



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY
HOMICIDE CASE NO. 11 OF 2018
REPUBLIC
VS
MISOZI CHARLES CHANTHUNYA

CORAM: THE HONOURABLE JUSTICE CHINANGWA
Dr. Kayuni, Masanjala, Malunda Counsel for the State
Michael Goba Chipeta, Counsel for Accused
Nyirenda, Court Clerk and Official Interpreter
Chirombo, Court Reporter

JUDGEMENT

1. Introduction

The accused was charged with three offences. On the first count the accused was charged with the offence of murder contrary to section 209 of the Penal Code. It was alleged that on or about 4th August 2010 at Monkey Bay in Mangochi district, with malice aforethought, the accused caused the death of Linda Gasu. On the second count the accused was charged with the offence of hindering burial of a dead body contrary to section 131 of the Penal Code. It was alleged that on or about 4th August 2010 at Monkey Bay in Mangochi district, the accused unlawfully hindered the burial of the

dead body of Linda Gasas. On the third count, the accused was charged with the offence of perjury contrary to section 101 of the Penal Code. It was alleged that on or about 17th August 2010 at Soche Police in Blantyre district, the accused knowingly gave false testimony touching on the missing of Linda Gasas which was material to the question of the murder of the said Linda Gasas.

The state paraded eleven witnesses and tendered nineteen exhibits. These were pictures of the hole that was dug at the request of the accused (Exhibit P1); picture of Mwala Lodge entrance (Exhibit P2); pictures of the room in which the body of Linda Gasas was exhumed (Exhibit P3 to Exhibit P5); picture of the dead body of Linda Gasas at varying angles (Exhibit P6 to Exhibit P8); video recording of the exhumation process (Exhibit P9); Misozi Chanthunyas call log (Exhibit P10); Jessie Kachales call log (Exhibit P11), Linda Gasas call log (Exhibit P12); preliminary postmortem reports (Exhibit P13 to P14); Misozi Chanthunyas reply to his caution statement (Exhibit P15); Misozi Chanthunyas medical report (Exhibit P16); Misozi Chanthunyas statement (Exhibit P17); Immigration exit schedule (Exhibit 18) and Linda Gasas student permit (Exhibit 19).

At the close of the prosecution case the court did enter a finding of a case to answer on all three counts under **section 254 of the Criminal Procedure and Evidence Code**. The accused exercised his right to remain silent and did not call any witnesses. This court thus has to determine whether the State has proved its case beyond reasonable doubt.

2. The Burden and Standard of Proof.

It is a settled principle in criminal law that the burden of proof in criminal cases lies on the State and the standard of proof is that beyond reasonable doubt. Legally the States duty to prove the charges beyond reasonable doubt still exists even where the accused remains silent. What then is 'proof beyond reasonable doubt'? In **Nyasulu and others v Rep** [2008] MLR 243 (SCA), the case

of *Rep v Banda* [1962-70] ALR (Mal) 96 was applied in which the court adopted Denning J.'s dictum in *Miller v Ministry of Pensions* 2 (1947) All ER 372 at 373 on what is meant by the expression "beyond reasonable doubt". Denning J, stated that:

"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 a 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." Below is the evidence which will be subjected to this test.

3. The Evidence

The **first prosecution witness** was Jessie Kachale, a relation to Linda Gasa. She stated that on 4th August 2010 she was with Linda Gasa at Chichiri Mall. At around 10 am Linda Gasa received a call from Misozi Chanthunya, and Linda Gasa told her that she wanted to meet Misozi Chanthunya in Nyambabwe. Linda Gasa did leave for Nyambadwe. Thereafter, on the same day, Linda Gasa telephoned Jessie Kachale thrice at around lunch hour ; 3pm and 5pm. Linda Gasa communicated that she was leaving for MonkeyBay with Misozi Chanthunya to his cottage; that the issue about the pregnancy was resolved as Misozi Chanthunya had given her a cytotec pill to abort the pregnancy; that Misozi Chanthunya had bought her a plane ticket to Zimbabwe on 5th August 2010 and that she was safe with Misozi Chanthunya in Monkey Bay at the Chanthunya Cottage. Jessie Kachale had known about Linda Gasa being pregnant having taken her relation for a scan.

On 5th August 2010, Linda Gasa family in Zimbabwe, informed Jessie Kachale that Linda Gasa had not arrived on the scheduled flights from Malawi. After two days, Jessie Kachale and her other

family members in Malawi began a search for Linda Gasá by reporting the matter to Soche police in Blantyre. On two occasions Misozi Chanthunya was called to the police and asked the whereabouts of Linda Gasá. His response was that he had left Linda Gasá at Wenela Bus depot on her trip to Zimbabwe. Jessie Kachale and her family members personally got involved in the investigations. They obtained a search warrant from Soche Police; travelled to Airtel Malawi in Lilongwe and obtained call logs; travelled to Mangochi and MonkeyBay in search of Misozi Chanthunyas cottage. When they arrived at the cottage in the company of police, they noticed that the cottage was spring cleaned and a sitting room and bathroom in the house seemed to have fresh cement on the floor. A couple of weeks after their return, Officer Jailosi informed them that he had a tip off and were digging the bathroom floor. When a dead body was found, Jessie Kachale and her family members were invited to identify the dead body. They identified the body as that of Linda Gasá because she had an operation on the right toe; a birth mark on one side of her stomach and the hair style which she had on Jessie Kachale had made it for her. After a medical examination, the body of Linda Gasá was flown to Zimbabwe for burial.

In cross examination Jessie Kachale stated that she did not see Misozi Chanthunya with Linda Gasá together on 4th August 2010; she did not hear Misozi Chanthunya insist that he meet Linda Gasá in Nyambadwe; that she did not see Misozi Chanthunya and Linda Gasá leaving for MonkeyBay; that she did not know who conducted the pregnancy scan; that she could not prove the father of the pregnancy through a scan but DNA; that she did not see Misozi Chanthunya take Linda Gasá to a hospital nor see him give Linda Gasá cytotec pills; that she did not get a medical specialist to prove that the pills Linda Gasá had were cytotec pills for an abortion; that she did not see Misozi Chanthunya buy an airticket for Linda Gasá; that she did not know the procedure of obtaining a search warrant and that she did not see Misozi Chanthunya kill anyone.

In re examination Jessie Kachale stated that the search warrants were obtained by the police; that Linda Gasu had informed her that her airticket was bought online ; and that Linda decided she wanted to go and stay in Zimbabwe to have her baby and not remove it.

The **second prosecution witness** was Chikumbutso Bwana. He stated the Misozi Chanthunya worker, Liabunya, approached him and told him that his boss would like to employ him. At this time, Misozi Chanthunya was in his car, a black two seater. Then Chikumbutso Bwana joined Misozi Chanthunya in the car where he found a hoe and shovel. The two went to Mwalaoyera where Misozi Chanthunya identified a place where Chikumbutso Bwana should dig a hole 1 metre long, 1 meter deep and 1 meter wide so that he could mine stone. Chikumbutso Bwana started digging in the presence of Misozi Chanthunya. He could not finish doing so because the place he was digging was hard. Misozi Chanthunya beckoned Chikumbutso Bwana to continue as he left to fetch bottles of water for him to drink. This was to no avail. Misozi Chanthunya then asked Christopher Bwana where he could find a soft place. In response he said such a place would be found near the river. The two then boarded the car and Chikumbutso Bwana was dropped off and given Mk2,000.

In cross examination the witness stated that he could not remember the month the events he narrated took place; that he was arrested in relation to the matter before this court and was released on bail.

He added that he never saw the accused kill Linda Gasu.

The witness was not re-examined.

The **third prosecution witness** was Stain Khonje. He stated that he met Misozi Chanthunya in the company of his worker Liabunya in the year 2010. Misozi Chanthunya had told him that he wanted to hire his boat. At an agreed fee, the two went on a boat ride. Stain Khonje taught Misozi Chanthunya how to drive the boat at his request.

In cross examination the witness stated that Misozi Chanthunya was hiring and learning to drive the boat so that he could show case his skill to his visitors the following day. On this particular day, which he could not remember, the two were alone in the boat. He added that Misozi Chanthunya had successfully used the anchor in the boat by himself. He further added that he never saw Misozi Chanthunya kill Linda Gasa nor did he see him with a dead body.

In re examination the witness stated that the events happened in the year 2010 whilst he was in the company of Misozi Chanthunya.

The **fourth prosecution witness** was Major Kandondolo, a night watchman employed by Misozi Chanthunya. He stated that in August 2010, he started work at 5pm and he saw Misozi Chanthunya's car, a black two seater. At around 8pm Misozi Chanthunya came out of the cottage with a woman whom he did not recognize. At around 10 or 11 at night Misozi Chanthunya came back alone and called the guard to go and buy drinks. On his way back he saw Misozi Chanthunya normally carrying a big bag from the car to the house. Later Misozi Chanthunya left the premise saying the place was dark there being no electricity. In the morning Major Kadondolo was off duty. On his return, Yohanne Liabunya, a fellow worker, told him that Misozi Chanthunya was at the cottage during the time he was on off duty; that Misozi Chanthunya came with two men whose names he did not know; that he was asked to carry bricks and put at the door and not enter the cottage. Later police officers arrived at the cottage and asked if he had seen the lady in a photograph he was shown. The premises were searched. The events disturbed Major Kandondolo and he resigned from his work and was arrested.

In cross examination the witness stated that on the material day in August 2010, he saw Misozi Chanthunya leave in his car with a person he could not recognize as it was dark; that he did not see Misozi Chanthunya instruct Liabunya to carry bricks and not enter the cottage; that he did not see Misozi Chanthunya come with two people nor did he see them working in the cottage. He added that on his arrest he was not shown a warrant of arrest; he was not beaten but was afraid. After one and a half months he was granted bail.

In re- examination, the witness stated that, he has never appeared in this court as an accused person.

The **fifth prosecution witness** was McDonald Kachule, an Immigration Officer. He stated that on 28th August 2010 at Mwanza Border, he was approached by Constable Adams. He was in the company of other officers who wanted to check the name of Linda Gasu in their records. Regarding the time at which busses pass at the border he added that, most busses going to Zimbabwe pass the boarder at 8 or 9 in the morning. When the bus arrives at the border, responsible officers sit at their tables checking and dating the passports and enter information in the exit schedule for Malawians. For persons who have foreign passports they are given an exit card to fill and their passports are dated. After checking the passports the passengers go back to the bus then a final check is done on all passports then the bus leaves. He further added that at that time the name, Linda Gasu was found in the exit schedule but the exit card was not there. When he was informed that the exit card was not available he believed something fishy happened. In normal circumstances, when the exit schedule is full, it is removed and put in the carton. When the carton is full, it is dispatched to Blantyre.

In cross examination the witness stated that he was told that the name Linda Gasu did not appear on the Mozambique side and the exit card was not available. He added that he could not know whether anyone checked the carton which was sent to Blantyre or which officer had done something fishy

on the exit card. He further added that he did not know the accused nor did he see her kill Linda Gasa.

In re-examination the witness reiterated that the exit card and schedule go together because the information was the same.

The **sixth prosecution witness** was Mzee Lajabu, an Immigration Officer. He stated that on 25 and 26 August 2010, he received a phone call from Oscar Simfukwe, a clearing agent at Mwanza boarder. He asked him to check if the exit schedule recorded the name Linda Gasa. He checked from 4th August up to 28th August 2010 and then told Oscar Simfukwe that the name Linda Gasa was not available. He added that Oscar Simfukwe wanted her name to be there but only the first name of Linda was found. Later he was asked to add the name Linda Gasa on the list of those exiting Malawi. He refused and said that that was not possible because when a person is exiting Malawi the serial number and permit number had to be recorded. He further added that he did not know why Mr Simfukwe made such a request.

In cross examination the witness stated that he did not know the accused person; that the accused was not present when Oscar Simfukwe made his request and that she did not see the accused kill Linda Gasa.

Nothing was said in re-examination.

The **seventh prosecution witness**, Oscar Simfukwe, a Custom Clearing Agent at Mwanza Boarder. He stated that on 28th August 2010 Richard Kachitingo, a businessman called him by phone and asked him to inquire from Immigration Office if Linda Gasa had passed through the border. He went to the Immigration Office and met Mr. Lajabu. He was told that the information cannot be given to

anybody without official permission and was advised to go to the Police. He communicated the same to Richard Kachitingo.

In cross examination he added that he did not know the accused person and he did not see the accused person kill Linda Gasu.

Nothing was said in re-examination.

The **eighth prosecution witness** was Senior Superintendent Detective Munthali, of Criminal Homicide Department. He stated that on 15th September, 2010 he was in the company of Officer Jailosi and other personnel, investigating the death of a lady Linda Gasu in Monkey Bay at Mwala Lodge . A body was found in a bathroom buried about a meter deep and his role was to record a video and take photographs which he presented in court. He added that the whole process took a place on 15th and 16th September 2010.

In cross examination, the witness added that there was no evidence to show that the accused buried the body at the place it was found; that there was no evidence to show that the accused killed the deceased; that he did not verify who was the owner Mwala Cottage through deeds but the accused took them there; and that the deceased body was taken to Blantyre without any stop over enroute.

In re examination the witness further added that, his role was to record and keep the recordings for court proceedings.

The **ninth prosecution witness** was Jacqueline Phiri, a Liaison Officer at Airtel. She explained that call logs show numbers, time, date and places where a person is. The witness had before her call logs of Misozi Chanthunya on number 0999955123; of Jessie Kachale on number 0993602526 and of Linda Gasu on number 0993740649. To begin, in her verbatim testimony on Misozi Chanthunyas

call log, Jacqueline Phiri, stated that '...from 03:08 the accused made a call to 01594098. This was at MonkeyBay. Then he called 0888988044. At this time he was at MonkeyBay. Then he called 0999558633 whilst at Monkeybay. Then a call came from 0999558633. It came from CI. Then he called 0999558630 from MonkeyBay. He called the same number again. Then he called 0884279460 while at MonkeyBay. These calls were made on 4th August 2010. They were both incoming and outgoing calls. The owner of the phone was in MonkeyBay'.

Regarding the call log for Jessie Kachale, the witness went on to state that, 'At 1 am Jessie Kachale received a call from 0999249972 from Development house. Then Jessie Kachale called 0999549970 from Chichiri. Then Jessie Kachale received from Naperi a call from 0999607992. Jessie Kachale called from Development House to 0999607990. Then Jessie Kachale received a call 0993740649 from Monkey -Bay at 5:08am on 4th August 2010. After that Jessie Kachale called 0993740649 from New Naperi and Jessie Kachale called the same number whilst she was at Naperi'.

Regarding the call log for Linda Gasa, the witness stated that, "at 3 Linda Gasa received a call from 0993602526, that person was at Development House. After that she received a call but the person was in Monkey-Bay. This shows that Linda Gasa and Jessie Kachale were communicating on 4th August and time was 5:08 and 3:08. The location was at Development house for Jessie Kachale and MonkeyBay for Linda Gasa'.

In cross examination the witness stated that 'once a call log is produced there is no way one can remove some data. The person who worked on the 2010 system passed on as such she had limited knowledge on how the 2010 system worked. I did not produce the call logs in 2010 and would not know if the call logs were tampered with. On 4th August Misozi Chanthunya called Linda Gasa once at 12:08 from Magalasi. I do not know if it is 12:08 am or pm. On Linda Gasa call log there is no outgoing call log to Misozi Chanthunya. I do not know who removed it. If this is correct, I do not know who added Misozi Chanthunyas number. Linda Gasa called Jessie Kachale three times on 4th

August 2010. This was at 8 past 8 at Chichiri; eight past 11 at Magalasi and eight past 3 at MonkeyBay. If Linda Gasa called Jessie Kachale three times then Jessie Kachale should have three corresponding incoming calls from Linda Gasa. On the call log of Jessie Kachale she received two calls at 8 past 5 am from MonkeyBay and at 8 past 5. The third call is not showing on Jessie Kachales call log. I would not know who removed the 3rd call. I would not know who added the third call on Linda Gasa call log. I wouldnot know who indicated these calls from Linda Gasa's call log to have been 8 past 8 in the morning, eight past 11 am and eight past 3 in the morning. I would not know who indicated the same time and indicated eight past 5 am on Jessie's call log. I would not know who did the discrepancies. On Misozi Chanthunyas call log the time does not show am or pm. Jessie Kachales call log shows am and pm. I would not know why there is a discrepancy. The duration of calls is captured in minutes. I am not sure whether the duration of the call is in minutes or seconds because I said the system present now is different from that of 2010. If we assume the duration is in seconds, the call from MonkeyBays at 3:08 shows 136 seconds that call should have gone more than 2 minutes. If that particular call had gone for more than for 2 minutes and it was made at 3:08, the next call cannot come at 3:08 again. I cannot explain why the next call came at the same time at 3:08. I cannot be in a position to say whether the locations that are shown on the call logs are correct and whether they are not tampered'.

In re examination the witness stated that, "The system used in 2010 was different because the system now shows the time clearly. The call log is generated by putting the number in the system and it gives all the information concerning that number like time, sim number, serial number, location. The current cannot be tampered with. I do not know what was happening to the system of 2010. The one who generated these call logs passed on. I do not know the office which produced the call logs at that time. A call log is merely printed out from the system as produced by the system. The call logs were produced in 2010'.

The **tenth prosecution witness** was Doctor Dзамалала, a Pathologist at College Medicine with over 20 years experience. Regarding the postmortem he conducted in this case he stated that , the postmortem was conducted around 17th September 2010 on the body of a young lady 25 year old Miss Linda Gasа as identified by the police and relatives. It was the finding of Doctor Dзамалала that the cause of death was poisoning and smothering. The poison found in the body was carbamate. The stab wounds found on the body were 4 in total, two in chest and two in the abdomen. These according to the Doctor were wounds inflicted after death and were not fresh wounds.

In cross examination the witness added that, he did not do the carbamate tests but these were done at the Ministry of Agriculture Central Veterinary which is the only lab testing on poison, pesticides. He added that he did not know Linda Gasа; that he did not know who ministered the poison to her and that at the time of death the fetus in the deceased body was not there nor was there any evidence of how the fetus was removed. He added that he was not present when the body was exhumed at MonkeyBay nor when it was being transported. If anything was done to the body during its transfer there would be fresh wounds, which would be very clear. He further added that the examination did not show who killed Linda Gasа nor did he see the accused kill Linda Gasа.

In re examination the witness stated that, the deceased had been pregnant but at the time of death that pregnancy was not there; that the stab wounds were inflicted after death and that the cause of death was poisoning as primary cause and secondary cause of death was suffocation.

The **eleventh prosecution witness** was Senior Superintendent Jailosi former Head of Homicide Investigation. He stated that on 18th August 2010 Jessie Kachale reported at Soche Police that Linda Gasа went missing on 4th August 2010 after being picked up by her boyfriend Misozi Charles

Chanthunya. After the report was made the Blantyre Police and Soche Police officers started the investigation of the missing of Linda Gasas. Then on 7th September, 2010 he left Lilongwe for Blantyre to see the progress of the case into the missing of Linda Gasas. He was informed that a search warrant to obtain call logs from Airtel was obtained and call logs were obtained; that Misozi Chanthunya was called to Soche Police for questioning and an ordinary statement from him was obtained; that information was received that Linda Gasas crossed Mwanza boarder enroute to her home in Zimbabwe and that a search on the boarder records of Mozambique and Zimbabwe revealed that Linda Gasas name was not recorded. Senior Superintendent Jailosi took over investigations and proceeded to verify the findings. At Mwanza Border he found that, an immigration officer had recorded that Linda Gasas had crossed Mwanza border enroute to Zimbabwe. He noted from the records that each line was supposed to have one name but in this case there were two names, but the other one could hardly be seen but below that there was recorded Linda Gasas, Zimbabwean Lady. The original copy was missing from the file. Investigations revealed that it was George Felix Mission, an Immigration officer, who had endorsed on the exit schedule.

He then led a team to Monkey Bay, Mwala Cottage to search the premises. Some leads were also followed that is of Chikumbutso Bwana who was hired to dig a hole in the forest of Mwalaoyera Oyela; Stain Khonje from whom the accused hired a boat to sail in Lake Malawi at night unfortunately there were heavy winds; Isaac Phakameya, who went to College of Accountancy to check if Linda Gasas was reporting for school and who went to Immigration headquarters to check if Linda Gasas had valid documents to stay in Malawi as a Zimbabwe national. The investigation team had confirmed the information from the leads they had. After obtaining a search warrant, a search on Mwala Cottage commenced on 15th September 2010. The team had received a tip to search a room that was freshly cemented as that was the place where Linda was entombed or buried. After digging through the concrete a body was found wrapped a duvet. After preliminary medical examinations on the body at the scene, the body was transferred to Blantyre for postmortem

examination. The postmortem results submitted by Dr Dzamalala revealed that the cause of death was poisoning and smothering. In between the accused had fled the country and was only brought back to Malawi on 1st April 2018. On 3rd April 2018 the scene of the crime was revisited in the company of the accused and they found it was reconstructed to its original state. The accused exercised his right to remain silent when he was charged and cautioned for the offence of murder. However prior to that, an ordinary statement recorded by Misozi Chanthunya in response to the missing of Linda Gasu was secured. Misozi Chanthunya signed the same on 17th September, 2010. In his statement, the accused records that he gave Linda Gasu US\$ 300 to assist her during her travel. Several arrests were also made including that of Chikumbutso Bwana; Issac Phakameya and George Felix Mission.

In cross examination the witness added that, he did not see the accused kill Linda Gasu. ; that he did not know how the search warrant in this case was obtained; that he did not see Misozi Chanthunya hire Chikumbutso Bwana to dig a hole nor see him hire a boat from Stain Khonje; that he didn't see Isaac Phakameya with Misozi Chanthunya go to College of Accountancy and Immigration; that the investigation team did not inform a coroner before the search was commenced; that he was not present when the accused left the country; that the documents found at the border were not made by the accused and that he wouldn't know who caused the original documents at the boarder to go missing.

In re examination the witness added that the coroner was not informed because the aim of visiting Mwala Cottage was to search; that there was no endorsement on the other side of the Malawian Boarder meaning Linda Gasu did not go to Zimbabwe as alleged.

4. Issue for Determination.

This court has to determine first whether the offences of murder; hindering burial of a dead body and perjury contrary to sections 209, 131 and 101 of the Penal Code were committed. And secondly whether the offence were committed by the accused. These will be dealt with in turn.

a) Murder

The accused has been charged with the offence of murder contrary to section 209 of the Penal Code. This section provides that 'any person who of malice aforethought causes the death of another person by an unlawful act or omission shall be guilty of murder'. Thus the essential elements of murder are that—

- (a) there must be death of a person;
- (b) the death must be caused by the accused; and
- (c) such death must be caused unlawfully and with malice aforethought

I will inturn analyze the elements of the offence of murder in view of the evidence by the prosecution.

(a) there must be death of a person

From the evidence adduced before this court it was not disputed that Linda Gasa was killed and her body was discovered buried in the bathroom floor of the cottage in MonkeyBay. The body was identified by Jessie Kachale after the body was dug from where it was buried. There is no other evidence disputing that the body that was found was not of Linda Gasa. As to the cause of death, the expert testimony of Dr Dzamalala records that Linda Gasa was killed through poisoning followed with smothering. Therefore this element was proved beyond reasonable doubt.

(b) the death must be caused by the accused;

The second element pertains to the identity of the person who caused the death. The prosecution position was that it was the accused person who caused the death. They have proffered evidence to prove this position. The defence argues that the accused person did not cause the death of the accused person.

It must be pointed out at the onset of this analysis that there was no direct visual evidence of anyone who saw Linda Gasu being killed by the accused person. What is before the court is circumstantial evidence. There is a plethora of cases in which murder cases have been decided on circumstantial evidence. Where a case rests on circumstantial evidence, it is the duty of the prosecution to convince the court that the evidence is not capable of any other inference than the guilt of the appellant: **Viyaviya v The Republic [2002–2003] MLR 423 (SCA)**. The High Court gave guidance on dealing with circumstantial evidence in **Nyamizinga v R [1971-72] ALR Mal, 259** Chatsika J stated that :*“Since it is circumstantial evidence it must lead to no other conclusion but the guilt of the accused. In **Dickson v R. (I)** Cram,J. in dealing with circumstantial evidence, held as follows (1961-63 ALR Mal. At 260):“... [W]here the evidence is circumstantial the accepted and logical approach is by way of elimination, that is by negating all possible hypotheses of innocence... In order to justify from the circumstantial evidence an inference of guilt the facts must be in compatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of these inferences from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”*

In **Samanyika V Republic**, Criminal Appeal Number 33 of 2002 (unreported) page 2, **Mwangulu J** state that *“Concerning circumstantial evidence, the burden of proof operates at two levels important for proof of guilt. First, the prosecution must establish beyond reasonable doubt the*

*facts for the court's inference of guilt. Consequently, the prosecution fails to discharge the burden always on it to prove guilt beyond reasonable doubt by not proving beyond reasonable doubt facts it wants the court to infer guilt. On the other hand, although established to requisite standard, proven facts may be insufficient to establish guilt beyond reasonable doubt. The Supreme Court of Appeal in **Jailosi v Republic (1966-68) ALR (Mal) 494** stated that each link in the chain of evidence must be unassailable and the cumulative effect must be inconsistent with any rational conclusion other than guilt. In **Nyamizinga v Republic (1971-72) ALR (Mal) 258** this Court held that the prosecution must establish beyond reasonable doubt that guilt is the only inference. In **Director of Public Prosecutions v Kilbourne [1973] AC 729 at 758**, Lord Simon said circumstantial evidence 'works by cumulatively, in geometric progression, eliminating other possibilities.'*

Therefore, in considering the circumstantial evidence proffered by the prosecution the court will be guided by the guidance given in the above cited cases which sets the correct approach for handling such evidence. From the evidence before the court there are two inferences that emerge. First, that the deceased boarded a bus enroute to Zimbabwe through Mwanza Boarder post, through Mozambique to Zimbabwe. Second, that she travelled from Blantyre with the accused person to Monkebay where she was killed by the accused person and buried under the bathroom concrete floor of the cottage belonging to the accused person. Both inferences are supported by circumstantial evidence which the court will deal with.

The evidence supporting the inference that she travelled to Zimbabwe by bus is inferred from the following circumstantial evidence :

- i. Her name appears in the immigration documents at Mwanza border post showing her exiting Malawi by road to Mozambique thereafter to Zimbabwe,

- ii. The accused person made such an allegation in his ordinary statement given to the police ;

This inference has the following shortfalls which raise very serious questions of its veracity:

- i. There was no corresponding entry records at the Mozambique border showing that she entered Mozambique from Mwanza border,
- ii. There was no further entry record at the Zimbabwe entry border post showing that she entered Zimbabwe as per this inference,
- iii. Further no person confirmed to have seen her from the time she is alleged to have boarded the bus to Mwanza to Mozambique and to Zimbabwe,
- iv. Further the evidence on the investigations at Mwanza border post reveal that some fraudulent activities were the reason the name appears on the list of persons exiting Malawi, and that most likely the name was added to simply conceal the true events of what occurred,
- v. The call logs that were submitted do not support or show that at the times she was making the calls she was anywhere near or enroute to Mwanza , Mozambique or even Zimbabwe,
- vi. Further her body was found in Monkeybay and not in Mozambique or Zimbabwe as should have been the case if this inference is to be believed,

From the above analysis the circumstantial evidence considered cumulatively, in geometric progression, does not support the inference beyond reasonable doubt that the deceased left Malawi travelling to Zimbabwe through Mwanza border post. Further the evidence leaves it open to other plausible possibilities which it fails to eliminate. Therefore it is a finding of this court based on the evidence before it that the deceased did not travel by road to Zimbabwe through Mwanza border post.

This leaves the court with the second inference which is premised on the following circumstantial evidence :

- i. Jessie Kachale gave the deceased transport money to go to Nyambadwe where she said she was to meet with the accused person;
- ii. Jessie Kachale received communication on her mobile number from the deceased mobile number that she was leaving for MonkeyBay with the accused person to the accused persons cottage,
- iii. Jessie Kachale received communication through phone from the deceased using her mobile number informing her that she was in MonkeyBay with the accused at the accused cottage.
- iv. Major Kandodolo, the night guard, saw the accused person leave the cottage in Monkebay with a lady.
- v. Later that night Major Kandodolo saw the accused person return alone to the cottage and the accused person insisted that the guard goes out to buy drinks even through according to the guard the accused was well aware and the guard also told him that all the shops would be closed at that time of the night. The accused person insisted the guard leave and the guard left.
- vi. On returning the guard saw the accused person carrying a bag from the car into the cottage. This is the very cottage in which the deceased body was later found. Later at around midnight the accused person left explaining that there was no electricity,
- vii. The accused was the last person to have been in the company of the deceased before her death: **Binny Thifu v Rep** [2008] MLR 18 (SCA)
- viii. Chikumbutso Bwana was asked to dig a hole by the accused on the allegation that he wanted to mine stone but the witness failed as the ground was hard with rock. There is no plausible

- reason of what minerals were to be mined, what expertise Chikumbutso Bwana had in mining, and further the size of the hole to be dug raises questions on the mining venture,
- ix. Stain Khonje was asked by the accused to teach him how to drive his boat on pretext that he had visitors whom he wanted to show off to. There is no further information on the visitors, who they were, whether they actually come or whether indeed they existed at all,
 - x. the call logs show the location of the accused person and deceased to have been in MonkeyBay around the time of her death,
 - xi. The deceased body was found buried in the cottage of the accused or at the cottage where the deceased told Jessie Kachale, she was going with the accused person, the same cottage the guard saw the accused enter into with the lady and later saw him carrying a bag into the cottage,
 - xii. A visitation to the deceased school where she was studying and also Immigration Office at after Linda Gasas died raises questions as to the intention of such visits. The death of Linda Gasas was being covered up
 - xiii. When investigations started into her disappearance, he left the jurisdiction and only returned to stand trial through extradition.

The defence in cross examination sought to cast some doubt on the above inference by raising the following issues amongst others:

- i. the number of incoming call registered on the receivers call log were in some cases not corresponding with the number of outgoing calls on the callers call log;
- ii. whether a particular call was made in the morning or afternoon was sparingly recorded on the call logs as time was merely recorded using digits not 'am' or 'pm';

- iii. the duration of a call did not tally with the time at which two consecutive calls were made,
- iv. the witnesses were not specific on dates and month when the events they testified of took place.

It would be pertinent that the court at this stage discusses the issue on call log and what value the call log evidence has in this matter as circumstantial evidence. It is the case of **Republic v Mvula (2012) Criminal Appeal number 7 (MSCA) (unreported)** on page 11 the Supreme Court stated that a call log is simply evidence of a log of call which does not show the contents of the calls. The court accepted them as circumstantial evidence though not unilateral evidence upon which a court can base a finding of the guilt of an accused person. A similar view was also expressed in The Supreme Court in **Kumwembe et al v R Miscellaneous Criminal Appeal 5B of 2017**, Mwangulu, JA cautioned on reliance on call logs as unilateral evidence of the guilt of an accused person. From the two cases it is clear that call logs can be admitted as part of circumstantial evidence however not to be relied upon as the sole evidence upon which to base a finding of guilty of an accused person.

With the above in the mind the court notes that the presence of the accused person and the deceased in Monkeybay is corroborated by the finding of her dead body, the testimony of the first accused person based on her firsthand account of what, where and with whom the deceased said she was with and was going and had arrived at. The call logs of both the accused person and that of the deceased do locate them in Monkeybay within the time leading to her death. These facts are not disputed by any other evidence. Therefore though the call logs have some discrepancies the court having cautioned itself on unilateral reliance on them proceed with

caution to admit the call logs as circumstantial evidence corroborating the presence of the accused person and the deceased person in Monkeybay at the time of her death.

The court must now turn to the issue of the memory of the witnesses as to specific dates and time of the events which they testified of. The defence in many instances asked most the witnesses to be specific on dates and month when the events they spoke of took place. It is on record that the alleged murder took place in or around August 2010. The hearing of witnesses commenced 10 years later in 2020. There was no indication that the witnesses were telling lies or being untruthful but simply that they could not recall with precision the dates or time. Of course this is to be expected that after 10 years certain details would not be recollected to precise specificity. This present case can be distinguished with the case of **Purmessur v Rep [1993] 16(1) MLR 458 (HC)** where it was held that the credibility of a witness cannot be impeached for telling a lie in respect of one aspect as it does not mean that whole of witness's evidence is also a lie. The faltering of memories after some time does not equate to a lie such as to impinge the credibility of the witnesses. In this case most of the witnesses could not just remember the exact dates the events took place. Surely in 10 years memories would falter. However the court found that the witnesses memories on what happened remained vivid. Their credibility run through during cross examination. Their responses were succinct and corroborated the testimonies of each other to present one coherent version of the events which lead to the death of the deceased. Therefore this court, despite the perceived lack of some specificity concludes that they were credible witnesses.

The totality of the circumstantial evidence considered cumulatively, in geometric progression, support the inference that the deceased left Blantyre with the accused person travelling to Monkeybay to a cottage owned or used by the accused person, that while at the cottage the

accused person was involved in the killing or causing of death of the deceased and later made efforts to disguise her death or the fact of his involvement in her death through among other concealing her body in the bathroom of the cottage in which they stayed, making a false story that she had travelled outside Malawi to Zimbabwe through Mwanza border post and eventually when it appeared that investigations were disproving his version of the events he left the jurisdiction to evade justice. This version eliminates any other reasonable inference beyond reasonable doubt and proves beyond reasonable doubt that it was the accused person that killed the deceased or was the one directly involved in her cause of death.

(c) such death must be caused unlawfully and with malice aforethought

In **Nyasulu and others v Rep [2008] MLR 243 (SCA)**. Malice aforethought is deemed to be established by evidence proving that the accused had an intention to cause the death to a person: section 212 (a) of the Penal Code, whether such person is the person actually killed or not.

This court having established that it was the accused that caused the death of the deceased the court must now determine whether the accused caused her death unlawfully and with malice aforethought.

The evidence before the court shows and demonstrates the length to which the accused person went to plan her disappearance through death, concealing all the evidence of where her body was buried and the fact of his involvement in her death. Jessie Kachale testified that Linda Gasu was pregnant and this was confirmed with the medical findings presented by the Dr Dzamalala. Second, around the same period the deceased went missing, the accused had asked Chikumbutso Bwana to dig a hole with given specifications to mine stone; third Stain Khonje was asked to teach the accused to sail a boat. Further Major Kandodolo, the night guard, was sent away on the pretext to buy drinks even when it was evident the shops were closed at that time and the manner in which the body was

concealed in concrete. All this demonstrates premeditation on the part of the accused to carry out the murder of the deceased. The premeditation establishes a deliberate intention on the part of the accused person to cause the death of the deceased and eventually cause her death. This court finds that this element was established by the prosecution beyond reasonable doubt.

Of course like with any sophisticated murders, carefully planned, meticulously executed, expertly concealed, diversionary tactics deployed to divert discovery of the crime and those responsible there will be other inferences that the perpetrators would have sown to cast doubt on their involvement. However in the present matter the other inferences are eliminable or eliminated leaving only one inference which has been proved beyond reasonable doubt which is that it was the accused person that killed the deceased or was the one directly involved in her death having been the last person known to be with her and there being no explanation of where or with whom she went after being in contact with the accused.

It is the finding of this Court concerning circumstantial evidence, the prosecution has discharged the burden of proof by establishing beyond reasonable doubt the facts for the court's inference of the guilt of the accused person on this charge and proving the facts insufficiently to the requisite standard. The link in the chain of evidence has been unassailably, cumulatively and consistently proven leading to only one rational conclusion of the guilt of the accused person.

It must be pointed out in conclusion as a reminder that "*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 ... the case is proved beyond reasonable doubt....*" per Denning J in **Miller v Minister of Pensions [1947] 2 ALLER 372.**

It is therefore the finding of this court that the charge of murder has been proved beyond reasonable doubt and the accused is convicted of the same.

b) Hindering the burial of a dead body

This offence has been provided for under section 131 of the Penal Code which provides that : .

Whoever unlawfully hinders the burial of the dead body of any person, or without lawful authority in that behalf disinters, dissects, or harms the dead body of any person or, being under a duty to cause the dead body of any person to be buried, fails to perform such duty, shall be guilty of a misdemeanour.

In this section the word "burial" means burial in earth, interment or any other form of sepulture, or the cremation or any other mode of disposal of a dead body and "buried" has a corresponding meaning.

The elements of the offence requires that :

- i. There must be dead body,
- ii. Burial of the dead body should be hindered,
- iii. The accused must be the one who hindered the burial
- iv. This must be unlawful.

On the first part, it has not been disputed in this case that there was a dead body and that the dead body was of Linda Gasa. On the second part, the definition of 'burial' has been given to mean burial in earth. The word 'hinder' can be given its natural grammatical because it is plain and unambiguous word: **Royal International Insurance Holdings Ltd v Gemini Holdings Ltd and another** [1998]

MLR 318 (SCA). Hindering simply means to obstruct. It is not in dispute that the body of Linda Gasu was found buried under thick concrete in the bathroom of the cottage belonging to the accused. This burial does not qualify as a form of burial envisaged under section 131 of the Penal Code but rather an intentional concealment of a dead body to hinder its lawful burial. A lawful burial would for example be a burial such as at a legally designated place of burial as provided under **section 113 of the Public Health Act**. In **R v Hunter, MacKinder, and Atkinson [1974] 1 QB 95**, the accused persons were found guilty of preventing a burial for hiding a dead body under paving stones. A person cannot be buried anywhere. This court finds that by the body being found buried in a bathroom floor under thick concrete, burial of the body of Linda Gasu was hindered.

The next question is who hindered the burial of the body of Linda Gasu? The accused was not seen burying Linda Gasu. The circumstantial evidence that leads to the guilt of the accused is that : Linda Gasu was with the accused on 4th August as per the accused statement recorded by himself on 17th August 2010; Linda Gasu was with the accused person in MonkeyBay on 4th August 2010 at the accused cottage as confirmed by the location of the two on their call logs and corroborated by Jessie Kachale who was informed by Linda Gasu that she was with the accused at his cottage; the night guard, Major Kandodolo, had seen the accused with a lady, who this court finds is Linda Gasu as she was taken to the cottage by the accused as explained above; the accused left the cottage with Linda Gasu as evidenced by the night guard, Major Kandodolo and never returned with her alive; the accused person sent the night guard, Major Kandodolo to buy drinks at almost midnight between 10 and 11pm; the accused person had asked Chikumbutso Bwana to dig a pit to mine quarry; the accused person had hired a boat to take the his friends on a sail and Linda Gasu was found buried in the cottage bathroom floor. Considering these facts in isolation may lead one to think the accused was not involved as painted throughout the cross examination of State witnesses. However, the totality of these facts lead to one conclusion as discussed in the preceeding part and that is to the guilt of the accused. Why would the accused make sure he is alone in the late night by sending the

night guard away and later decides to leave the premises because there is no electricity? Was the accused really in the mining business? Was the accused really bringing in friends to show case that he could sail a boat? Why did the accused carry a big bag? Moving on, as pointed in the discussion of the circumstantial evidence in the preceding part, this Court has found that it was the accused who caused the death of the deceased. The evidence explained above shows that there was lots of effort taken by the accused to conceal the body leading to the finding that burial of Linda Gasa was hindered by the accused. Again we should not forget that "*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 ... the case is proved beyond reasonable doubt....*" per Denning J in **Miller v Minister of Pensions [1947] 2 ALLER 372**. This court finds that the charge of hindering the burial of a dead body has been proved by the prosecution beyond reasonable doubt. The Court therefore convicts the accused as charged.

c) Perjury

The offence of perjury is provided for under section 101 of the Penal Code. It reads as follows:

(1) Any person who, in any judicial proceeding, or for the purpose of instituting any judicial proceeding, knowingly gives false testimony touching any matter which is material to any question then depending in that proceeding or intended to be raised in that proceeding, shall be guilty of the misdemeanour termed perjury.

It is immaterial whether the testimony is given on oath or in any other manner authorized by law.

The forms and ceremonies used in administering the oath or in otherwise binding the person giving the testimony to speak the truth are immaterial, if he assents to the forms and ceremonies actually used.

It is immaterial whether the false testimony is given orally or in writing.

It is immaterial whether the court or tribunal is properly constituted, or is held in the proper place or not, if it actually acts as a court or tribunal in the proceeding in which the testimony is given.

It is immaterial whether the person who gives the testimony is a competent witness or not, or whether the testimony is admissible in the proceeding or not.

The elements of the offence that can be gathered from this section are that

- a) there must be a judicial proceeding or an intended judicial proceeding
- b) a person must knowingly give false testimony material to a proceeding or intended proceeding

It is argued by the State that the accused gave false testimony touching on the missing of Linda Gasa which was material to the question of the murder of the said Linda Gasa. The statement that the accused person gave to the police on 17th september 2010 reads as follows:

"I recall that it was on 4th August 2010 that I spoke to Linda Gasa when she asked me to give her a lift from her place of residence in Nyambadwe. She was to depart for Zimbabwe that day if transportation would be available or the following day as she mentioned. I arrived at her place of residence in Nyambadwe between 11 o'clock and 12 o'clock on the 4th of August to assist her with a lift to BP Service Station opposite Wenela Bus stop because of the number of bags she had to carry. I also gave her US\$ 300 to assist her during her travel at the same time. Since that day she has not been in contact with me. I am also told she has not been in touch with her friends or relations and

this has caused me and them great concern. She was wearing a black sweater and tight fitting blue jeans on the day I gave her the lift to BP service Station. She had long black braided hair. She is light skin in complexion and of medium build. She mentioned that she would be visiting her sister in Zimbabwe for sometime and was not sure of or when she would return to Malawi.

Signed

Misozi Chanthunya

17th September 2010

I declare that this statement is true to the best of my knowledge and belief and I know that if it is tendered in evidence I shall be liable to prosecution if I willfully state in it anything which I know to be false or believe it not to be true

Signed

Misozi Chanthunya

17 September 2010

Having the foregoing statement in mind which was recorded by the accused himself, it is noted that the accused told the police on oath or in a form which was binding upon him to speak the truth that he had left Linda Gasa at Wenela Bus depot on 4th August 2010 at around lunch hour while fully knowing that this was a lie. This statement is untrue for several reasons, without going into the detail of what the court has already stated in this judgment on its finding on the true version of events leading to her death and his involvement in the same.

First Jessie kachale was informed by Linda Gasa that she was leaving with the accused for Mangochi on 4th August 2010; secondly the call log of Linda Gasa and the accused show that they were in Monkeybay on 4th August 2010; thirdly, the dead body of Linda Gasa was found in the accused

family cottage. This means Linda Gasa never left for Zimbabwe. As observed above Linda Gasa was taken from Blantyre to MonkeyBay by the accused and she never returned back alive. At the time the accused was making the statement and the declaration as to its truthfulness he was well aware that he was telling a lie, as he was in MOnkeyBay with the deceased on the material day. Though aware of this he proceeded to make a declaration of the truthfulness of the statement. The accused person was aware that the statement was to being gathered by the prosecution as part of the evidence for the purpose of instituting criminal judicial proceeding related to the death or disappearance of Linda Gasa by the mere fact that he acknowledged the same in closing in his statement; that by the police inviting him to give the statement, the police are mandated at law to commence judicial proceedings where they find during their instigations that a crime has been committed: **section 83 of the Criminal Procedure and Evidence Code**. The defence has argued that the statement ought to have been tendered by the police officer who was present at its recording. The court notes that the accused was the author of the statement having recorded it himself. The veracity of the contents of the statement are not in issue as in circumstances where a statement is recorded by a police officer. In the later scenario it is important to call the author to explain the contents recorded. In this case the author, the accused, was in court. There was no miscarriage of justice in this case. The accused by his statement knowingly gave false testimony which statement touched on matters which he was aware were material or were to be raised in that intended criminal proceeding. Therefore the court finds that the charge of perjury has been proved beyond reasonable doubt.

d) Other Observations

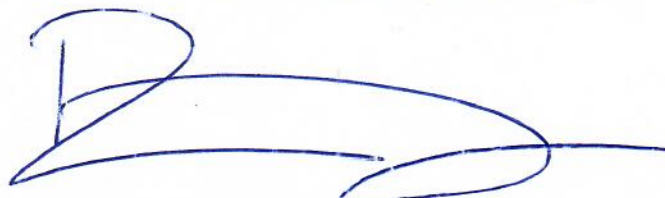
In this part the court will generally discuss the objections raised by the defence relating to the inadmissibility of evidence illegally obtained evidence. The defence argues that the process of obtaining search warrant; absence of the involvement of a coroner; procedure of exhumation

amongst other procedures taken during the investigation of the matter and presented in evidence were illegal. This court is of the view that **section 3 of the Criminal Procedure and Evidence Code** would apply in this matter to cure the procedural defects. It is imperative that substantial justice should be done without undue regard for technicality. We should not loose sight of the fact that a dead body was found. This dead body was found in the accused cottage. The accused was the last person with the deceased alive on 4th August as per his statement. The gist of criminal law is to find whether a crime has been committed and find out who committed the crime without a miscarriage of justice within the cardinal right to fair trial. The question is should the whole case be thrown out because a coroner was not involved and body was exhumed 'illegally'? Has there been a gross miscarriage of justice in the gathering of evidence?. Totally not. This court finds that the procedural issues raised by the defence are technical in nature and are cured by the given law.

5. Findings

The court finds that the state has proved the guilt of the accused on all three counts. The accused is found guilty and convicted of the offence of murder contrary to section 209 of the Penal Code; hindering the burial of a dead body contrary to section 131 of the Penal Code and perjury contrary to section 101 of the Penal Code.

Pronounced this 27th day of August 2020 at Zomba



R.M CHINANGWA

JUDGE



**REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY
HOMICIDE CASE NO. 11 OF 2018**

**REPUBLIC
VS
MISOZI CHARLES CHANTHUNYA**

**CORAM: THE HONOURABLE JUSTICE CHINANGWA
Dr. Kayuni, Masanjala, Malunda Counsel for the State
Michael Goba Chipeta, Counsel for Accused
Nyirenda, Court Clerk and Official Interpreter
Chirombo, Court Reporter**

SENTENCE

1. Introduction

The convict was charged and convicted with three offences namely murder contrary to section 209 of the Penal Code; hindering burial of a dead bod contrary to section 131 of the Penal Code and perjury contrary to section 101 of the Penal Code.

The brief facts are that the convict murdered Linda Gasu. The medical reports submitted recorded that the deceased was poisoned; smothered and stabbed four times. She was then buried in the bathroom of a family cottage and the convict lied about the whereabouts of Linda Gasu on being interrogated by the police. The evidence revealed that the convict had attempted to have her buried in a hole but all digging efforts failed. He also had attempted to dump her in the lake but nature failed him.

2. Submissions on Aggravating and Mitigating factors

Written submissions were made by both Counsel whereby the State argued with reasons for a life sentence whilst the accused person argued for a given term with reasons. Below is a summary of the submission.

In mitigation the convict through Counsel prayed for a 10 year sentence arguing that the accused is a first offender; that he spent 7 years in pretrial custody in South Africa; the conviction was based on circumstantial evidence and did not show a clear motive; the accused is not a threat and there is no likelihood of him committing violence.

On the other hand the State prayed for life imprisonment arguing that the killing of Linda Gasas was unprovoked and in cold blood; by the convict whom the deceased trusted; the killing was premeditated; the convict never showed any remorse throughout the trial; and the deceased family have been traumatized beyond their imagination as they learnt of and pursued justice for the murder of Linda Gasas, a child, a sister and a friend to many.

3. Analysis of Law

The offence of murder carries a maximum sentence of death; whilst the offence of hindering burial of dead body carries a maximum sentence of a fine or two years imprisonment and perjury attracts a maximum of 7 years. In arriving at the appropriate sentence the court has to examine both the mitigating and aggravating factors. "This will always involve a consideration of the extent and the circumstances in which the crime was committed, the personal circumstances of the defendant, the impact of the crime on the victim and the public's interest in the prevention of crime": **Rep v Nazombe** [1997] 2 MLR 105 (HC).

Both parties have made submissions citing case authorities regarding which way the sentence should tip. Attached to the State's submission were the sentiments of the family of the deceased to help the court arrive at the appropriate sentence under **section 260 of the Criminal Procedure and Evidence Code**. The death sentence for murder offence was not in issue on account of the extradition agreement between Malawi and South Africa relating to the convict.

On the extent and circumstances in which the crime was committed, this court agrees with the State that the offence of murder was committed in cold blood and premeditated. Linda Gasas was lured away to Monkey Bay, by her 'lover' a person she trusted, where she met her fate. She was poisoned, then smothered; and stabbed 4 times. This shows that the convict wanted to ensure that Linda Gasas was really dead. This was gruesome. Linda Gasas had no chance of survival as all four methods used to kill her were lethal in themselves. The convict was simply heartless and he portrayed the character of a beast. Her burial in thick concrete was meant to conceal her death from her family who loved her. The accused could then not tell the truth of Linda Gasas whereabouts despite being the last person who had been with her alive.

On the personal circumstances of the accused this court finds that there was nothing substantial that was submitted that would count in mitigation. The convict is in perfect health and of sound mind there being no medical evidence to the contrary.

On the impact of the crime on the victim's family, the written submissions of family members says it all. Words cannot express their pain. To the convict she was his prey. To her family Linda Gasas was loved for who she was. Their faith in God is helping them pull through the ordeal of the unexpected loss of their child, sister and all that she was to the family.

On the last part that a sentence should address the public's interest in the prevention of crime, this tells of the deterring factor that sentences should address much as the convict is being rehabilitated. This court is also aware of the need in having uniformity of sentences for similar matters though not every case would be the same: **The State v Stephano Dzonzi et al** Criminal Case No 41 of 2018 (HC) (unreported).

There is a plethora of cases in recent past where the courts have ordered life sentences, to mention the Stephano Dzonzi Case cited above. This court is inclined to ordering a life sentence for murder because of the gruesome nature the crime was committed. On the offence of hindering a dead body, though the offence is a misdemeanor, the manner in which the body was disposed off, buried under concrete, was simply to have no trace of the victim anywhere. The burial spot was private property. This means no one would easily have found the victim as access to the said premise would be an issue and secondly digging into one's private property would be another hurdle. Any disposal of a dead body to completely remove every trace of a crime should call for a maximum term. On the offence of perjury, this court notes that the

offence in this case is a serious one as the lie was told to enforcement officers during the course of investigations. The convict being human, simply displayed what every human being would do to evade the consequences of his actions, that is lie. A short and sharp sentence would be appropriate to rehabilitate the convict and also deter others.

Other Observations

This court echo's the sentiments of the court in **The State v Stephano Dzonzi et al** Criminal Case No 41 of 2018 (HC) (unreported) on whether being a first offender would really count as a mitigating factor in grave crimes. Certainly not. This school of thought is not novel and is good laws. The Georgia First Offender Act (O.C.G.A section 42-8-60) clearly states who is eligible to plead that they are first time offender. These include those who are not charged with a serious violent felony; those who are not charged with a serious sexual offence etc. This means being a first offender does and should not automatically entitle one to leniency. Horrendous crimes should attract a sentence that befits the crime. This is such a case. It is only in such a case that the sentence would achieve the balance explained in the **Nazombe case** cited above.

On whether the sentences should run consecutively or concurrently and on whether the sentence should consider the pretrial custody time, it was held in **Kumwenda v Rep** [1993] 16(1) MLR 233 (SCA) that it was only in rare instances that consecutive sentences for one or more offences based on the same transaction would be allowed. This was where the court felt the need to protect the public against the offender or where it was deemed necessary to deter other would-be offenders. It was further held that where an offender has been detained in prison for a long time prior to his trial and passing of sentence, a sentencing court may order such sentence of imprisonment to commence on the day on which he was arrested. In this case the court finds that the offences happened in one transaction as the convict tried to conceal the death of Linda Gasa by lying and hiding her body after killing her. In addition the gruesome manner in which the murder was executed can only attract a life sentence and ordering consecutive sentences on all three counts would be for academic purposes. Further this court notes that the accused was in South Africa before he was charged for offence of murder. He orchestrated his stay in South Africa and now cannot plead for mercy on that account.

On whether the conviction was based on circumstantial evidence and no show clear motive was established, it's this courts view that this is a matter for appeal and not a mitigating factor on sentence.

On the issue of the convict not being a threat and there being no likelihood of him committing violence, this court notes that the victim's wife did obtain a protection order against the convict's violent behavior during the course of the trial. This shows the violent nature the convict has in addition to what he has already displayed in this gruesome murder. Besides this, this argument does not fall within a mitigating factor for the offences herein: see **Boipelo Prudence Leboa-Chanthunya v Misozi Chanthunya** before Principal Resident Magistrate sitting in Blantyre Civil Cause Number 451 of 2019.

On whether the convict should be kept at Chichiri Prison, this court finds that there is no exceptional circumstance shown in this court within the law as to why the convict should be treated differently from all other convicts. As such he will be treated as all other convicts.

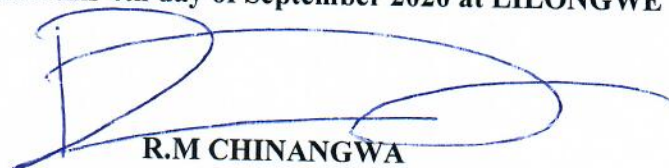
4. Order

The accused is sentenced to

- a) Life imprisonment for murder contrary to section 209 of the Penal Code.
- b) 2 year's imprisonment for hindering the burial of a dead body contrary to section 131 of the Penal Code.
- c) 2 year's imprisonment with hard labour for perjury contrary to section 101 of the Penal Code.

The sentences are to run concurrently from the date of conviction.

Pronounced this 4th day of September 2020 at LILONGWE



R.M CHINANGWA

JUDGE