



REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

SITTING AT MANGOCHI

HOMICIDE CASE NO. 2 OF 2021

THE REPUBLIC

V.

JAMES PILO KHANG'A

SUMAILA NIKISI

GAYESI KATUPE

CORAM: HONOURABLE JUSTICE MZONDE MVULA

Mr. A. Salamba, Assistant Chief State Advocate for the Republic

Mr. P. Masanjala, Senior State Advocate

Mr. R. Mkweza, Senior State Advocate

Mr. Z. Ndeketa, Principal Legal Aid Advocate for the Accused

Mr. N. Mdazizira, Senior Legal Aid Advocate

Ms. K. Chingeni, Senior Legal Aid Advocate

Mr. M. Malipa, Court Clerk and Official Interpreter.

Mrs. G. Chirombo, Court reporter

JUDGMENT

Mvula, J.

1.0 Introduction

1.1 This judgment should have long been delivered to bring an end to an allegation over the death of one Saidi Dyton. However developments beyond me made it impossible for the exercise to occur sooner. I am glad to proceed with the delivery of, whose conclusion is as follows:

2.0 The Charge Sheet

2.1 The 3 accused were jointly arraigned over 3 counts as follows:

2.2 Count 1, murder contrary to section 209 of the Penal Code. Particulars of the offence alleged that James Pilo Khang'a, Sumaila Nikisi, Gayesi Katupe and Lucius Daudi Ngalu (at large) on 27th January 2021 at Kadewere village T.A. Chowe, in Mangochi district with malice afore thought, caused the death of Saidi Dyton.

2.3 Count 2, extracting human tissue contrary to section 224A (a)(ii) of the Penal Code. Particulars of the offence alleged that James Pilo Khang'a, Sumaila Nikisi, Gayesi Katupe and Lucius Daudi Ngalu (at large) on 27th January 2021 at Kadewere village T.A. Chowe, in Mangochi district unlawfully and without good or unjustifiable reason, extracted the tissue from a corpse of Saidi Dyton.

2.4 Count 3, trafficking in persons contrary to section 14(1) as read with section 2 of the Trafficking in Persons Act. Particulars of the offence alleged that James Pilo Khang'a, Sumaila Nikisi, Gayesi Katupe and Lucius Daudi Ngalu (at large) on 27th January 2021 at Kadewere village T.A. Chowe, in Mangochi in the Republic of Malawi, by means of deception for the purpose of exploitation, obtained Saidi Dyton a person with disability, namely albinism.

2.5 In the correct application of the law, for the first count, the Republic should establish beyond reasonable doubt that the 3 accused persons, with malice afore thought, caused the death of Saidi Dyton. The Prosecution must prove that the deceased died by a voluntary act of the accused. In this regard, there must be express or implied malice afore thought. See **Chisiyana v Republic 1 ALR Mal 730**.

2.6 For the second count, the guilty mind under section 224A (a)(ii) of the Penal Code comprises the actual act where body organs are removed from the host. See **Rep v Packson Criminal Case 21 of 2019 (unreported)**. Participants in a common criminal enterprise doing something without authority, once unlawfulness is proved, completes the offence. It becomes irrelevant the purpose they engaged to extract human tissue. So long the accused have knowingly done the thing in question, for their use and benefit, the offence is made out. See **Rep v Kamil and Yaghi 6 ALR Mal 358**.

2.7 On the third count, the Prosecution only needed to establish that the said Saidi Dyton was not only moved from one place to another. Specifically moving the victim for one place to another was done for the purpose of exploitation, as intended by the doer. The offence is accordingly made out once exploitation, is established. The *actus reus* and *mens rea* are completed as well. In this case, the particular wrong is obtaining the victim for an illegal purpose. See **Republic v Joseph Kapinga and Anne Kapinga Criminal Case 139 of 2015 Zomba District Registry (Unreported)**

3.0 **Case for the Prosecution**

3.1 The prosecution called 7 witnesses. PW1 was Mr Ladi Sinoya. Uncle to Saidi Dyton. He testified that on 27th January 2021, the deceased Saidi Dyton left home with his friend Mohammed to go to the house of the first accused. He did not return. They followed up and they did not ever find Saidi Dyton. They went to the village headman. Since they did not find him the case was reported to the Police.

- 3.2 Flora Sinoya Saidi PW 2 is mother to the deceased. She said her son lived with albinism and was aged 23 at the material time. He left home on 27th January 2021 where after doing casual labour, he got K2000 payment. He had gone to change the money. He went to the house of the first accused who is a grocer and well known business man in the area. The deceased went with Mohammed, his good friend. Her son did not return from the house. They asked Hawa, girlfriend to the deceased, of his whereabouts. She said they parted at a road intersection as he proceeded with Mohammed to the house of the first accused. She was not at peace with non-availability of her son. They searched all over, unsuccessfully. They returned to the house of the first accused for him. The first accused said the son left around 7pm the previous day. The issue was reported to Police.
- 3.3 Hawa Mazida PW 3 was girlfriend of the deceased. They were in a romantic relationship for 4 months. She testified that he was a bit stout in stature, and a person living with albinism. She said he went missing after the deceased and her brother Mohammed (best friend to the deceased) were last seen together going to the house of the first accused. They parted at a junction and they never met again. Despite being her boyfriend, the night he went missing he did not sleep at her house.
- 3.4 Mohammed Mazida PW 4 a 15 year old good friend of the deceased was made to testify in open court without spectators in the gallery. He is of “immature years” for purpose of testifying in open court under section 60 of the Courts Act. He is above the cut off age to conduct a *voire dire* which is 14 years for such witnesses as per **Nyirenda v Republic 7 MLR 182**.
- 3.5 He testified knowing the first accused as Khang’a, the second as Gayesi and the third as Ishmael. He said the third is Ishmael which locally is Sumaili. This is notwithstanding the fact that the second and third accused were juxtaposed in the sitting arrangement on this date of trial till. This anomaly was later corrected by the Court by ordering them to sit as they appear on the charge sheet. The two names shall be interchanged in this order. This identification however, confirms he knew the trio, well.

- 3.6 He proceeded to state that Khang'a is someone he sees at this house, while Gayesi and Ishmael he saw at the house of the first accused when he went with Saidi Dyton. He could not remember the day but must be in February 2021. On his day he went to the house of the first accused to change money into smaller notes. When he got there with the deceased, food was prepared by wife to the first accused. They sat down on the basket mat. He chose not to eat, while his deceased friend ate. With one lump of nsima to go, the latter offered him and he ate some food. He left Dyton Saidi at the house of the first accused. They had agreed to meet at the usual tea room the next day. He left the house and slept at his home. On the next day as agreed, he went to the tea room. His friend was nowhere to be seen. PW2 and PW 3(his sister) were having tea there.
- 3.7 He asked PW2 where his friend was. He had not seen him despite them agreeing the previous day at the house of the first accused to meet at the tea room. PW 2 said she had not seen him either. He went to PW1, Uncle to the deceased, to explain that his friend could not be found. He has never seen his friend ever since. He took part in the search for his friend with PW1, PW2, and PW3, by going to the house of the first accused. The first accused said that Saidi had not been there again. He confirmed he saw the second and the third accused at the house of the first accused.
- 3.8 Waga Samson PW5 is wife to the first accused married for a year, with whom they have a young child, of the 4 children she has. The witness is also a cousin to the second accused, whom she calls brother. The father of the accused is elder to hers. She said that Saidi Dyton came to their house in January 2021 with his friend whose name she forgot. She prepared some food. They ate and they continued to chat thereafter. Before the arrival of the deceased and his friend, the second and third accused came to the house around 12 noon. When Saidi Dyton went to sleep the second and third accused had left their house.
- 3.9 In the night the deceased slept over at their house, the first accused had woken up and stayed upright. She asked her husband where Saidi Dyton

was. He did not say anything. He just said “what happened was not just!” (*zomwe zachitika si chilungamo.*) This surprised the witness because Saidi Dyton had slept in their kitchen. Her husband was awakened by the second accused in the night and they went somewhere with Saidi. She continued to probe where Saidi Dyton was, but, she got no answers. She did not probe further.

- 3.10 The witness said that the 3 accused killed Saidi Dyton. She knew this because the first accused woke up Saidi Dyton, and went wherever they went with him. When the first accused woke up this night, she thought he went to answer a call of nature. She believed the trio did this because earlier that day, the second and third accused came to the house and were discussing plans. She heard the second accused waking up her husband this night. The second accused is her relative. She was able to pick up his voice calling her husband. The witness did not come out of her blocks with her evidence given the account she gave to Police. The evidence in this matter therefore will be confined to only that which testified from the dock.
- 3.11 Patuma Jali PW6 is wife to the second accused. She knew all the 3 accused because she sees them in Kadewere village just as she used to see Saidi Dyton. She described him as a person living with albinism in the village. She heard in February 2021 that Saidi Dyton was amiss. Police came to her home on direction of the second accused. They asked how she moved about on a particular day. She said earlier she went to the garden and the second accused left around 4pm and returned at midnight with the 2 other accused persons. This got her surprised as they have never before came home together this this late. When she heard that the deceased was missing, she said she started to recollect events as follows:
- 3.12 She asked the second accused why he was found with the first and third accused that late at their house, surprisingly all of whom had torches. “Do not ask me because you are a woman!” was the answer she got from him. The second accused carried a yellow sack. In addition, he wore a jumper and his pair of trousers was wet. She told him that if the sack did not

contain any food, they were not welcome in her house. The 3 men this night she reiterated, were the ones in the dock, went away with the sack.

- 3.12 Police later made a breakthrough in investigation of the case. PW6 identified IDP 1 the smaller yellow sack carried by the second accused, IDP 2 the jumper for the second accused worn this night, IDP 3 black trousers he wore together with, and IDP 4 the hoe with handle which she stated belonged to the family. It was abandoned in the family garden.
- 3.13 PW 7 Detective Rodrick Ridson, an investigator since 2016 of Mangochi Police was assigned to investigate the matter. He stated that on 29th January 2021 they received a report from Malombe Sub Station that there was a case of a missing person, living with albinism named Saidi Dyton of Kadewere village T.A Chowe in Mangochi. He went missing on 27th January 2021. He was in contact with PW1 and PW6. In his investigation he revealed that all trails pointed to the first accused who failed to explain the whereabouts of the missing person, last slept at his house.
- 3.14 He detained the wives of the first accused (PW5) and that of the second accused (PW6) as part of investigations. With the nature of the case, the best places to investigate were houses of the first and the second accused. He interviewed PW6 where he traced in his leads of information as a detective. He was told that the body of the missing person was at the house of the second accused. During interview with PW6, she touched on the events of this night and that he came home wet with 2 co-accused with a yellow sack. She suspected that after the inquest of him by her, after which he went into the night, they must have buried the body in the garden. The investigation was thus narrowed down to the house of the second accused.
- 3.15 The Police investigative team, Village Head Kadewere, Village Head Bwanali in whose village the garden of PW 6 and the second accused was, and the District Health Officer from Mangochi, all took part in the search. They went to this garden. Immediately they found a hoe earlier identified as IDP 4 tendered as EXP 1 and freshly dug ground. IDP 2 and IDP 3 the

jumper and trousers were tendered as EXP 2 and EXP3 respectively worn by the second accused this night. They dug up the fresh soil mould, close to where EXP1, the hoe of PW6 and the second accused was found. It transpired that the area was a shallow grave. Relatives of the deceased, despite exhumation being done after 9 days, which body was decomposing with maggots, identified it. This was a cover up of a homicide. They recognised the body to be that of Saidi Dyton, earlier reported, as missing.

- 3.16 The second accused now cooperated and confessed the ordeal as in EXP 4 and EXP 5 and EXP 18 whose objection to tendering of the same was overruled by the Court for reasons which were ably explained. The first accused was recorded statement under caution which was tendered as EXP 6 and formal Charge as EXP 7 which he admitted to the offence. The third accused gave statement under caution and formal charge in EXP 8 and EXP 9 which he denied the offence. The Post Mortem Examination Report was tendered by the witness as EXP 10. It identified that the corpse was of a human person living with albinism. It was dissected and wrapped in black plastic bags in EXP12 and the yellow sack IDP 1 identified by PW6
- 3.17 The court saw the sack, that indeed it had shade of yellow despite being dirty and dug up with mud, and buried in earth. The medical doctor reconstructed the body and placed in in mortuary gurney whose picture was tendered as EXP 15. After exhumation, EXP 14 EXP 16 and EXP 17 the still pictures preserved in digital format were tendered to court. The body parts of the missing person, turned deceased are of Saidi Dyton.

4.0 **The Defence Case**

- 4.1 The Court found the 3 accused with a case to answer. Under section 254 of the Code, the accused persons were put to defence. The first and the second chose to exercise their Constitutional right to remain silent under section 42(2)(a). They did not take the witness box for defence. The third accused alone gave defence as follows.

- 4.2 DW1 Gayesi Katupe testified that he is married with 5 wives and he does not stay with either. He goes to each for visit at select times. He denied knowing anything about the death of Dyton Saidi. Around 20th January 2021, he went to the village at Machelamba. On the way to the village, they pass by house of the first accused, mostly to buy a cigarettes at his grocery. Then he met Ishmael (second accused) who was at his garden, who shared the news of sickness. He met his wife who came to tell him as well that his mother is sick. They left on 29th January to see his sick mother. His friend Ishmael, agreed to go with him to see the sick mother. They went by bike.
- 4.3 He got home where he indeed found that his mother is sick. He decided to spend a night to take the mother the next day to hospital. This night Community Policing members came asking for Ishmael. They arrested him together with the witness. He believes he was arrested simply because he was harbouring Ishmael in the village. He was placed in Police cell where Ishmael confessed that he had done this. The Police did not tell him why he was under further detention. Where he stays and the place the offence took place is less than 1km away. He did not go to any house on 27th January 2021. He denied ever committing the offence.
- 4.4 In cross examination, by the first accused, he stated that the evidence by 4th and 5th Prosecution witnesses that he went to the house of the first accused is fabrication. However, when posed with the same with the prosecution, he admitted that PW4 and PW5 were right seeing him at the house of the first accused. The wife of the second accused (PW6) and his wife (DW2) are friends.
- 4.5 DW 2 Wasa Sanudia, is fourth wife to DW 1. He testified that on 23rd January to 27th January 2021, the third accused was at home. On 28th January he left with his other wife for his home. In cross examination by the Prosecution, she testified that the husband went to the garden and returned around 10.00am. He did not go anywhere. Her husband came to sleep at his house. The witness kept changing statements on the whereabouts of the husband.

5.0 **Legal Standard of Evidence at end of Trial**

5.1 **The Burden and Standard of Proof**

5.2 Under section 187 of the Code, the law provides for the burden of proof. It reads:

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

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

(2) The burden of proving any fact necessary to be proved in order to enable any person to give evidence of another fact is in the person who wishes to give such evidence”

5.3 The burden of proving the guilt of the accused, rests on the prosecution. This burden does not shift from them, except under few statutory exceptions. These exceptions lie in reverse onus provisions. The prosecution must discharge this burden to the requisite standard of proof beyond reasonable doubt. See **Republic v. Banda 4 ALR Mal 96**.

5.4 This requisite standard was defined earlier, by Lord Denning in **Miller v Minister of Pensions [1947] 2 All ER 372**. He stated at p. 373;

“...That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a 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 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...”

5.5 Justice Mwaungulu in **Republic v Suleman and another [2004] MLR 283 (HC)** applied this dictum. He held it to mean:

“that the court must be certain that it is sure that the defendant is guilty of the offence charged.”

5.6 In other words, there should be no grain doubt that the accused committed the offence. In this regard, the prosecution must prove all the elements of the offence. See **Republic v. Chimbelenga 1996 MLR 343**. Every fact and circumstance that is material and necessary to constitute the indictment must be established in proving the elements of the offence. See **Lameki v Rep 2 ALR Mal 13**. Proof must be adduced not only that the offence was committed but the accused person committed it. See **Woolmington v. DPP (1935) AC 462**. It is not for the accused person to prove his innocence in a criminal case. See **Republic v Saidi 1 ALR Mal 560**.

5.7 Where an accused raises the defence of alibi, the law under section 193A (2) of the Code informs the position at law as follows:

“the notification under subsection (1) shall specify the place or accused claims to have been present at the time of the alleged crime and the names and addresses of the witnesses and any other evidence upon which the accused intends to rely and establish the alibi”

5.8 In **Bonzo and Another v Republic [1997] 1 MLR 110**, it was said that:

“Once [alibi] has been laid by the defendant, the defence becomes part of the overall picture and the burden remains on the prosecution to prove the case against the defendant beyond reasonable doubt. The Prosecution has to disprove the defence. This may entail calling evidence in rebuttal. Sometimes, however, all that the prosecution has to do is by cross examination to show that although the defence raised it, is untenable. It must never be thought that there is any burden on the accused to prove the alibi. Once the defendant raises it, the Prosecution must disprove it.”

5.9 Indirect way of proving this element, is where the offender may not be able to make this account to court. It becomes therefore open to the court to infer from the proved facts, other facts necessary to complete the picture of guilt or innocence. This is circumstantial evidence as good evidence. It was said in **R v Taylor (1928) 21 Cr App. R 20**, by Hewart C.J. that:

“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 it is circumstantial”

5.10 In order to justify an inference of guilt from circumstantial evidence, the facts must be incompatible with the innocence of the accused. Further they must be incapable of explanation upon any reasonable hypothesis other than his guilt. The action of the accused should not be capable of explaining himself in any other way. All possible directions of occurrence must be capable of being eliminated firmly pointing to his guilt. See **Dickson v R 2 ALR Mal 252**.

5.11 The case of **Mehta v R (1961-63) ALR Mal. 363** Southworth J (as he then was) explained circumstantial evidence in the same way as any other evidence where the burden of proof should never leave the prosecution. The case will be made out where there are no other situations to explain away other than the guilt of the accused:

“ ...The burden of proof resting on the prosecution goes beyond setting up *a* preponderance of probability and requires the Crown *case* to be established beyond all reasonable doubt; and that when the Crown *case* rests upon circumstantial evidence ...the court must be sure there are no other co-existing circumstances which would weaken or destroy the inference [drawn from the evidence].”

5.12 Where the evidence given by the prosecution or the defence creates reasonable doubt as to the guilt of the offender, such offender must be acquitted. This is clear under section 188(1) (b) of the Code. It reads:

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

[Emphasis supplied]

6.0 **Charge of Murder**

6.1 Section 209 of the Penal Code provides the offence of murder. It reads

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

6.2 There are 3 elements of the offence which must be proved on this head:

- (a) Death of Saidi Dyton;
- (b) Death caused by an unlawful act or omission (*actus reus*)
- (c) a guilty mind to cause the said death.

6.3 Section 212 of the Penal Code demonstrates the *mens rea* for the offence of murder. The section reads:

“Malice afore thought shall be deemed to be established by evidence proving any one or more of the following circumstances-

- (a) **an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;**
- (b) **knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person**, whether such person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous harm is caused or not, or by a wish that it may not be caused;
- (c) **an intent to commit a felony**
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

[Emphasis supplied]

6.4 Against the foregoing, malice afore thought is the intention to cause death of another person. See **R v Macheso 1 ALR Mal 102**. It does not matter whether the intention results on the death of the person intended. The key factor is the guilty mind which is read from the acts that intent or actually lead to bring about the death of another. See **Chasiyana v Rep 1 ALR Mal 730**.

7.0 **Evidential disposition and analysis to the charge of murder**

7.1 **Was there death of a person?**

7.2 The court had regard to evidence of PW7. The detective led evidence by recording statements and evidence of arrest from the first and the second accused persons herein. They confessed to the killing of the deceased. There is a mutilated body, being pictures of the deceased. There is a recording in video form where the second accused narrates the ordeal and how this was actually executed. Malice aforethought therefore is made out. Further account can be obtained from evidence of PW5 and PW7.

7.3 Their statements and evidence to Court, gave similar account on the disappearance of Saidi Dyton. EXP 8 speaks to the caution statements each gave at Police. The said PW5 to PW6 and most critically PW4 last saw the deceased alive with and left him at the house of the first accused. The first accused woke up in the night. Together with the deceased and in the presence of the second and third accused went into an unknown place and he never was found alive until his shallow grave was discovered. It becomes therefore open to the court to infer from the proved facts, that the trio murdered him, from other facts necessary to complete the picture of guilt or innocence by circumstantial evidence. See **R v Taylor (supra)**.

7.4 The defence contend that the investigator gave hearsay evidence. As a court, we rule that cannot expect PW 7 to see the accused to commit the offence. He would surely stop the crime and the case would not be here. Evidence is presented directly and circumstantially as above explained.

Investigators draw inferences and connect dots by investigations. The court in its judicial discretion, attaches the weight to the evidence and draws conclusions, accordingly.

7.5 PW 2 testified that she identified the remains of her son and she buried limbs. EXP 14 to 17 pictures taken by PW7, confirm that the deceased was cut up to pieces by those who committed the offence. The evidence was led that PW 4 went with the deceased to the house of first accused. Together they were offered food by the first accused prepared by PW 5 and wife to the first accused. Unveiling the chain of events, indeed the deceased was made to stay at this house of his “Uncle” under the pretext of chatting and food being prepared to eat. PW4 left the deceased at the house of first accused. This was repeated and corroborated by both PW3 and PW5. Wife to the first accused testified that the deceased slept in the kitchen at the house of the first accused and was awoken in the night by the 3 accused. They went away never to return alive.

7.6 **Was the death caused by an unlawful act or omission?**

7.7 The act must be done without lawful justification. See **Rep v Phiri [2009] MWHC 50**. It is an act that is done, contrary to law. The act must be prohibited but the doer executed it voluntarily and willfully. See **Rex v Maya 1 ALR Mal 96**. PW 6 saw the 3 accused, and of them, Ishmael the second accused had carried a yellow sack. This night, the first accused had said in related discussion, to his wife “*chachitikachi sichilungamo*” when PW5 asked where Saidi Dyton was. The same night, the second accused also answered PW 6 “Do not ask me because you are a woman!” upon being asked about the contents of the sack.

7.8 We have two men who went out in the dead of the night away from their wives, and fail to give a proper account to their significant others over simple questions. The Police go to the scene. They discover newly dug up grave. After exhumation, the missing person turned dead, is confirmed as Saidi Dyton. His body was mutilated and the head and trunk, buried

separately from the rest of his limbs. PW7 as investigator connects dots of the evidence of the Prosecution in discharge of legal burden of proof to case. See **Chisenga v Rep (1993)16(1) MLR 52**. Concealment of the contents of the sack and done by night confirms that this was an unlawful act and without justification at law. The caution statements of the first two accused point as to the doer. In fact, the first accused James the second accused Ishamil or Sumaili had carried a yellow sack. In it were parts of a lifeless human being. This night, the first accused said to his wife “*chachitikachi sichilungamo.*” He indeed confirms the unlawfulness of their joint actions in this night.

7.9 **Was death caused by malice aforethought?**

7.10 PW7 in his investigative trail uncovered a chain of events. The trip to go fishing at night was not as innocent as it was posed to be from the view point of the deceased. It was a trap meant to take him from the place he lay in slumber to be surprise attacked. The assailants carefully chose per account by the second accused to Police, a strategic spot and attack the deceased on a river where water flows fast. The rationale was so conceal any blood spillage, not leaving behind, stains on the ground. The second accused confessed under caution and embellished in the video recording, use of a club to hit the deceased in the head, and hacking him on the throat, to death.

7.11 This chain of events clearly reveals the malice aforethought, and intention of so acting. The intention was to kill the person living with albinism and sell his bodily parts for money as recorded under caution. The violent manner that the accused collectively attacked the victim breeds malice afore thought Section 212(a) is fulfilled. The accused with their free mind took the deceased fishing only to hit him with a club and killed him. They later mutilated his body and took the body home in a sack.

7.12 PW5 and wife to second accused testified seeing the yellow sack, the hoe and bloodied clothes the second accused wore this night. Circumstantially,

the second accused is firmly placed at the scene and linked with the death of the deceased. See **Chidothi and Another v Rep (1992) 15 MLR 51**. The accused tried to disown contents of their caution statements by retraction. The truth is while they disowned them in fact, however connecting the dots, the contents connect with what the state witnesses told the court. There is corroboration.

7.13 Their story conveniently tied in by filling in the gaps that were left by PW1 to PW 7. What coincidence. They become external pointers that not only was there death of the deceased by malice aforethought, but, those on the opposite end to the case of the prosecution were responsible. See **Republic v Humphrey Elia and Mary Nankhuku Criminal case 164 of 2018 (Unreported)**. The burden of proof never shifts from the prosecution. They have to prove the guilt of the accused and not the accused to prove his innocence.

7.14 Cases of albinism are complex from the view point of the offenders. They make plans to conceal their tracks and often times the offenders are unimaginable. There is careful planning and execution is almost perfect. The cases are proved circumstantially by filling the missing gaps that the investigation picks up on. See **Dickson v R (supra)**. The court has to be patient and scour through the narration provided by the witnesses for the Prosecution and the rebuttal raised by the defence. Unless the same created reasonable doubt that must be resolved in favour of the accused.

7.15 Otherwise, so long the salient parts remain and a common thread runs through the evidence for case of the prosecution, the offence is made out. See **Republic v Kumbilani Patson and 3 Others Criminal case 21 of 2019 (unreported)**

7.16 **The video recording**

7.17 The second accused argued that the same was not recorded under caution and therefore should not be used in evidence against him. There had to be

a caution to him that whatever he said under it will be used against him in court. The Court should not consider the evidence in defence. Where the same reaches a point that it creates reasonable doubt, must result in his acquittal. See **R v Msosa [1993] 16 (2) MLR 734**. Substantial justice should be done without undue regard to technicality per section 3 of the Criminal Procedure and Evidence Code. We apply this principle. Secondly, the accused in the video narrated that the recording was done freely and he gave the narration voluntarily stating how the offence was committed. It would be miscarriage of justice to throw out this evidence.

7.18 The statement that the accused gave to Police was later buttressed by the video recording. The recording was a chat where someone was asking and another recording what was discussed. It is not record of interview per se. It was a narration that the second accused freely gave just as all the evidence that is on file. The normal statement was recorded and the Police sought to record the video which the accused did not object.

7.19 In fact he was heard in it that he was not forced into making it. The contents of the witness statement and the video recording therefore are materially true. The recording of the video corroborates to that of the witness statement recorded under caution. The court will attach normal weight to this, which corresponds to EXP 13 and 17. The video recording therefore becomes good evidence.

7.20 Defence argued that evidence of PW1 and PW4 is not coherent. Notably, that much as the deceased went to the house of the first accused with PW4, the evidence does not reveal what happened behind the scenes. PW 5 was not a credible and truthful witness because she gave selective account in court during testimony of what she earlier gave at Police. This goes even to say the 3 accused had 3 meetings at her house when in court she said of one meeting ever occurring at her house.

7.21 On the material night as another inconsistency, she further said she thought her spouse went to answer a call of nature. However, when put to

her, she said she heard the second accused calling her husband. Another example, she told the Police that her husband was planning to kill the deceased for K60m bounty. In court, she did not say these things. She therefore should not be taken seriously especially because she did not see the accused take the deceased in the dead of the night.

7.22 This court agrees to an extent. A woman and a mother who feels pain of child birth, would be last to conceal at court evidence of conspiracy to murder a person living with albinism. PW 5 and PW 6 and the deceased are related by affinity. In some regards, by consanguinity. It is an open secret that they are brutally murdered for the unreasonable belief that their body parts are a fortune. On the other hand, PW 5 is spouse of the first accused is with his infant.

7.23 Experience shows that ladies shun away from testifying against spouse for lack of financial and material support at familial level after conviction. In this regard, the moment a woman foregoes that fear to testify against her spouse, know that she has chosen the path of truth and justice. She therefore must be taken seriously in her account. After all evidence is what is given in court and not what was sated at Police.

7.24 PW6 confessed not seeing the contents of the sack the second accused came home with that night with the other 2 accused persons. PW7 merely regurgitated the evidence of PW1 to PW6 which is inuanded with hearsay. He too gave inconsistent account with PW5 and PW6 as key witnesses for the Prosecution. In would be illusory to fully rely on caution statements only obtained by such a person because taking away these, there is nothing pointing to the guilt of the accused. PW 5 did not see the accused leave with the deceased. PW5 only heard the voice of the second accused waking up the first accused deceased at night. She did not see them take him away for this account.

7.25 This being the case however, the evidence of PW6 remains that she saw the sack IDD 1 as yellow with 3 accused who had torches. She did not see

the contents. Circumstantially and by deduction, we can find the contents given the movements of the accused this night **Dickson v Rep (supra)**. The witness saw what was eventually tendered as EXP 2 to EXP 5. PW 6 she remained steadfast in her account that that the 3 accused came home close to midnight with a yellow sack. She could tell the time by the phone she gave to her child currently in Lilongwe. She reiterated that her husband went into the night returned late despite her not seeing the direction he went.

7.26 The Republic saw this to the contrary. This is because the burden of proof at this stage. The case must be proved to the standard of proof beyond reasonable doubt. This can be done by direct or indirect evidence. Direct evidence must prove these facts to sustain a conviction. Direct evidence is that which directly tends to prove the facts of an issue. See Section 2 of the Code. Circumstantial evidence, however, refers to proof of facts in issue by means of other facts. See **Chidothi and Another v Rep (supra)**. In our reasoned analysis, circumstantial evidence confirms what direct evidence leaves hanging.

8.0 **Count 2**

8.1 An offence is complete when the *actus reus* and *mens rea* have been established in an offence. The offence from the offence creating section has to establish that there was (i) extraction of human tissue from a corpse or living person, (ii) there was unlawful purpose and (iii) the accused were involved in it.

8.2 PW 6 and wife to the second accused, saw the 3 accused, Ishmael had carried a yellow sack. This night, the first accused said to his wife “*chachitikachi sichilungamo*” when PW5 asked where Saidi Dyton was. The same night, the second accused also answered PW 6 “Do not ask me because you are a woman!” when asked about the contents of the sack. We have two men who went out in the dead of the night away from their

wives, and fail to give a proper account to their significant others to simple questions. The Police go to the scene. They discover newly dug up grave.

8.3 After exhumation, the missing person is confirmed as Saidi Dyton. His body was mutilated and the head and trunk was buried separately from the rest of his limbs. PW7 as investigator connects dots of the evidence of the Prosecution in discharge of legal burden of proof to case. See **Chisenga v Rep (1993)16(1) MLR 52.**

8.4 Saidi Dyton had body parts extracted per exhibit 10, which corpse was carried in EXP 11, some of its parts wrapped in EXP 12, covered in EXP 13. The extraction of human tissue is evidence in EXP 14 to EXP 17 which correspond to EXP 4 to EXP 9 the respective caution statements and formal charge for all 3 accused. EXP 18 was freely given to Police by second accused as his account consistent with EXP 4 and EXP 5, as well as the video recording. The contents of EXP 12 seen by PW 6 were for use and benefit of all the accused in a joint criminal enterprise by the 3 accused persons who so acted in concert per section 21 of the Penal Code and therefore are in joint criminal enterprise. See **Rep v Kamil and Yaghi (supra).**

8.5 **Purpose for extraction**

The caution statements for the first and second accused reveal that the deceased was murdered for body parts because there was a market for K60,000,000.00 which they would share equally. PW 5 testified to that effect. The evidence by the Prosecution is only that available in caution statements which become retractable upon plea of not guilty. The contents therefore have to be proved if materially true.

8.6 The evidence points that the people who murdered the deceased did so for body parts. In this case evidence of PW5 and the events of the night that he went missing is important. PW5 heard the discussion and what the spouse said aloud. "Zachitikazi sichilungamo" at 2am when the utterer

was supposed to be asleep but went out of the house only to return wet and bloody with a troubled mind. The evidence from post mortem examination of the deceased Saidi Dyton from exhibit P10 correspond to the evidence of the first and second accused persons. These two said they chopped off these limbs.

- 8.7 No person can be mutilated and have their body parts sold for money. This is an illegal act. This is for illegal purpose. See **Rep v Phiri (supra)**. I find that the first, second and third accused rightly stood trial on this count.

Count 3

- 8.8 Trafficking in persons contrary to sections 14(1) as read with Section 2 of Trafficking in Persons Act. It reads:

Any person who trafficks another commits the offence termed trafficking in persons and shall, upon conviction, be liable to imprisonment for fourteen years without the option of a fine.

- 8.9 Section 2 of the Act defines trafficking in persons as:

Recruiting, transporting, transferring, harbouring, receiving, or obtaining a person, within or beyond territory of Malawi, through fraud, deception, for the purpose of exploitation of that person

- 8.10 Against the foregoing, the offence will be made if the evidence against the accused persons will establish that there was obtaining of Saidi Dyton, which was done by fraud or deceit, for purpose of his exploitation, done by the accused persons.

8.11 Obtaining

- 8.12 Saidi Dyton slept at the house of the first accused who carefully hatched a plan. The deceased with his best friend PW 3. The wife to the first accused is material here. She prepared food as the first accused invited

his friends and heard the call of the second accused his relative behind the house. They got up to fish and the victim never came back alive.

8.13 **Fraud of deception**

8.14 The first accused made the deceased stay home saying he should not go and have food. His best friend testified he felt that was odd and he gave up and left the deceased at the house of first accused. The intention of the first accused was as if to make him remain innocently. They woke him up in the night “going fishing.” As they passed a stream, the deceased was attacked in the head, hacked on the throat and cut to pieces so blood stains are not seen. This is deception as the purpose of obtaining him was to kill him. After killing him, which act in itself is exploitative, the men dismembered him per images tendered to court.

8.15 **Exploitation**

8.16 No person has a right to take out the life of another. As if that is not enough, no person should mutilate the body parts of another and use them for whatever purpose. Exhibit P10 the post mortem report confirms the victim died due to acute hemorrhage. Exhibits P14 to 17 pictures taken after the sack was exhumed show a dismembered compose for its parts. A dead person should have all parts intact.

8.17 This one has parts all over dissected as if they are butchering a carcass for its body parts. This is exploitation for all intents and proposes. The removal of body parts under section 2 if the Trafficking in Persons Act includes the removal of body parts or the extraction of organs or tissue.

8.18 PW 3 said he left the deceased at the house of the first accused. The wife of the first accused heard the first accused wake up the second accused who had come to see him earlier that day. They woke up the deceased who slept in the kitchen. They went fishing. He never came back. He was never to be seen. Until the sack and exhibits P 14 and 17 was revealed and the

clothes of the first accused bloody as they were who said “zachitikazi si chilingamo.”

- 8.19 The exploitation was for the removal of body parts. See **Republic v Kumbilani Patson and 3 Others Criminal Case 21 of 2019 (unreported)**. The defence argue that just because a witness told an inconsistent account then his evidence be disregarded in *toto*. See **Purmessur v Republic 16(1) MLR 458**. Witnesses testify that they will tell the truth at Court. If they give incoherent account, then the court in discretion and with reason will believe that evidence that is believable and corroborated by the larger picture of things to the case. In this case, that the third accused was not with the first and second accused on the material night.
- 8.20 This is not believable because of the other evidence and account linking him to the case. This confirms that those who exploited the deceased are none other than the accused who are the only ones connected to the offence. PW 5, PW 6 and PW 7 all connect the 3 as the perpetrators to the offence. The state has proved the case beyond reasonable doubt on this count.
- 8.21 The court states all evidence has to be considered collectively. PW1 to PW7 all confirm that the deceased, a person living with albinism, was last seen alive at the house of the first accused where he slept on 27th January 2021. The last of the witnesses to place him there was PW4 Mohammed, his best friend. Critically PW5 wife of the first accused does it best. At this house the first accused hosted the second and the third accused on this very same day to a “meeting.”
- 8.22 Suffice to add that PW2 and PW 4 said the accused had frequented the house of the first accused prior to this death. The number of times may not matter to discredit the competence and compellability of evidence given by PW 6. The quality of it certainly does. On 28th January, Saidi Dyton would not be found. He was last traced to the house of the first accused.

Word spread in the village that the deceased was initially missing. PW 1 PW2 and PW4 led Police to the house of the first accused and PW5 and PW6 become involved. The police suspect the second accused is the master minder because he was last seen by the first accused and third accused this night.

8.23 Despite having some inconsistencies over some the evidence of the Prosecution, the salient parts did not get manifestly discredited to warrant use of section 188 (1) (b) of the Code, in favour of the accused. The golden thread of evidence withstood the rigor of defence case which silence under constitutional right was not loud enough. At midnight PW6 sees the 3 accused with torches. She saw the yellow sack tendered as EXP 11. It connects to a mutilated and buried body in a hurriedly dug up grave. Collectively the trio possessed EXP 11 which contained EXP 12 to EXP 17 being bodily parts of Saidi Dyton. Exploitation is thus proved.

8.3 **Alibi by the third accused**

8.4 In **Bonzo and Another [1997] 1 MLR 110**, where the defence is one of alibi, it still becomes the duty of the Prosecution to disprove such alibi. The case still need to be proved beyond reasonable doubt. The prosecution needs to disprove the defence. Evidence in rebuttal and cross examination can be done to disprove the alibi. This comes because the third accused said the night of 27th January 2021 he was at the house of his wife.

8.5 However during trial third accused stated he did not visit the first accused. PW 4 and PW 5 saw him at the house. This means the account by third accused needs to be treated with a pinch of salt. Turning to DW2 account, she said she was asleep and could not tell what happened while she was deep in slumber. This makes the alibi not water tight. It is debunked.

9.0 **Conclusion by the Court**

9.1 The issue at hand is the weight to be attached to the caution statements given the trio pleaded not guilty and the dictates of the case in **Chisenga v Rep 16(1) MLR 52** in the circumstances. Indeed retracted statements still come part of record. The court however had to place caution in the weight of the evidence. Section 176 (3) of the Criminal Procedure and Evidence Code is clear.

Evidence of a confession admitted under subsection (1) may be taken into account by the Court or jury as case may be, if such court or jury is satisfied beyond reasonable doubt that the confession admitted under subsection (1) may be taken into account by a court or jury, as the case may be if such a court or jury is satisfied beyond reasonable doubt that the confession was made by the accused and that its contents are materially true.

9.2 Confession based solely on a confession statement that has been retracted is permissible. The qualifier is where there is corroborative evidence or that which points that the confession is materially true. See **Maonga v Rep [2002-2003] MLR 175**. The external evidence here tending to connect the trio to the offence are the accounts by PW4, PW 5 to PW7, the video recording, and the distressed condition the first accused was in the night the offence is alleged to have taken place. Of paramount importance is the phrase his wife stated he made to himself as he sat upright in a soliloquy “*chachitikachi sichilungamo!*” The first accused came to his senses that what they did to the deceased was not right. His conscience haunted him. Hence the reaction in the manner because he regretted his acts.

9.3 Where a caution statement is corroborated, it is presumed to be true and admissible in court. See **Useni v R 3 ALR Mal 250**. There is no evidence that the statements were obtained under duress. The court properly admitted them in evidence. The external pieces of evidence connects to the contents of the statements. One may presume they are materially true. They will therefore form part of the record to help the court make a finding,

- 9.4 The investigator comes in as the role suggests to piece together the evidence for the Prosecution. For sure him being a Police officer, if the accused offended in his presence, he would arrest them on the spot. Duty allows him to retrace steps and reconstitute the scene, draw inference and make conclusions by submission to the Court. See **Yamikani Letasi v Republic MSCA Criminal Appeal 1 of 2017. (Unreported)**.
- 9.5 The retracted evidence has to be used in relation with the other evidence on the record. In any event, a confession is only applicable against the maker. See **Mseyama and Others v Republic Criminal Review 6 of 2016 (unreported)**. The caution will work against the maker alone and it cannot be used against another as if it is prosecution witness testifying.
- 9.6 The long and short of it all is that despite exercise of section 42(2)(e) of the Constitution, on the first and second accused, the evidence by them speaks loudest. A week prior to the disappearance of the deceased, all kept coming and going out from there days prior. On 27th January 2021, you went again at night. The second accused woke up the first accused. The first accused in turn went to the kitchen to wake up Saidi Dyton having agreed earlier to have been a “good size”. They took him fishing. They went to the house of the 2nd accused at midnight.
- 9.7 PW6 saw the accused all with torches. She asked what was in the sack. “Do not ask me because you are a woman!” she was answered. The deceased was hurriedly buried in the garden for the second accused. Upon exhumation his body parts had been mutilated. In the same night, the first accused said “*chachitikachi sichilungamo*” to his wife.
- 9.8 Saidi Dyton had body parts extracted per exhibits 10, which corpse was carried in EXP 11, some of its parts wrapped in EXP 12, covered in EXP 13. The extraction of human tissue is evidence in EXP 14 to EXP 17 which correspond to EXP 4 to EXP 9 the respective caution statements and formal charge for all 3 accused. EXP 18 was freely given to Police by second accused as his account consistent with EXP 4 and EXP 5. The contents of

EXP 12 seen by PW 6 were for use and benefit of all the accused in a joint criminal enterprise. See **Rep v Kamil and Yaghi (supra)**.

9.9 The court therefore finds each of the 3 of you guilty on count 1 of murder contrary to section 209 of the Penal Code, guilty on count 2 of extraction of human tissue contrary to section 224A(a)(ii) of the Penal Code, and trafficking in persons contrary to section 14(1) of the Trafficking on Persons Act 2015. Even if we go by indirect evidence, it all firmly points to you as players in the horrendous disappearance of Saidi Dyton. All evidence in its totality, suggests that the deceased had his life cut short by the trio with evil intentions, body parts extracted for exploitation, being a person living with albinism. I accordingly convict each one of you, accordingly.

9.10 Made in open court this 9th May 2022 at Mangochi



JUDGE