



Library



**IN THE HIGH COURT OF MALAWI**  
**MZUZU REGISTRY CRIMINAL DIVISION**  
**SITTING AT RUMPHI**  
**HOMICIDE CASE NO. 34 OF 2020**

**REPUBLIC**  
**VERSUS**  
**PATRICK KALEYA**

CORAM: HON. JUSTICE T.R. LIGOWE  
W. Nkosi of Counsel for the State  
C. Duke and Chiwalo of counsel for the Accused  
F. Mwakhwawa, Official Interpreter  
J. Chirwa, Court Reporter

**JUDGMENT**

Ligowe J

- 1 Patrick Kaleya is charged with murder contrary to section 209 of the Penal Code, on allegations that on or about 4<sup>th</sup> April 2019, at Kanduku village, T/A Chikulamayembe in Rumhi, he, with malice aforethought, caused the death of Iddi Botha and he pleaded not guilty.
  
- 2 The prosecution brought Mustard Suzgo Kaleya, the village headman, Francis Botha, brother to the deceased, Sarafi Botha, daughter of the deceased and Detective Kamzingeni, the police officer who investigated the matter, to testify and closed their case. I now have to determine in accordance with section 254 of the Criminal Procedure and Evidence Code if they have made out a case against the accused sufficiently to require him to make a defence.

3 The rules for consideration at this stage of the case are very clear. The cases of *Rep v Dzaipa* [1975–77] 8 MLR 307, *DDP v Chimphonda* [1973–74] 7 MLR 94, *Namonde v. Rep* (1993) 16(2) MLR 657 and *Gwazantini v The Republic* [2004] MLR 75 (HC), all agree that no case will have been sufficiently made out if the evidence has not proved the essential element of the alleged offence, if the evidence has been so discredited as a result of cross-examination and if it is so manifestly unreliable that no tribunal could safely convict on it.

4 Applying this in *Gwazantini v The Republic* [2004] MLR 75 (HC) Chipeta J as he then was stated at page 83:

“Considering section 254 of the Criminal Procedure and Evidence Code side by side with the material practice direction on the matter, it is clear beyond peradventure to me, that if indeed I find that either an element of the offence charged has not been covered in evidence, or even if I observe that all elements of the offence charged have been covered by the evidence, I at the same time consider the said evidence as being so discredited by cross examination or as being so manifestly unreliable, I have no choice but to acquit the accused. Conversely it is equally my very clear understanding of the law that if I otherwise find all the elements of the offence charged covered by the evidence proffered by the prosecution and if at the same time, I find that the said evidence has neither been so discredited nor shown to be otherwise so manifestly unreliable, I ought to put the accused on her defence.”

5 I find after hearing the evidence in this case, that the accused and the deceased were relations, and had been quarrelling over a garden, apparently belonging to the Bothas. It had been used by the accused person’s mother for some years, but in 2018 the deceased wanted to take it over, but the accused resisted. There had been a tug of war since, until later in 2019, the accused person accused the deceased of stealing his maize from the garden and warned Sarafi Botha that her father would go missing in two or three days. Four days later the father was found dead outside his house. At first, the family thought he had been attacked by thugs, but Sarafi Botha’s view was that thugs would have removed some body parts. She suspected the accused because of what he had said four days before and that he came to the funeral too late, around 10:00 pm and drunk.

6 The post-mortem examination report exhibited by the investigator shows that the body had a deep cut on the forehead and on the occipital bone and there were clots of blood in the mouth and on the face. There is nothing the investigator found linking the accused to the death apart from Sarafi Botha's suspicion.

7 The offence of murder is provided for under section 209 of the Penal Code. It states:  
"Any person who of malice aforethought causes the death of another person by an unlawful act or omission shall be guilty of murder."

8 There are therefore three basic elements of the offence - (a) death caused by (b) an unlawful act or omission of the accused person (c) with malice afore thought.

9 I find that the evidence in the present case shows that death was caused, but not that it was caused by an unlawful act or omission of the accused person. All that is there is a suspicion. It was held in *Mtama vs. Rep*, 10 MLR, 15 that a suspicion however strong cannot be used as a basis for a conviction. My further view is that a suspicion cannot be a basis for finding that a sufficient case has been made out against an accused person under section 254 of the Criminal Procedure and Evidence Code.

10 It has to be remembered that section 254 of the Criminal Procedure and Evidence Code is in recognition of the accused person's right to adduce and challenge evidence and not to be a compellable witness against himself or herself, as provided for under section 42 (2) (f) (iv) of the Constitution. An accused person should only be called to defend after the prosecution has sufficiently made out a case against him or her. The law does not expect the accused to trip into the offence in his or her defence. In *Gwazantini v The Republic* [2004] MLR 75 (HC) at page 80 Chipeta J as he then was said:

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

11 I therefore find that no case has been made out sufficiently against the accused person in the present case for him to be required to defend. I acquit him.

12 Pronounced in open court at Rumphi this 18<sup>th</sup> day of February 2021.



T.R. Ligowe  
**JUDGE**