



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY
HOMICIDE CASE NUMBER 8 OF 2021
BETWEEN
THE REPUBLIC

AND

**PATRICK THOMSON MUHEVURE, ZIONE MUKHALA, FELIX JAFARI (KILIMANI),
FELIX STONE, FRANK NAKUPETHE AND LISTON MAPONDO KACHOCHOLA**

Coram: Honourable Justice Violet Palikena-Chipao

Mr. A. Salamba/Mr. A. Mphepo, Counsel for the State

*Mr. N. Mdazizira/Mr. R. Makanje/Ms. K. Chingeni, Counsel for the
Accused Persons*

Accused persons Present

Ms. A. Kazembe, Official Interpreter and Court Clerk

Ms. L. Mboga, Court Reporter

JUDGMENT

Patrick Thomson Muhevure, Zione Mukhala (deceased), Felix Jafari (Kilimani), Felix Stone, Frank Nakupethe and Liston Mapondo Kachochola were charged with three counts in relation to a person with albinism. The first count is one of murder. It is alleged that the 6 Accused persons together with James Namauzongo and Grace Katunga both at large in the period between the

months of May 2020 and 17th August 2020 in Chiondo village, T/A Nazombe in the district of Phalombe in the Republic of Malawi, with Malice aforethought caused the death of Yosefe Muyaya.

The second count is one of extracting human tissue contrary to section 224A (a)(ii) of the Penal Code. The particulars allege that the 6 Accused persons together with James Namauzongo and Grace Katunga both at large in the period between the month of May 2020 and 17th August 2020 in Chiondo village, T/A Nazombe in the district of Phalombe in the Republic of Malawi, unlawfully and without good or justifiable reason, extracted tissue from a corpse of Yosefe Muyaya. The third count is one of trafficking in persons contrary to section 14(1) as read with section 2 of the Trafficking in Persons Act. The particulars of the third count allege that the 6 Accused persons together with James Namauzongo and Grace Katunga both at large in the period between the month of May 2020 and 17th August 2020 in Liphala village, T/A Nazombe in the district of Phalombe in the Republic of Malawi, by means of deception for purposes of exploitation obtained Yosefe Muyaya, being a person with a disability, namely albinism.

All the six Accused persons entered a plea of not guilty in respect of all the three counts necessitating the calling of witnesses by the State in proof of the allegations against the them. Eleven witnesses were thus called by the State. The witnesses were McDonald Namauzongo, Margret Namauzongo, Margret Mukoko, Gadama Beula, Peter Gomani, Alick Muma, Harold Mwaleya, Detective S/Inspector Silvester Gondwe, Detective Sub Inspector Amos Mdzinga and Alice Kambale. At the close of the prosecution's case, the 1st, 5th and 6th Accused Persons were found with a case to answer and were invited to enter their defence. The third and fourth Accused Persons were found with no case to answer and they were acquitted. This judgment is therefore in respect of the 1st, 5th and 6th Accused Persons.

THE STATE'S CASE

McDonald Namauzongo was First Prosecution's Witness (PW1). He is an Uncle to Yosefe Muyaya being a sister to Yosefe Muyaya's mother. His evidence was that he first heard from Frank Nakuphetha, the 5th Accused that his brother James Namauzongo had gone to Lilongwe to cheer up Yosefe Muyaya who was sick. PW1 told the 5th Accused that he was not aware of this development and PW1 proceeded to the house of his in-law, Margret Namauzongo to confirm the news. Margret Namauzongo confirmed that her husband, James Namauzongo, went to Lilongwe to see Yosefe Muyaya who was reported sick. PW1 said he tried calling his brother but could not get through. PW1 said that he only came to learn that his brother had said that Yoseph Muyaya had been taken by a 'mabungwe' to go to Lilongwe for school after the child had already gone missing.

PW1 went further to say that later he managed to speak with James Namauzongo who said that the child was out of hospital and he would be travelling back to Phalombe once the Organisation gives him transport money. James Namauzongo later called him and said he was in Limbe but he

did not have sufficient transport to reach home. And later James Namauzongo told him that he had dropped at Miseu 4 and was walking. He advised James Namauzongo to go to the village headman for help. In the morning, he followed up but there was no trace of his brother. He then met Peter Gomani, his cousin who expressed ignorance of the issue. Then relatives from PW1's side and from the side of James Namauzongo's wife met and resolved to go to the T/A. The T/A said that he had information that a person with albinism was seen at the house of Mai Gogoda and following this information, a report was made to Police but he said the Police did not record everything from him as they said they will record a compressed statement.

PW1 also said that his brother's wife also told him that she heard that James Namauzongo was back and was at his former wife's place and he followed up but did not find him. PW1 further said that during one occasion when he went to the house of James Namauzongo, Namauzongo's wife was reporting of family issues, when Muhevure came and told her to tell her husband (James) that the Lilongwe program was ready and they should go to conclude the same.

PW1 further told the court that he was invited by the police to identify clothes. In court PW1 was shown clothes which he identified and said they belong to Yosefe Muyaya. PW1 explained that he recognized a short as belonging to Yosefe Muyaya because he saw him wearing it as a boxer. He also identified a shirt. The two items were marked as IDP1 and IDP2.

In cross examination, PW1 said that he has known the first accused since they were kids. He also said that he does not have evidence that the Accused killed Yosefe Muyaya or that Yosefe Muyaya went to Lilongwe and how. PW1 also said that he does not know why First Accused said James should go to Lilongwe but he said on the evidence of his in-law, he believed that James went to Lilongwe. PW1 denied knowledge that one Silence Stone from Chiringa trading centre went missing after a report of the missing of Yosefe Muyaya. He acknowledged that a report of the missing of Yosefe Muyaya was made before confirming with Social Welfare. He also said that there were more than one child with albinism in Chiringa. On the clothes, PW1 said that the short and shirt were not unique to Yosefe as they could easily be found in Phalombe. PW1 acknowledged that 5th Accused accompanied him to the TA to report on the missing of Yosefe because, 5th Accused did not know what had happened to Yosefe. PW1 also said that there is evidence of recorded conversation between James and 6th Accused showing that 6th Accused was involved in the killing of Yosefe.

In reexamination, PW1 said that they did not report to Social Welfare of the missing of Yosefe because they did not know what had happened to Yosefe. He also said that when he met 6th Accused, 6th Accused said that James had gone to Lilongwe. When shown IDP1 and IDP2 he said that he saw Yosefe wearing these clothes.

Second Prosecution Witness (PW2) was Margret Namauzongo, mother to Yosefe Muyaya. Her evidence was that her son Yosefe Muyaya was staying with her brother James Namauzongo.

Third Prosecution Witness (PW3) was Margret Mukoko, wife to James Namauzongo and Aunt to Yosefe Muyaya. She confirmed that her family was staying with Yosefe Muyaya and that one day her husband told her that Yosefe was wanted by some organisation to go to Lilongwe for studies. One day her husband went out with Yosefe only to return with him in the evening saying that people from the 'organisation' did not turn up on that day. Two days later her husband informed her that people from the 'organisation' have come and he together with Yosefe left for Phalombe and returned the following day morning with a report that Yosefe had been taken to Lilongwe. PW3 further said that she queried her husband why he did not take transfer letter, clothes and medicines for Yosefe. The following day her husband left with clothes, notebooks and medication for Yosefe saying that he would drop the same at Social Welfare in Phalombe.

Later her husband told her that he had received a call from Lilongwe that Yosefe was in hospital and he left for Lilongwe to see him. Her husband s later told him that he had arrived in Lilongwe and the child was better. Later as her husband was not returning and after getting in touch with her in-law, a report was made to the chief of the missing of Yosefe. The TA informed them that his son had seen a child with albinism at the house of Mai Gogoda.

In Court, PW3 identified a shirt, trousers, shoes and a hat. She said that she bought the shoes; that the hat was given at school and used to wear the shirt and the trousers. The items were identified as IDP3 for the hat; IDP4 for the shoes and IPD5 for the trousers

In cross examination, PW3 said that her husband told her that Yosefe was taken by some organisation to go to school in Lilongwe but she said she knows that Yosefe was killed. She also said that the TA told them that his nephew had seen a person with albinism at the house of Mai Gogoda. She acknowledged that her husband took clothes to give to Yosefe but she did not see which clothes were taken.

Fourth Prosecution Witness (PW4) was Gadama Beula. His business is in the business of manually emptying septic tanks and toilets (pit latrines) when they are full. He told the court that he was engaged by the police in Phalombe to empty a toilet which was full for purposes of recovering some items from the toilet. He said he was told that he needed to retrieve human body parts which were thrown into the toilet. He was told that some hands and bones of a person with albinism were thrown into the latrine and he needed to recover them. PW4 said that he went to Chiringa close to the market into a fence where the work was to be done. He said he was working with his two colleagues. He PW4 further said that they found a lot of soil in the pit and emptied the same. In the process they came across a jumbo which had items. Some items were hard and others were not. They took out item by item. They found some skin-like item with hair but the officers told them to leave that inside the toilet. In addition, they found clothes which were folded in one place. The clothes were trousers, shirt, shoes, baleta(hat). He went further to say that since the clothes

had faeces, they had to wash the same. In court PW4 identified shirt, trousers, hat and shoes which he said were together. He also identified bones of various shapes which he said were also found in the toilet.

In cross examination, PW4 said that he was not told the name of the owner of the compound where the exercise was carried out. He also said that during the exercise only four people entered the compound and the rest were outside. He said none of the community members saw him removing the items from the toilet but saw the items outside. PW4 acknowledged that when he arrived at the compound there was nobody. He however said the village headman was present at the compound during the exercise but was not at the toilet site. He also said the compound was secure as there was a fence but he said people could get in to draw water.

Fifth Prosecution Witness (PW5) was Peter Gomani. PW5 accompanied PW1 when he went to PW3's house to confirm the news which Nakuphethe told him that Yosefe had been taken to Lilongwe by James Namauzongo. He said that James's wife confirmed the news but said she did not know if the village headman was aware. They together went to the village headman who referred them to the TA. The TA told them that his nephew had seen a person with albinism at the house of Zione Mukhala. Zione Mukhala was called but she was reported to be in Lilongwe. Then the TA referred them to police. PW5 further said that James Namauzongo's wife told him that James had said that the trip was initiated by Social Welfare Office. So when they went to Police, the Police asked them to go and follow up with Social Welfare Office. Social Welfare Office said that they knew nothing about the issue. Chilinga Police also told them that James was in hiding.

In the course of making follow-ups, the ex-wife of James was taken for questioning as her brother said tell them the truth that James came to your house and that he would not run away but for Nakuphethe. PW5 said he went to the compound of Zione Mukhala where there were many people, police officers and a person who was emptying a toilet. A volunteer was invited for identification of items which were taken out of a toilet and he presented himself for the same. PW5 identified the following items;

- a. Hat which Yosefe received from school
- b. Trousers which Yosefe was wearing
- c. Tshirt bought by the mother
- d. Long sleeve shirt bought by PW5
- e. Sleepers (mbaula) bought with money from the teacher at school
- f. Pack of bones

PW5 said it was the police who showed out the items. He also said the whereabouts of James are not known but at one point he spoke on phone with 6th Accused and this was known through a phone recording. Phone recording was identified as IDP8.

In cross examination, PW5 said Yosefe was killed but he did not see him being killed and he also did not see who killed him. He also said that Nakuphethe is a cousin to James and an advocate for the marriage of James. He acknowledged that Nakuphethe was part of the team that went to the TA and then to Police. He further said that the TA did not mention the name of the child with albinism seen at the house of Mai Gogoda so he does not know who it was. As to the items found at the compound of Mayi Gogoda, PW5 said he found the toilet already emptied and was told the items were retrieved from the toilet. He also said he saw the items which included bones but he could not tell if they were human bones. He also said he cannot tell if relations of the accused were present at the compound when the toilet was being emptied but he said there were many people outside. He further said that there was an audio in which James was telling 6th Accused to run away

In re-examination, PW5 said that the emptying of the toilet was done before he arrived but he was shown the emptied toilet. He also said he heard from the audio 6th Accused being told to ran away.

Sixth Prosecution Witness (PW6 was) Alick Muma, Village headman Chiondo. His evidence is that he was called by Senior Chief Nazombe and was asked about Zione Mukhala. This followed the missing of Yosefe Muyaya, a boy with albinism. He said the Chief said that his son had seen a child with albinism at the house of Zione Mukhala. He went further to say that later he was called by Police at the house of Zione Mukhala where clothes were found a Peter Gomani a relative of the concerned person identified the clothes. PW6 identified the clothes which he said were retrieved from a toilet at the house of Mukhala.

In cross examination PW6 said that he does not have evidence that the child seen at the house of Mukhala was Yosefe. He also said that he arrived at the scene after the toilet had already been dug. He also said that the clothes she saw are not unique.

Seventh Prosecution Witness (PW7) was Detective Sub Inspector Dalili of Chiringa Police Unit. His evidence was that he received a report of a missing child from McDonald Namauzongo and Peter Gomani. He said the report was that the child was taken by his Uncle James Namauzongo on the pretext that he was being taken to Lilongwe through Social Welfare department. Social Welfare denied knowledge of the issue and suspicion arose that the child was murdered by his Uncle and other accomplices. He also received information that the Uncle was hiding at his ex-wife's house .i.e at the house of Alice Kambale. He went to the house of Alice Kambale with his colleagues and there initially Alice denied knowledge of the issue but upon her brother's intervention, Alice acknowledged that James visited her to seek refuge but Alice refused due to the news about the missing of Yosefe. PW7 further said that Nakuphethe told Alice to warn her husband to ran away. He went further to say that Alice took James to her sister to hide him but her sister also refused to hide James upon hearing of his involvement in the offence.

PW7 said he went back to Nakuphethe upon hearing that he warned James to run away. For this reason, PW7 considered Nakuphethe as an accomplice but when questioned, Nakuphethe denied involvement in the same. PW7 also heard that Muhevure was saying that he was going to buy a

motor cycle using money which were proceeds of work done at the house of Mayi Gogoda. He further said that Muhevure at one point went to the house of James's wife to tell her that she should tell her husband that the trip to Lilongwe to correct money was ripe. PW7 said that he interviewed Muhevure and Nakuphethe and concluded that there was something tangible and so he reported to Phalombe Police Station. Phalombe Police informed him that Yosefe was murdered and that bones were recovered from a toilet together with clothes at the house of Mai Gogoda. He went further to say that there was also a recorded phone conversation between James, Kachochola 6th Accused and his father Mr. Kachochola. The recording was identified as IDP9.

PW7 played the audio in court. The Audio is in lomwe and an interpreter was brought to be translating the audio as it played. His translation was poor as such the court directed that the state should engage a translator who would produce a transcript for service on both parties before the date of hearing. The witness was allowed to proceed with his other evidence to be recalled latter for purposes of tendering the audio once the translation is done. PW7 further said that the police engaged some men to dig the toilet at Mai Gogoda's house and the dug the toilet in the presence of the police, the village headman. PW7 identified the items that he said were retrieved from the toilet.

In cross examination, PW7 said that Matevure said he was going to buy rifo motor cycle with money from work performed at Mai Gogoda's house and that at one time, he told James' wife to tell James that the trip to Lilongwe was ripe and that that's why he arrested. After he arrested the suspects, he referred them to Phalombe Police for further investigations. PW7 further said that when the toilet was dug, there were many people present including himself, the village headman and Peter Gomani but that the police, Peter Gomani and the village headman were the ones who were inside and the rest were outside. PW7 said Nakuphethe was an accomplice because he warned James through his wife to run away and that he knew that James had committed an offence. PW7 said it was Alice who said 5th Accused went to her to warn her about James. He further said that Alice initially lied that James did not visit her but later changed to tell the truth upon the intervention of her brother. He also said that Kachochola went to Lilongwe and was arrested in Lilongwe. He said he does not know how many times Kachochola went to Lilongwe but that in the context, it was the first time.

When asked about the audio, he said it was recorded by the ones in the conversation and that Mr. Kachochola (father to 6th Accused) acknowledged one of the voices to be his. He therefore said it was not necessary to engage voice experts. He also said Mr. Kachochola identified the other two speakers as 6th Accused and James.

In re-examination, PW7 said that Alice was arrested because she knew the movements of James but initially lied to the police. As for Nakuphethe, PW7 said that he knew where James was hiding and warned him yet he was accompanying the other reports in looking for him. As for Muhevure he said Muhevure told James' wife to tell her husband should go to Lilongwe to collect money

with Mai Gogoda and also for saying he will buy a motor cycle with money for work done for Mai Gogoda. He further said that since one of the people conversing in the audio acknowledged the same, there was no need to go to mobile operators for further evidence.

Eighth Prosecution Witness (PW8) was Harold Mwaleya, an Orthopedic Clinician at Phalombe District Hospital. His evidence was that on 4th September, he was requested to examine some bones. He said that the bones upon examination were found to be human bones. This conclusion he said was arrived at having considered the shape, colour, appearance and atomic attachments. The bones were described as color bone, tarsal bone, pharyanges, attachments to colar bone and metartasals. He said the bones appeared to have been disconnected from the body for about two weeks. These were marked as Exhibit P8.

In cross examination, PW8 said that he cannot tell whose bones they are by just looking at the bones. PW8 said in his report he did not include teras. PW8 further said that the estimation of the period as to how long the bones have been detached from the human body was based on the appearance of the bones.

Detective Sub Inspector Nenani of Luchenza Police Station was the Ninth Prosecution Witness (PW9). At the time of the alleged commission of the offence, PW9 was based at Phalombe Police Station. His evidence was that as a crime officer, he went to the house of Zione Mukhala on 1st September upon getting information that Muhevure and his friends killed Yosefe Muyaya, chopped off his legs and arms, peeled off his skin and threw them in a toilet of Zione Mukhala. He went further to say that they identified some men to dig the toilet and upon digging, the following items were retrieved; shirt, trousers, cap (hat), plastic slippers, t-shirt and human bones and invited the village headman to witness the process. He said the chief was invited after the extraction of the items from the toilet to see what had been gotten out of the toilet

PW9 took photos of all the recovered items and also photos of the toilet. He said the bones were confirmed by a doctor to be human bones and the clothes were identified by relatives to be clothes of Yosefe Muyaya. The items were marked as follows;

- g. Photos from the scene of crime as Exhibit P2
- h. Shirt which was IDP1 as Exhibit P3
- i. Hat (cap) which was IDP3 as Exhibit P4
- j. Shoes (slippers) which were IDP4 as Exhibit P5
- k. Trousers which was IDP5 as Exhibit P6
- l. T-shirt which was IDP7 as Exhibit P7
- m. IDP6 as Exhibit P8

In cross examination, PW9 said that the village headman came after the digging had already been done. He said there were a lot of people at the house during the time the digging was done. Among the accused, he said only 1st accused was present but the owner of the house was not present. PW9 further said that the accused said they had thrown feet, palms and fresh. He said the recovered bones are for Yosefe but he said he had no expertise to tell that the bones were those of Muyaya.

PW9 further said that they went to the house of Zione Mukhala (deceased) with 1st Accused only. He said the owner was not taken because it was not necessary and they knew they would find a lot of people at her house. He acknowledged that no relative of the owner of the compound was present at that time. He also acknowledged that Uncle to Yosefe found the toilet already emptied. He also said that what was thrown into the toilet were palms, feet and fresh. He further said that the bones are those of Yosefe Muyaya but that he had no expertise to establish the same.

In re-examination, PW1 said that the bones given to the doctor were from the toilet and that according to the investigator, it was 1st Accused who said they threw Yosefe Muyaya's bones into the toilet.

Detective Sub Inspector Mzinga of Karonga Police Station was the Tenth Prosecution Witness (PW10). He was at the time of the alleged offence based at Phalombe Police. He was involved in the investigation of the matter. His evidence was that he got a report from McDonald Namauzongo that his nephew had been abducted by James. In the course of investigations, Nakuphetha, Alice Kambale and Patrick Muhevure were called for questioning. He said that Patrick Muhevure (1st Accused) upon being interviewed admitted committing the offence together with his colleagues. He said that Muhevure said that they took Yosefe to Nyambwe River where they killed him, chopped his hands and legs, peeled off his skin and took the items to the house of Zione Mukhala where they threw the same into the toilet after burying the deceased at the river.

Muhevure led the police to the place of death but they did not find the body. They only found the paper which was used to wrap the body. Some clothes were also found at this place and were identified by Macdonald Namauzongo as belonging to Yosefe Muyaya. The clothes were marked as Exhibit P9 and the paper as Exhibit P10. PW10 went further to say that he instructed his team to dig the toilet at the house of Zione Mukhala and a number of items were found including clothes and bones. He said the suspects were charged with the offence of murder and they denied the charge but Muhevure admitted the offence. The caution statements and formal charges of the five accused persons and those of Zione Mukhala were read in court and tendered in evidence. They were marked as follows;

- n. For Muhevure Exhibit P11A and 11b for caution statement and formal charge respectively;

- o. For Zione Mukhala, Exhibit P12A and 12B for caution statement and formal charge respectively;
- p. For Felix Jafari, Exhibit P13A and 13B for caution statement and formal charge respectively
- q. For Felix Stone, Exhibit P14A and 14B for caution statement and formal charge respectively
- r. For Frank Nakuphetha, Exhibit P15A and 15B for caution statement and formal charge respectively
- s. For Liston Kachochola, Exhibit P16A and 16B for caution statement and formal charge respectively

Patrick Thomas Muhevure and Zione Mukhala admitted committing the offence and also mentioned the other suspects in their caution statements. The rest of the suspects denied knowledge and involvement in the commission of the alleged offences.

In cross examination, PW10 said that Muhevure and Zione Mukhala admitted committing the offences and mentioned the other suspects. He however acknowledged that there is no other evidence. PW10 said he does not know if there was another Stone who disappeared when the child went missing and he did not follow up on the same because Muhevure led them to Stone. He also said that it was Muhevure who led the police to Felix Stone, Felix Jafari and to the house of Zione. He also said the circumstances of the case namely the admission of Muhevure and Mukhala, the information that they threw clothes and body parts in the toilet, the finding of the same in the toilet are also proof that Yosefe was killed. He further said that the bones were found in the toilet where the accused said they had thrown the bones.

PW10 further said that Nakuphetha was arrested because he was mentioned to have taken part in the offences. He further said that the body of Yosefe Muyaya has not been found but his body tissues. He acknowledged that the doctor mentioned collar bone and he said it is possible that other bones were taken away

In re-examination, PW10 said that with the confession of the suspects and the missing of the child, the retrieved clothes and bones it can be concluded that he was murdered. He also said that it was Muhevure who led Police to the scene of murder where a plastic paper used to wrap the body was found.

Eleventh Prosecution Witness (PW11) was Alice Kambale. Her evidence was that she was approached by Nakuphetha who was looking for James Namauzongo. Nakuphetha told her that he had a message for James to tell him that the police were probing him for the missing of Yosefe a child with albinism. Two days after the visit from Nakuphetha, James came to her house asking for lodging but she refused. She went to inform her brother about the visit. Later she was picked by the police upon information that she was keeping James.

In cross examination, she said that when the police asked her about James, she said she knew nothing but later explained what she knew. She said she did not lie but she was afraid.

PW7 was recalled as a witness for purposes of tendering the audio as at the time of his evidence there was no translation from Elomwe to English or Chichewa. The audio was played to the end and then PW7 tendered a transcript translating the audio. The audio was translated by who presented the transcript in court and read it out.

With the evidence of the 11 witnesses, the prosecution closed its case.

THE DEFENCE CASE

First Defence Witness (DW1) was Patrick Thomson Muhevure, a brick layer and a farmer. In his defence he denied the charges against him but he went further to state that Liston and Nakuphethe are not supposed to say anything to the court in relation to the matter as they do not know anything concerning this case. He said he only mentioned them because he was being assaulted by the police during interviews. He further said that he was just seeing Yosefe Muyaya in Liphala village but insisted that he does not know anything concerning the case. First Accused said that if anything it should be Zione Mukhala (deceased) who should first speak about the allegations. He further said that he knew James because he used to buy medicinal drugs from him.

First Accused disowned the caution statement tendered in court saying he was being assaulted and that he did not say what is contained in the statement. He also said that he does not know how to read and write. He further said that he was arrested because people from the Namauzongo family suspected him of having been involved in the case but he does not know anything.

In cross examination, First Accused confirmed information in the caution statement but he said he gave out this information because he was being assaulted and he just wanted the police to leave him. So he confirmed giving police his particulars; mentioning the name his nephew Nazi Kwezani and mentioning the names of the other accused persons. He said he mentioned the other suspects as his friends and not in connection with the offences. He said he had other friends who work with him as piece workers and others with whom he plays bawo but that he just mentioned the ones he mentioned out of fear and also to satisfy the police. First Accused said he did not write his name and that he just told the police his name. Later he changed and said he wrote his name.

He also acknowledged to have gone to Nyambwe River with the police but he said nothing was found there. He acknowledged that he was the one who mentioned Nyambwe River but he said he cannot confirm that he led the police to the river. He also said he cannot say anything on the case because when the things happened, he was at Thyolo Prison. He said he cannot be convicted because he was not found with anything and he was not caught red handed. He confirmed to have said that Liston and Nakuphethe should not testify because they do not know anything. He also said he too does not know anything.

In re-examination he acknowledged to have given the police his correct name but as for the two accused persons he said he mentioned them as friends and not in relation to the offence.

Second Defence Witness (DW2) was Frank Nakuphetha. He said he knew Yosefe Muyaya as the advocate of the marriage of James Namazuzongo and Margret Mukoko and because the said Yosefe was staying with James. He also said that he does business of buying rice in Malawi and reselling it in Mozambique. On one occasion, he went to Mozambique to sell rice with Mwandiyesa Makawa. He went again with him on another occasion but on this other occasion, he had been sent by wife of James to inform McDonald Namauzongo that James Namazuzongo had gone to Lilongwe to see a sick child. He went further to say that on this other occasion, he returned and did not proceed with the journey upon meeting McDonald Namauzongo. They went to the house of Margret Mukoko but did not find her. He went further to say that the following day McDonald told him that he had confirmed the news and that he had even spoken to James who said the child is better and he will be coming back the next day.

Frank Nakuphetha went further to say that McDonald Namauzongo told him that James said he had run out of transport and McDonald told him to find a pace at Nyezelera where McDonald would go to pick him the following day but that when McDonald followed up the next day, James was not found. When he met with McDonald and the other family members, he said he was told that Patrick Muhevure told Margret Mukoko that James was wanted to go to Lilongwe and he was asked to go get Patrick Muhevure for questioning on why he wanted James. He went further to say that he went in search of Patrick Muhevure with McDonald and he was asked about the whereabouts of James but Patrick Muhevure said he knew nothing. He further said that the village headman advised them to go to the TA. They went to the TA where McDonald explained everything and that Ziona Mukhala had asked for James to go to Lilongwe. The TA called for village headman Chiondo and asked him about Ziona Mukhala and he said Ziona Mukhala had gone to Lilongwe but he did not know where exactly.

Since it was reported that James had said the child was taken to welfare, Social Welfare Officer was invited but he expressed ignorance over the issue and that at that point the TA advised the team to report the matter at police. He went further to say that the family later went to check for James at Alice Kambale's place but they did not find him. He said in particular he was asked to go to Alice and he did but Alice told him that since she and James were divorced, James could not go to her. Said he was later arrested for the present charges.

In cross examination, Frank Nakuphetha said that Patrick Muhevure did not tell him why Ziona Mukhala wanted James for. He also said that when he met McDonald on his way to Mozambique, he was going to meet McDonald but his friend Mwandiyesa was going to sell rice. He said a family meeting was called for Margret Mukoko to explain in front of the whole family, the whereabouts about her husband. He said that the family was moving together as they followed up the issue. He was assigned to go to Alice Kambale while another team was going to Social Welfare. He denied

to have told Alice Kambale that it is rough out there. He acknowledged that people buy unshelled rice from Mahonga in Mozambique and sell in Malawi but that he sells it in Mozambique. He said he started rice business after grocery business failed. He said one may decide to sell rice in Malawi or Mozambique. He said he was in Mozambique selling rice the whole month of August. He said the place where they were selling rice was in Mozambique although they were using Malawi kwacha. He also said the place is far as it would take a whole day if travelling by bicycle. As for how long he was staying in Mozambique when he went to sell rice, he said it depended on how business was and that he would only return when they finish selling rice.

In re-examination, Frank Nakuphethe denied to have told Alice that it is rough out there. He also said that he went to the house of Alice because another team went to Social Welfare.

Mwandiyesa Makawa testified as Third Defence Witness (DW3) and he testified on behalf of Frank Nakuphethe. His evidence was that Frank Nakuphethe was his business partner and they would go to Mozambique to sell rice and that they would take about two weeks depending on how business faired. DW3 further said that they had agreed with Frank Nakuphethe to go to Mozambique to sell rice when a day before the trip, Frank Nakuphethe informed him that he was asked to handle a family affair which required him to go to McDonald's house. As such they left for Mozambique together but parted ways when Frank Nakuphethe met with McDonald on their way.

In cross examination, he said he and the fifth accused had been in rice business for a long time and that they were selling milled rice. He said he knew Frank Nakuphethe through the rice business and that the sad Frank Nakuphethe has never done a grocery business. He acknowledged that many people sell milled rice in Malawi but he said it was a person's choice to sell in Malawi or Mozambique. He insisted that he was doing business with Frank Nakuphethe and that he was not couched on what to say. He also said that he knew nothing about Yosefe Muyaya.

In re-examination, DW3 said that Frank Nakuphethe does business. He said he does not calculate the period he stays in Mozambique on business as it depends on how long it takes to sell all the rice.

Fourth Defence Witness was John Kasadeya who testified on behalf of Liston Mapondo Kachochola, the 6th Accused Person. He said Liston is his half-brother in that they share the same mother. He said that he stays in Lilongwe at Mpingu and that Liston visits him. He said Liston visited him in September 2018 for piecework in the fields. He went further to say that Liston visited him again in 2019 July for piece work and that he visited him again in 2020 as usual but visited in July. He went further to say later in December 2020, he was approached by 7 strange people at his house who were asking for James Namauzongo. He said he told them that he did not know the person and then they asked him for Liston Mapondo. He led them to the garden where Liston was and they the people handcuffed him together with Liston. He said he did not ask who the people were as he thought they were looking for piece work. The people asked both of them about James

Namauzongo but they both said they did not know him and they were taken to separate police formations. They were then taken to Blantyre and then to Phalombe but in all places they said they did not know James Namauzongo. They were also taken to Mulanje Prison where a certain elderly woman denied knowing them and they also said they did not know her. They were also taken to Chichiri prison to identify some person but they did not know the person.

In cross examination, DW4 said that Liston Mapondo was his brother and that his father was Kachere Kachochola Mapondo. He also said that Malemu Mapondo Kachochola is a brother to Liston's father. He also said his brother visits him in Lilongwe every year for piece work and that in 2020 he visited him in July. When asked about his statement, he said it suggested that only in 2020 did Liston visit Lilongwe early but this was wrong because even in 2019 he visited Lilongwe early.

He said he had taken long without visiting his village and that as such he did not know what was happening at the village. He said he listened to the audio tendered in court but he said he cannot believe that Liston was in Phalombe from April to September. As to the case, he said he does not know anything. He also said that he cannot comment on what Muhevure said but can only say how his brother went to Lilongwe in July 2020.

In Re-examination, DW4 said that Liston's father was Kachere Mapondo Kachochola. He maintained that Liston went to Lilongwe in July 2020. When asked about the name Malemu Mapondo Kachochola, DW4 said that he does not know much about the paternal side of Liston's father.

THE LAW

THE BURDEN AND STANDARD OF PROOF

Once a plea of not guilty is entered, it rests with the state to prove each and every essential element of the offence charged. This is so because the burden of proof lies with the person who alleges the crime. Relevant to this is section 187(1) of the Criminal Procedure and Evidence Code which provides as follows;

"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 is guilty of any offence lies upon the prosecution."

The standard required to discharge that burden is that of proof beyond reasonable doubt. The case of *Miller v. Ministry of Pensions (2) [1947] 2 All ER 372* defines what amounts to proof beyond reasonable doubt as follows;

“That the degree is well settled. It need not reach certainty, but it must carry with it 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”.

In the case of **Rep v Laycook** Criminal Case No. 6 of 1990 (unreported), the Court said that if the evidence is such that the court feels sure of the guilt of the accused persons then the case is proved beyond reasonable doubt. In applying this standard of proof, the court is also mandated not only to look at the prosecution’s evidence but also the defence evidence in order to determine whether the requisite standard has been met (See **Nkhata v. Republic** Criminal Appeal No. 16 of 2011 (LL) (Unreported)). The approach to be taken when considering the evidence of the defence was laid down in the case of **Gondwe v. Republic** [1971-72] 6 ALR Mal 33 which was cited with approval in the case of **Republic v. Msosa [1993]** 16(2) MLR 734 in which Weston J had this to say;

Nevertheless, it is trite learning that it is for the prosecution to establish its case beyond reasonable doubt and not for an accused person to prove his innocence. This has been said so often as to be a danger of losing its urgency. As in every case where an accused person gives an explanation, in this case its application required that court’s approach to the appellant’s story should not have been what it evidently was: ‘Is the accused’s story true or false?’ resulting, if the answer were ‘False’ in a finding that the appellant must necessarily have had a fraudulent intent. The proper question for the Court to have asked itself was ‘Is the accused’s story true or might it reasonably be true?’ – with the result that if the answer were that the appellant might reasonably be telling the truth, the prosecution would not in that case have discharged the burden of proof beyond reasonable doubt imposed upon it by law”.

THE OFFENCES UNDER CHARGE

(a) Murder

The offence of murder is provided for in section 209 of the Penal Code which provides as follows;

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

To establish the offence of murder, the following elements must exist;

- (1) There must be death of a person;
- (2) The death must be caused by the accused person; and
- (3) Such death must be caused unlawfully and with malice aforethought.

Under section 212 of the Penal Code malice aforethought is deemed to be established in any one

of the following circumstances where there is;

- 1) 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;
- 2) 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;
- 3) an intent to commit a felony;
- 4) 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.

(b) Extraction of human tissue

The offence of extraction of human tissue is provided for in section 224A of the Penal Code which provides as follows;

224A A person who –

- (a) extracts;
- (b) is found in possession of;
- (c) sells;
- (d) buys; or
- (e) otherwise transacts in –
 - (i) a human corpse; or
 - (ii) human tissue extracted from a human corpse or living person

commits an offence and shall be liable, upon conviction, to imprisonment for life:

Provided that possession of a human corpse or tissue –

- (a) in accordance with any written law; or
- (b) for other good and justifiable reason

shall not constitute an offence under this section

Elements of the offence are as follows;

- there must be a human corpse
- human tissue must be extracted from the corpse
- the Accused must be the one who extracted the tissue from the corpse
- and the extraction must have been done not in accordance with the law or without any other good and justifiable reason

(c) Trafficking in Persons

The offence of Trafficking in persons is provided for under section 14 of the Trafficking in Persons Act. Trafficking in persons is defined in section 2 of the Trafficking in Persons Act as

'Recruiting, transporting, transferring, harbouring, receiving or obtaining a person, within or beyond the territory of Malawi, through-

- (a) Threats or use of force or coercion*
- (b) Abduction*
- (c) Fraud or deception*
- (d) Abuse or threats of abuse of power or position*
- (e) Abuse or threats of abuse of position of vulnerability*
- (f) Abuse or threats of abuse of the law or legal process; or*
- (g) Giving or receiving of payments to obtain consent of a person having control of the trafficked persons,*
for purposes of the exploitation of that person.

From the reading of sections 14 and 2 of the Trafficking in Persons Act and the offence as charged the following elements must exist to prove the offence of trafficking in persons;

1. The act namely recruitment or transporting or receiving, or obtaining or harbouring
2. The means namely fraud or deception, or coercion, or abduction, or through use of force or threats thereof or use of abuse of power or position of vulnerability
3. The purpose (end result) which is exploitation

In the case of **Republic v Goodson Chinolo and Sydney Sichome** Confirmation Case No. 2038 of 2020 (LL) in applying the definition in section 2 of the TIPPA, the court held as follows;

In other words, the elements to be proved by the prosecution to sustain a conviction for the offence of trafficking in persons are the action: recruiting, transferring, harbouring, receiving or obtaining; the means: through the use of force or threats thereof, coercion, abduction, fraud, deception, abuse or threats of abuse of power or position, abuse or threats of abuse of position of vulnerability, abuse or threats of abuse of the law or legal process, or giving or receiving of payments to obtain consent of a person having control of the trafficked person and the Purpose: for the purpose of exploitation of that person.

Exploitation includes the following;

- (a) Forced labour or extraction of work or services from any person;
- (b) the forced participation of a person in all forms of commercial sexual activity such as prostitution, sexually-explicit performance, forced prostitution, and forced participation in the production of pornography;
- (c) the removal of body parts or the extraction of organs or tissue; or
- (d) any other practice in terms of which it cannot be said that the person participated willingly.

ISSUES FOR DETERMINATION

In view of the legal requirements in terms of the charging sections and the elements of the offences under charge, the court is called upon to answer the following question;

1. Whether there was death of one Yosefe Muyaya;
2. Whether such death was caused by the Accused persons;
3. Whether the death was caused by unlawful means and without any justification;
4. Whether there was extraction of human tissue from the corpse of Yosefe Muyaya;
5. Whether such extraction was done by the Accused Persons;
6. Whether such extraction was unlawful or without good justification;
7. Whether Yosefe Muyaya was obtained from his home;
8. Whether such obtaining was by deception; and
9. Whether he was obtained for purposes of exploitation.

SUBMISSIONS

Both parties made closing submissions. The Defence submitted that the state has failed to establish the case against the accused person beyond reasonable doubt and that they should therefore be acquitted from the offences charged. On the other hand, the State submitted that the evidence against the accused was sufficient and that they should all be convicted of the offences charged. The basis for the submissions of each party will be considered as the court analyses the evidence in respect of each offence and each accused person.

ANALYSIS OF THE LAW AND THE EVIDENCE

As the court assesses the evidence in the light of the standard of proof and the requirements required to satisfy each offence, it is mindful that the guilt of an accused person can be established through direct evidence, circumstantial evidence or evidence of a confession. In the case of *Republic v. Kennedy Salivasio* Homicide Case No. 127 of 2011 (PR), the court held that guilt of the accused person can be established by direct or indirect (circumstantial) evidence. The court went further to say that it is often hard to prove a case through direct evidence and that in most cases the state will rely on circumstantial evidence. Circumstantial evidence has been held to be the best evidence. This was stated in the case of *R -v- Taylor (1928) 21 Cr. App. R 20* where Hewart, C.J had this to say:

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

The *R -v- Taylor* case was cited with approval in the case of *Republic v. Kennedy Salivasio (above)*. The case of *Simkonda v. Republic* Criminal Appeal No. 1 of 2017 (MZ) explains what circumstantial evidence is. It was thus held in the *Simkonda v. Republic Case* that circumstantial evidence is that which tends to prove a fact by proving other events or circumstances which afford a basis for a reasonable inference of the occurrence of the fact at issue. The procedure for the court to follow when dealing with circumstantial evidence was laid down in the case of *Viyaviya v The Republic* [2002-2003] MLR 423 (SCA) as follows;

" ... where the evidence is circumstantial the accepted and logical approach is by way of elimination that is by negative all possible hypothesis of innocence. In order to justify from circumstantial evidence, an inference of guilt the facts must be incompatible with the innocence or the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. A court of law can only convict an accused person if one inference and one inference only, is possible. Where several inferences are open, some consistent with innocence and others consistent with guilt, it is not open to a court, in the absence of any other evidence, to choose the inferences consistent with guilt and to reject inferences consistent with innocence"

Circumstantial evidence is therefore admissible and relevant in this case. This issue for the court is to determine whether the circumstances presented by the State negate all possible hypotheses of the innocence of the Accused Persons.

Both parties have addressed the court on the issue of evidence of confessions. Apparently, the record contains confessions of the First Accused Person and Zione Mukhala (deceased). It has been submitted by the Defence that on the authority of the case of *Yamikani Letasi v. Republic MSCA* Criminal Appeal No.11 of 2017 that the State cannot rely on the confession of the First Accused Person. This was based on the argument that since the 1st Accused retracted his confession by entering a plea of not guilty, the State has a duty to prove each and every element independent of the confession by corroborating independent evidence and that in the present case there is no such corroborating evidence.

Whilst it is correct that a confession can be retracted by a not guilty plea, it is not correct to say that once retracted, then the confession can no longer be relied upon. As was held in *Banda and Another v. Republic Criminal Appeal Case No. 9 of 2017 (HC)(PR)* once retracted, then there would be need for corroboration of the confession to prove that not only that the offence was committed but that it was committed by the Accused Persons. Section 176 of the Criminal Procedure and Evidence Code (the CP & EC), governs the use of or admissibility of confessions. The law regarding confession statements in this country is well-settled. This section states:

176(1) Evidence of a confession by the accused shall if otherwise relevant and admissible be admitted by the court notwithstanding any objection to such admission upon any one or more of the following grounds that such confession was not made by the accused or, if

made by him, was not freely and voluntarily made and without having been unduly influenced thereto.

(3) Evidence of a confession admitted under subsection (1) may be taken into account by a court, or a jury, as the case may be if such court or jury is satisfied beyond reasonable doubt that the confession was made by the accused and that its contents are materially true. If not so satisfied the court or the jury shall give no weight whatsoever to such evidence. It shall be the duty of the judge summing up the case specifically to direct the jury as to the weight to be given to any such confession."

What is crucial in the present is whether or not there is independent corroborating evidence to the confession showing not only that the confession was made by the Accused Persons but also that it is materially true. Once such corroborating evidence is available, this will be the best evidence as against the First Accused Person.

The treatment of the 5th and 6th Accused Persons *visa vis* the confession statements of the First Accused and the deceased (Zione Mukhala) is however different from that of the First Accused. This is so because under section 176(2) of the CP & EC a confession is only evidence against its maker and that it cannot be evidence against another accused unless that other accused person adopts it as his own. In the present case, at no point did the 5th and 6th Accused Persons adopt the confessions of the two First Accused Persons as their own. As such the confessions cannot be used as evidence against them. In respect of each of the offences, the State kept on referring to the confession statements of the First and Second Accused as though they are evidence against the 5th and 6th Accused. As observed, the confessions cannot be evidence against the 5th and 6th Accused Persons as the two did not adopt the same as their evidence. The State is left with the other evidence as against the 5th and 6th Accused Persons. Having said this, we now move on to consider each offence.

Murder

For the offence of murder to be established, three elements must be proved; there must be death of a person; the death must be caused by the accused person; and such death must be caused unlawfully and with malice aforethought. It is the Defence's submission that the Prosecution has failed to establish beyond reasonable doubt that the three accused persons committed the offences charged. It is argued that there is no evidence that there was death of a person and let alone death of Yosefe Muyaya. It was argued that whilst the state proved that Yosefe Muyaya was staying with his uncle James Namauzongo and that the said Yosefe Muyaya is missing, none of the State witnesses saw Yosefe Muyaya being killed. With regard to bones tendered in evidence, whilst not challenging the evidence that the bones were found in the toilet of Zione Mukhala and that according to PW8, they were human bones, it was argued that there was no DNA conducted to establish that the bones were those of Yosefe Muyaya or that they belonged to a person with albinism. As for clothes in exhibits P3, P4, P5, P6, P7 and P9 which were found at Nyambwe river

and the toilet of Zione Mukhla and which witnesses identified to belong to Yosefe Muyaya, the Defence argued that the clothes only tell us that they are clothes of Yosefe Muyaya but do not prove that Yosefe was killed and do not say anything as to his whereabouts. It was further argued that the witnesses did not even say which clothes Yosefe was wearing the time he was last seen.

As to the plastic paper found at Nyambwe river which also first Accused acknowledged, the Defence argued that there was no test of the blood found on it to establish that it was human blood and in particular that of Yosefe. It was also argued that although in the alleged confession statement of First Accused, he said the paper was used to wrap the trunk of Yosefe Muyaya, no such trunk was found at the river. In addition, it was argued that although in the caution statement first accused mentioned bones of feet and leg, only bones of one foot and collar bone were found and none from the hand. It was therefore, the Defence's conclusion that the caution statement could not be relied upon.

The defence further argued that there is no evidence showing that any witness saw the Accused persons killing Yosefe Muyaya and that even circumstantial evidence was not sufficient to link the accused to the offences under charge. As regards 1st Accused, it was argued that apart from his alleged confession, the only other reason for arresting him was that he said he would buy a motor bicycle using money he would get from work he performed for Zione Mukhala. It was argued that since he retracted his confession, the prosecution needed to prove each element of the offence by independent evidence and that there is no such evidence.

As regards the 5th Accused person, it was also argued that he was only arrested for going to house of former wife of James Namauzongo to warn James Namauzongo that he was wanted by the Police. The Defence argued that 5th Accused went to house of former wife of James not to warn James but in search of James and that the words '*kunja kwavuta had nothing to do with warning James*'. It was further argued that 5th Accused went to the house of Alice as another team went to Social Welfare. It was further argued that 5th Accused was in Mozambique selling rice in August and that this was confirmed by Mwandiyesa Makawa. It was thus submitted that there is nothing cogent that 5th Accused knew about James and Yosefe. As to his being mentioned by 1st Accused in his caution Statement, it was argued that under section 176(2) of the CP & EC, the confession cannot be used as evidence against the 5th Accused.

As regards the 6th Accused person, the Defence argued that that Exhibit P18 an audio clip which laid the basis for the arrest of 6th Accused person should not be given any weight because its authenticity was questionable as it is not known who recorded it. It was further argued that there was no evidence to verify the identity of the voices. The Defence argued that the evidence of PW7 that the voices were those of 6th Accused, his father and James was hearsay and that there was nothing in the clip showing that 6th Accused committed the offences. The Defence further argued that although the clip mentions Kachochola, there is no evidence to show that the mentioned Kachochola is the 6th Accused person. Further to this, it was argued that according to the evidence

of DW4, the 6th Accused was in Lilongwe from July 2020 and that this was not the first time he went to Lilongwe for piece work. It was thus argued that what was said in the clip that the Accused had never been to Lilongwe cannot be correct. In addition it was argued that the evidence of 1st Accused's confession cannot be used against the 6th Accused in view of section 176 (2) of the CP & EC. The Defence further argued that in the absence of proof of death of Yosefe Muyaya, it is not necessary to discuss the issue of whether or not the death was caused unlawfully and with malice aforethought. It was therefore submitted that there is no evidence to show involvement of 6th Accused in the offence of murder.

The State in their submissions argued that the evidence shows that Yosefe died between May 2020 and August 2020. The State argued that First Accused and Zione Mukhala admitted to have committed the offences. It was the State's argument that the confession was corroborated by evidence of PW10 who said that 1st Accused Person led the police to Nyambwe river where a plastic paper was recovered which was used to wrap the body of Yosefe Muyaya. It was therefore argued that death of a human being was proved.

It was further argued that the accused persons had no authority to kill Yosefe Muyaya. It was further argued that they had no justification to lead young Yosefe Muyaya to the river and cut his throat and mutilate his body such and that as such the killing was unlawful. The State relied on the confession evidence of 1st Accused person in which he admitted to have killed Yosefe Muyaya together with his colleagues arguing that the confession was corroborated by the evidence of the plastic bag found at Nyambwe River (Exhibit P10); a shirt identified to belong to Yosefe Muyaya (Exhibit P9) which was found together with the plastic bag; other clothes found in the toilet and Exhibit P8; and the bones which were found in the toilet of Zione Mukhala's toilet. It was the State's submission that the evidence sufficiently connects the first accused to the offences.

As regards the 5th Accused person, Frank Nakuphethe, it was argued by the State that the 5th Accused Person was mentioned by the First Accused and Zione Mukhala in their caution statements and that he is the one who went to Alice Kambale's house to warn James Namauzongo that the police were looking for him. It was further argued that it was the 5th Accused person who informed PW1 that James Namauzongo had taken Yosefe Muyaya to Lilongwe. The State's view was that 5th Accused person's going to the house of Alice Kambale was not for the search of James but rather to warn James to run away for fear of being arrested. The State argued that the warning taken together with the confession evidence of the First Accused and Zione Mukhala sufficiently prove that the 5th Accused was involved in the murder of Yosefe Muyaya.

As regards 6th Accused person the state also argued on the basis on an audio recording which mentions the name Kachochola, and the confession statements of 1st Accused and Zione Mukhala

that the 6th Accused Person was involved in the murder of Yosefe Muyaya. Sixth Accused person relied on evidence of alibi produced by DW4 but the State argued that the evidence of DW4 was full of contradictions and that it is also contradicted by the audio which shows that the 6th Accused had not gone to Lilongwe before.

The State further argued that the circumstances of the death as explained in the caution statements showed that death was caused by malice aforethought in that the assailants wanted to kill Yosefe Muyaya to sell his body parts. It is therefore submitted that the offence of murder has been proved.

The offences under charge relate to Yosefe Muyaya, a boy with albinism who at the time of the alleged offence was 14 years of age. Yosefe Muyaya was staying with his uncle James Namauzongo and his wife Margret Mukoko at Liphala Village. Yosefe's mother was staying in elsewhere with her husband. In the course of staying, James Namazuongo told his wife who was PW3 that the child was wanted by some organisation in Lilongwe for schooling. Later James Namauzongo allegedly left for Phalombe to drop the child at the 'organisation' and returned a day later. When allegedly going for the trip, no transfer letter from the school, clothes and medicines for Yosefe Muyaya were obtained. When PW3 enquired from her husband about these, the following day, her husband took with him note books, clothes and medication for Yosefe Muyaya saying he would drop these at Social Welfare office in Phalombe. However when it later transpired that Yosefe Muyaya was missing, follow-ups were made with the Social Welfare Office in Phalombe who said that they knew nothing about the issue. This means that James Namauzongo lied to his wife that Social Welfare Office was involved in the issue of taking Yosefe Muyaya for schooling in Lilongwe.

The issue of the missing of Yosefe Muyaya surfaced when sometime after Yosefe Muyaya was allegedly taken to Lilongwe, James Namauzongo informed his wife that he was going to Lilongwe to see his nephew who was reportedly sick at that time. That was in August, 2020. When PW1 heard of the news of sickness of Yosefe Muyaya and that James had travelled to Lilongwe to see him, he expressed surprise as he was not aware of the issue of sickness and as such together with PW3 they tried to get hold of James Namauzongo to confirm the issue. At first they failed to get through his phone. Later they managed to link up and James Namauzongo told them that he was on his way but he did not have enough transport. PW1 advised James to go to Nyezerera to village headman to seek refuge for the night as he has planned to arrange for transport to pick him up. The following day PW1 went to Nyezerera but there was no trace of James Namauzongo and efforts to reach him by phone proved futile. At one point, as confirmed by PW11, Alice Kambale (former wife to James Namauzongo), James Namauzongo visited her house when the issue of the missing of Yosefe Muyaya was spreading in the area but PW11 refused to entertain him. Other than the one time that James Namauzongo visited his ex-wife, Alice Kambale, since he left his home in August 2020, James Namauzongo has not been seen again by his wife and family and is not reachable on his phone up to date. The Court's view is that this James Namauzongo is in hiding. In view of these circumstances and in view of the allegations before the court, the question is

whether it can be said that Yosefe Muyaya was murdered and so murdered by the Accused Persons. The other two offences are very much dependent on this offence.

From the evidence of the prosecution witnesses, no one saw any of the accused persons or indeed any other persons killing Yosefe Muyaya. The State's case therefore is based on circumstantial evidence and evidence of confessions. We have already discussed the principles relating to confession evidence and circumstantial evidence. What remains is the application of the principles to the present case. We will first deal with evidence of confession. The First Accused, Patrick Thomson Muhevure made a confession statement. In his statement the First Accused Person stated the following;

that he was called by his Aunt who was a witchdoctor to go to her house. He went to her house where he found other people including his fellow suspects, James Namauzongo and Yosefe. He was informed that there is a program to sell Yosefe and that there was already an available market. Proceeds of the sale were to be in the sum of K120, 000, 000 but his cut was K300, 000. He and the other people took the child to Nyambwa River in the night where they violently laid the child on a plastic paper and one of them sliced the child by the neck, cut off his hands and legs and mutilated the skin. Then they covered the trunk and the head and buried the same close to the river. Then the skin, the hands and legs were given to Zione Mukhala who together with Namauzongo would go to Lilongwe to sell the same. Then after two days, James Namauzongo and Zione Mukhala informed him that they were going to Lilongwe. They did not return until after a week when Zione Mukhala returned and informed him that there was no payment as Zione Mukhala said she had just come back without anything and that things were not looking clear.

First Accused went further to say that after arrest, he and other suspects led the police to the scene of the murder where they had buried the remaining body tissue after removing some parts. He however said that they found that someone had removed the body and they only found the plastic paper with which they wrapped the trunk.

The investigator who tendered the statement of first accused person also tendered the statement of Zione Mukhala which was also a confession. The version of the story was the same except to say that Zione Mukhala added that bones of the hands, legs and skin were thrown into her toilet and they were covered with soil to prevent smell. Zione Mukhala was the second Accused Person in this case but she passed on in the course of the proceedings after four prosecution witnesses testified.

First Accused initially denied to have made the statement or even to have signed for it. But when he was asked in cross examination, he acknowledged to have made the statement and signed for it but he said he only said the things mentioned so that the police would let him go as they were

assaulting him as they recorded the statement. Although the First Accused retracted the statement, the court finds pointers outside the caution statement which tend to show that the statement is materially true.

Firstly, the First Accused said that Yosefe Muyaya was killed at Nyambwe River and part of his body was wrapped in a plastic paper and buried at the river. During investigations, he led the Police to Nyambwe River to the place of the incident where the police recovered a plastic paper with blood stains. At the spot, the police also recovered a short. The short was identified as IDP1 and later tendered Exhibit P1. PW1 identified the short and said that it belonged to Yosefe and which he said Yosefe was using as a boxer. In defence the First Accused acknowledged that he went to Nyambwe River with the police but he said he could not confirm if he led the Police to the river. He however acknowledged that he is the one who mentioned Nyambwe River. Upon further questioning, he said he cannot say anything because the issues happened when he was in Thyolo prison. He then went on to say that he cannot be convicted because he was not found with anything or caught red handed. It appears to the court that his understanding of the law is that he can only be convicted if he is caught *in flagrante delicto* but as we already observed earlier on, a conviction can be properly had on confession or circumstantial evidence as long as the evidence meets the principle guiding the court on how to deal with this nature of evidence. So the fact that he was not caught in the act or that he was not found with anything does not exonerate him if there is other evidence to connect him to the offence. What the court finds upon considering the State's evidence on the point and the defence, is that it is the First Accused who not only mentioned Nyambwe river but also led the Police to the river. The Court also finds that at the river a plastic paper was recovered with patches of blood. The court also finds that a boxer which Yosefe used to wear was also found on the spot. It does not appear to the court that it was a mere coincidence that a boxer belonging to Yosefe Muyaya was found at a place where the First Accused in his statement said was the locus for the murder of the said Yosefe Muyaya. These in the court's view are pointers showing that the statement is materially true.

Further to this, the First Accused person said that upon killing Yosefe Muyaya his body was mutilated and the skin, legs and hands were cut off and taken to Zione Mukhala and James Namauzongo who were to take the same to Lilongwe. From the statement of First Accused, their work did not extend to the disposal of the parts that were given to Zione Mukhala and James Namauzongo. However when Zione Mukhala was interviewed, she stated that legs and hands were thrown into her toilet after which soil was thrown to prevent smell. During investigations and upon getting this information, the Police also went to the compound of Zione Mukhala where they engaged an expert in manual emptying of toilets in the district to empty the toilet of Zione Mukhala with the aim of recovering the body parts.

The expert engaged was PW4, Gadama Beula. From his evidence the court established that he worked on a toilet where he emptied it and in the course of emptying the toilet, he found a jumbo which had some items. Some of the items were hard and others were not. There was also a skin-

like item with hair but he was told to leave it in the toilet by the police. In addition PW4 found clothes folded together in one place. These clothes he said were a pair of trousers, shirt, shoes and baleta and he had to wash them as they had faeces. PW9 Detective Sub Inspector Nenani who at the time of the offences was a Crime Officer at Phalombe Police was one of the officers who went to the house of Zione Mukhala with PW4. PW9 took photos at the scene of the things that were found upon emptying the toilet. These are photos of the dirt taken out of the toilet; uncleaned bones, uncleaned clothes and cleaned bones. These photos were marked as Exhibit P2. Although PW5 and PW6 did not witness the emptying of the toilet as it happened whilst they were outside the compound where a group of people had camped, they both confirmed that they were shown these items as items which were retrieved from the toilet.

The clothes which were found in the toilet were a shirt long sleeve, a t-shirt, a trouser, shoes (gwaladi) and a hat (baleta). Among the group of people outside the compound was PW5, a relation of the said Yosefe Muyaya. When he was shown the clothes, PW5 identified the clothes as belonging to Yosefe Muyaya. These clothes were also identified by PW3, Aunt to Yosefe Muyaya who was staying with the said Yosefe Muyaya at her house. These clothes were tendered in evidence by PW9 and were marked as follows; shirt as Exhibit P3, cap (baleta) as Exhibit P4, shoes (gwaladi or slippers) as Exhibit P5 and the trousers Exhibit P6 and t-shirt as Exhibit P7.

When one looks at the list of clothes found in the toilet, they make up a complete set of clothes; long sleeve shirt, t-shirt, trousers, shoes and a baleta (hat). The clothes were shown to the court. They are not torn to suggest that they were thrown into the toilet because they were worn out. They were found in a toilet at Chiondo village whilst the owner of the clothes was resident in Liphala village. It is on record that these clothes were folded in one place. It is not ordinary to find a complete set of clothes of one person in a toilet of a stranger folded together in a village away from his own village for no apparent reasons. There must be some good explanation to the same.

PW4 also identified bones which he said he retrieved from the toilet. PW5 and PW6 confirmed to have seen bones at the house of Zione Mukhala. The bones were received in evidence. These bones were said to be human bones. PW8, an orthopaedic from Phalombe Hospital is the one who examined the bones. His examination report was marked as Exhibit P8. In the report he identified the following bones; metatarsals, pharynges, collar bone and backbone. In court when PW8 was shown the bones which PW4 recognised as the ones he retrieved from the toilet, PW8 described them as metatarsals, pharynges, collar bone and tarsal bone. PW8 said that he concluded that these were human bones having considered the shape, the color, appearance and atomic attachments. He also said that from the shape and the length of the bones, they belonged to a person of not older than 15 years of age. The issues raised by the Defence about the bones were that whilst the bones were said to be human bones, there was no DNA test to show that they were bones of Yosefe Muyaya and also that although 1st Accused in his statement said they threw into the toilet bones of hands and legs, no bones of the hands were found in the toilet. Again just as with the clothes, there is no plausible explanation as to why bones of a person should be found in someone's toilet. Human

bones are not ordinary materials which a person can just possess and dispose of anyhow. Even where a person is found dead in the middle of the jungle and were bones of unidentified person, the body will not just be dumped. Police are involved; the body is picked and properly buried because of the respect that humanity gives to people even when they are no longer able to do anything for themselves. It is unheard of to have human bones just thrown in a toilet by way of disposal.

In his defence, the First Accused person denied the charges. However his credibility was questionable. He contradicted himself in some respects. In examination in chief, he said that he did not state the things in his caution statement and that he did not sign for the same as he said he does not know how to read and write. In cross examination however, he confirmed to have given the statement read in court only that he said he stated the things he stated because he was being assaulted and he wanted the police to leave him. He acknowledged that the names he mentioned were not names of strangers but of people he knew. One was his nephew and the others were his friends. Nyambwe River which he mentioned was not non-existent and he in fact led the police to the river. On the issue of leading the police to the river, he initially acknowledged to have mentioned the river to the police but he said he cannot confirm that he led the police to the river yet later in the course of cross examination, he acknowledged to have led the police to the river. Again he denied to have signed the caution statement but when cross examined, he acknowledged to have written his name on the documents. When further cross examined, First Accused said what he can say is that the body of the child was not found at the river, that leg bones were not found and that he was not caught red handed and that as such he cannot be convicted.

Again, the First Accused person when further cross examined, said he cannot say anything in this case because things happened when he was in Thyolo Prison. He did not indicate as to why he was at Thyolo Prison and as to when he went there. Besides, this issue only came out in cross examination and he never raised it in examination in chief or in re-examination. He also gave an interesting response in cross examination when he said that he was married at the age of 9.

First Accused in his defence taking advantage of the absence of the deceased Zione Mukhala said that for him to speak, Zione Mukhala should speak first because he himself knew nothing. It was puzzling to the court to hear First Accused say this when he knew that his co-accused, Zione Mukhala passed on whilst the case was in progress. Again whilst saying he knew nothing about the offences, First Accused said that his two co-accused (5th and 6th Accused), should not speak on the case because they knew nothing. This would suggest to the court that he himself knew something about the case but not his friends and that he wanted to take advantage of the death of Zione Mukhala and yet his confession was to the effect that him and Zione Mukhala were together in the offence.

Yosefe Muyaya went missing between May and August 2020. Todate he has not been found. He was taken out of the home where he was staying by his Uncle who was also his guardian under the

guise that he was being taken to Lilongwe for school. Since August 2020, schools have opened and closed and yet Yosefe Muyaya has never returned to his home. James Namauzongo, the person who was last seen with him and who said he had taken him to Lilongwe cannot be found since August 2020. From the evidence of the State, at the time he went missing, James Namauzongo was aware that the police were looking for him in relation to the missing of Yosefe Muyaya. The Social Welfare Office which was said to have been involved in the process of sending Yosefe Muyaya to Lilongwe denied knowledge of any such process. There is no sin in finding help for a child to go to a boarding school for James Muyaya to be in hiding because of getting help and sending his nephew to a boarding school. The court's conclusion is that the reason James Namauzongo is at large is because he knows that Yosefe Muyaya is not at school in Lilongwe nor indeed anywhere.

Whilst Yosefe Muyaya is missing, the First Accused and the deceased, Zione Mukhala made startling revelations that actually this Yosefe Muyaya was murdered by them and other people for purposes of selling his body parts. A place where the said Yosefe Muyaya was said to be murdered was visited and a plastic paper which was said to be used to wrap the trunk of his body which was buried at the place was found at the place. A short used as a boxer by Yosefe Muyaya was also found at the spot. The Confessions also revealed that some bones were thrown into a pit latrine at the house of Zione Mukhala. The toilet was emptied and indeed some human bones were found. Although not all the mentioned bones were found, human bones were indeed found in the toilet. In addition, a complete set of clothes folded in one place which were identified to belong to Yosefe Muyaya were found in the toilet. The court is mindful that no DNA was conducted to establish if the bones belonged to Yosefe Muyaya. But in the scheme of things and on the totality of the evidence considering

- 1) the confession,
- 2) the finding of a boxer at the site where the said Muyaya was said to have been murdered,
- 3) the fact that it was First Accused who led the police to the site of where he said the said Yosefe Muyaya was murdered,
- 4) the finding of plastic paper which was said to have been used to wrap the remaining body tissue,
- 5) the finding of human bones in the toilet of Zione Mukhala to whom First Accused admitted to have handed over some bones;
- 6) the finding of a complete set of clothes folded together and which included shoes and hat positively identified to belong to the missing person
- 7) the fact that the person who took Yosefe Muyaya out of the house where he was staying under the guise that he was taking him to school is at large and has not been seen since he learnt that the police were looking for him; and
- 8) that a child with albinism was seen at the house of Zione Mukhala (also known as Mai Gogoda)

The court's analysis is that all this considered together lead to the conclusion that Yosefe Muyaya

is not just missing but that he was actually killed and that some of his bones were thrown into a toilet at the house of Zione Mukhala. He was gruesomely killed by having his neck sliced by a group of people which included the First Accused for purposes of selling his body parts and that after being killed, his body was cut in pieces hence the finding of some bones in the toilet of Zione Mukhala. The killing was clearly unlawful and the intentions were not only bad but also evil. There was no justification whatsoever for taking out a life of an innocent young man in such horrific manner. There is no better way of expressing the conduct as murder. It is therefore the finding of the court that an offence of murder was committed on Yosefe Muyaya by a group of persons which included the First Accused.

The 5th and 6th Accused Persons denied the charges even when they were interviewed. As already observed above, the state cannot rely on the confessions of First Accused and Zione Mukhala which mentioned the two accused as having been involved in the killing of Yosefe Muyaya because these two did not adopt the statements as their own as provide in section 276(2) of the CP & EC. Other than the confessions, the evidence connecting the two accused persons to the murder charge is circumstantial. For 5th Accused, it is said that he is the one who informed PW1 that James Namauzongo had gone to Lilongwe to see Yosefe Muyaya who was unwell and also that he went to the house of Alice Kambale to warn James that the police were looking for him. In Defence he said he was sent by PW3, wife to James Namauzongo to go to Mozambique to inform PW1 about the sickness of Yosefe Muyaya and that James Namauzongo had gone to visit him. However when PW3 testified the issue was never that she is the one who sent out 5th Accused. The 5th Accused was moving together with PW1 as they were trying to locate James Namauzongo. He acknowledged to have gone to the house of PW11, Alice Kambale where James was believed to be and the State in their evidence indicated that he went to warn James Namauzongo that he was being sought after by the police. His conduct raised suspicions as to his knowledge in what had happened to Yosefe Muyaya and his interest in protecting James Namauzongo. The suspicions however are not sufficient enough to conclude that he was indeed involved in the murder of Yosefe Muyaya. It cannot be said with the evidence before the court that the case against 5th Accused, Frank Nkuphetha has been established beyond reasonable doubt. He is therefore found not guilty of the offence of murder.

The Evidence against 6th Accused is that conversed with his father and James Namauzongo in the aftermath of the missing of Yosefe and when investigations had started and that in the conversation, he was being warned to run away because of the allegations of murder of Yosefe Muyaya. The audio recording containing the said conversation was tendered in evidence. The recording was in lomwe language. The investigator in his evidence that the father of the 6th Accused recognised the voices in the audio and acknowledged that they were those of himself, 6th Accused and James Namauzongo. A translated version of the audio which was tendered in court indeed showed that there were three people in the conversation. The father of the 6th Accused did not come to court to confirm what he had told the police despite having given a statement to the police and having been summoned to come to court. The investigator was emphatic in his evidence

on the point and there is no reason to disbelieve him. At the time the State wanted to tender the statement of the Father of the 6th Accused, the Defence objected to the same among other things arguing that the father was not willing to come and testify against his son. In the audio, a person was being warned to run away and go to Lilongwe. Sixth Accused was found in Lilongwe and that is where he was arrested. In the circumstances and in view of the confessions mentioning his involvement, the state was justified in suspecting that 6th Accused was involved in the offences.

Sixth Accused chose not to testify in his defence but he called a witness who testified to the effect that the 6th Accused went to his house in Lilongwe in July 2020. This evidence did not exonerate the 6th Accused because the offence is alleged to have occurred between May and August and he himself is alleged to have only gone to Lilongwe in July. He could have travelled to Lilongwe after the offence was already committed. In the absence of the confession evidence of his co-accused, the evidence against 6th Accused is that of the audio clip and that he escaped to Lilongwe after the offence. It is observed that in the audio, it is suggested that the 6th Accused had never gone to Lilongwe before but his brother in his evidence said that this was not the first time for him to go to Lilongwe. Again it is observed that in the audio, there is no direct reference to the killing of a person and in particular Yosefe Muyaya. Although the evidence raises suspicions as against 6th Accused, it is not sufficient enough to conclude beyond reasonable doubt that the 6th Accused persons was involved in the murder of Yosefe Muyaya. The 6th Accused person is therefore found not guilty of the offence of murder.

Extraction of human tissue from the corpse of person.

This offence will be established when there is evidence that an accused person extracted or removed human tissue or body parts from the corpse of a person and that such extraction was without any good justification or without the mandate of the law. On the count of extracting human tissue from a human corpse or a living person, it was argued by the Defence that there is no evidence to show that the bones tendered in court were bones of Yosefe Muyaya and that we cannot just assume that the bones are from the body of Yosefe Muyaya. In the absence of evidence of extraction, it was argued that there is no evidence that the extraction was done unlawfully and that it was done by the accused persons.

The State on the other hand argued that there is evidence from PW10 and the confessions of the two accused that Yosefe Muyaya was mutilated and bones were thrown into a toilet and that with the finding of the human bones were found in a toilet shows that there was extraction. The State argued that it was a lame excuse by first accused to say that he is not guilty because he was not found with anything. The extraction of the body parts being for purposes of sell was unlawful. The State argued that since all the accused persons were present when the acts were committed, under section 21 of the Penal Code they are all guilty.

It has already been found as a fact under the offence of murder that Yosefe Muyaya was killed and that his body was cut with some of his bones being found in a toilet of Zione Mukhala. It is

therefore not disputed that body parts or human tissue was removed from the corpse of Yosefe Muyaya. Such removal was not done in accordance with any law and there was no other good or justifiable reason for removing his body parts other than selfish and demonic reasons of selling the same. The evidence is therefore sufficiently proving the offence of extraction of human tissue from the corpse of a person. There is already a finding of the involvement of the First Accused in the killing of Yosefe Muyaya. The killing was for purposes of removing body parts for purposes of sell as such having been involved in the killing and with his own confession, First Accused was involved in the extraction of body tissue.

As for the 6th and 7th Accused, the evidence does not establish their involvement not only in the killing but also in the extraction.

Trafficking in Persons

In accordance with the particulars of the charge, the offence will be established if it can be shown that there was obtaining of Yosefe Muyaya; that such obtaining was done through the means of deception and that the purpose for such obtaining was to exploit Yosefe Muyaya. With regard to the offence of trafficking in person, it was argued that there is no evidence that Yosefe was recruited, transported, transferred, harboured, received or obtained within or beyond Malawi. It was argued that Yosefe was taken to Lilongwe by James for school and that none of the Accused Persons accompanied James Namauzongo. It was further argued that none of the witnesses showed that any of the accused used any of the means in section 2 in order to take Yosefe. It was further argued that there is no evidence that Yosefe Muyaya was exploited and that there was no evidence that bones presented in court were from the body of Yosefe Muyaya. It was therefore submitted that the State had failed to prove the charges against the accused persons and that as such they must be acquitted.

The State on its part argued that Yosefe was obtained by his uncle James Namauzongo for purposes of killing him to sell his body parts but that the obtaining was by fraud as he lied that he had found donors to help the child with school in Lilongwe. It was further argued that there was exploitation of the child in that he was killed mercilessly and had his body dismembered. It was therefore the State's submission that the offence of trafficking in persons has been established to the required standard.

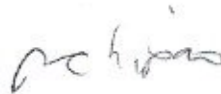
It is clear from the evidence of PW3 that James Namauzongo obtained Yosefe Muyaya from their home on the pretext that he was being taken to Lilongwe for School through the Social Welfare Office. The Social Welfare Office denied knowledge of any such issue and despite schools opening and closing from 2020 to date Yosefe Muyaya has not been seen since he was taken by James Namauzongo and no one else has heard from him. There is however evidence as already found under count one that Yosefe Muyaya was actually murdered in Phalombe where some of his body parts were recovered. This is proof that James Namauzongo obtained Yosefe Muyaya by deceitful means by lying that he was taking him to school. By cutting and removing his body parts, the

assailant demonstrated that their intention was to exploit him. Under section 2 of the TIPPA, exploitation includes killing and removal of body parts. Although the evidence does not show that First Accused participated in the obtaining of the said Yosefe Muyaya which was for the intention of exploiting Yosefe Muyaya, his participation in the killing and removal of body tissue from the corpse of Yosefe Muyaya shows that the First Accused aided and abetted James Namauzongo in carrying into effect the offence he had intended to commit. Within the meaning of section 21 of the Penal Code and the TIPPA, the First Accused was a party to the offence committed by James Namauzongo. The court therefore finds the offence of trafficking in persons proved against the first accused person beyond reasonable doubt.

Conclusion

On the whole of the evidence, the court finds the First Accused guilty of the three offences of murder, extraction of human tissue and trafficking in persons as charged and accordingly convicts him as charged. The Fifth and sixth Accused persons however are found not guilty and are accordingly acquitted from the offences charged. They are to be released from custody unless if held for other lawful causes.

Pronounced in Open Court this 7th Day of April, 2022 at Phalombe.



Violet Palikena-Chipao

JUDGE