik disables the central nervous system and also leads to haemolysis. Both of these actions are fatal.”
- 37 Professor Liomba’s evidence confirms Dr Dzamalala’s findings as regards the toxicology of the samples that were presented to him.
- 38 Fallison Kaponda is the Chief Laboratory Technician at the Central Veterinary Laboratory in Lilongwe. His evidence shows that he did a thin layer chromatography test of the samples presented to the laboratory. At the end the sample analysis detected a chemical substance that matched the laboratory’s working reference for Termik. In cross examination, Fallison Kaponda confirmed that he could trace any other drug with this test.

There are several other standards at the laboratory and not only for Termik. He had not been given any reference for *Vecuronium Bromide* as he did the exercise.

- 39 Dr Dzamalala had been asked a similar question earlier on as to how sure he was that Termik was the only toxic substance in the samples. His response was that the test goes by a diffusion column if there is toxicity in the samples. In the present case the column compared favourably with Termik and it meant there was no other substance. If there were, there would have been another column which would not have matched with the standard substance.
- 40 Granted, the results of the test excluded the presence of any other compound in the sample apart from Termik. There is one particular thing however, that Dr Dzamalala, Professor Liomba and Fallison Kaponda agreed in their cross examination and that is that their examinations and tests could not detect who administered the Termik to the deceased.
- 41 It is after Dr Dzamalala's report that the investigators started to handle the case as one for murder. Sub Inspector Blessings Chimaliro actually testified that at that point it was upon orders from a superior in the Police that he arrested the accused persons. Let me stress here the need to let every criminal investigator free to independently investigate any case they are handling up to conclusion. Meddling investigations by any whatsoever power from above who has no idea what is on the ground just messes up the process. It is clear to me the investigator abruptly concluded the investigations the moment he got the orders. He was given no chance to do a thorough job.
- 42 Well, from the evidence given by the State witnesses, Counsel for the 1<sup>st</sup> accused submits that there are three possible causes of the deceased's death.
- (a) She died from a venomous snake bite.
  - (b) She died from being administered a wrong drug, *Vecuronium Bromide*, thinking it were an anti-venom.
  - (c) She died from haemolysis due to acute poisoning with Termik.

Counsel argues that the State has thus failed to establish what really caused the death of the deceased and therefore failed to prove an essential element of murder. Counsel further contends that there is no evidence showing that the 1<sup>st</sup> accused person did anything which might have caused the death of the deceased. The evidence obtaining is that the deceased took a glass of wine at Khala on 3<sup>rd</sup> January 2020 around 20:30 hours, but then the 1<sup>st</sup> accused person was not there. Counsel further contends that having failed to establish the real cause of death, it is academic to start talking about malice aforethought.

43 Just like his colleague, Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons contends that the deceased was bitten by a venomous snake but when she presented at Care Polyclinic she was given a wrong drug and so she died. He argues that the Termik theory is not credible. And so, the evidence does not satisfy any element for the offence of murder against the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons.

44 Counsel for the 4<sup>th</sup> accused also argues for the snake bite and administration of *Vecuronium Bromide* to the deceased. Counsel argues that *Vecuronium Bromide* is the *novus actus interveniens* in this case. As regards poisoning Counsel contends that no witness testified as to when and where it might have been administered by any of the accused persons.

45 The State on the other hand is of the opinion that Diana strangely stayed the whole day at Khala Restaurant waiting for Kotanna, knowing what was intended that day, and she made sure Kotanna was led to where she was to be poisoned. State Counsel also argues that Diana encouraged Kotanna to drink some wine that evening. State Counsel blames the accused persons' statements at police for being rehearsed statements economical with the truth. They do not state in their statements as to what exactly happened at the house in Area 3. Yet the post-mortem reveals that the deceased had rice which had poison it. They do not want to state that they had food at the house. Diana does not state where she was with the deceased before the watchman saw them through the gate. Counsel refers to Thokozani Richard Kaunda's observations that the four looked unconcerned with the death of their friend and then argues that Termik does not just walk into a human body. This was ingested by the accused persons.

- 46 Counsel refers to the evidence of Esther Mphugela, Zachia Christable Montersino and Elasimu Lusiyo and argues that their evidence shows that the Termik that was found in the body system of the deceased was consumed in the time she was in the company of the accused persons. Counsel relies on the case of *Rep v. Juma*, Criminal Case No. 49 of 2020 (Lilongwe District Registry) (unreported) in which Justice Mwale applied the doctrine of last seen as stated in the Nigerian case of *Rabi Ismail v. The State* [2011] MJSC 20, and *Igabele v. The State* [2006] NWLR 100. Counsel provided the court with no copy of *Rep v Juma*. I tried to look for it in the little time I had before delivery of this judgment but could not find it. I however found chance to read *Igabele v. The State*. What I find is that the doctrine is applied where there is no direct evidence but circumstantial evidence. In the whole scheme of circumstantial evidence sufficient to support a conviction in a criminal trial, cogent, complete and unequivocal, leading to the irresistible conclusion that the accused person and no one else is the murderer, where the facts are incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt, where the accused person was the last person to be seen in the company of the deceased person, he has the duty to give an explanation relating to how the latter met his or her death. In the absence of such an explanation the court will be justified in drawing an inference that the accused killed the deceased person.
- 47 It is clear so far that the charge of murder in this case is neither based on the snake bite nor administration of the wrong drug, but the presence of Termik in the blood and body tissue samples of the deceased. Admittedly however, what is lacking is evidence of who might have given the Termik to the deceased.
- 48 From all that State Counsel has submitted, with due respect, there has not been any evidence showing that Diana Bhagwanji had any knowledge that Kotanna was intended to be poisoned that day. Esther Mphugela or Zachia Christable Montersino never showed like Diana actually encouraged Kotanna to take the wine. The rice and meat are what Dr Dzamalala found in the oesophagus and stomach of the deceased during the autopsy. No witness in this court gave evidence that the deceased took any other food apart from wine

during the material period. Dr Dzamalala never gave evidence as to when and where the rice and the meat might have been taken.

49 Dr Dzamalala said that when Termik is taken orally, it gets absorbed into the body to a point of reaching a threshold. According to him this is the point at which the deceased started convulsions. He said that Termik degrades haemoglobin in the blood, making it incapable of carrying oxygen in the system and therefore leading to respiratory arrest. What he did not say is the period it takes from the point of ingestion with Termik to the threshold. This should have helped the Investigator to pin where the deceased was, who she was with and what they did, to find how she might have gotten to take the poison.

50 Even on the basis of circumstantial evidence, on the available evidence, the fact that the deceased had been with the accused persons away from Khala Restraunt from about 22:00 hours to the time she died, cannot lead to the conclusion that the accused persons and no one else purposely gave her Termik. There could be suspicions against the accused persons with regard to the death of the deceased, but as submitted by Counsel for the 4<sup>th</sup> accused, a suspicion however strong cannot be used as a basis for a conviction. *Mtama vs. Rep*, 10 MLR, 15. I would add, even for purposes of finding a case against an accused person sufficient to require him to defend, not a suspicion.

51 I therefore find that no case has been made out against the accused persons in this case sufficiently to require them make their defence. They are acquitted.

52 Delivered in open court at Lilongwe this 19<sup>th</sup> day of August 2020.

T.R. Ligowe  
**JUDGE**