



**IN THE HIGH COURT OF MALAWI  
ZOMBA REGISTRY  
CRIMINAL CAUSE NO 14 OF 2018**

**BETWEEN:**

**REPUBLIC**

**- VERSUS -**

**KENNETH MOSES.....1<sup>ST</sup> ACCUSED PERSON**  
**STEVEN LIPIYASI.....2<sup>ND</sup> ACCUSED PERSON**  
**ULEMU MWANGOMBA.....3<sup>RD</sup> ACCUSED PERSON**  
**HERBERT MALONI.....4<sup>TH</sup> ACCUSED PERSON**  
**MADALITSO SAULOSI.....5<sup>TH</sup> ACCUSED PERSON**  
**HANIWELL KAPOTA.....6<sup>TH</sup> ACCUSED PERSON**  
**LESTON MAFUSO.....7<sup>TH</sup> ACCUSED PERSON**  
**JUSSAB SAITON NGOZO.....8<sup>TH</sup> ACCUSED PERSON**  
**DU GEOFFREY MKWAILA.....9<sup>TH</sup> ACCUSED PERSON**  
**FRANCISCO KAMTSITSI.....10<sup>TH</sup> ACCUSED PERSON**  
**MANUEL MASTER.....11<sup>TH</sup> ACCUSED PERSON**

**CORAM : HON. JUSTICE PROF. KAPINDU**

Messrs Malunda & Masanjala, of Counsel for the State,

Mr. Majekete, Ms. Mfuni-Chikaipa, of Counsel for the Defendants

Mr. Banda, Official Interpreter

Mrs. L. Mboga, Court Reporter

**JUDGMENT**

KAPINDU, J

1. The accused persons herein stand jointly and severally charged with the offence of murder, contrary to Section 209 of the Penal Code (Cap 7:01 of the Laws of Malawi).
2. The particulars of the charge averred that the accused persons herein, with malice aforethought, on or about the 24<sup>th</sup> day of May, 2016, caused the death of Fletcher Masina (the Deceased person) at Zintambira Village in Ntcheu district. The deceased person was a person with albinism.
3. The first and 4<sup>th</sup> accused persons already pleaded guilty and were convicted on their own respective pleas of guilt.
4. Regrettably, and on a sad note, towards the end of last year (2020), the Court was informed of the demise of the 4<sup>th</sup> accused person, Mr. Herbert Maloni, who was reportedly found dead outside Ntcheu Prison. This is a matter that needs thorough investigation by the Police and Prison authorities if this has not been done yet, and more importantly, an inquest must be conducted into the death of the deceased person by

the Coroner at Ntcheu Magistrate Court, in accordance with the Inquests Act (Cap 4:02 of the Laws of Malawi), in order to legally establish the cause and circumstances of the death of the 4<sup>th</sup> accused person, and for the said Coroner to make any appropriate recommendations as may be necessary. Section 6 of the Inquests Act makes it clear that the holding of such an inquest is mandatory. The section provides that:

Notwithstanding anything contained in this Act, whenever any prisoner, or any person in custody, or any patient in a mental hospital, shall die from any cause whatsoever, a coroner of the district in which such death has occurred shall hold an inquest.

5. Failure by the State to cause an inquest to be conducted by a Coroner in any and every case where a prisoner or person in custody dies, from any cause, would constitute a breach of this law. It is therefore imperative that the same be conducted with speed.
6. That said, in view of the demise of the 4<sup>th</sup> accused person, the case against him herein is therefore hereby permanently abated by reason of such death.
7. Thus, under the circumstances, the 1<sup>st</sup> accused person remains to be the one who is still awaiting his sentencing by the Court. The Court had decided that the 1<sup>st</sup> and 4<sup>th</sup> accused persons would be sentenced after the judgment on liability regarding the other accused persons is rendered.
8. All the remaining nine accused persons pleaded not guilty to the charge. The matter against them therefore proceeded to full trial. The State proceeded to adduce evidence that sought to establish their guilt.

9. After all the prosecution's evidence had been heard, the Court found the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> accused persons with no case to answer and therefore acquitted them in terms of section 254(1) of the Criminal Procedure and Evidence Code (Cap 8:01) (CP & EC). The Court proceeded to find the 2<sup>nd</sup>, 3<sup>rd</sup>, 10<sup>th</sup> and 11<sup>th</sup> accused persons with a case to answer, pursuant to the provisions of section 254(2) of the CP & EC.
10. The present judgment therefore relates to the 2<sup>nd</sup>, 3<sup>rd</sup>, 10<sup>th</sup> and 11<sup>th</sup> accused persons herein, namely:
- (a) Mr. Steven Lipiyasi (also known as Phungwako);
  - (b) Mr. Ulemu Mwangomba;
  - (c) Mr. Francisco Kamtsitsi; and
  - (d) Mr. Manuel Master, respectively.
11. The issue for determination as regards the four is whether they are guilty of the murder of the deceased person herein, the late Mr. Fletcher Masina. The Court now proceeds to examine the evidence that was led by both the prosecution and the defence, starting with the prosecution's evidence.
12. The 1<sup>st</sup> prosecution witness (PW1) was the deceased person's widow, Mrs. Tabitha Fletcher Masina. She testified that she had been married to the deceased person for 11 years. She stated that they had 4 children together and that the children were still young. She told the Court that the oldest is a girl aged 13 years old and the last a four year old boy.
13. PW1 explained the events of 24<sup>th</sup> May, 2016. She explained how, in the afternoon of that day, she left her husband at the garden as he wanted to check on the crops. She was surprised when she noted that time was passing and he was not coming back home as usual.

14. At about 7 pm she went to ask at his relatives' place and they were also surprised as he was not there either. They went to the garden. They found his tools. They also found his clothes soaked in blood behind a stream. They concluded that he might have been killed. They started searching for the body but because it was dark, they did not find his body and they went back to the village.
15. Early in the morning on the following day, a bigger search group went to the garden again. They found Mr. Masina's dead body lying in a bush and it was badly damaged. When asked during examination in chief whether she observed anything on the dead body, she stated that they never allowed her to see the dead body because of the state that it was in. She was not cross-examined.
16. PW2 was Melisiya Mayeso from Zintambira Village in Ntcheu. She mentioned that she was the wife of the 8<sup>th</sup> accused person, Jussab Saiton Ngozo. PW2 had previously given a Statement under caution to the Police where she stated that she had discovered in the house that one of her husband's shirts, a white shirt, had been soaked in blood. She had stated in the statement that when she asked him about the blood-soaked shirt, he stated that he had been bleeding. She told the police that she suspected that her husband might have been involved in the death of Fletcher Masina. She signed the statement by writing out her name.
17. However during her oral testimony in Court, she evidently renounced the evidence contained in her Caution Statement. She stated that she told the Police that contrary to what was contained in the Caution Statement, she knew nothing about the matter. State Counsel sought permission to refresh her memory by showing her a copy of the Statement that she gave to the Police. She categorically disowned the statement and stated that she was completely illiterate and that she did

not know how to read or write. She stated that she could only thumbprint and the writing on the Statement was therefore not hers.

18. PW2 also flatly denied the contents of the Statement. State Counsel sought an adjournment to talk to the witness which request was granted. When she returned however, she continued to deny knowledge of anything connected with the death of the late Masina or the alleged blood-soaked white shirt.

19. Counsel for the State applied to have PW2 declared a hostile witness under Section 230 of the Criminal Procedure and Evidence Code. The prayer was granted. She however maintained her version. She mentioned that she had four children.

20. The Court, throughout her testimony, carefully observed the demeanour of PW2. She struck the Court as a very dishonest witness. The Court at that stage sought to confirm PW2's allegation that she was completely illiterate. The Court asked whether she had ever enrolled in school. She answered in the affirmative and stated, after a rather long pause, that she had studied up to Standard 3. Asked whether at Standard 3 she could not even write out her own name, she reiterated her position that she could not. When the Court asked whether any of her former school teachers were around, she answered forcefully that all her former teachers were dead. When the Court informed her that perjury is an offence and intimated that it would adjourn to confirm this position with education authorities, PW2 quickly changed her story, with a straight face, and said no, now she had just remembered that her former teachers were still alive. The Court concludes that PW2's credibility as a witness was completely discredited and this Court will attach no weight whatsoever to her oral testimony.

21. PW3 was Kenneth Moses, the first accused person herein, who had earlier pleaded guilty and was convicted on his own plea. Kenneth Moses told the Court that it was him, along with Herbert Maloni, Ulemu

Mwangomba and Steven Lipiyasi who were responsible for the killing of the late Fletcher Masina. He was emphatic that it was one Sergeant Mizere, a Malawi Defence Force (MDF) service man, who gave him instructions to find a person with albinism, have him killed and get his private parts and bones.

22. PW3 described Sergeant Mizere as someone he had known for a long time as they lived together in Salima, and that he (PW3) once worked for him in a shop. He stated that one day, after sometime had passed without the two meeting, he fortuitously met Sergeant Mizere at Golomoti. He stated that Sergeant Mizere pulled him aside and asked him what he was currently doing. He told him that he was just engaged in various piece works. Thereupon, according to PW3, Sergeant Mizere told him that he had a job for him. He explained that he wanted PW3 to get him bones of a person with albinism. He told him that the deal would involve a lot of money – that he would be paid MK40 million.
23. PW3 stated that he expressed discomfort as it was not in his nature to kill a person and that he had never done so before. However, he stated that Mizere encouraged him to go ahead. PW3 stated that the amount of MK40 million that he was promised for him if he brought the body parts of a person with albinism was very tempting, but also that the thought of killing a human being bothered him alot.
24. He stated that he then met Mr. Lipiyasi, the 2<sup>nd</sup> accused person herein, whom they also call “Phungwako”. The 2<sup>nd</sup> accused person was operating a motorcycle taxi business (Kabaza). PW3 stated that he explained to Mr. Lipiyasi what Sergeant Mizere had just told him. He stated that since he was young and Mr. Lipiyasi was an older man, he sought advice from Mr. Lipiyasi.
25. According to PW3, Mr. Lipiyasi was immediately taken up by the story and he thought it was a great opportunity to make money. He told PW3 to keep the matter a secret. He told PW3 he would find him some

brave young men to assist him do the job because PW3 appeared to be too prayerful.

26. Later, Mr. Lipiyasi called him to his home and introduced PW3 to two men: Herbert Maloni and Ulemu Mwagomba. PW3 stated that Mr. Lipiyasi said the task would not be difficult because there were a number of persons with albinism in the area. They finally settled for Mr. Fletcher Masina, the deceased herein, as their targeted victim.
27. They started off looking for the late Mr. Fletcher Masina. PW3 told the Court that on the way they met PW1, the deceased person's wife and they asked her the whereabouts of her husband. Unsuspectingly, she told them that he was at the dambo garden. This was around 1pm.
28. When they got to the garden, they indeed found the deceased working in the garden. Mr. Lipiyasi at that stage left the three – i.e PW3, Herbert Maloni and Ulemu Mwagomba to proceed to kill the deceased whilst he went to get a motorbike that he would use to carry his bones once they killed him. Mr. Lipiyasi, according to PW3, told them that "*mukalongosola mundiuza*" [when you have things sorted out, you will let me know] which PW3 interpreted to mean that when they were done killing the deceased, they should let him know so that he could come carry the required body parts.
29. PW3 stated that before they killed the deceased, they called Sergeant Mizere again advising him that they had found the person with albinism and they were about to attack him. They asked him to confirm if they were to proceed to kill him. He stated that Sergeant Mizere told him that they should go ahead and kill him.
30. PW3 explained that Ulemu Mwagomba was the first to attack the deceased. He hit him on the head with a hammer and the deceased fell to the ground instantly. Then Herbert Maloni and PW3 joined in assaulting the deceased until he was dead. They took his dead body

close to a stream and they started cutting off his limbs. They cut off the arms, the legs and his private parts. They put the body parts in a sack bag but the private parts were kept separately in a jumbo.

31. PW3 stated that they were quite nervous as it was still afternoon. They then called Mr. Lipiyasi on his phone using Mr. Lipiyasi's wife's phone which he had left behind with them. Mr. Lipiyasi later arrived and he took the sack bag on the motor cycle together with Ulemu Mwagomba who was his worker. PW3 and Herbert Maloni walked to Mr. Lipiyasi's house. PW3 carried the private parts in a plastic bag.
32. PW3 testified that at Mr. Lipiyasi's house, they had discussions around 10 pm. Mr. Lipiyasi said he did not want the body parts in his house and they decided to hide them at Mr. Lipiyasi's dimba (dambo garden).
33. PW3 stated that he then called Sergeant Mizere who instructed him to leave with the private parts at once to deliver them to him at Golomoti that same night. He stated that they finally met Sergeant Mizere at Golomoti, at around 12 midnight on the bus stop on the road to Salima. He stated that himself and Herbert Maloni demanded that they be paid first the initial deposit of MK15 million which they had been promised as part payment before they could produce the body parts.
34. PW3 stated that at that point, Sergeant Mizere produced MK15,000. This, according to PW3, was a trifling amount and it caused a furore at the scene. He stated that Sergeant Mizere sought to explain that the MK15,000 was not part payment but rather it was meant for transport so that they could travel to Salima with the remaining body parts, and that the full payment would be made once the remaining body parts were produced. This, according to PW3, did not please him and Herbert Maloni (the 4<sup>th</sup> accused person). Herbert Maloni angrily threw the MK15000 away and each went their own way.

35. PW3 stated that a few days later, Sergeant Mizere called again. He told PW3 to tell his friend, Herbert, that they should go again to Golomoti where they would now be given the full amount as promised. They subsequently met again at Golomoti and they explained to Sergeant Mizere that they buried the parts at a graveyard. He said there were four people at this stage, Sergeant Mizere, Herbert Maloni, PW3 and someone else whom he did not know. He stated that they finally got the body parts and they started off for Salima in Sergeant Mizere's vehicle where they were told they would be paid.
36. However, PW3 stated, when they arrived at Chipoka roadblock, they met the Police who stopped the car, searched it, found the body parts and were arrested him and Herbert Maloni. This was on 1<sup>st</sup> June, 2016. He stated that he was surprised that only himself and Herbert Maloni were arrested. Sergeant Mizere and the other man were not arrested. Then the Police started beating them and in the process they could not even see how Sergeant Mizere and his friend left the place. They were then taken to Salima Police Station together with the body parts.
37. At the Police station, they were asked where they were taking the body parts to. He stated that they explained that it was Sergeant Mizere who knew where the body parts were going. When asked who else was involved in the killing, they mentioned Mr. Steven Lipiyasi and Ulemu Mwagomba. The Police then proceeded to arrest these two as well.
38. PW3 explained that Sergeant Mizere had explained that it was a friend of his who needed the body parts, but that PW3 did not know the identity of that person.
39. In cross examination, Counsel Majekete pressed PW3 to describe sergeant Mizere in more specific terms. PW3 stated that he could not describe him much better apart from the fact that he was a soldier at

the Parachute Battalion at Salima and that he had once employed him in a shop.

40. PW4 was Herbert Maloni, the 4<sup>th</sup> accused person herein. As explained earlier, he has unfortunately since passed away.

41. PW4 explained that he came from Chalera village in the same area of T/A Chakhumbira in Ntcheu district. His evidence was largely a repetition of PW3's evidence. He explained that Mr. Lipiyasi called him to his house where he also found Ulemu Mwagomba whom he knew as Mr. Lipiyasi's worker. He stated that Mr. Lipiyasi then also called Kenneth Moses.

42. According to PW4, the four of them met inside Mr. Lipiyasi's house. He stated that Mr. Lipiyasi then explained the plan that there was need to kill a person with albinism so that they could get money. When PW4 asked who was going to give them the money, Mr. Lipiyasi said Kenneth Moses would explain and Kenneth Moses explained. PW4 said he needed time to think about this plot and he went back home.

43. PW4 told the Court that after a day, Mr. Lipiyasi called him again telling him that he should go to his house because the programme was now confirmed (meaning the programme to kill Fletcher Masina). He stated that it was Kenneth Moses who identified Fletcher Masina as the target.

44. At the house, he stated that Mr. Lipiyasi took a hammer and a knife and gave them to Ulemu Mwagomba his worker. He stated that on the way, they met a short woman who talked to Kenneth Moses. Kenneth Moses asked her where her husband was and she said he was at the Dimba (dambo garden).

45. PW4 proceeded to state that when they arrived at the garden, before they attacked the deceased, he was a bit hesitant to proceed with

execution of their hatched plan, and he asked Kenneth Moses to call the person who said he wanted the body parts of a person with albinism and that he should put the call on hands-free mode so that he could hear for himself. He stated that Kenneth Moses called and PW4 heard Mizere speaking. He stated that during the call, Mizere said that he wanted arms, legs and private parts.

46. PW4 stated that after hearing what Sergeant Mizere had said, he felt encouraged that the plan was real. He further stated that during the telephone conversation, Mizere confirmed that he would pay them MK40 million. He testified that it was at this stage that they felt emboldened and proceeded into the garden to attack the deceased.

47. PW4 stated that at first Kenneth Moses was hesitant to attack the deceased because the deceased knew him. They then agreed that Ulemu Mwangomba should go first to attack the deceased. He stated that Ulemu Mwangomba hit the deceased with a hammer on the head and then himself (PW4) and Kenneth Moses joined and started hitting the deceased with wooden rods until the deceased died. He stated that they then carried the dead body to another place and Ulemu started cutting off the limbs and the private parts. Ulemu was cutting and PW4 was helping. They then put the body parts in a bag.

48. PW4 then proceeded to essentially repeat the same version narrated by Kenneth Moses, up to the point where they now met Sergeant Mizere at Golomoti around midnight. He stated that Sergeant Mizere had told them that by just delivering the private parts that night, they would receive MK15million. He stated that at Golomoti they waited for a while and then they saw a small white Mercedes Benz. Sergeant Mizere came out. It was his evidence that Sergeant Mizere spoke to Kenneth Moses first and then PW4 joined them.

49. PW4 stated that he was shaking at the time and that Sergeant Mizere assured him not to be afraid. He stated that Mizere was in the

company of another man. Kenneth told PW4 that these were the people he was talking about. He stated that Kenneth Moses took out the private parts and showed them. He stated that they praised them for having done a commendable job. He stated that it was Mizere's friend who received the private parts and threw them into the car. He stated that Sergeant Mizere then produced MK15,000.

50. PW4 stated that he asked what the money was for and he was told that it was just for subsistence. He stated that the two (Mizere and his friend) said that they had to take the parts to the market first and then they would be paid. PW4 said he did not agree to this. He was angry. He said he could not kill a person for MK15,000. He said he told them they had made him commit an offence that he did not want to commit. He said he threw the money away and told them not to call him again because he would kill them. He angrily he took his bike and told Kenneth Moses not to follow him because this is not what they had agreed.

51. He stated that he called Mr. Lipiyasi and told him what had happened. He asked Mr. Lipiyasi to give him the body parts because he felt he was being played. He then took the parts to a graveyard at Mpherekeni and he then traveled to Mangochi. He said he was there for only a day when Kenneth Moses called him again telling him that they would now be given the MK15million. He said he was assured they would get the money.

52. PW4 explained that Mizere came on a different car this time. He also explained that the person he came with the second time was different from the first one. He stated that on the first meeting, Mizere's friend was short, big and stout, whilst on the second meeting, Mizere's friend was slimmer and a bit talkative. He also said that whilst on the first occasion it was Mizere driving, this time it was Mizere's friend driving.

53. PW4 then in essence repeated Kenneth Moses's version, up to their arrest at Chipoka roadblock, what happened at Salima Police where they were interrogated and the subsequent arrest of Steven Lipiyasi and Ulemu Mwagomba.
54. PW4 however also mentioned that whilst at Salima Police Station, the investigators took his phone searching for numbers and names. He said there were numbers that linked him to Mr. Lipiyasi so that he could know what was happening. He said there was also a number for "Dr" Kapota's daughter. He said "Dr" Kapota was a herbalist in the village. During cross-examination, Counsel Majekete asked PW4 what was the connection between "Dr." Kapota and the offence herein and he emphatically stated that there was no connection.
55. It is also worth pointing out that both PW3 and PW4 emphasised that as far as they were concerned, the people that were involved in the conspiracy to kill and who participated in the actual killing of the late Fletcher Masina were Kenneth Moses, Herbert Maloni, Steven Lipiyasi and Ulemu Mwagomba.
56. PW5 was Molisyo Abele. He stated that he comes from Khwekhwelere village in the area of T/A Kachindamoto in Dedza District. He is a 54 year old man. He stated that he knew three people among the 11 accused persons. He identified Manuel Masitala (the 11<sup>th</sup> accused person); Francisco Kamtsitsi (the 10<sup>th</sup> accused person), and Don Mkwaila (the 9<sup>th</sup> accused person). He stated that he has a shop in his village and he sells soap, clothes and beer. He stated that two young men, Manuel Masitala and Francisco Kamtsitsi used to come to his shop to drink beer.
57. PW5 stated that when late Fletcher Masina died, after one day, Manuel Masitala came to his shop at around 7pm. He started drinking beer. Sometime after 8pm, Francisco Kamtsitsi came and joined him. They were drinking beer at the veranda of the shop. He stated that at

about 12 pm Masitala started crying. He said Francisco was asking Manuel Masitala why he wanted to cry. He stated that Manuel said that he was very scared about what had happened, the death of the young man. He stated that Francisco then asked him if he was aware that they were at a shop which was also close to a busy road. He told him that he could get arrested. He said that Masitala said that even if he were arrested, he would reveal what he knew. He said that Masitala also said that from that day he would never eat pork.

58. PW5 stated that Francisco left the place crying and that Manuel also left sobbing. He testified that this is what he heard. He stated that when he heard the two young men having this discussion, he knew they were talking about late Masina because he was the only person who had recently been killed around the area.

59. PW6 was a Police investigator, Superintendent Arnold Sikumbiri who is currently Officer-in-Charge of Jenda Police Post. He stated that on 30 May 2016, whilst working at Salima Police Station, he received information that the informant was being offered bones of a person with albinism for sale. He stated that both the Officer in Charge and the Station Officer were out so he advised the informant to come again on the following day, 31 May 2016.

60. The following day the informant told the Station Officer that he was in contact with someone at Golomoti. He stated that they then engaged the person at Golomoti by assuring him that both the market and the cash were ready. He said they engaged a civilian vehicle and gave it to the informant whilst his team was monitoring at Chipoka Roadblock.

61. He said that at about 16 hours, the civilian vehicle approached. It was stopped, searched and the bones were indeed recovered from the two suspects. He stated that they were somehow cooperative as it was clear that the bones belonged to them. He stated that upon being

interrogated, they both admitted to having killed the deceased, and that they also mentioned that there was a person called Steven Lipiyasi Phungwako and his employee who looked after his cattle. He said management released resources and they travelled and got the other two suspects arrested. He stated that they admitted having killed the deceased.

62. PW6 stated that the four arrested accused persons also revealed that they had sentry men whose names were Manuel Kapota, Leston Mafuwa and Madalitso Sailesi. He said that the Police were led to their houses and arrested them.

63. PW6 stated that there were also Francisco Kamtsitsi and Jussab Ngozo who had earlier been picked by Ntcheu Police Station based on their own information and engagements.

64. During cross-examination, Counsel Mfuni-Chikaipa pressed on PW6 to state the name of the informant at Salima. He mentioned that the informant was Sergeant Mizere. He also clarified that the person he referred to as Leston Mafuwa was Leston Mafuso.

65. PW6 further clarified that whilst the State had taken a Statement from Sergeant Mizere, the same had not been included as part of the disclosures.

66. I must pause here and immediately say that the Court was very surprised as to why a statement from such an important witness, whose name has featured prominently in evidence in the instant case, was not included as part of the disclosures that the State made. It is also significant to mention that Counsel Masanjala explained to the Court that the Witness Statement from Sergeant Mizere was recorded after trial had already commenced on 25 February 2019. He stated that the Statement of Sergeant Mr. Mizere was given to the prosecution on the

same day that Statements were recorded from Kenneth Moses and Herbert Maloni.

67. Counsel Masanjala stated that having examined Sergeant Mizere's statement, it was materially the same as the evidence of PW6 and that the State therefore took a prosecutorial decision not to include the evidence of Sergeant Mizere.

68. The Court is mindful that it is up to the prosecution to determine which witnesses to call or not to call. The Court's opinion however is that it would have been proper for Sergeant Mizere to have been called to testify and be cross-examined in the present proceedings as a person who took a prominent part in matters concerning the case before the Court. He would also have been afforded an opportunity to perhaps clear his name through his own testimony, considering that the evidence of PW3 and PW4 was potentially incriminating on him.

69. I must also mention that in this regard, the Court considered the propriety of using its own powers to call Sergeant Mizere as a witness in terms of section 201(1) of the Criminal Procedure and Evidence Code, under the circumstances. However, the Court felt restrained in view of the guidance given to courts by the Supreme Court of Appeal in the case of **Maxwell Namata -vs - Republic**, MSCA criminal Appeal No. 13 of 2015, where the Court made a number of pertinent remarks regarding the exercise of the power of the Court to call witnesses under section 201(1) of the CP & EC. The Supreme Court of Appeal stated as follows:

While we do not want to sit here and pretend to interpret what the State was at, it is obvious that the State was not keen on Mr. Kandoje. It was sure it could get by without his testimony. That explains its decision not to include him on its list of witnesses from the word go. Secondly, we remind ourselves

that in Malawi, it is for the prosecution to prosecute. How they do that is their business as long as they abide by the law and best practice. There is therefore no denying the fact that it is for the prosecution, and with the greatest respect, never for the trial court, to decide when to close their case.

70. The court cited the case of ***R vs Damson*** 1923-60 ALR Mal 526 at 527, where Spencer-Wilkinson CJ said:

it must be left to the prosecuting officer to decide when he will close his case and he must take the responsibility if at that stage there is insufficient evidence to support a conviction.

71. The Supreme Court of Appeal then proceeded to state that:

A trial Court can only resort to section 201 where it is essential to the just decision of the case, is in the interests of justice, and does not amount to the court taking over the prosecution of the case... we are of the view that section 201(1) must, except for very cogent reasons which must appear on record, be resorted to not just sparingly, but most preferably before the prosecution has closed its case. Exactly when between the start of the case and the closure of the prosecution's case is up in the air. Suffice it to say that if we allowed a trial court to liberally resort to section 201(1), more so after the close of the prosecution's case, an impression would be created that the trial court is reopening the state's case with a view to patching it up. A circumstance in which a trial court should never find itself...

72. The Supreme Court of Appeal went on to elucidate on how, in its view, section 201(1) of the CP & EC is to be invoked:

So when can a Trial Court resort to section 201? And how does it go about doing so? On the face of it section 201 (1) suggests that a Trial Court can resort to section 201 at any stage of a trial. With respect *at any stage* cannot, literally, mean *at any stage*. It would, for instance, not be a very clever Trial Court that called its own witness as PW1. It would be a similar Court that called its own witness[es] notwithstanding an accused person's decision to exercise their right to silence and not to call witnesses. That would be an unjustifiable interference with the accused person's right to silence and not to call witnesses. It is also improper for a Trial Court to merely inform the parties that it will call a witness of its own and thereafter proceed to do so. Rather it should notify the parties of its intention to do so, the reasons therefor which should be recorded and give the parties a chance to say their bit on whether or not the court should so proceed. Then and only then should the Court rule which way it wants to go. This not only provides ample evidence of fairness, independence, impartiality and transparency it also allows a superior court sitting on appeal or review to understand why the Trial Court proceeded like it did and to decide whether or not to agree with such course of action. In the matter before us the Trial Court only thought of calling its own witness after the State had closed its case. It never said, on record or otherwise, whether that was

in the interests of justice or essential for the just decision of the case. It actually gave no reason[s] for doing what it did.

73. It is very clear in the present matter that the State deliberately chose to keep Sergeant Mizere's Statement, and indeed his evidence, to itself. It was part of the prosecution's strategy in prosecuting the matter. Thus Sergeant Mizere's purported statement was never furnished to the Court and to the defence by way of disclosure. Therefore, at this stage, all the Court knows is that the statement was made but the Court has no idea what Sergeant Mizere states in it.

74. The Court therefore concluded that since the exclusion of Sergeant Mizere's evidence was a deliberate prosecutorial strategy, if the Court were to proceed to call him to testify, such a prospect would, in all probability, have fallen foul of the guidance provided by the Supreme Court of Appeal in **Namata vs Republic** as conduct amounting to a hijacking of the State's prosecutorial strategy or otherwise seeking to patch up the prosecution's case. The Court therefore decided not to call Sergeant Mizere to come and give evidence in terms of section 201(1) of the CP & EC.

75. The last prosecution witness, PW7, was Detective Sergeant John Semu. It was his evidence that on the 24<sup>th</sup> of May, 2016, Ntcheu Police Station received a complaint from Tabitha Masina that her husband went missing at the garden along Linthumbule River. she reported that he was a person with albinism.

76. It was PW7's evidence that the body of late Fletcher Masina, the deceased person herein, was recovered the following day, on 25 May 2016, near a stream. The arms and legs of the deceased had been removed. The dead body was taken to Ntcheu District Hospital for

postmortem examination. Burial was then ordered and investigations proceeded.

77. He testified that after a few days, Ntcheu Police arrested four suspects. These were brought to Ntcheu police Station for questioning with respect to the information that they had. The suspects thus arrested were: (a) Du Mkwaila; (b) Jussab Ngozo; (c) Francis Kamtsitsi; and (d) Manuel Masitala.

78. PW7 stated that Detective Sergeant John Semu recorded their statements. He proceeded to state that on 1 June, 2016, Ntcheu Police Station received information from Salima Police Station that they had arrested two men who were found with bones of a person with albinism. These two were Kenneth Moses and Herbert Maloni.

79. PW7 stated that they (at Ntcheu Police Station) were informed by Salima Police that upon interrogation, Kenneth Moses and Herbert Maloni explained the whole story as to what happened at Zintambira Village as regards the death of Fletcher Masina and how this might also affect many others.

80. After being found with a case to answer as stated above, Mr. Steven Lipiyasi (also known as Phungwako); Mr. Ulemu Mwangomba; Mr. Francisco Kamtsitsi; and Mr. Manuel Master decided to testify in their own defence.

81. DW1 was Mr. Ulemu Mwangomba. In his evidence, he stated that he “admitted” committing this crime. He went on to say that on the material day, Steven Lipiyasi, Herbert Maloni, Kenneth Moses and himself agreed to kill Fletcher Masina on the following day. However, he stated that his friends proceeded on the same day to go and kill Fletcher Masina in his absence. These were Herbert Maloni and Kenneth Moses.

82. He told the Court that in the evening, Kenneth Moses and Herbert Maloni came to his house which was at Mr. Steven Lipiyasi's house. He stated that they took him on a bicycle to where they had kept the body parts of the deceased. They told him that they had already done the job, and that his duty was to skin the deceased's body. He stated that he performed the task, but he was unaware of where the body parts were to be taken to.
83. DW1 testified that they put the parts in a bag and took it to Mr. Steven Lipiyasi, and that he gave the body parts to Mr. Lipiyasi so that he could keep them. In the morning of the following day, Mr. Lipiyasi told him to go home. He then went back to his home at Chiwembu. He stated that later, on a morning, the Police came to arrest him.
84. He stated that he had no knowledge about the 10<sup>th</sup> and 11<sup>th</sup> accused persons, i.e Mr. Kansitsi and Masitala. He only knew them in prison.
85. During cross-examination, DW1 was asked to confirm that through his lawyers, he had filed a witness statement to the court. He confirmed. DW1's attention was then drawn to paragraph 7 of that Statement, where he stated that he was together with Kenneth Moses and Herbert Maloni, when they killed the deceased person.
86. In his statement dated 19<sup>th</sup> June, 2020, which he made to his legal practitioners from the Legal Aid Bureau, DW1 stated that he had been approached by Herbert Maloni and Steven Lupiyasi who told him that they had found a market for persons with albinism. He stated that they then agreed to kill the deceased herein. He proceeded to state in the statement that Kenneth Moses, Herbert Maloni and himself followed the deceased at his dimba and killed him there. However, DW1 denied that he took part in the killing although he agreed that he was part of the agreement to kill the deceased. He was not re-examined.

87. DW2 was Mr. Steven Lipiyasi. He stated in strong terms that he was not acquainted with Mr. Kenneth Moses, and that it was not true that Kenneth Moses told him anything about this matter. He stated that he knew Herbert Maloni, because sometimes he would drop customers at his village. DW2 told the Court that he does passenger carrying transport on a motorbike (popularly known as Kabaza). He stated that he was also in the business of buying and selling cattle.
88. DW2 testified that Herbert Maloni would inform him whenever there was cattle for sale. He proceeded to state that on this matter, however, it was Herbert Maloni who knows the truth. He proceeded to state that anything that Kenneth Moses and Herbert Maloni said about him was false.
89. DW2 stated that he remembered that on 20<sup>th</sup> May 2016, he was at his house because his motorbike had broken down. At this time he stated that he had just bought 2 mobile phones – one for his wife and the other for his daughter. However, he had not bought sim cards. He stated that he tried to call a friend to try get him sim cards but the number could not be reached. He then called Herbert Maloni and managed to talk to him. He requested Herbert Maloni that if he had money he should buy for him two Airtel sim cards, and that Herbert Maloni agreed. He stated that on the same day, just after 4pm, Herbert Maloni brought the sim cards to his house. He found him alone. He did not stay long. He said farewell and he left back home. He stated that from that day, he never called Mr. Herbert Maloni because he had nothing to say to him.
90. DW2 went on to state that on 24<sup>th</sup> May 2016, he started his motorbike again after it had been repaired. He was at his business place. He stated that he was unaware that his friends had committed an offence. He stated that he could only remember that in 2019, they told the Court that on this day they managed to speak to Sergeant Mizere, and that he did not know Sergeant Mizere. He stated that they

also told the Court that they went to Golomoti but that he knew nothing about this. He stated that they also told the Court that they were in touch with Sergeant Mizere whom they knew and that they, Kenneth Moses and Herbert Maloni, had agreed to do business with Sergeant Mizere; and that they came to his area but he said that they did not tell him and that he knew nothing about this criminal scheme. He further stated that when Kenneth Moses and Herbert Maloni went to Salima, he knew nothing about it.

91. As regards Ulemu Mwangomba, DW2 stated that he knew him when he was buying cattle from his area. He stated that sometimes when he bought cattle, he would hire him for piece work. He would give DW1 money and they would then part ways. He proceeded to state that another year, DW1 married close to his area in Zuze village. He however denied that DW1 was his regular worker.

92. DW2 then stated that on 2<sup>nd</sup> June 2016, whilst he prepared to go to his business, he saw the Police with Herbert Maloni and Kenneth Moses. They arrested him at his house. He stated that this was all that he knew about this matter.

93. During cross-examination, DW2's attention was drawn to his witness statement which was filed with the Court and served on the prosecution by his lawyers. In response to questions connected to his statement, DW2 denied all allegations connected to the death of the late Fletcher Masina, stating that he only discussed sim cards with Herbert Maloni. He stated that although the statement was supposed to reflect what he told his lawyers, some of the things in the statement, in particular those connecting him to the killing of the late Fletcher Masina, were not true.

94. In the statement which he signed and which was filed by his legal practitioners from the Legal Aid Bureau, he clearly stated that around May, 2016, he was approached by Kenneth Moses who informed him

that he had found a market for a person with albinism. He stated in the statement that upon hearing this, he called Herbert Maloni. Herbert Maloni said he had to think about the matter and after a few days, he called Herbert again and Herbert accepted the deal. He stated that he then discussed with Kenneth Moses and Herbert Maloni on how to execute the crime. He stated that he was however not present when the late Fletcher Masina was killed.

95. DW3 was Francisco Kamtsitsi, the 10<sup>th</sup> accused person. He told the Court that it was on 24<sup>th</sup> May 2016 when his village headman received a call from Chief Zintambila that a person had been killed and that they should go to look for the person. He stated that all in the village went out together with the Police to look for the person. He stated that they searched throughout the night but failed. Early in the morning of 25<sup>th</sup> May 2016, they went back to resume the search. They found the body of the dead person on the banks of Linthumbule river.

96. DW3 stated that the police authorized that they take the body to his village, Zintambila. He stated that on the 4<sup>th</sup> day, he went to the grocery of Molosia Abele, where he wanted to buy relish (fish). It was his evidence that when he arrived, he found Manuel Master at the grocery drinking beer. He entered the grocery and bought a beer (mkalabongo) and got out of the grocery. He sat on the veranda (khonde) where he was drinking the beer. Then Manuel Master came to join him. They started chatting. Manuel Master said to him that the manner in which the deceased person had been killed was very dangerous. He then told Master not to say those words because he could be arrested. He stated that Manuel Master told him that he would never eat pork again.

97. He testified that when he finished drinking his beer, he went back home. On 27<sup>th</sup> May, he saw the police come to his home. They arrived at night. They said they had come to arrest him. When he asked them why, they said that it was in connection with the murder of Fletcher Masina; and that this was in view of the words he spoke at the grocery

of Molosia Abele. He told the Police that he did not know anything about the matter. The police still arrested him and took him to Ntcheu Police station.

98. DW4 was Manuel Master, the 11<sup>th</sup> accused person. He stated that on 24<sup>th</sup> May, 2016, he was at his house when he heard their village headman announce that there was a message from Zintambila village that a person had been killed and they should go and help to search for that person because they were failing to find him.
99. He stated that many from the village, including him, left and went to the bush that was being mentioned. They searched until late at night but failed to find the person. In the morning of the following day they went back to continue searching. They were accompanied by the police. They searched until they finally managed to find the body. When they examined the body of the deceased, they noted that the body did not have hands and legs. The deceased person's skin was light – he was a person with albinism. He stated that he was filled with sorrow because since he was born he had never seen anything like that. He stated that the police took the body to his village, at Zintambila village.
100. DW4 told the Court that on 26<sup>th</sup> May 2016 in the morning, he went to the grocery of Molosiyo Abele, where he bought beer and he was drinking. He stated that later, Mr. Francisco Kamtsitsi (DW3) found him, and they were now drinking the beer together. He stated that he then said that the way that the person – the deceased herein, was killed was so dangerous and saddening (m'mene munthu uja anaphedwela ndimochititsa mantha komanso zomvesa chisoni). He stated that Mr. Francisco then said that he should not say such things because people were grieving and that they could arrest him. DW4 stated that with what he saw, from that day he would never eat pork again (ndimmene ndinawonela muja kuyambila lero nyama ya nkhumba sindizadyanso). He told the Court that he stated this because of the deep sorrow and

grief from what he saw at the scene. He told the Court that he did not say what he said because he knew who had killed the deceased.

101. He then testified that on 29<sup>th</sup> May 2016, he saw the Police come to arrest him, and they said this was in connection with what he said at Molosiyo's grocery concerning the murder of the deceased herein. He stated that he told them that he could swear by heaven that he knew nothing about this.

102. Such was the evidence in the present matter. I now turn to the applicable law.

103. The first point is to underscore the point that the concept of the burden of proof in adversarial common law jurisdictions is that the person who asserts the affirmative of or on a matter must prove the assertion, but the person that denies need not prove the denial. In our criminal procedure law, this concept of the burden of proof has been codified under Section 187(1) of the Criminal Procedure and Evidence Code which provides that:

The burden of proving any particular fact lies on the person who wishes the court or jury, as the case may be, to believe in its existence, unless it is provided by any written law that the proof of such fact shall lie on any particular person:

Provided that subject to any express provision to the contrary in any written law the burden of proving that a person who is accused of an offence is guilty of that offence lies upon the prosecution.

104. In the case of ***Constable Stonard Chalusa v Republic*** [2013] MLR 43 (SCA), Ansah, JA, delivering the decision of the Supreme Court of Appeal, stated at page 46, that:

According to section 187(1) of the Criminal Procedure and Evidence Code (CP&EC) the burden of proof lies on the person who wishes the court and/or jury as the case may be, to believe in its existence, unless it is provided by any written law that the proof of such fact shall lie on any particular person. It is therefore, trite law that the burden of proof in criminal cases is rested on the prosecution, as was held in the case of **Woolmington v DPP** [1935] AC at page 462 Lord Sankey said that:

“But while the prosecution must prove the guilt of the prisoner, there is no such burden laid down on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence ...throughout the web of the English Criminal law, one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt.

105. On standard of proof, Section 188(1)(b) of the CP & EC, in the provides that:

the accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused in respect of that offence.

106. In **Rep v Msosa** [1993] 16(2) MLR 734, Chatsika J. (as he then was) stated that:

At the end of the trial the court must subject the entire evidence to such scrutiny as to be satisfied beyond reasonable doubt that important elements of the offence are proved. Even where the prosecution proves beyond reasonable doubt all elements of an offence, the court must consider the defence evidence. If the defence evidence creates a reasonable doubt as to guilt, the court must resolve the doubt in the favour of the accused.

107. In the case of ***Viyaviya v The Republic*** [2002–2003] MLR 423 (SCA), Tembo, JA, delivering the decision of the Supreme Court of Appeal, stated that:

It is trite that the burden of proof rests on the prosecution throughout the trial and the standard of proof required in order for a conviction to be had in any criminal case is proof beyond reasonable doubt. Whenever and wherever there is a reasonable doubt as to whether the accused committed the alleged offence, such doubt is resolved in favour of the accused.

108. In relation to the offence itself with which the accused persons herein have been charged, the offence of murder is provided for under section 209 of the Penal Code. That 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.

109. Malice aforethought in turn is defined under section 212 of the Penal Code which provides as follows:

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

- (a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;
- (b) knowledge that the act or 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.

110. A number of decisions, including the decision of the Supreme Court of Appeal in **Constable Stonard Chalusa v Rep** [2013] MLR 43 (SCA), and the decision of the High Court in **Rep v Jack Bandawe** [2010] MLR 288 (HC), stand for the clear and well-settled legal proposition that malice aforethought, which is the mens rea for the offence of murder, is comprised in an intention that either death or grievous bodily harm may result from the conduct of the accused person, or the accused person being reckless as to whether death or grievous harm may result or not. The law is that once the unlawful act or omission (the conduct) which effectively causes the death of the victim is coupled with the abovesaid mental element (mens rea), the offence of murder is committed.

111. Another significant legal issue for purposes of the instant matter relates to the issue of participation in crime. Section 21 of the Penal Code provides as follows in this regard:

- (1) 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 to commit the offence; and
  - (d) any person who counsels or procures any person to commit the offence.
- (2) In a case arising under subsection (1)(d), the accused may be charged with himself committing the offence or with counselling or procuring its commission.
- (3) 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.
- (4) 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 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.

112. The question for this Court's determination is whether the accused persons herein committed the offence of murder or not.

113. To recap, the 1<sup>st</sup> accused person and the 4<sup>th</sup> accused person were already convicted upon their own pleas of guilt. The case against the 4<sup>th</sup> accused person has permanently abated following his death, whilst the 1<sup>st</sup> accused person awaits his sentence.

114. The Court starts its analysis with the evidence against the 2<sup>nd</sup> accused person. The evidence against the 2<sup>nd</sup> accused person, Steven Lipiyasi (Phungwako) in the present case is overwhelming. When Steven Lipiyasi's own evidence as revealed by the voluntary statement that he made and brought before this Court through his own legal practitioners; and also his Caution Statement, is weighed against the totality of the evidence herein, including and especially the evidence of PW3, Kenneth Moses, PW4 Herbert Maloni and DW1 Ulemu Mwangomba, the evidence unmistakably points to his direct involvement in the killing of the deceased person. The evidence shows that the 2<sup>nd</sup> accused person is the one who emboldened the 1<sup>st</sup> accused person to be brave and proceed with the plot to kill a person with albinism.

115. The Court watched the 2<sup>nd</sup> accused person as he remorselessly gave a false account of the events before this Court. The evidence he voluntarily gave to his own lawyers is very consistent and corroborates the evidence of PW3, PW4, PW 6 and DW1, yet he was telling this Court that he knew nothing about the whole issue. He is the one who procured both the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons to join the criminal enterprise to kill the deceased. He counselled the 1<sup>st</sup> accused person to be brave and not go back on the plan to kill the

deceased. He even accused him of being “too prayerful” under the circumstances. He Counselling the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused persons on how to go about committing the offence. He accompanied the accused persons to the scene of the crime but did not want to take part in the actual killing. He left the other accused persons a phone so that they could call him once they had the deceased killed. When the deceased person was killed, his dead body’s parts were brought to the house of the 2<sup>nd</sup> accused person.

116. It is clear that PW3 and PW4’s evidence is very consistent and corroborative. It is further corroborated by the totality of the evidence of both DW1 and DW2. When one examines the voluntary statements of DW1 and DW2 to their own defence Counsel, the statements directly corroborate the accounts given by the 1<sup>st</sup> accused and the 4<sup>th</sup> accused persons (PW3 and PW4).

117. The evidence directly implicates the 2<sup>nd</sup> accused person. The Court examined the demeanour of both PW3 and PW4. The Court did not see anything to suggest any insincerity or bad faith on their part.

118. This Court forms the distinct impression that whilst the 1<sup>st</sup> accused person is the one who brought the initial idea of killing a person with albinism to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused persons, it was the 2<sup>nd</sup> accused person who, contrary to his denials before this Court, which this Court has concluded were false denials, he was in fact the main mind, the nerve centre, behind the commission of this grisly murder.

119. It is the finding of this Court that it was the 2<sup>nd</sup> accused person who gave the 3<sup>rd</sup> accused person tools for the murder. In that regard, in terms of section 21(1)(b) of the Penal Code, he enabled and aided the other accused persons to commit the murder herein. In so doing, he clearly intended for the deceased person to be killed. He was therefore a participant in the offence and he had the requisite malice aforethought under the circumstances.

**120. I therefore have no hesitation in concluding that the evidence in the instant case proves, beyond reasonable doubt, that the 2<sup>nd</sup> accused person herein is guilty of the murder of Fletcher Masina, contrary to section 209 of the Penal Code. I so find and therefore convict him accordingly.**

121. Then there is the evidence concerning the 3<sup>rd</sup> Accused person, Ulemu Mwagomba.

122. Once again, the evidence against the 3<sup>rd</sup> accused person is so overwhelming. In his own Caution Statement, the 3<sup>rd</sup> accused person sought to admit committing the offence. However, he was suggesting in his Statement under Caution that when he arrived at the scene where the body of the late Fletcher Masina was lying, late Masina was already dead.

123. However, the evidence of the PW3 and PW4 was particularly telling in implicating the 3<sup>rd</sup> accused person as the one who hit the deceased first with a hammer to the head. This evidence is corroborated by the 3<sup>rd</sup> accused person's own voluntary statement, freely made to his lawyers without even the request from or any prompting of the Court or the prosecution, where he clearly stated that he was present at the scene when the deceased person was killed. He clearly stated under paragraph 7 of that statement that "we killed him."

**124. Once again, I have no hesitation in concluding that the evidence led by the prosecution before this Court proves, beyond reasonable doubt, that Ulemu Mwangomba directly participated in the actual killing of the deceased. He did the actual act constituting the offence. He clearly intended to kill the deceased in terms of section 212(a) of the Penal Code. He is guilty of the offence of murder and I so find. He is therefore hereby convicted**

**of the offence of murder, contrary to section 209 of the Penal Code.**

125. As for the 10<sup>th</sup> and 11<sup>th</sup> accused persons (Francisco Kamtsitsi and Manuel Master, respectively), the evidence against them was as follows: a few days after the gruesome death of the deceased person herein, PW5 who owns a bar, sometime close to the middle of the night, after the 10<sup>th</sup> and 11<sup>th</sup> accused had been drinking beer at his shop for almost 5 hours, suddenly heard the 11<sup>th</sup> accused person crying and saying he was scared because of the death of a young man; and that he would never eat pork again. His friend, PW10 was heard warning PW11 that he could get arrested. PW11 stated that even if he were arrested, he would reveal what he knew.

126. At the stage of a case to answer, the Court concluded that their conduct, as evidenced by the conversation they had, raised reasonable suspicion that they might have been involved in the killing of Fletcher Masina. The Court opined that the 11<sup>th</sup> accused person's expression of grief coupled with his suggestion that he would reveal what he knew about the death; his cryptic suggestion that he would not eat pork again, and indeed the 10<sup>th</sup> accused person's warning to the 11<sup>th</sup> accused that he should be careful because he could get arrested; and the 10<sup>th</sup> accused person himself sobbing as stated by PW5, were all factors that raised a reasonable suggestion of possible involvement. The Court recalled the case of ***Republic v Alice Joyce Gwazantini*** Criminal Case No. 208 of 2003 (High Court, Principal Registry), where Chipeta J (as he then was) stated that:

Thus for a prima facie case to be said to have been established in any given case, **the evidence need not be such as would cause a reasonable tribunal to convict....** It is sufficient if it is merely such as **could** achieve such a result. The distinction may be

fine but in my understanding “would” carries with it an element of more certainty than “could”, which appears to connote mere possibility, and according to the accepted test for discovering whether or not in any given case a prima facie case has been made out, it is the “could” and not the “would” degree of evaluation that must be applied.”

127. Applying this test, the Court found that the nature of the evidence against the 10<sup>th</sup> and 11<sup>th</sup> accused persons was such that, if no explanation was provided by the accused persons, a reasonable tribunal could convict, although the Court emphasized that this did not necessarily mean that the evidence was such that a reasonable tribunal “would” convict.

128. Now the 10<sup>th</sup> and 11<sup>th</sup> accused persons have testified in their own defence as DW3 and DW4. Their evidence was consistent. They were part of the search team that looked for the remains of the body of the deceased person overnight, as well as in the morning of the day following his killing, when they discovered the body. The 11<sup>th</sup> accused person saw the body at close range. The murder was so gruesome. He had never seen anything like that in his life. He was struck with shock, fear and sadness at what he saw. The words he expressed at the bottle store were words of grief. This, I said, was corroborated by the evidence of DW3. Further, all the accused persons, in their evidence in defence, have stated that they do not know the 10<sup>th</sup> and 11<sup>th</sup> accused persons and PW3, PW4 and DW1 categorically state that they were not part of the group that conspired to kill and killed the deceased.

**129. In the premises, there is no evidence to the requisite standard of proof beyond reasonable doubt to convict the 10<sup>th</sup> and 11<sup>th</sup> accused persons. In fact, if anything, there is satisfactory**

**evidence consistent with their innocence. The 10<sup>th</sup> and 11<sup>th</sup> accused persons are therefore found not guilty of the offence of murder herein and are hereby acquitted.**

**Pronounced** in open Court at Zomba this 8<sup>th</sup> day of January, 2021.



R.E. Kapindu, PhD

**JUDGE**