CRIMINAL DIVISION

CRIMINAL APPEAL NO. 17 OF 2021

(Being Criminal case No 731 of 2017 in the Senior Resident Magistrate Court sitting in Lilongwe)

BETWEEN

BERLINGTON KAMWAGHA.....APPELLANT

-AND-

THE REPUBLIC.....RESPONDENT

CORAM: HON. JUSTICE R.E. KAPINDU

Mr. Katundu, Mr. Sikwese, Counsel for Appellant

Mr. Malunda, Counsel for the Respondent

Mr. Dzikanyanga, Court Interpreter/Clerk

E. Lupwayi, Court Reporter

JUDGMENT

KAPINDU, J

1. The Appellant, Mr. Berlington Kamwagha was, until his conviction, a Senior Superintendent in the Malawi Police Service. Then, one day, an early morning domestic dispute with his wife, who is the complainant in this case, Mrs. Chisomo Masamba Kamwagha, evidently degenerated into a physical fight. As a result of the fight, the complainant lodged a complaint with the Police.

2. The Appellant was resultantly arrested, charged and prosecuted in the Senior Resident Magistrate Court at Lilongwe on two counts, namely: (1) causing grievous harm, contrary to section 238 of the Penal Code (Cap. 7:01 of the Laws of Malawi) in respect of the alleged physical assault on his wife, and (2) malicious damage to property, contrary to section 344(1) of the Penal Code, in respect of the alleged wilful damage to the complainant's mobile phone during the physical fight.

3. At the commencement of trial, he pleaded not guilty to the charges. The matter therefore proceeded to a full trial. The State called 3 witnesses, namely the victim herself, Ms. Chisomo Masamba Kamwagha as PW1, her sister Ms. Lusungu Masamba as PW2, and the Police Investigator Detective Sub-Inspector Saxton Mangani as PW3.

4. During the trial, it was alleged that the Appellant and the complainant, who as stated above, were husband and wife respectively, were involved in a physical altercation, resulting in a physical fight and subsequently in injuries being sustained by the complainant, including bleeding on the lower left eye, a cut under the lip, and a swollen face.

5. The Appellant's defence included arguments that the injuries sustained by the complainant did not amount to grievous harm as defined by the Penal Code, and that the charges of causing grievous harm and malicious damage to property were not supported by the evidence provided by the state.

6. The SRM convicted him on both counts, i.e grievous bodily harm and malicious damage to property. The lower Court sentenced the Appellant herein to six (6) years imprisonment with hard labour on the first count of causing grievous harm, contrary to section 238 of the Penal Code; and two (2) years imprisonment with hard labour on the second count of malicious damage, contrary to section 344(1) of the Penal Code. The Court ordered that the sentences were to run concurrently effective from the date of pronouncement, that is to say 23rd March, 2021.

7. Aggrieved by the decision of the SRM in this regard, the Appellant appealed against both the conviction and the sentence, while the Respondent, the State, argued that the conviction on the charge of grievous harm was supported by evidence, but that the charge of malicious damage to property

was not. Further, it was the State's position, in agreement with the Appellant, that the sentences imposed were manifestly excessive.

8. Pausing here, the Court reminds itself that an appeal comes by way of rehearing. The appellate Court looks at all the evidence, findings of fact and how the law was applied to the facts in order to determine whether the court below properly directed itself as to the facts and the applicable law in arriving at its decision. See ***Mulewa v Rep*** [1997] 2 MLR 60; ***Chombo v Rep*** [1994] MLR 66. It is therefore apposite that the Court should re-evaluate both the evidence that was adduced in the lower Court and the law that was applied in arriving at the Court's decisions.

9. As stated earlier, the State called three prosecution witnesses. PW1 was Ms. Chisomo Anthia Masamba Kamwagha, the Appellant's wife and complainant in the present case. She informed the Court that she was the Principal Administrative Officer at the Department of National Public Events. She stated that she knew the accused, Mr. Berlington Kamwagha, as her husband, to whom she had been married since the 22nd of March, 2014.

10. Mrs. Kamwagha stated that she pressed charges against her husband following an incident that occurred on the 27th of August, 2017, where she claimed that he assaulted her, leading to the charges herein that were filed on the 29th or 30th of August that year.

11. According to her testimony, the assault occurred after she returned home late from an entertainment spot called "Cockpit". She stated that "Cockpit" was a club that she visited after she had dined with her friends, male and female, at the Mimosa restaurant at Game/Shoprite complex. Essentially, she told the Court that she was at Cockpit with this same group of male and female friends.

12. It was her testimony that she returned home from the entertainment joint at around 3 O'clock in the morning (3 a.m). It was her evidence that upon her arrival at home in Area 3 and just after she had changed into her sleepwear, her husband demanded to know where she had been up to that time. PW1 stated that she reminded him that she had earlier told him about an engagement event that she would have, and that she had informed him that she would come back home late. She stated that she told him this during a family meeting.

13. PW1 also told the Court that on the material night, proceeding into the early morning of the following day, she just did not find it necessary to inform her husband of her whereabouts. She stated clearly to the Court that she did not see the need to do so. She further told the Court that she indeed noted on her mobile phone during that night/early morning, whilst she was out having fun at Cockpit, that there were numerous missed calls from her husband showing that he had been trying to call her during the night, and that she suspected

that he wanted to know where she was and why she was late in returning home. She however stated that she did not find it necessary to answer or return any of his calls because she knew that she would, after all, eventually find him at home and explain what she had been up to during the night. She informed the Court that she in fact told the Appellant these very words when he asked her about these matters upon her return home. PW1 added that:

> *"I didn't tell him that I was going out. He had been going out too without telling me. That is the behaviour he had been showing me. I went out too without telling him. The same way he has gone out without telling his wife."*

14. It was PW1's further testimony that, notwithstanding her explanations to the Appellant, her late return home led to a heated argument between the two leading to the assault herein, in which, she stated, Mr. Kamwagha (the Appellant herein) beat her, primarily targeting her head, and that he continued with the attack outside the house on the verandah. PW1 stated that during the assault, the Appellant also damaged her phone and threatened to smash a car.

15. PW1 told the Court that after the attack, she sought help from her mother and later received medical attention at Kamuzu Central Hospital.

16. Following this, she decided to file criminal charges against her husband.

17. She stated that at first, she engaged with the Victim Support Unit, but that they subsequently grew cold feet after realising that the person she was accusing (the Appellant herein) was a senior Police Officer. She stated that she did not relent and with her insistence, she was assigned a CID officer to whom she provided a statement, laying the charges.

18. PW2 was Ms. Lusungu Masamba, an Assistant Teacher at Sapitwa Junior Academy and sister to Mrs. Kamwagha (the complainant/PW1). PW2 recounted the events of the morning after the assault, where, she stated, she found her sister in a distressed and injured state. Ms. Masamba (PW2) told the Court that she then contacted a nurse family member to assist with her sister's injuries and later accompanied her to Kamuzu Central Hospital for treatment.

19. PW3 was Detective Inspector Saxton Mangani. He told the Court that he was stationed at Mponela Police Station as the Station CID Officer, and that he had been involved in the arrest of the Appellant. Detective Mangani confirmed his presence during the recording of Mr. Kamwagha's caution statement and arrest and presented the caution statement and the evidence of arrest as part of his evidence. He also identified and tendered photographs depicting the condition of the complainant.

20. After finding the accused person with a case to answer, the Appellant decided to testify. He was DW1. He provided his account of the events. He stated that he was at a football match while his wife prepared for her cousin's bridal shower. Upon his return home, he stated that he found his wife and their child absent and was later informed of his wife's presence at Cockpit with one Mayeso Kazombe, allegedly his wife's boyfriend. He stated that it was his friend Matthews Maganga who informed him that his wife was at Cockpit with the alleged boyfriend.

21. DW1 told the Court that he quickly started off, intending to follow his wife and the alleged boyfriend at Cockpit, confident in his physical skills as a Police Officer and his martial arts skills. He proceeded to state that however, he soon reasoned with himself against the idea, considering that he had a mother and three children, and he returned home to wait for his wife's return.

22. It was his testimony that his wife came back home between 3 am and 4 am, and that he noted that she was dropped by a vehicle which he recognised to be the alleged boyfriend's car, although at the time of the testimony he had forgotten the registration number on the number plate.

23. He stated that considering what the couple had been through since courtship days, he uttered to his wife words to the effect of *"when will you stop this prostitution?"*, and that in response, PW1 slapped him. He stated that she then slapped him again,

whereupon he grabbed her hand. He told the Court that at this point, PW1 then fell on his arms and bit him on his biceps, and also grabbed his private parts. In response, as he tried to rescue himself, he stated that he beat her up, and hence the injuries that she sustained as shown in the pictures that were exhibited and produced before the Court.

24. DW1 explained that he reacted in the manner that he did because of anger in view of the manner in which PW1 had conducted herself on the material day, and perhaps also due to pent up anger which had accumulated over time. He conceded during cross-examination that this was the first time the couple had a physical fight like this.

25. Such was the evidence that the lower Court heard in the present matter.

26. On appeal, in addition to the various documents filed by the Appellant in support of the appeal, the Court also granted the Appellant permission to adduce fresh evidence on appeal on the issue of his employment record.

27. In his sworn oral evidence, the Appellant informed the Court that he was a former Senior Superintendent in the Malawi Police Service, stationed in Dowa prior to his conviction. He detailed his employment history, noting his initial role as a Secondary School Teacher starting in November 2005, and then transitioning to the Malawi Police Service on June 1, 2006.

28. Under cross-examination by Counsel Malunda, the Appellant clarified that his highest rank in the Malawi Police Service was Senior Assistant Superintendent, and that at the time of the incident herein, he was based at Kawale Police Station, waiting for deployment after he had returned from training in China. He also clarified that whilst his teaching experience was at SOS Secondary School, acknowledging the school's status as an NGO, he taught at that school as a public servant who had been deployed by the Ministry of Education.

29. There was no re-examination.

30. Counsel Katundu then proceeded to make his submissions to the Court.

31. Counsel Katundu adopted the Grounds of Appeal as filed on behalf of the Appellant, which were both against conviction and sentence. He also adopted the Skeleton Arguments filed on behalf of the Appellant. Counsel proceeded to adopt the affidavits and Supplementary Skeleton Arguments filed.

32. The primary contention in the appeal was what Counsel argued was the lower Court's error in convicting the Appellant of grievous bodily harm when the evidence did not meet the test of the legal definition of grievous harm under Section 4 of the Penal Code.

33. The Appellant argued that the Court below erred in convicting him and handing down a severe sentence of imprisonment without considering all the mitigating factors submitted by the Appellant, such as being a first-time offender, having lost his job, and the impact this had on his family.

34. In closing, Counsel Katundu reiterated the Appellant's contention that the offence of grievous harm was not adequately established by the evidence. Counsel referenced the case of ***Namata v Republic***, (Criminal Appeal 13 of 2015) 2018 MWSC 9 (23 March 2018), asserting that the Malawi Supreme Court of Appeal held that the law in Malawi does not permit conviction on an alternative (lesser) charge.

35. Counsel Malunda for the State on his part begun by challenging the assertion that calling of a medical expert was a mandatory requirement for all cases of grievous harm as argued by the Appellant. Counsel provided the example of visibly apparent injuries which, he argued, might not need medical evidence in order for one to establish that there had been grievous harm. Counsel posited a hypothetical situation where an accused person chops off the hand of a victim in public view. Counsel Malunda contended that in such an instance, it cannot plausibly be argued that a Court cannot conclude that there was a case of grievous bodily harm unless the same be established through the tendering of a medical report.

36. Counsel Malunda however conceded that in the instant case, the medical report did not adequately detail the injuries to support a charge of grievous harm. He agreed with Counsel for the Appellant that the evidence before the Court below did not meet the test of the definition of grievous harm under section 4 of the Penal Code. He therefore suggested that instead, the Appellant should have been convicted of a lesser offence, namely unlawful wounding, contrary to section 241(a) of the Penal Code. Counsel therefore invited this Court to substitute the conviction for grievous harm with a conviction for the offence of unlawful wounding.

37. Concerning the sentence, both parties agreed that it was excessively harsh. The state proposed a significant reduction of the sentence herein, notwithstanding the aggravating factor that the Appellant was a senior Police Officer.

38. Regarding the charge of malicious damage, the State acknowledged the conflicting testimonies and the absence of the damaged phone as evidence. Counsel Malunda stated that it was regrettable that the phone which was allegedly damaged was not produced before the trial court (the court below), so that the said Court could examine the nature of the damage, and that such examination could have helped the Court to determine whether the damage to the phone was consistent with the same being maliciously smashed to the ground, as alleged by the complainant; or that the phone simply hit the wall and

fell to the ground during the physical duel between the Appellant and the complainant as argued by the Appellant.

39. The State therefore agreed with the Appellant that the conviction on the charge of malicious damage to property was not supported by evidence satisfactory beyond reasonable doubt, and that it ought therefore not be sustained.

40. The Appellant, on his part concluded by submitting that this lack of evidence introduced some reasonable doubt, which should be taken or resolved in favour of the Appellant.

41. The state suggested, however, that should the conviction be upheld, a fine would be a more appropriate penalty, with compensation directed to the victim.

42. The Court is very thankful to Counsel for their great industry and eloquently articulated arguments.

43. As stated earlier, the Court approaches an appeal hearing such as the instant one, by way of rehearing. The Court has, in this regard, carefully examined all the evidence and arguments advanced before it.

44. On the charge of grievous bodily harm, the Court first examines the definition of the term *"grievous harm"* as provided for under section 4 of the Penal Code. The section states that:

> ""grievous harm" means any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health or which is likely so to injure health, or which extends to permanent disfigurement or to any permanent or serious injury to any external or internal organ, membrane or sense."

45. Section 4 of the Penal Code proceeds to define *"harm"* as meaning *"any bodily hurt, disease or disorder whether permanent or temporary."*

46. In addition, section 4 of the Penal Code states that the word *"maim" "means the destruction or permanent disabling of any external or internal organ, membrane or sense."*

47. In the case of ***Rep v Jonathan*** [1990] 13 MLR 389 (HC), Unyolo, J (as he then was), referred to section 238 of the Penal Code and the definition of the term *"grievous harm"* under section 4 of the Penal Code, and stated at page 391, that the definition of the term *"grievous harm"* was well clarified by the learned authors of *Archibold Criminal Pleading Evidence and Practice*, (36 ed), who stated, at paragraph 2654, page 985, that:

> "'Grievous bodily harm' should be given its ordinary and natural meaning of really serious bodily harm, and it is undesirable to attempt any further definition of it."

48. In the case of ***Rep v January*** [1997] 1 MLR 438 (HC), Unyolo, J (as he then was), stated at page 440, that:

> *"I have observed that the phrase "grievous harm" is a legal expression. It is defined under section 4 of the Penal Code as a "maim or dangerous harm" or as a "really serious harm" according to the case of* ***DPP v Smith*** *(1961) AC 290. It is doubtful whether the injury suffered by the complainant in the present case amounted to a grievous harm within the meaning of the law. As always, the burden was on the prosecutor to prove that this was the case. The learned Principal State Advocate submitted that the State was unable to support the conviction. He stated that the facts, in his view, disclosed the offence of unlawful wounding. He was also unable to support the extent of the sentence, saying that it was on the high side. I was also unable to support the conviction. Having considered the matter carefully I was of the view that the facts disclosed the offence of assault occasioning actual bodily harm. The medical report does show that the complainant did sustain actual bodily harm. Accordingly, I set aside the conviction in open court and substitute therefor a conviction for the offence of assault occasioning actual bodily harm contrary to section 254 of the Penal Code. This offence is a misdemeanour punishable by a maximum punishment of five years' imprisonment."*

49. Counsel for both the Appellant and the Respondent (the State) maintained that the severity of the injuries sustained by the complainant did not rise to the level of *"grievous harm"* as defined under the Penal Code. Both parties argued that the extent of harm sustained was less severe than those that typically characterise the offence of grievous harm. Therefore, Counsel on both sides requested that the Court consider changing the guilty verdict from one of grievous harm to that of unlawful wounding.

50. The Appellant's Counsel emphasised the absence of expert medical testimony to corroborate the contents of the Medical Report detailing the complainant's injuries. The Appellants Counsel also contended that the admission of the Report in evidence was unprocedural in that there was no rigorous cross-examination of the author on its contents, and that as such, its authenticity and accuracy were in doubt. In support of this argument, reference was made to the case of ***Republic v. Mabvuto Mchotseni***, Confirmation Case No. 423 of 200 [2002] MWHC 32, in which the prosecution's failure to summon a key witness with material evidence was considered fatal to the prosecution's case.

51. Additionally, the Appellant's Counsel argued that the lower court failed to give due consideration to the defence of self-defence proffered by the Appellant.

52. The Court agrees with State Counsel Mr. Malunda's assertion that medical reports, while often instrumental in proving the degree of harm suffered by a person, are not an absolute prerequisite for establishing a case of grievous harm under section 238 of the Penal Code. The Court agrees with Counsel's contention that in certain instances, such as where a victim's limb gets dismembered in public view, with the result that there is incontrovertible evidence that the accused person is indeed the one responsible for the intentional criminal act, a charge of grievous harm could be independently proven even without a supporting medical report. The Court, in such a case, would not need the evidence of a medical practitioner in order to be satisfied that the violent dismemberment of a victim's hand by an accused person, constituted really serious harm, thus qualifying as grievous harm within the meaning of section 238 as read with section 4 of the Penal Code. It could be, for instance, that there was abundant eye-witness evidence testifying to the accused person's criminal act.

53. In the instant matter, the trial magistrate, upon evaluation of the evidence presented, determined that the complainant had indeed suffered grave injuries at the hands of the Appellant. With respect however, the learned Magistrate's analysis on this issue was quite wanting in material respects. The learned Magistrate did not make any attempt at all to relate her findings of fact to the constitutive elements of the offence of grievous harm as defined under section 4 of the Penal Code. All the learned Magistrate said by way of findings was:

"you can note that the victim suffered serious injuries at the hands of the accused person. The degree of her injuries were ably captured in pictures that were tendered by the investigator in this case, showing the victim heavily bleeding from the left cheek, having a swollen eye and wrapped in a chitenje. In defence, it was noted that the accused person did not dispute the fact that he caused grievous harm to the victim. What is coming out clearly from his testimony is that he was provoked by the victim's conduct of coming home late, not telling him of her whereabouts and not picking up her phone when he was calling her...From the above evidence, one can note that the victim's evidence remains uncontroverted. The accused person actually conceded to have caused the grievous harm to the victim and also maliciously damaged her phone if we are to closely appreciate the evidence before court...the evidence and facts on the record show that the victim had her external organs seriously injured, including the eyes and lips. The extent of the injuries sustained by the victim were such that her whole face was swollen and there was heavy bleeding as can be noted in the testimony of PW 1 and PW2 and also the pictures that were tendered by PW3. Reaching this far therefore, the court opines that there was grievous harm that was suffered by the victim."

54. It seems the learned Magistrate placed a lot of weight on the fact that, according to her, the Appellant "*did not dispute the*

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54. It seems the learned Magistrate placed a lot of weight on the fact that, according to her, the Appellant *"did not dispute the*

fact that he caused grievous harm to the victim." This is a rather unsupported finding. The Appellant admitted in his evidence, in Chichewa, that *"[ndina]menya ndi kuvulaza akazi anga"* [I beat and hurt my wife.] He also stated in his Caution Statement that *"ndinamumenya kwambiri"* [I beat her severely]. These are rather vague statements. Saying that *"ndinavulaza"* [I hurt her] may or may not mean *"I inflicted grievous harm."* If he said *"ndinamuvulaza kwambiri"* [I hurt her so severely], that could perhaps be construed as an admission of causing grievous harm, on its face.

55. However, what is critical is for the Court to bear in mind that grievous harm is an offence that has its legally prescribed constitutive elements. A mere linguistic statement by an accused person during defence testimony in Court, purportedly loosely admitting to causing harm on the complainant cannot, on its own, be taken as a conclusive admission of liability for the offence of grievous harm unless all the salient elements of the offence had been put to him and explained to him, and he admitted each and every one of these elements.

56. Pausing there, I must mention that this Court has scrupulously reviewed Exhibits P3, P4, and P5, which consist of colour photographs depicting the complainant's injuries. Indeed, the record shows that these exhibits faced no objection or contestation from the Appellant's Counsel during cross-examination.

57. It is evident from the pictures that PW1 suffered profuse bleeding on her facial area and there was pronounced swelling on her left eye as well as conspicuous swelling on her lips. The medical report stated that she suffered a cut below her left eye which was sutured at the hospital.

58. The question that this Court asks itself is whether these injuries reached the threshold of grievous harm under section 238 of the Penal Code or constituted unlawful wounding under section 241 of the Penal Code as urged by both Counsel.

59. It is in this regard appropriate to set out the provisions of section 241 of the Penal Code, and the meaning of the term wound under section 4 of the Penal Code.

60. Section 241 of the Penal Code provides that:

"Any person who-
(a) unlawfully wounds another; or
(b) unlawfully, and with intent to injure or annoy any person, causes any poison or other noxious thing to be administered to, or taken by, any person,
shall be guilty of a felony, and shall be liable to imprisonment for seven years."

61. The term wound, in turn, is defined as follows under section 4 of the Penal Code:

""wound" means any incision or puncture which divides or pierces any exterior membrane of the body, and any membrane is exterior for the purpose of this definition which can be touched without dividing or piercing any other membrane."

62. According to the definition of grievous harm shown above, in order to prove the offence, the prosecution must prove, beyond reasonable doubt, that:

(a) There was harm which amounted to a maim or dangerous harm, or

(b) There was harm which seriously or permanently injured health or which was likely to seriously or permanently injure health; or

(c) There was harm which which extended to permanent disfigurement; or

(d) There was harm which led to any permanent or serious injury to any external or internal organ, membrane or sense.

63. On the other hand, in terms of the definition of *"wound"* as shown above, in order to prove the offence, the prosecution must prove, beyond reasonable doubt, that the the person accused caused any incision or puncture which divided or pierced any exterior membrane of the complainant's body. Anything short of causing such incision or puncture will fall

short of the definition of unlawful wounding under the Penal Code.

64. As stated above, Counsel for both parties formed the clear view that the extent of harm sustained by PW1 herein was less severe than injuries that would typically characterise the offence of grievous harm. Resultantly, they invited the Court to consider changing the guilty verdict from one of grievous harm to unlawful wounding.

65. In the instant case, to answer whether the facts reveal a case of *"really serious harm"* as to amount to grievous harm within the meaning of section 238 of the Penal Code, we have to answer the following questions:

(a) Was there harm caused to the victim (PW1) which amounted to a maim or dangerous harm? As shown above, the word *"maim"* has a definition under the Penal Code: *""maim" means the destruction or permanent disabling of any external or internal organ, membrane or sense."* In the instant case, there was really no proof of destruction or permanent disabling of any of the Appellant's external or internal organ, membrane or sense. There was a cut on the skin membrane below her left eye and under her lip, leading to significant bleeding on the complainant's face, but there was no evidence to suggest that any of these would lead to permanent damage. Indeed, a cut on a skin membrane per se, short of clear evidence, cannot, in this Court's considered view, be

described as a *"destruction"* of the skin membrane. So this Court concludes that there was no evidence of a "maim" based on the criminal standard of proof of beyond reasonable doubt.

(b) The other issue on this point is whether there was *"dangerous harm."* The term *"dangerous harm"* is defined under section 4 of the Penal Code as meaning *"harm endangering life."* Again there was no evidence in the present matter showing or proving, beyond reasonable doubt, that the injuries sustained by PW1 were life-threatening.

(c) The other question is whether there was harm caused by the Appellant which seriously or permanently injured PW1's health or which was likely to seriously injure her health. The Court recalls its earlier finding above that there are circumstances in which it may make a finding of grievous harm without reference to medical evidence. Such however is not the case in the present matter. The fact that there was evidence of blood on the complainant's face, and that her face got swollen, is not by itself sufficient to satisfy the Court that the degree of injury had risen above the nature of injury that would characterise lower forms of offence such as unlawful wounding or assault occasioning actual bodily harm. Neither was there any established medical evidence that the assault herein had caused any form of permanent injury to her health. The Court finds that the learned Magistrate's finding

on this matter was therefore not supported by evidence to the requisite standard of proof in criminal matters.

(d) The next question is whether there was proof, to the requisite standard, of harm which caused permanent disfigurement on the complainant. This is directly linked to paragraph 65(c) above and the answer is clearly in the negative. This, under the specific circumstances of the instant case, would have needed clear medical evidence testifying to such a fact and there was none.

66. It is to be recalled that proof beyond reasonable doubt is such a high standard indeed. In the case of ***Miller vs Minister of Pensions*** [1947] 2 All ER 372, Lord Denning famously described this standard of proof as follows:

> *"Proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence – of course, it is possible but not in the least probable –the case is proved beyond reasonable doubt, but nothing short of that will suffice."*

67. Lord Denning's simple but highly illuminating statement in ***Miller vs Minister of Pensions*** is widely considered as a

seminal statement on the standard of proof in criminal cases around the common law world, including Malawi.

68. In the case of ***Rep v Chaponda*** (Criminal Appeal 15 of 2018) 2020 MWHC 10 (2 June 2020), this Court stated, at paragraphs 69-70, that:

> *"The human rights enshrined and entrenched under our Constitution are fundamental and should not be lightly interfered with. This Court therefore considers that this high standard of proof, although not cast in dry ink under the Constitution, ought to be regarded as part of the fabric of the right to a fair trial under section 42(2)(f) of the Constitution. These courts will therefore not entertain any attempts to whittle down the requirement that in criminal cases, the prosecution is under a duty to prove all the essential elements of an offence beyond reasonable doubt. The burden of proof lies squarely on the prosecution."*

69. Based on this high standard of proof, the Court is inclined to agree with both the Appellant and the State that there was no sufficient evidence to establish the offence of grievous harm, contrary to section 238 of the Penal Code. The threshold for establishing that offence is high and it was not reached in the instant matter.

70. The Court also recalls that the Appellant raised the defence of self-defence. This defence was raised generally by the

Appellant, whether the Court would be minded to considering convicting on the grievous harm charge or the unlawful wounding charge.

71. The Appellant stated in his evidence before the lower court that the complainant (PW1), was in fact the initial aggressor, as, according to his evidence, she slapped him first, and that his actions were merely responsive and defensive in nature. Whilst professing expertise in martial arts, the Appellant claimed that he exercised much restraint, and that his conduct was purely in self-defence.

72. In this regard, the Appellant referred to Exhibit D1, a medical report from the Officer-in-Charge at the Police Headquarters Clinic, dated October 2, 2020, which documented treatment provided to him for a puncture wound sustained on August 27, 2017. The report diagnosed the Appellant with a *"Soft tissue injury...Human bite."*

73. The Court has already found that the harm herein did not amount to grievous harm within the meaning of the term under section 238 as read with section 4 of the Penal Code. The Court will therefore not spend much time on this issue. However, a few observations are still in order. The Court noted that the assault herein did cause some significant harm on the complainant (PW1) to the extent that her face became so much soaked in blood, her left eye was so swollen that the swelling led to a temporary closure of the eye, and her lips were evidently swollen

as a result of the Appellant's assault. This is all well evidenced by the pictures exhibited herein. The question that arises is whether, under these circumstances, this Court should have taken the Appellant's self-defence claims seriously.

74. Upon a careful consideration of the events and all the facts as narrated by both parties and also as borne out by the documentary evidence herein, this Court would conclude that while the initial actions of the Appellant, if what he stated in his defence in Court is anything to go by, may have been intended as acts of self-defence, the manner in which he ultimately responded was grossly out of all proportion and bore no reasonable relationship to the purported necessity for self-defence. The assault by PW1, in the manner that it was alleged by the Appellant in Court, constituted a relatively minor physical attack. However, in his caution statement, the Appellant stated that he beat up his wife (the complainant) quite severely. Further, it is this Court's view that a proper recourse to self-defence ought not to have resulted the in the nature and extent of the injuries sustained by PW1.

75. In the circumstances, this Court holds that the Appellant could not have the benefit of the consideration for a self-defence claim.

76. The other issue that the Appellant raised was that he was operating under provocation.

77. In this connection, the Court finds that the Appellant's severe beating of his wife (PW1), by his own admission during his testimony in the Court below, was indeed driven more by anger arising out of the conduct of PW1 that morning which was aggravated by the Appellant's belief that PW1 had in fact been dropped home by a man whom the Appellant suspected was having an extra-marital affair with her [PW1]. The Appellant stated that the circumstances were compounded by the Appellant's anger that had accumulated over time on account of PW1's previous conduct.

78. It is this Court's finding that the Appellant's assault on his wife (PW1), as attested to by the Appellant himself during his testimony in the lower court, stemmed primarily from a surge of anger prompted by PW1's conduct on the morning in question, and that this was exacerbated by the Appellant's suspicion that PW1 had in fact been dropped home by an individual with whom the Appellant believed PW1 was engaging in an extramarital relationship. The Appellant indicated in his testimony on the lower Court that these circumstances were further compounded by accumulated resentment on his part resulting from PW1's prior conduct, and again the Court finds this as a fact.

79. It is important to note, however, that the defence of provocation, for purposes of criminal liability, does not extend to the offence of grievous harm under the Penal Code, or indeed any other offence other than murder. In so far as the issue of criminal liability is concerned, the defence of provocation is

applicable solely to cases of murder, where, if provocation is established, the Court must reduce the charge from murder to manslaughter. In the context of all other offences, unless statute specifically provides otherwise, provocation may only be considered as a mitigating factor during sentencing.

80. The next issue to consider, having found above that the offence of grievous harm was not established by the evidence in the Court below, is whether this Court may then competently substitute the finding of guilty on the grievous harm charge for one of unlawful wounding as urged by Counsel for both parties.

81. The question of whether it is competent for Malawian courts to be entering alternative verdicts was comprehensively dealt with by the Supreme Court of Appeal in the case of ***Namata vs Republic***, Criminal Appeal 13 of 2015 [2018] MWSC 9. Chikopa, JA, delivering the judgment of the Court, stated that:

> *"[W]e do not think that courts should be entering alternative verdicts... We are convinced they are not the way to go in the current constitutional dispensation...Firstly, in these days of constitutional supremacy and separation of powers, it is, constitutionally, for the State in the person of the Director of Public Prosecutions to decide who to prosecute, for what offence and before which court. A Trial Court's role is only to decide, on the basis of the charges and evidence before it, on the guilt or otherwise of the accused. If the accused is guilty it shall say so. If not it will also say so. But it is not,*

in our judgment, for courts to convict accused persons for offences not brought to it by the State. The courts would, in so proceeding, i.e. in entering alternative verdicts in those circumstances, be exercising powers they do not have and arrogating to themselves powers constitutionally granted to the DPP. They should do neither. We are aware that over the years courts have entered alternative verdicts. That there has even developed a jurisprudence and law on how and when this should be done namely when a court is convinced that it will occasion no injustice to the accused. See sections 153 - 157 of the CP&EC inclusive. We will respond by pointing out that most of this jurisprudence and law is pre-1994. Before the current constitutional dispensation. And further that we do not think that the CP&EC can, in view of section 5 of the Constitution, take away powers or give powers which the Constitution has given or not given. Secondly, we are convinced that we would, if we entered an alternative verdict, be flouting the appellant's fair trial rights. Above we have spoken of how an accused should, inter alia, be presumed innocent; how he should be allowed an adequate opportunity to defend himself; of how he should be informed with sufficient particularity of the allegations against him; of how he should be allowed to lead evidence and question witnesses; and of how he should be tried before, at the very least, an impartial court. Are alternative verdicts, made as they are in the comfort of the court's chambers in the absence of the parties, after the close of the parties' cases the products of

a fair trial? We think not. A Court cannot claim impartiality or to have abided by the tenets of fair trial if it, of its own volition and without hearing the accused finds him guilty of an offence other than the one he was charged with. An offence in respect of which he, inter alia, entered no defence, called no witnesses in his defence and was not informed of at all. Thirdly, and considering that an alternative verdict should only be entered where the same occasions no injustice to the accused, it appears to us surreal that an accused can be convicted of an offence not charged, not informed about and in respect of which he entered no defence without at the same time occasioning him an injustice. In our most considered opinion criminal courts must keep away from alternative verdicts. Unless they are for offences charged in the alternative. Let it be for the State to, as they prosecute, follow the proceedings well enough to know when an amendment is needed in view of a new turn of events. If they cannot they should, like everybody else, face the consequences of their shortcomings."

82. This is a decision of the Supreme Court of Appeal which is binding upon this Court. The Court has not found another subsequent decision of the Supreme Court of Appeal that holds to the contrary. Resultantly, this Court cannot substitute the quashed conviction on the grievous harm charge with an alternative conviction for the offence of unlawful wounding as was urged by both parties, or perhaps the offence of assault occasioning actual bodily harm under section 254 of the Penal

Code, which this Court would have thought would actually have been the best offence with which the Appellant herein should have been charged.

83. Neither can this Court order a retrial of the Appellant. Once again, on the issue of ordering a retrial, this Court is bound by the Supreme Court of Appeal decision in the case of ***Namata vs Republic*** above. The Supreme Court stated that:

> *"[W]e think that retrials must actually never be resorted to. They interfere with the independence/impartiality of trial courts, afford the State a needless second bite of the cherry and effectively allows it [the State] to benefit from its own error[s]. Because a retrial is only ordered where a superior court is convinced there is sufficient evidence to secure a conviction against the appellant the superior court is, at the time of remitting the case for retrial effectively telling the retrial court, placed down on the hierarchy, which way to go in so far as the accused's guilt is concerned. That does not offer the trial court much room within which to exercise its independence/impartiality. A retrial will not therefore be ordered."*

84. In the circumstances, it sadly emerges that the conviction of the Appellant on the charge of grievous harm contrary to section 238 of the Penal Code must be quashed and the attendant sentence of 6 years imprisonment with hard labour that was imposed by the lower court is hereby set aside. On the authority

of ***Namata v Republic***, this Court is unable to substitute an alternative verdict for that of grievous harm. As the Supreme Court of Appeal stated in that case, the State must face the consequences of their shortcomings for having made a poor choice of the offence or offences for which the Appellant herein was to be charged and prosecuted.

85. The Court refers to this end as a sad conclusion because the Court is under no illusion that this was a typical case of gender-based violence (GBV), and specifically violence against women in the context of a domestic relationship. This was pure physical abuse. The conduct therefore constituted domestic violence within the meaning of Section 2 of the Prevention of Domestic Violence Act (PDVA), and, if properly charged with an appropriate offence and duly convicted, such conduct would have constituted a very significant aggravating factor.

86. The Court also concludes that the outcome on this matter is a sad result considering that the Appellant, as a senior Police Officer (he was a Senior Superintendent of Police), was entrusted with the sacred responsibility of upholding the law and protecting the community, and more so his own family, and yet he evidently engaged in a violent assault upon his own wife. Notwithstanding her own behavioural failings, which were very clear from the evidence herein, the Appellant should have exercised restraint, especially as a well trained senior professional. The Appellant's conduct, in this regard, went against the very principles that he was sworn to uphold. The

Appellant was under a duty to protect rather than assault and violate his wife's physical integrity, her misbehaviour on the material day notwithstanding.

87. Police officers, especially senior police officers such as the Appellant was, are supposed to be role models within our communities. As such, their actions, both on and off duty, are closely observed by members of the public and can significantly influence public perceptions about the integrity of law enforcement.

88. Violent conduct by Police Officers in circumstances in which they could and should have restrained themselves, tarnishes the image of the entire Police Service and has the potential of eroding or contributing to the erosion of public trust and confidence in the institution of the Police.

89. The Court wishes to end on this sad chapter by observing that we have arrived at this sad result of an acquittal without the option of entering an alternative verdict when the facts would easily have proven other assault related offences under the Penal Code, such as assault occasioning actual bodily harm, simply because of a poor choice of charges by the prosecution. This therefore presents a serious lesson to the State that when making decisions in relation to the framing of charges in this genus of offences, they must carefully apply their minds to the underlying philosophy of the taxonomical classifications of various offences under different chapters of the Penal Code.

90. The offence of grievous harm which was preferred by the prosecution in the instant case falls under Chapter XXII of the Penal Code which is on *"Offences Endangering Life or Health"*. Evidently, the offences which the Appellant herein ought to have been charged with, such as assault occasioning actual bodily harm under section 254 of the Penal Code, fall under Chapter XXIV of the Penal Code on *"Assaults."*

91. There are fundamental philosophical or principled differences between the nature of the offences in Chapter XXII and Chapter XXIV of the Penal Code, and these differences essentially lie in the severity of harm, the intent behind the actions, and the societal interests that they protect.

92. Chapter XXII of the Penal Code, upon a close analysis, deals with offences that are inherently more serious in nature, as they directly threaten life or could result in significant harm to one's health. The offences in this chapter are essentially felonies and they carry harsher penalties, including life imprisonment, such as the offence under section 235 on *"Acts intended to cause grievous harm or prevent arrest."* The offence of grievous harm itself under section 238 in this chapter carries a maximum penalty of imprisonment for fourteen years.

93. The acts described in this chapter are either premeditated or involve a higher degree of malice or recklessness regarding human life. These offences under this chapter are treated more

severely due to the potential for long-term or permanent damage to individuals and the significant breach of the societal social contract when a person endangers others in such a grave manner.

94. Chapter XXIV of the Penal Code, by contrast, addresses *"Assaults,"* which are generally considered misdemeanours, and which involve less severe forms of physical violence or harm, or the threat thereof, without necessarily having the intent to cause grievous harm or to endanger life.

95. Resultantly, the penalties imposed by the Penal Code are less severe, reflecting the lower level of harm or threat of harm that is typically associated with these offences. Examples include common assault under Section 253 of the Penal Code or assault occasioning actual bodily harm under section 254 thereof, which offences may result in minor or short-term physical injury. Although the wrongful conduct and injury is reckoned by the law, the law recognises that this genus of offences does not pose the same level of threat to life or health as the offences in provided for in Chapter XXII.

96. Therefore, in summary, whilst both chapters aim to deter physical harm to individuals and indeed to protect individuals from harm, Chapter XXII, under which the Appellant was charged, is specifically focused on preventing actions that could result in very serious consequences for the victim's life and health, and the attendant heavier penalties reflect society's

judgment that these are among the most egregious violations against a person's physical integrity. The elements of such offences, including the gravity of the harm caused, must be proved beyond reasonable doubt.

97. In stating all this, the Court simply wishes to call upon prosecutors to be particularly cautious, analytical, systematic and indeed informed by proper legal philosophy, when making a choice of the offence with which to charge a person in order to avoid a sad conclusion of a matter as has been reached in the present case. This is more so considering the very stringent standard that the Supreme Court of Appeal has set out in ***Namata vs Republic*** by proscribing the imposition of alternative verdicts during appeal or review by a higher court.

98. The Court now proceeds to address the Appellant's appeal against his conviction for the offence of malicious damage to property contrary to section 344(1) of the Penal Code. Section 344(1) of the Penal Code provides that:

> *"Any person who wilfully and unlawfully destroys or damages any property is guilty of an offence, which unless otherwise stated, is a misdemeanour, and he shall be liable, if no other punishment is provided, to imprisonment for five years."*

99. It was evident from the contentions presented by both the Appellant and the State, that their interpretation of the law

concerning malicious damage to property was basically that there was need for evidence, to the requisite standard, namely beyond reasonable doubt, showing that the Appellant deliberately caused damage to the mobile phone in question. In other words, they opined that the requisite *mens rea* was intention.

100. Counsel for the State, Mr. Malunda, contended that regrettably, in the present case, the damaged phone itself was not presented as an exhibit, thereby depriving the Court of an opportunity to evaluate the extent of the damage and assess whether the same was indicative of intentional destruction by the Appellant as opposed to accidental damage caused by the phone being dropped to the ground.

101. The inference to be drawn from this argument is that in the absence of evidence demonstrating that the Appellant intentionally shattered the phone, the offence of malicious damage to property, as alleged, would not be substantiated. Indeed, Counsel for both parties advanced this position.

102. With the greatest respect, this proposition unfortunately does not appear to be the position of the law on the matter. In the case of ***Chimwemwe Gulumba v Republic***, Misc. Criminal Application 51 of 2003, [2003] MWHC 27, Mwaungulu, J (as he then was) properly summarised the essence of the offence of malicious damage to property under Malawian law. The learned Judge stated that:

"The understanding of the word 'willfully' under section 344 and, indeed, under other provisions in the [Penal] Code, is informed, under section 3 of the Code, by the meaning of the word under English Criminal Law. The word there is not understood only to mean 'deliberately' or 'voluntarily'. It covers both intention and recklessness...Under English law, therefore, 'willfully,' as used in section 344 (1) of the Penal Code connotes intention or recklessness. The offence however is 'malicious' damage to property. Malice is therefore part of the crime."

103. The point to emphasise therefore is that in order to prove malicious damage to property, it is enough for the prosecution to prove recklessness. The prosecution does not always have to prove intentional damage as the parties seemed to suggest. The learned Magistrate in the Court below got this point correctly.

104. However, the Court proceeds to reckon that, as Counsel for both parties correctly observed, there is no exhibit of the phone on the record of appeal in order for this Court to perceive with its own eyes the extent of the damage that was caused. There is also no indication at all that the said phone was produced before the court below as an exhibit in order for the Court to make its own appreciation of the nature of the damage, as draw a conclusion as to whether the damage was consistent with accidental fall, or a fall arising from intentional or reckless shattering of the same.

105. It must still be borne in mind that the degree of proof, that the mobile phone herein was damaged maliciously by the Appellant, is proof beyond reasonable doubt. Based on that standard, the Court is not satisfied that the damage to the phone herein was wilful and malicious in the sense of section 344(1) of the Penal Code.

106. Indeed, examining the Judgment of the Court below, it is not entirely clear how the learned Magistrate came to be satisfied, beyond reasonable doubt, that the Appellant had damaged the phone maliciously. After analysing the testimonies of both the complainant and the Appellant, and the Court dwelt overly long on what the complainant said and very cursorily on what the Appellant had said, the Court stated that:

> *"Reaching this far, the court is more inclined towards the victim's evidence that the accused person willfully smashed the victim's cellphone upon snatching it from her."*

107. The Court stated that it was "more inclined towards the victim's evidence." This is language that is more consistent with the standard of a balance of probabilities. The Court did not, here, express itself in language that suggested that the evidence against the Appellant was so strong against him as to leave only a remote possibility in favour of his version, which could be dismissed with the sentence, "of course, it was possible but not in the least probable." The Court could have stated that it was

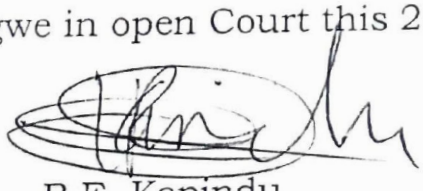
completely convinced by the complainant's evidence. However, having, in its finding, stated that it was only *"more inclined towards the complainant's evidence"*, the Court then proceeded to state that it was satisfied beyond reasonable doubt about the Appellant's guilt on this count. This is troubling judicial analysis. With respect, this Court cannot uphold it.

108. In the result, the Court quashes the lower Court's conviction of the Appellant on the charge of malicious damage to property, contrary to section 344 (1) of the Penal Code, and the appeal on that count also succeeds.

109. The appeal against conviction having succeeded on both counts, the respective sentences of six years imprisonment with hard labour on the first count of causing grievous harm, contrary to section 238 of the Penal Code; and two years imprisonment with hard labour on the second count of malicious damage, contrary to section 344(1) of the Penal Code are hereby set aside. The Appellant must therefore be immediately released from prison unless otherwise held for other lawful reasons.

110. It is so ordered.

Delivered at Lilongwe in open Court this 25th Day of March, 2024



R.E. Kapindu

JUDGE