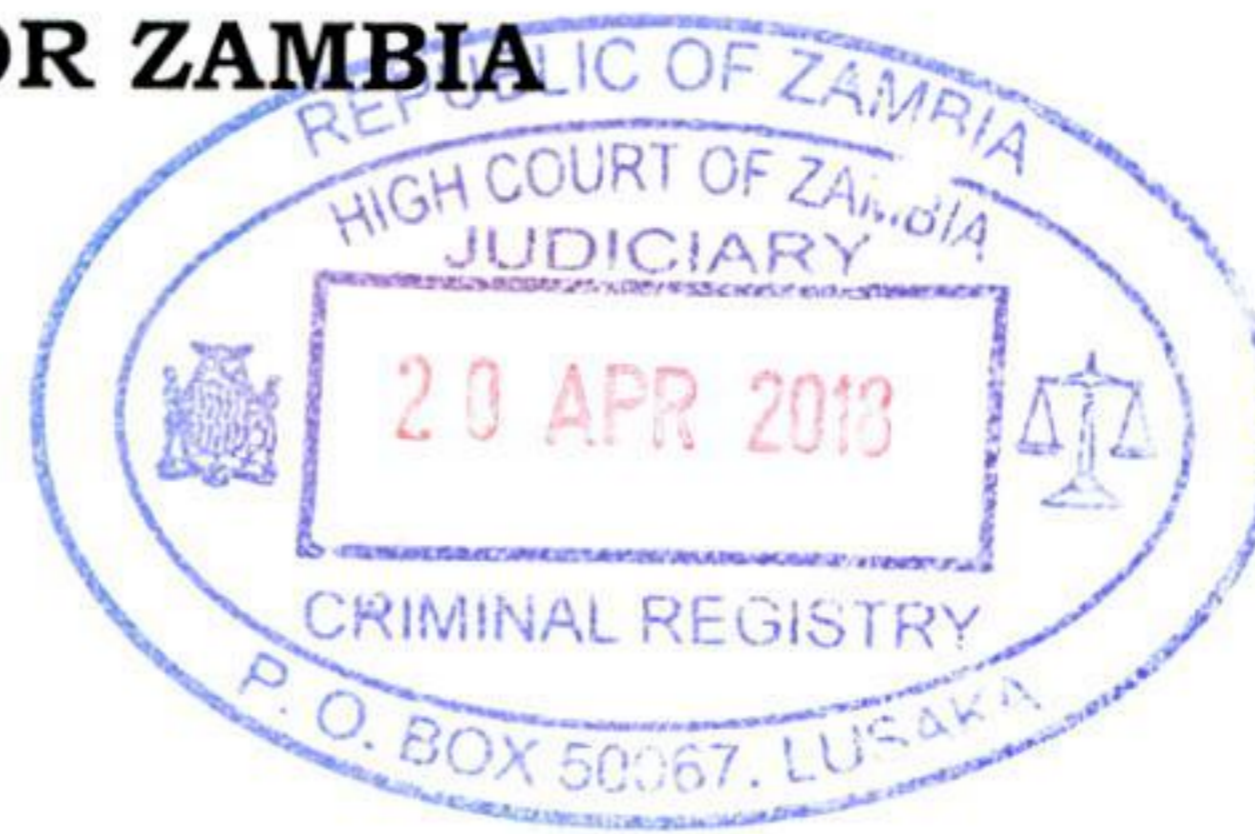


IN THE HIGH COURT FOR ZAMBIA
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

HP/07/2018



BETWEEN:

THE PEOPLE

V.

RODGERS HAMASAMU

Before Hon. Mr. Justice M. Chitabo, SC on the 19th April, 2018

For the State: Mrs. A. K. Mwanza – Senior State Advocate

For the Accused: Mrs. L.T. Tindi- Legal Aid Counsel
Mrs. M. Musonda – Legal Aid Counsel

JUDGMENT

Cases referred to:

- 1. Bwanausi v The People (1976) Z.R. 103*
- 2. Humphrey Phiri and others V The People (Appeal No. 153/154/155/156/157 of 2015)*
- 3. Kampafwile v The People (1972) ZR 242.*
- 4. Patrick Sakala v The People (1980) ZR 205*

5. *Whiteson Simusokwe v The People SCZ Judgment No. 15 of 2002*

Legislation Referred to:

1. *Penal Code Chapter 87 of the Laws of*

The accused person stood charged with the offence of Murder contrary to section 200 of the Penal Code Chapter 87 of the Laws of Zambia.

Particulars of the offence are that Rodgers Hamasamu on the 13th day of August, 2017 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, did murder Mirriam Nambeya.

The accused person pleaded not guilty to the charge and the State called five (5) witnesses to support its case.

PW1 was **Doreen Chisenga** of Kuku compound in Chawama Lusaka who testified that she was a bar sales lady who owned a bar at Katambalala market. She narrated that on the 12th of August, 2017 she went to open the bar at around 05:30 at Katambalala market in Kuku compound. She began operating and at around 17:00hrs she saw a man, the accused, and a woman with a child on her back, the deceased, enter the bar. She knew these people as her regular customers and they walked in with bottles of KST beer, a very strong beer.

At around 18:30hrs the deceased began failing to walk and started hitting herself against the wall and juke box. When she noticed she was falling with a child, who was about 3 years old on her back, the

accused told the deceased to give him the child and that they should head home. The deceased refused to go home and the two began pulling each other and a fight ensued. When the witness saw this fight she retrieved the child from them as they were using fists on each other.

According to PW1, she started telling off the accused that what he did was wrong by allowing the deceased to take strong beer as she kept falling with the child and could have killed the child. She told him that she would get the child and let them go home and when they sobered up they could come and collect the child from her. She said the other people in the bar complained about the noise the two were making and PW1 chased them from the bar. She told them that when they sobered up they should return to collect the child and informed them that she would close at 21:30. Both of them were staggering from drunkenness as they walked. At 21:30 she closed the bar and went with the child at her house in Kuku compound.

The following day at 05:30 she went to open the bar with the child on her back. She cleaned the bar and later started selling beer. At around 08:30hrs she saw the accused come into the bar with two beers in his hands. The child who was now at the counter ran towards him. She left the counter and went and got the child. She told the accused that he was not going to get this child and that she would wait for the mother to come so that she could take both of them to the police. She testified that she told him this because of

their behavior the previous day to discipline them so that they could stop drinking beer in the manner they did.

It was her further testimony that all the patrons of the bar who were present were also upset with him and told him that they would have killed the child the previous night. The accused said he was also looking for his wife as she did not sleep at home and that he had to force the door open to get in. He then left and went to buy snacks for the child and gave them to the child while he was drinking beer.

A short while later she saw two ladies and a man enter her bar and said that they had found the deceased in an incomplete building. According to her, all the customers in the bar and the accused person and the witness all went to the building which was near the bar. When she reached there she removed the child off her back and left the child at a distance and went to watch what was happening.

She explained that the deceased was lying inside the building undressed and blood was oozing from the nose and ears and her hair appeared to have been pulled out. The ladies then took chitenge material and covered her.

She further narrated that the deceased was still breathing but was not able to talk. The accused started crying and then left the scene and went to book a taxi and took the deceased to the clinic.

When they left for the clinic police officers from Chawama Police Station arrived at the scene and they were interviewed. The witness went back to the bar and at around 11:00 the accused and his cousin came to collect the child. She told them that she would take them to Victim Support Unit within the market. While at the Victim Support she told the counsellors that the mother to the child had just been taken to the clinic as they were drinking beer recklessly. She then gave accused back the child as they were there.

When cross examined by the learned Mrs. Musonda the witness revealed that she knew both accused and the deceased for about a year as they were her customers and used to move together. She denied knowing that the accused worked for Magnum Security Company as a security guard. She maintained that the accused went to her bar on the 12th of August at around 17:30 in the company of the deceased. She said she was not aware that the accused was working on that very day and only knocked off at 18:00 as he looked very drunk that a person could not possibly work in that condition.

She explained that she did not tell the police the extent of the argument between the accused and the deceased. She further maintained that she saw the accused person and the deceased fighting on the material night. She said she had told the police about the occurrence of the fight by giving a statement. The witness conceded that the statement did not reflect that the deceased and the accused person were fighting and exchanging blows. She

maintained that the two were arguing to a point where they disturbed her other customers.

Under further cross examination by the learned Mrs. Tindi, the witness stated that she told the police what time the accused person and deceased went to her bar but the police may have left it out. She confirmed that that was not the first time that she was witnessing an argument in her bar.

She further confirmed that the reason she chased the two was because the two were arguing and disturbing other customers. She said she did not know where the two went after this nor did she know what may have transpired after the two left her bar. She maintained that the following morning the accused person came to her bar with a bottle of Eagle beer. The witness further maintained that both the accused and the deceased were drunk on the material night.

In re-examination the witness explained that she told the police that the accused person and the deceased were fighting. It was her position that maybe the police omitted that from the statement.

She said she misunderstood the question pertaining to whether she went to report the matter to the police, hence she denied making a statement to the police on the night of 12th August, 2018. She clarified that in the morning of 13th August, 2017 the accused had Eagle Beer in his hands.

She stated that she told the police officers everything that transpired including the time that the accused person and the deceased came and she maintained that both of them came to her bar drunk.

PW2 was **Matina Mukwanya** of Chawama compound who testified that the deceased was her step aunt who was her stepmother's sister. She narrated that on the Sunday of the 13th August, 2017 she was sleeping at her home when her young brother Suwilanji went to call her and informed her that there were three men who were looking for her outside. She went outside and found the accused with two other men. The accused then informed her that the deceased had been taken at Chawama clinic between 10:00 and 11:00 hrs. She narrated that at first she refused to go with him but then changed her mind and followed the accused. When she arrived at Chawama clinic they went directly to the doctor's office and found that the deceased was on a drip and was asleep. She was wearing a pant and was wrapped in a bedsheet and was wearing a t-shirt that was stained with blood. She said her hair was shaggy as if it had been pulled and had some traces of dried grass. On one of her ears there was sore and it was oozing with blood.

The Doctor told her that the reason she was not waking up was because she was very drunk. The Doctor then told the accused to carry her into the children's ward which he did.

The witness then asked the accused where the child was he said he left the child at his neighbour's house. She disclosed that the child

was not the accused's biological child but was only the deceased's and that the accused and the deceased were not legally married. She then suggested to the accused that they go and pick up the child to which he agreed. She went with the accused to go and pick up the child and while on their way she called her aunts and informed them where the deceased was. As they were going to his house they passed through the accused's cousin's place. The accused explained what happened and Mutinta scolded him. Mutinta told him that they told him that he should have sent the deceased back to her home.

They then proceeded to Katambalala market and on their way the accused went to a bar and bought Eagle Beer. They then went to another bar where the child of the deceased was.

They found the child with the bar lady and the bar lady started rebuking the accused and she told her that he and his wife drink recklessly such that his wife nearly killed the child. She said that the bar lady told her that she got the child from the deceased because she was very drunk and had fallen on her back. She refused to give them the child as they had reported the matter to the Victim Support Unit. When they went to the Victim Support Unit, the officer who was handling the matter was not there and she took the child and left the accused arguing with the bar lady's daughter.

Later the accused and two friends followed her to her house in Chawama. As they were going she asked him what happened and

he told her that he went for work and when he came back he found the deceased was not home and he forced the door open paid the house rentals and he then went to look for the deceased. He said he found deceased very drunk by the road. When the accused requested for the house keys the deceased threw a coin in water and said that the keys had fallen in water. He started looking for the keys in water but he did not find them. He said he took the deceased to a bar and bought her Eagle beer. He told her he left the deceased in the bar and went to look for relish. When he went back to the bar he found it closed. She said according to him he knocked and knocked at the bar and almost broke the door but no one opened. At the time she requested for the deceased clothes she found food cooked and the bed was made.

Later they were told to clean the deceased and they cleaned her and she later died.

When cross examined the witness confirmed that she did not know what happened to the deceased. She admitted that the accused told her that the deceased was found drunk by the road side. She also confirmed that he told her that he went back to the bar where they were the previous night and then someone went to tell them that the deceased was in an unfinished building. She said that according to the accused he did not know the deceased's whereabouts that morning. She admitted that the deceased had bad drinking habits and confirmed that she left their home without any explanation.

PW3 was **Tadjimurat Musakhanov** a State Forensic Pathologist of University Teaching Hospital area in Lusaka. He explained that he conducted a postmortem and prepared a Postmortem Report. He explained that the postmortem was conducted at 16:00hrs and that he found two blunt force traumatic head injuries on the left side and the right side. All the other organs of the body such as chest, neck, genitals and stomach were intact. The cause of death was fatal head hemorrhage. He said he suspected that she was beaten because she had injuries on two sides.

In cross examination he clarified that it could not be a road traffic accident because the injuries were only two. He admitted that falls, physical injury and road traffic accidents could cause blunt force injury. He said it was not possible for the deceased to have fallen twice causing the injuries she sustained on either side because the nature of the blunt force injury he found on one side alone would have caused a coma.

PW4 was **Grace Mwale** of Plot 286/19 Kuku compound in Lusaka who testified that on 12th August, 2017 she was at her home at around 16:00hrs she heard a knock on her door and she found the accused outside who was her tenant. He told her that he had brought money for rentals but she told him she did not want his money as she had already given him an eviction notice. When the accused inquired why, she told him that the way the accused and his wife drunk was excessive. She said she did not want them to continue in that manner as too many things come out of alcohol.

She said that even when he insisted she still continued refusing the money and these negotiations took 30 to 45 minutes. He said he had stopped this behaviour and would not repeat the same. She eventually decided to get the K350 and he told her that he was going to the market to buy food as he had found no one at his house and the house was locked, and he left.

She narrated that she had known him for three to four years. She said she knew his first wife whom he had a child with. She narrated the accused and his wife lived in one of her houses and in 2016 when they had too many household goods they decided to move out of the house to a bigger one.

In 2017 the accused came back looking for a house and explained that his wife had left him and he could not continue in a big house just alone as the wife had taken all the household goods. Since the tenant who was there before had left she allowed the accused to move in and he told her that he was not married and would be staying alone. A few days later she found a child outside the accused's house. When she inquired from the accused whose child she was, he told her it was his friend's child.

She testified that on the 8th or 9th of August, 2017 she went to the accused's house and only found the deceased. That was the last time she saw the deceased. The witness was positively identified the accused as her tenant.

In cross examination she confirmed that when the accused went to pay the rent he told her that he did not know the whereabouts of the deceased. She said that she was not sure what time the accused went to pay the rentals and left but guessed it could be around 16:00hrs to 17:00hrs as she woke up abruptly. She admitted to having made a statement but could not remember the day.

PW5 was **Detective Constable Bright Mukonkota** of Chawama Police Station who testified that on 14th August, 2017 in the CID department and he was allocated with a docket for murder. He interviewed the witnesses and he found out that there was a suspect who was detained in custody. He then visited the crime scene at katambalala market in Kuku compound.

When he returned to the station he interviewed the accused person and he recorded a warn and caution statement and considering his reply he visited the residence of the accused person to verify and interview the neighbourhood.

On 15th August, 2017 he booked for a postmortem to be conducted on the deceased which he attended on 16th August, 2017 at UTH mortuary. He was then issued with a coroner's report and it stated that the deceased had suffered blunt force head injuries. Upon inquiry from the pathologist what this meant, the pathologist informed him that the victim was either injured or beaten.

Based on the summary of the postmortem results that he received from the pathologist he went to interview the accused person again.

The response from the accused did not satisfy him and he made up his mind to charge and arrest the accused person for the subject offence which charge he denied.

He explained that he had challenges in investigating the matter as the people that he came across could not come forth as witnesses including the neighbourhood. The witness positively identified the accused as Rogers Hamasamu.

When cross examined the witness confirmed that the accused told him that on the 12th of August 2017 he went home and he did not find the deceased. He also confirmed that the accused mentioned that he went to look for the deceased and found her at a bar drunk. He also confirmed that the accused told him that he left her at the bar and went to buy relish.

The witness also tendered the statement made by PW4 and was admitted into evidence and marked D2. He said when he visited the crime scene the body had been moved as she had not been pronounced dead.

In re-examination he told the Court that while the accused said he went to another bar with the deceased on the material night, that other bar did not exist as there was only one bar involved in this case. He further clarified that the accused told him that he did not find the deceased at the bar and that he went to buy relish was an attempt by the accused to find his defence.

He further explained that the accused person went back to the bar to demand for the child. This bar was where the accused and the deceased were fighting and the accused person forced the deceased to go with him home. It was the same fight which disturbed the other customers and made the bar lady to chase the two out of the bar.

He said that while the accused told him his version, as an investigating officer he could not rely on the information coming from the accused as he was the only one who knew how the two of them moved prior to the deceased's death.

The accused having been found with a case to answer was put on his defence and he elected to give sworn evidence and did not call any witness.

DW1 one was the accused herein, a security officer at Magnum security who testified that on 12th August, 2017 he woke up in the morning and prepared to go for work. He left the deceased, who was his girlfriend, at home with her three year old daughter. He reported for work at 06:30am where he worked from that time to 18:00hrs when he knocked off and went to withdraw money from the ATM as the landlord was asking for money for rentals.

He stated that he was working from Downtown mall and after passing through an ATM to get money he arrived home at around 19:00hrs and he found that there was no one at home and the house was locked. He then went to his landlady, PW4 to pay the

rentals and he proceeded to Katambalala market. When he arrived at the market he found the deceased coming from one of the bars and she was drunk. He then got her and took her inside the market and he thought to take her to a bar where he knew some people considering her state of mind because he wanted to go and buy relish.

He went to the PW1's bar and he left her there and went to look for relish at Kuku market at around 20:00hrs. When he went back at around 21:00hrs, he found the bar closed and he assumed that the deceased had gone home but when he arrived at home he found the door locked and he forced door open and he went in and slept. The following day on 13th August, 2017 instead of going for work, he went to the same bar he left the deceased to find out how she moved the previous night.

When he arrived there he found PW1 with the deceased's child and he inquired where the mother to the child was. According to him, PW1 told him that the deceased was so drunk after he left that she dropped the child and that was how she got the child from her. He sat in the bar thinking that if they had hidden the deceased, she would come back to collect the child assuming she left with another man.

Less than 10 minutes later, someone came to tell him that they had seen the deceased at a nearby unfinished shop. When he got there he found the deceased was lying down, she was not talking and had dried blood on her cheek and she had no trousers on but was just

in her underwear. He then asked the police reserve found in Katambalala market what was happening and they responded that they had found the deceased just like that. He then told the police reserve that the deceased was his girlfriend and he booked a taxi as a matter of urgency since he saw that the deceased was still breathing. They put the deceased in the vehicle and went to Chawama police where the matter was reported and a medical report form was issued and she was rushed to Chawama clinic where she was taken directly in the doctor's office.

The Doctor inquired as to what had happened and he explained to him and she was put on a drip. The accused then went to the deceased's brother's house and found PW2. He explained what transpired to her and she immediately followed the accused to the clinic.

PW2 inquired on the whereabouts of the child and he informed her that she was at a bar in Katambalala market where they went to collect the child. He found PW1's niece with the child and an argument ensued over how the deceased was found in the position that she found herself. PW1's niece became agitated and said that they go the Victim Support Unit where they went inside the market. They however did not find anyone at the Unit and PW1's niece gave PW2 the child.

After PW2 left he waited for PW1 to come and after waiting 30 minutes he decided to go to the clinic. When he arrived at the clinic, he found the deceased was alone and the drip had finished and he

asked them to put another one. He later went back to pick up PW2 from the deceased's brother's house so that they could go to the clinic while the child remained behind. At around 18:00hrs the deceased died and her brother later came to the clinic.

He denied being at PW1's bar at around 17:00 as he was still at work at the time. Further that PW1 lied about most of the things stated in her testimony. He denied going to her bar with skippers according to PW1's statement and yet he said she testified that he was with ASP beer.

He denied PW1's evidence that he and the deceased were chased from the bar at around 18:30 as he had not even reached home before 19:00hrs. He further stated that PW1 lied when she told the Court that she asked the accused and the deceased to come back to collect the child by 21:00hrs as bars were closed by that time. He stated that the security guards who were in charge of the bars ensured that the bars would be closed by 21:00hrs.

He stated that he went to the bar to look for the child at the bar as he did not know well the whereabouts of the deceased. He denied reaching at PW4's house at around 16:00 to 17:00hr on the 12th August, 2017 to pay rentals.

He said that when Detective Mukonkota went to PW1's bar he found they had stopped selling. He further instructed his young brother to have PW1 arrested. He also stated that he was surprised by the turn of events because when the deceased died he went to inform

the police about her death and he was detained in police custody when he went to report.

In cross examination the witness admitted to having paid rent on the 12th August, 2017. He further admitted to having gone to a bar of PW1. He clarified that there were bars along the road side. He stated that he reached PW1's bar at around 20:00 and he came back at around 21:00hrs after buying relish from Kuku market. He stated that according to the evidence of PW1 he would have found the bar open had he returned at 21:00 since she said she closed her bar at 21:30. He maintained that he left the deceased who was drunk at a bar with a child on her back.

He denied being angered by finding the house locked but admitted that he had an issue with the deceased over the house being locked. He denied fighting with the deceased in the bar and having been drunk on the material night and the following morning. He stated that all the other witnesses were lying. He explained that he went to buy relish at Kuku market from the vendors who sold relish outside. He said the distance to Kuku market would take about a 20 minute walk. He denied being drunk on the morning of 13th August, 2017 stating that had he been drunk the doctor would not have allowed him to lift the deceased.

He admitted that the deceased appeared to have been beaten but that he was not the one who killed her.

I have considered the evidence on record and based on the said evidence I make the following findings of fact:

1. *That accused person and the deceased were in a relationship and lived together.*
2. *That on the material night the deceased was drunk and was moving with a child on her back.*
3. *That the accused and the deceased went to PW1's bar*
4. *That PW1 took the deceased's child from her due to her drunken state*
5. *The deceased was found unconscious in an unfinished building near PW1's bar.*
6. *That the deceased was taken to Chawama clinic for medical attention by the accused where she later died.*
7. *That the accused was charged and arrested for the murder.*

Having made the above findings, I must begin by stating that it is trite law that in a criminal prosecution when an accused pleads not guilty he thereby puts the prosecution to prove all the essential ingredients of the charge. Such proof should be beyond reasonable doubt. These sentiments were echoed in the case of ***Kampafwile v The People (1972) ZR 242.***

To prove a charge of murder, three elements require establishment.

- (i) That a person died.
- (ii) There was malice afore thought.
- (iii) By an unlawful act at the hands of the accused person.

The Postmortem Report marked Exhibit P1 indicates that the deceased suffered from blunt force injury and PW3 in his testimony explained that this kind of injury would lead someone into a coma. It was established that the said injury was the cause of death. The first element is therefore proven.

With regard to the element of malice aforethought, the evidence on record is that the deceased was drunk the night before her demise and this was confirmed by the evidence of PW1 and PW2 who said the doctor told her that the reasons the deceased was on a drip but could not wake up was because she was very drunk. The accused in his defence also told this Court that he found the deceased drunk as she was coming from the bars at Katambalala market. It is also clear from the evidence of PW3 that the injuries sustained by the deceased on either side of the head could not have been due to her falling down and hitting her head.

He emphasized that the sort of head injury she sustained just on one side was capable of leading her into a coma. This to me shows that there must have been someone who caused such an injury. He also indicated that he suspected that the deceased was beaten. The severity of these injuries leave me satisfied that there was an intention to cause either the death of the deceased or indeed a murderous assault on her.

What is now left for me to determine is whether this unlawful act was committed by the accused. The evidence in this matter is largely circumstantial. The law is very clear on circumstantial

evidence as was stated in the case of **David Zulu v The People (1977) ZR 151** where it was held that:

“ there is one weakness peculiar to circumstantial evidence; that weakness is that by its very nature circumstantial evidence is not direct proof of a matter at issue but rather is proof of facts not in issue but relevant to the fact in issue and from which an inference of the fact in issue may be drawn.”

The Supreme Court gave further guidance on the approach to be taken when dealing with circumstantial evidence in the case of **Patrick Sakala v The People (1980) ZR 205** where it was held inter alia that:

“The circumstantial evidence must be so cogent and compelling that no rational hypothesis other than murder could on the facts of this case be accounted for”

Further, Justice Malila in the Supreme Court case of **Humphrey Phiri and others V The People (Appeal No. 153/154/155/156/157 of 2015)** stated that in order to convict on the basis of circumstantial evidence the evidence must be such that no other inference may be drawn other than the prisoners' guilt.

The prosecution's evidence is that the deceased and the accused went to PW1's bar at around 17:00hrs and after a while, as they were both drunk, the deceased started failing to walk. The accused then asked the deceased to go home but she resisted and an

argument ensued between the two. The two started fighting with fists and because the deceased kept falling while having a child on her back, PW1 came to the child's rescue and chased them as they were disturbing PW1's other patrons. She told them that she would keep the child until the both sobered up and that said she waited and closed the bar at around 21:30 and when the child's parents didn't come she closed the bar and left with the child.

She took the child to her home and the following day she said that the accused went to her bar at around 08:00hrs with a beer in hand and was asking for the child. She however refused to give him the child and said she would take them to the Victim Support Unit for the negligence exhibited. It was at that time that some people entered her bar and told him that his wife was seen in a nearby unfinished building.

The evidence of PW2 corroborated the evidence of PW1 that on the morning they found the deceased unconscious, the accused appeared to be drunk and that he told her that he left the child at a neighbor's house but found the child at PW1's bar. She said as they were going to PW1's bar the accused entered another bar and bought a beer and proceeded to PW1's bar. She also confirmed that the child remained in the custody of PW1 who reported the matter to the victim support unit.

In his defence the accused told this Court that in fact when he arrived home he did not find the deceased and only found her coming from some bars at Katambala market. He said because of

the drunken state she was in he took her to PW1's bar as that was where he knew people and went to buy relish. He said by the time he went back to PW1's bar at 21:00hrs, it was closed.

He confirmed the evidence of PW1 that he went back to the bar the following morning to look for the child and according to him, he was also looking for the deceased. He denied having been drinking or having a beer when he went to PW1's bar that morning. He said he was shortly thereafter informed that the deceased was at a nearby building where they found her unconscious.

The evidence of PW1 in my view was unshaken. There was no possible reason that was shown by the defence as to why she would lie against the accused. In my view she was a credible witness and I believe her evidence that the deceased and the accused went to her bar to drink and she threw them out because the two were fighting and in the process she took the child. This evidence is supported by the evidence of the accused himself who admitted to having been at her bar with the deceased that night and further going back for the child they left with her the following day.

With regard to the time that the accused was at PW1's bar, PW4 testified that she was abruptly woken up by the accused at around 16:00hrs when he came to pay his rentals. In cross examination she said she was not very sure what time exactly the accused came but she said it could have been around 16:00hrs or 17:00hrs. The accused on the other hand claimed that he was at PW4's house at around 19:00hrs before he proceeded to the market.

I am of the firm view that the evidence of PW4 corroborates the evidence of PW1 that the accused and the deceased were at her bar at around 17:00hrs. In my view, even if PW4 said she woke up abruptly, she could not have mistaken the time the accused went to her house for 19:00hrs. I am therefore satisfied with the evidence of PW1 that the accused and the deceased went to her bar at around 17:00hrs.

Further, I find great difficulty with the evidence that the accused left the deceased at the bar and went to buy relish only to find that the bar had closed at around 21:00hrs yet PW1 indicated that she closed at about 21:30 as she waited for the child's parents to return. He said he left the deceased at PW1's bar at around 20:00hrs and that it took him about 20 minutes to walk to where he bought the relish. This still gave him almost an hour of extra time to arrive at the bar at 21:30hrs.

The accused's evidence is that when he returned he found the bar closed and the following day he went to pick up the child and also inquire on the whereabouts of the deceased. I find it interesting how the accused was very sure the child was at PW1's bar when he said he left her with her mother the previous night. To me it is an indication that PW1 was actually telling the truth that both the deceased and the accused were aware that she took the child from them because of what had transpired and that was why he knew exactly where to find the child.

The evidence of PW2 also showed that the accused lied to her that he left the child at a neighbour's house when in fact the child was left at PW1's bar. Her evidence also shows that the accused said when he found the house locked he went to look for the deceased and asked her for the keys but she was so drunk she threw some coins in a puddle of water saying those were the keys. He confirms that in fact he found the accused and asked for the keys before they went to PW1's bar. In my view, the fact that he wanted the keys and she did not give them to him and their drunken state was likely to agitate him leading to the fight that ensued when they were in PW1's bar.

Further, I am convinced by the evidence of PW1 that he fought with the deceased and the witness was very sure that he was drunk on that day and when cross examined said he did not look like someone who had been working as he looked drunk. I am further convinced that the accused was the last person seen with the deceased by the witnesses before me.

The evidence of PW3 indicated that the head injuries sustained by the deceased were not likely to have been due to a fall or a road traffic accident but were more consistent with one sustained when a person is beaten. It is on record that the accused was seen fighting with his fists with the deceased. While no one saw the accused inflict the said injury on the deceased, I find it most probable that the deceased could only have been beaten by the accused wherever they went.

In the case of ***Bwanausi v The People (1976) Z.R. 103*** it was held that

“Where a conclusion is based purely on inference, that inference may be drawn only if it is the only reasonable inference on the evidence; an examination of the alternative and a consideration of whether they or any of them may, be said to be reasonably possible cannot be condemned as speculation”

On the totality of the evidence before me I am convinced that the circumstantial evidence in this matter takes the case out of a realm of conjecture and thereby giving it such a degree of cogency that the only inference that can be drawn is that of guilt.

Further, the evidence before me is that the accused found his house locked as the deceased who lived with him had carried the keys. He later found her coming from bars near Katambalala market and when he asked for the keys to the house from her, she did not give them to him but instead threw some coins into a puddle of water saying that the same were keys. The accused is said to have later forced his door open in order to enter his house. The undisputed evidence on record is that the deceased was in the habit of excessive drinking as was stated by PW2 and PW4. I have no doubt in my mind that accused was quite unhappy with the behavior by the deceased on the material day.

However, even if it could be argued that he was provoked to prompt a reaction that lead to a brutal attack on the deceased, the law requires that the accused's reaction be proportionate. In the case of **Whiteson Simusokwe v The People SCZ Judgment No. 15 of 2002** the Supreme Court held that *in a claim of provocation the reaction of the accused person must be proportionate with the result that any evidence of excessive force defeats the defence*. In the case in casu the defence of provocation even if it were raised would fail because the accused's reaction was not proportionate.

Based on the evidence before me, I am therefore left without a doubt that the accused person was the one who brutally beat up the deceased causing her to sustain blunt force head injuries which eventually lead to her death. I therefore find that the prosecution has proven its case beyond all reasonable doubt and convict the accused accordingly.

I have carefully listened to the submissions by the Learned Defence Attorney Mr. Siatwinda inviting me to find extenuating circumstances anchored on now convicts drunkenness at the time of the commission of the offence.

To address the issue I am confronted with, I have visited a recent case of the court of final resort in the case of **Jose Antonio Gulliadi v. The People**.

However, we must hasten to add that this appeal being an appeal against sentence we are now at large to consider

whether the sentence other than death for the two counts of murder was appropriate under the circumstances. We are referring to the **Remmy Bwalya Shula vs. The People; Justin Mumbi v. The People and Kezzy Ngulube v. The People**. In the **Kezzy Ngulube** case we stated that:

“From the outset, we wish to say that we are not persuaded by the argument simply because there was no evidence of general drunkenness at trial. As we said in the above Mumbi case, drunken circumstances generally attending upon the occasion sufficiently reduce the amount of moral culpability so that there is extenuation. However, in our view, there was no extenuation in this case”
(emphasis ours)

In **Kezzy Ngulube** we accepted that the circumstantial evidence pointed to the guilt of the appellant as he was drinking with the deceased and had the opportunity to put rogor in the cup of the deceased when the deceased went to the toilet. That the appellant by putting the poison into the deceased's wine had the intention to cause harm to the deceased. Although this happened at a drinking place, we rejected drunkenness as an extenuating circumstance.

In the case of **Mumbi v. The People** the appellant upon reaching his uncles house took some beer. Thereafter, he demanded for a pair of shoes from his uncle who refused to give

him. The appellant disappeared only to appear with a firearm which he pointed at his uncle. The uncle fled from the house. The appellant then pointed the gun at PW3 and upon seeing this, the deceased panicked and stood up and moved towards the appellant. The appellant then shot the deceased three times. It was established that the appellant had stolen the gun after he had broken into the house of the owner of the gun. The appellant elected to remain silent. The appellant was sentenced to the mandatory death sentence.

On appeal to this court against sentence only, it was argued, inter alia, that there was evidence before the trial court that on the material day the appellant was offered beer at his uncle's house. And at apprehension, the arresting officer stated that the appellant was smelling of beer and appeared drunk. Counsel argued that this amounted to an extenuating circumstance. We rejected this argument and found no extenuation and dismissed the appeal.

And in the case of **Jack Chanda and Kennedy Chanda v. The People**, the appellants had been drinking for about five hours and we accepted that it was an extenuating circumstance and we allowed the appeal on that basis.

In the case in casu, we now need to examine the evidence to ascertain whether there was sufficient evidence to sustain drunkenness as an extenuating circumstance. According to the evidence, the appellant strangled Zenaida and tried to rob her

of money from the bee sales. Zeniada did not state that the appellant was drunk before or after attacking her. In fact, the evidence in the court below is that the appellant arrived in the morning and started drinking with Adamson; then they left and later came back with Irene. The appellant was drinking with Admanson and Irene and he was at last left alone. Up to that point there was no evidence that he was drunk. He left for some time and came back before lunch and then he sent Foloma to go and buy him more beer. It was at that point that he demanded for money from Zenaida and then strangled her. In any event, we do not believe that a person who is drunk can attempt to rob and strangle someone with a chitenge around the neck to the extent of bleeding from the nose and eyes. The evidence from Zenaida, the victim of the attempted murder is that the appellant strangled her as her demanded for the money from her sales. Although this was a place where home brewed beer was sold, we cannot state that there was any evidence of general drunkenness.

We do not agree that a man who is drunk and has diminished responsibility can turn around and attack a person in such a brutal manner to the extent where she bled from the nose and eyes as a result of being strangled by the appellant and thereafter tow other persons are found strangled to death in a similar fashion within the same village on the same day. We agree with the learned trial Judge when he found that the similar fashion in which Zenaida was strangled and the

strangling to death of the deceased persons was an odd coincidence which is evidence of something more which the court is entitled to take into account as we held in the case of **Machipisha Kombe v. The People.**

Further, although the appellant had been drinking kachasu earlier in the day, there is no evidence that he was drinking for a long period of time or that he drunk all day. In the same vein, when Zenaida's mentally challenged cousin found the appellant strangling Zenaida, the appellant's reaction was to grab a container of beer before fleeing from the scene. A person who is drunk cannot flee from the scene as the appellant did. And when Paul met the appellant in the bush, he did not mention that the appellant was drunk but merely pointed out that the appellant who at the time was wearing a blood stained shirt told him that he was running away from war in Mozambique.

The circumstantial evidence points to the fact that at that time, the appellant had already killed the deceased persons especially that he mentioned that he had been with someone who had killed and buried a child in the hills that day. It appears to us that the appellant simply had the propensity to kill on the material day and in our view, he cannot benefit from drunkenness as an extenuating circumstance when all the circumstances are taken into account.

We must emphasise that trial courts must be wary of finding drunkenness as an extenuating circumstance in every case

where the offence is committed at a drinking place or where the accused claims he was drinking or was drunk. It is important to consider the peculiar facts instead of applying drunkenness as an extenuating circumstance in every single case which would lead to injustice.

We therefore find that the learned trial Judge misdirected himself when he found that there were extenuating circumstances in this case. The sentence of 45 years with hard labour imposed by the learned trial Judge in respect of the two counts of murder cannot stand and it hereby set aside. In its place, we sentence the appellant to the mandatory death sentence on each count of murder. The sentences shall run concurrently.

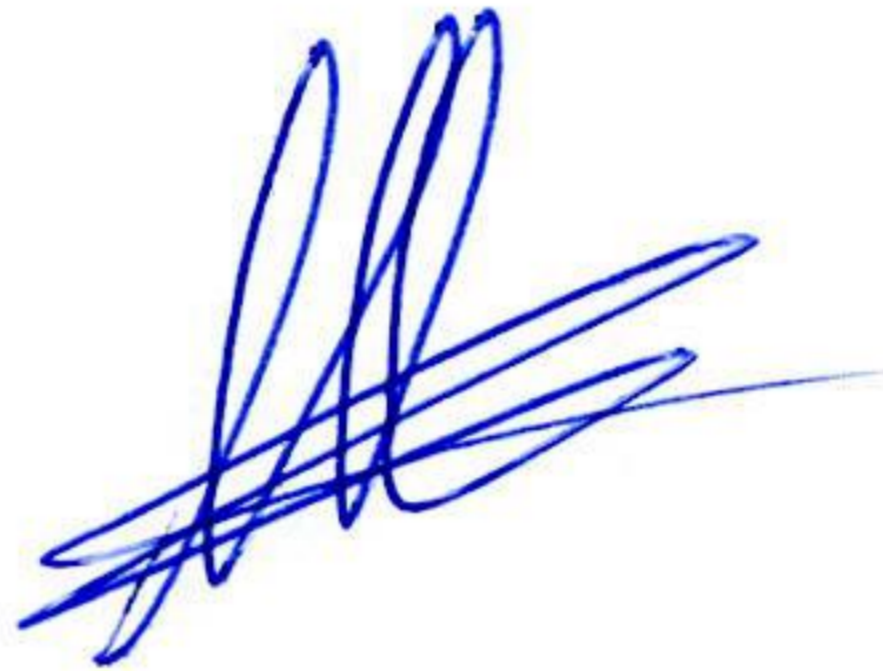
In the case in casu, though there is evidence of drinking, the actions of the convict are inconsistent with the actions of a drunken person; for example, after the deceased was found in the uncompleted building, he made necessary inquiries from the market security guards and even hired a taxi to convey the deceased to the clinic after obtaining the necessary police report. This is inconsistent with a drunken person to make rational judgments of action after the discovery of the deceased and efforts to search and locate the child and deceased.

I decline to accept the invitation to make a finding that the circumstances dictate that there were extenuating circumstances. In the circumstances, I have to obey and apply the law.

I sentence the convict to extreme penalty to suffer death as provided for under section 200 of the penal code.

Leave to appeal to the superior Court of Appeal granted against both conviction and sentence.

Delivered under my hand and seal this 19th day of April, 2018

A handwritten signature in blue ink, consisting of several overlapping loops and strokes, positioned above a horizontal line.

MWILA CHITABO, SC
JUDGE