

**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY**

CRIMINAL CAUSE NO. 22 OF 2008

BETWEEN

THE REPUBLIC COMPLAINANT

AND

AMONI PHIRI RESPONDENT

CORAM : HON. JUSTICE MZIKAMANDA

 : Kahaki Jere, Counsel for the Applicant(s)
 : Khembo, Counsel for the Respondents
 : Mr. Njirayafa – Court Interpreter

JUDGMENT

MZIKAMANDA, J.

The accused person, Amon Phiri is charged with murder contrary to Section 209 of the Penal Code. The particulars are that the accused person on or about 12th October, 2007 at Mtambo Village in the District of Salima with malice

aforethought caused the death of Samson Benson. He pleaded not guilty to the charge.

At the hearing, the first prosecution witness was LUTE ESTON, wife of the deceased. She testified that on the 12th of October, 2007 the deceased left her at home at 6:00 am and went to Thavite Trading Centre in Salima where he conducted a bicycle hire business. At 8.00 am a colleague of her husband who did bicycle hiring together with the deceased found her at home and told her that her husband had been attacked and he lay of the road side. She rushed to the scene and found her husband as he breathed his last. She noticed that the deceased had a wound on the right rib and near the deceased's body was a knife with a white handle. The deceased bicycle was not at the scene. Neither was the deceased's cell phone. The Police were informed by telephone. She identified a bicycle which the police allegedly recovered in the course of their investigations as belonging to her deceased husband.

PW 2 was Jedani Chimwendo, a colleague of the deceased who reported to PW 1 that her husband had been attacked. According to him, he knew the accused person as one who used to hire his bicycle from Thavite Trading Centre to the Lake (Lake Malawi shores). On the material day he and the deceased and another known as Frazer had been at Thavite Trading Centre very early waiting for hirers. He briefly left for his home to bring spanner and when he returned he found that the deceased had been hired. Shortly he too was hired. As he went towards the lake, at Mtambo village, he saw the deceased lying on the road side near some bush, having been stabbed with a knife through the right ribs. He immediately

dropped the one who had hired him and went back to report his findings to the deceased's relatives. At the scene was a knife. The deceased's bicycle and Cellphone were not there. During cross-examination he said that the accused was popularly known as "Sibweni" to those who are in the bicycle hire businesses. He said that when someone is coming for hire they search him for any dangerous weapon. They do so as the normal procedure.

PW 3 was Kanyenda Kadango based at Nkhotakota. He knew the accused as "Sibweni" - On 15th October, 2007 the accused person offered him a bicycle for sale at K7,500.00. He bargained and bought it at K5,500.00 The accused had told him that he got the bicycle from his sister who had asked him to sell it. He has asked the accused where he got the bicycle from because he did not believe it was his as he had never seen him with a bicycle before. As a precaution he had taken the accused to Nkhotakota Police to witness the transaction but the police refused saying that their job would be to recover the bicycle if it turned out to be stolen. He bought the bicycle. Four days later CID from Salima approached him demanding the bicycle and saying that the owner of the bicycle had been murdered. He was placed in cell for four days before he was released. He identified the same bicycle which PW 1 said belonged to her deceased husband as the one he bought from the accused person.

PW 4 was Frazer Sulamoyo. He did bicycle hiring together with the deceased and PW2 at Thavite Trading Centre in Salima. He knows the accused as "Sibweni" and as a person who used to hire his bicycle to the Lake. On the day in question he was slightly late to get to Thavite and he found that "Sibweni" had already

arranged with the deceased to pick him on his bicycle. "Sibweni" told him that he was late and it would be Samson to pick him. He saw the deceased leave the place having picked the accused on his bicycle. About 20 minutes later he saw PW 2 come to tell him that the deceased had been stabbed. He rushed to the scene and found the deceased lying on the road side with blood coming out. He also saw a knife at the scene. The deceased bicycle and the phone which he used to wear around his neck were not there. They looked for the accused but the accused had run away. The police came and took the deceased to Salima Police. The dead body was brought back the following day for burial. The bicycle that the accused allegedly sold to PW 3 was the one the deceased used on the day he picked up the accused. He also identified a cellphone shown to him as the one that the deceased put around his neck on the material day.

During cross-examination he said that he had on three previous occasions been hired by the accused and they had gone down the same route. He said that he would not say that they take any protective measures before picking up a customer. He only learnt that the police recovered the bicycle in Nkhotakota. PW 5 Detective Constable Matupa took charge of investigations in the present case. According to him when the police got a report that the deceased had been murdered, he and others visited the scene. He found the dead body lying flat on the drain on the road side. It had a stab wound on the right and blood was flowing. Beside the dead body was a knife with blood stains. He believed the knife was used to commit the crime. From the scene he noticed that a bicycle and a nokia 1110 phone were missing.

The body was taken to Salima Hospital for postmortem examination. They learnt that "Sibweni" was the one who committed the crime. The accused was later spotted at Chia in Nkhotakota. On 25th October, 2007 the accused was arrested in Nkhotakota and was taken to Salima on 26th October, 2007. The accused was cooperative during interrogation. He told the police how he committed the offence and where he sold the bicycle and the cell phone. He was charged with murder and he admitted the charge. The accused was taken for psychiatric examination at Salima District Hospital and he was found to be mentally sound. On 3rd November, 2007 the accused led the police to where he sold the deceased's bicycle and it was recovered. He also led to the recovery of the deceased's cell phone.

In his defense testimony the accused stated that he is a fish monger. On the day in question he left for the Lake to buy fish. At Thavite he hired the bicycle of the deceased for which he agreed to pay K150.00. The deceased searched him first for dangerous weapons before carrying him on the bicycle. They left the place and after going for 60 Km the deceased stopped the bicycle and said that the fare they had agreed on was small since the goods he was carrying were too much. The deceased demanded an additional K150.00 to make a total of K300.00. When the accused told him that he had no additional money, the deceased produced a knife stabbed him on the elbow with it as they struggled. The struggle continued and both of them appeared strong. The knife then stabbed the deceased who then fell to the ground. The accused became afraid. He decided to take the bicycle and run away from the scene for fear of being beaten up by people. There was no one in the neighbourhood as they struggled because the place was

deserted. When he ran away he went to Nkhotakota. He did not report to police because he was full of fear. Out of the same fear he decided to dispose of the bicycle by selling it. He sold it at Nkhotakota so that the police should not find him with it. After two weeks the police arrested him at the Lake of Lozi in Nkhotakota Boma. He said that he never saw the deceased with a phone. The phone tendered in evidence was recovered from where he sold it after the police had simply asked him where he sold the phone. He said he had bought that cell phone from a certain man whom he could not remember. He had it for six months before he sold it at K5,000.00. The police beat him and recorded his statement. He said that he did not expect the deceased to die. He thought that the deceased would just have had a wound just as he too had a stab wound.

During cross-examination he said that the deceased searched him but found him with nothing. He said that he did carry luggage, four small baskets of fish, when the deceased demanded extra K150. He said that he had earlier bought the fish and had kept them somewhere before he hired the deceased. He said that at the time they agreed on the fare of K150.00 he had told the deceased that he would carry his fish. He said that the two began struggling with each other after covering a distance between Shoprite in Lilongwe and Bwalo la Njobvu. (I take judicial notice that the distance between Shoprite in the City of Lilongwe and Bwalo la Njobvu within the same City is within the range of 3Km). He said from the point where they struggled to where he got on a vehicle was 30 Km. He said that the deceased produced a knife from his trousers and demanded money before he could injure the accused. The stabbing on him shoot up his blood pressure such that he struggled with the deceased. When the knife stabbed the

deceased it was in the deceased's hand although he later said he held the knife in his hands when it stabbed the deceased. He said that the deceased fell on the knife as the accused was holding it. He rejected the statement tendered in court as having been made by him. He did tell the police that he was stabbed on the elbow but the police dismissed it as a lie. He conceded that the bicycle exhibited in court belonged to the deceased despite some few alterations to it. He denied to have stabbed the deceased with a view to steal the bicycle. He took the bicycle and run away because he had run short of ideas. He ran away for fear of being arrested. He removed parts of the bicycle to disguise it because he was afraid of being arrested. However during re-examination he said that it was not him who changed the bicycle but that he sold it in its original condition. He sold the bicycle out of fear that the police would come and find it. When asked by the court as to what else he took from the scene he said he only took the bicycle. He abandoned the four small baskets containing fish at the scene. The extra load that he was asked to pay for were the four small baskets containing fish.

I had ordered that counsel for either party to file with this court written submissions within seven days of 3rd April, 2009. Only counsel for the defense complied. I will proceed to give my judgment taking into consideration the submissions of the defense.

Section 209 of the Penal Code provides that:

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

This is a criminal charge and the duty rests squarely on the prosecution to prove every essential element constituting the offence beyond reasonable doubt. (See *Section 187 of Criminal Procedure & Evidence Code, Regina v Saidi 1 ALR (Mal) 560*). There is no duty whatsoever on the part of the accused to prove his innocence or indeed to disprove anything. As Section 42 (2) (f) (iii) of the Constitution provides every person accused of the commission of any offence has the right to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial.

In dealing with the case at hand I must examine the evidence to see if it establishes that:

- (i) The accused person caused the death of SAMSON BENSON;
- (ii) If the accused caused the said death he did so by an unlawful act or omission, and
- (iii) Whether the accused caused the said death of malice aforethought.

On the first element there is clear evidence that SAMSON BENSON died on the morning of 12th October, 2007 on the roadside between Thavite Trading Centre and the Lake Malawi in Salima. This was at Mtambo Village although the actual scene was at a deserted place. All the witnesses who went to the scene found the deceased lying on the roadside and losing blood from a wound on the right side of

the rib area. The postmortem report shows that the deceased died on 12 October 2007 and attributed that death excessive loss of blood. In short there is ample evidence establishing the death of the deceased on 12th October, 2007. This death had happened by 8.00 am. Yet at 6.00 am the deceased left home alive and well to do business. According to the clear evidence of PW4 and confirmed by the accused himself, the deceased picked up the accused person on his bicycle as the accused had hired him. Again the accused concedes that somewhere along the way at some deserted place he abandoned the deceased after he noticed that the deceased had collapsed. Indeed the accused concedes that what led to the collapsing of the deceased was his having sustained a stab wound on the rib side following struggles between the accused himself and the deceased. I find that there is overwhelming evidence that the accused person wholly caused the death of the deceased SAMSON BENSON. In terms of Section 215 of the Penal Code at no point has there been a suggestion that the accused person did not cause the death of the deceased. In fact it seems to me from the defence submission that the defence has been anchored on self-defense, namely that the accused acted in self-defense when he struck the deceased and caused his death.

I must consider next whether the accused caused the death of the deceased by an unlawful act. There is no doubt on my mind that the death of the deceased was caused by stabbing using the knife that was found at the scene and which was tendered in evidence. The accused gave conflicting stories as to the act of stabbing. In one breath he said that the deceased in fact stabbed himself as the two struggled because the knife remained in the hands of the deceased. Then he said he was holding the knife when the deceased landed on it. Presumably, this

time the accused person had snatched the knife away from the deceased. I must say that the nature of the wound as described by the witnesses and the postmortem report does not bear the characteristics of it being self inflicted by the deceased. I discount the earlier contention by the accused. The latter contention too lacks any credibility. If I were to accept the latter contention the suggestion would be that since the deceased threw himself on the knife that was being held by the accused, then the act of stabbing was involuntary on the part of the accused. I am unable to accept that suggestion in the light of the evidence in this case. The evidence is very clear that the act of stabbing by the accused on the deceased was voluntary on the part of the accused person. I would reject any notion that it would have been by mistake that the accused stabbed the deceased. The act of stabbing a person to death is not inherently unlawful. The law recognizes that there can be lawful homicide as well as unlawful homicide. Thus homicide is not generally unlawful where death of a person is caused in the execution of the lawful death sentence of a competent court as in the proviso to Section 16 of our Constitution or where a person acts in self-defense. Homicide will be unlawful when it is done contrary to or is prohibited by or unauthorized by law. An unlawful act therefore is one that is contrary to law. A violation of some prohibitory law done willfully or voluntarily would amount to an unlawful act. In Rex v Maya (1923-60) 1 ALR (Mal) 96 Sheridan, CJ. Considered the meaning of what amounts to an unlawful act causing death for purposes of a murder charge and referred to the following words in Salmonds on Torts, 9th edn at 348 (1936):

“The wrong of trespass to chattels consists on committing without lawful justification any act of direct physical interference with a chattel in the possession of another person.”

Key words in the above statement are *“without lawful justification.”* In the case at hand the accused seeks to rely on the defences of self-defense and provocation. While self-defense where reasonable force, otherwise called proportional force, is used constitutes a complete defense to a crime including murder, provocation has the effect of reducing the offence of murder to manslaughter. Even if the accused had not raised the defences of self-defense or provocation in the charge of murder this court would have been duty bound to consider these defences.

In setting up the defense of self-defense the accused has denied that the knife was his and has alleged that in fact it was the deceased himself who produced the knife and threatened to stab him. The accused alleged that the deceased in fact stabbed him on the elbow. To reinforce his argument that at the time of the incident he was not armed with any knife at all he said that the deceased searched before they left Thavite. No one witnessed the alleged search. PW2 indicated that they normally search customers for dangerous weapons but he was not there when the alleged search on the accused was done. PW 4 who was present and who said that he had previously been hired by the accused said no precautionary measures were taken. Even PW 2 had ever been hired by the accused before. In his defense evidence the accused person stated that he was a fish monger and a regular customer to the persons who did bicycle hire business at Thavite Trading Centre. It is clear to me that the accused was a regular

customer to the deceased as well as PW 2 and PW 4. I am reinforced in this view by the defense in its submission at page 17 where it says:

“Besides the accused was a businessman who frequented the village of the deceased, the least he could do is plan to kill the deceased knowing fully well that it could affect his business. Moreover the accused knew that the PW 4 had seen him leaving with the deceased.”

In the light of the fact that the accused frequented the village of the deceased and had developed a business relationship with the people who did the bicycle hire business including the deceased it is most improbable that the deceased would have searched him for dangerous weapon on this day. On the contrary the conduct of the accused following the killing of the deceased leaves in no doubt at all that the accused took advantage of his familiarity with the deceased and was armed with a knife knowing that he would not be searched. I find that the knife that was used to stab the deceased belonged to and was produced by the accused himself. He was on the carrier of the deceased bicycle and he must have stabbed the deceased while the deceased was not looking. This explains why he would only manage to stab the deceased on the sides in between ribs. I reject his contention that he was stabbed on the elbow first. In fact he was even hesitant to show the scratch which he alleged the knife had left. He did not go for any treatment on the wound inflicted by the knife and he did not tell any-body, let alone the police regarding his injury and the alleged attack he had from the deceased. The accused kept contradicting himself as to who had the knife

between him and the deceased when the deceased was stabbed. The accused emerged as a person who was untruthful about the events of that fateful morning. I reject his defense of self-defence out-right on the grounds that it is without merit and incoherent within the defence story. Similarly the defence of the provocation cannot aid the accused as it is not supported by way of the evidence. In fact the defences of self-defense and provocation cannot stand in the light of the overwhelming evidence against the accused. The accused had no lawful justification to stab to death the deceased person. I find that the accused person wholly caused the death of the deceased by an unlawful act of stabbing the deceased.

So far I have dealt with the actus reus of the offence charged. I must now turn to the mens rea which is whether the accused caused the death of the deceased of malice aforethought. Section 212 of the Penal Code defines malice aforethought. An intention to cause death, or grievous bodily , knowledge that the act causing death will probably cause death or grievous bodily or an intention to commit a felony will amount to malice aforethought. Intention may be expressed or, may be inferred from surrounding circumstances. I take note that the accused person did state towards the end of his evidence-in-chief that:

“To me the death of the deceased has affected me badly. I did not expect it to end in loss of life. I thought he would just have a wound like I had a stab wound.”

I am afraid I cannot accept these sentiments by the accused person. The violent manner in which the accused attacked the deceased from behind cannot in all reasonableness be understood to mean that accused had no knowledge that his act which caused death would probably cause death or grievous bodily harm. The conduct of the accused person following the death of the deceased was revealing of the accused person's intentions. Having caused the death of the deceased the accused ran away with the deceased's bicycle and sold it at Nkhotakota. It is clear that at the time of taking the bicycle he did not just want to use it to get away from the scene. He even sold it. He suggested that he sold because he feared that the police would find it with him. Yet PW 3 who bought the bicycle said that they together went to police for the police to witness the sale and that evidence was firm. I am of the view that the disposal of the bicycle was not out of fear of the police but in fulfillment of his entire enterprise. I am also satisfied and I find that the nokia cell phone belonged to the deceased. The accused took it together with the bicycle and sold it again in fulfillment of his enterprise. I reject the accused's argument that he bought the cell phone from an unknown person.

Regarding the bicycle the accused contradicted himself that he is the one who made the changes to it although he later said he sold it in the condition he took it. The accused person's defense is incoherent and can not be believed. He clearly was untruthful in any respects. He lied that he had carried four baskets of fish. There were no fish found at the scene when the deceased was found 20 minutes after he had left Thavite. He lied that they had travelled 60 Km when the struggles began. Sixty Kilometres is a long journey which can not be covered within 20 minutes even by the fastest bicycle. He later estimated the distance as between

Shoprite and Bwalo la Njovu in Lilongwe, a distance of less than 3 Km. He had gone to the place to buy fish. It is incoherent that he would just pick a bicycle and a cell phone from the scene leaving the fish behind when the fish was the reason he had found himself at the scene. I find that all the circumstances point to the fact that the accused person had carefully planned to commit the murder herein. I also find that he had an intent to commit the felony of theft of the bicycle and cell phone when he stabbed the deceased to death. I am satisfied and I find that the accused caused the death of SAMSON BENSON of malice aforethought.

Consequently, I find that the prosecution has proved the charge of murder against the accused. I find him guilty and I convict him of murder contrary to Section 209 of the Penal Code.

PRONOUNCED in Open Court this 22nd day of April, 2009 at Lilongwe.

R.R. Mzikamanda

J U D G E