

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Criminal Case No. 36 of 2008

THE REPUBLIC

Versus

ELUBE CHALEMA

RHODA MTEMANG'OMBE

IREEN CHIBOWA

ANGELINA MTEMANG'OMBE

MELINA CHALEMA

AND

ELIFA CHIBOWA

Coram: HON. JUSTICE MANDA

Maere and Lemucha for the State

Mulenga, Chisama and Chagoma for the defendants

Mrs Nthunzi Court Clerk

Mrs. F.M. Gondwe Court Reporter

JUDGMENT

The hearing of this matter was concluded on the 11th day of March 2010 and the matter was adjourned for judgment. When adjourning the matter, the state and the defence had indicated that they intended to make written submissions to the court. In this regard the court gave 21 days for the submissions to be delivered to the court. As of writing this judgement, the only submissions that were on record were those of the State. Rather than continue waiting for the submissions, I elected to proceed with the

judgment. This is bearing in mind that, while the 4th, 5th, and 6th accused persons are on bail, the remainder are in custody and are anxiously awaiting on this judgment. Indeed much as I would want to indulge counsel for the defendant by allowing them to make a submission on a capital offence, I must draw the line somewhere. After all, submissions do not weigh in heavily on the court's final decision as the same is supposed to be based on the evidence that was adduced.

The charge that was brought against the six accused persons was one of murder, contrary to Section 209 of the Penal Code. This followed the brutal death of a young girl by the name of Madalitso Chalema. This girl was killed on 29th Day of January, 2009, at Njalama Village, in the area of Traditional Authority Nthache, in Mwanza District. She was 16 years old at the time of her death. The deceased girl happened to be the daughter of the first accused person and the sixth accused person's older sister. However it would also seem that she was also related to the other accused persons, as the first three accused persons are sisters.

Pictures of the deceased's body were taken and tendered into evidence and were marked ExP1. The pictures show a girl, who was badly beaten up. Her head was smashed, her limbs were broken and on top of that her body was partly burnt. The evidence was that the girl was beaten using a pounding pestle and then thatching grass was heaped on top of her body and then set alight. It is therefore without exaggeration that I do state that this was a brutal death.

The facts leading to the death of the deceased are not in dispute, the deceased, in the company of the six accused persons and two boys by the name of Dan and Kondwani Mtemang'ombe were apparently engaged in some prayers. During those prayers, which were being done at night or just after the sun had set, the group was heard shouting 'moto! Moto! tikupha mfiti pano.' According to PW2, Chikondi Jasi, he heard these words when he and his young brother Thokozani, were coming from football training and that the words were coming from the direction of the Chalema's house. This was around 8 pm. Upon hearing these shouts, PW2 told the court that he waited to see what was happened at which point he heard sounds of something being beaten. Since it was at night, PW2 told the court that he could not tell what was being beaten. However immediately following him hearing the sounds of something being beaten, he saw a fire being lit and that something was being burnt. Upon drawing closer to the fire, PW2 told the court that he saw that it was a person's body that was being burnt, though he could not identify who it was. It was PW2's evidence that the place he saw the body burning was the same place he heard the shouts coming from, namely the Chalema's house. While he did not see anyone

around the burning body, PW2 told the court that he was able to identify some of the voices as belonging to the 1st, 2nd and 3rd accused persons. It was his evidence that he lives close to the three accused persons and has grown up knowing them and that is how he was able to tell their voices. It was PW2's evidence however that he did not know who had burnt the body of the deceased but that he began to wake people up.

One of the people that were woken up on this day was the deceased's father, Tedson Chalema (PW1). He told the court that when he got out of his house he found the body of his deceased daughter, lying beside his house. He said that there were pieces of burnt grass on her head; her body had burn marks and was very limp, and that her face badly beaten up such that he could not recognise it. He told the court that he didn't know how his daughter came to be in such a state. However he told the court that his wife (1st accused), the five accused persons, the deceased and also Daniel and Kondwani Mtemang'ombe were Members of the Church of Christ. That on this day, the deceased, his wife, the 4th, 5th and 6th accused persons, were fasting. Apparently, one of the reasons the group was fasting for was so that the deceased would be granted intelligence as she was not doing well in school.

It was PW1's evidence that he had cooked some green maize on this day and that the deceased had wanted to have some of it but was called out of the kitchen by the 1st accused so that the group should pray for her 'weakness.' It was his evidence that he went to bed while the group was praying for his deceased daughter. Suffice to say that he did inform the court that when he found his daughter dead he did ask his wife as to what happened but that she refused or chose not to answer him, as she was speaking in 'tongues.'

However in cross-examination PW1 did inform that at some point his wife did inform him that they had killed a 'Chiwanda' or an apparition. Apparently in the understanding of his wife, the 1st accused, they had killed something else on this night and not her deceased daughter, Madalitso. Indeed it was his evidence that he believed that his wife may have seen the devil on this day. However I must quickly say that this is a matter of pure conjecture because obviously PW1 was asleep when all this happened and cannot be in a position to state with certainty what his wife saw on the day in question. It was also the evidence of PW1 that his wife and her group would fast when the 'spirits' (or the 'Holy Spirit') told them to and that in his opinion, the group believed in whatever the 'spirits' (or the 'Holy Spirit') would say so much so that the 1st accused would not do some chores around the house. It was PW1's evidence in cross-examination that he had actually told his wife to have a separate time for the prayers so that she could do some work around the house. Finally, it was also his evidence that the 4th, 5th and 6th accused persons were not leaders of this prayer group

and that they were susceptible to parental control and instructions since they are juveniles.

Suffice to say that PW1 did also agree under cross-examination that when the prayer group was apparently possessed by the spirits they did not look normal. At this point the court did of course wonder as to whether the defence were going to argue that their clients were temporarily insane when they killed this 'Chiwanda' which of course turned out to be Madalitso. Of course without the submissions by the defence, it can not be averred by this court that that was indeed the purported defence. However even from the cross-examination of PW2, the questions that were being asked by the defence seemed to suggest that the deceased was not human at the time she was being beaten, apparently because PW2 never heard any cries of pain when he heard the sounds of something being beaten. Indeed while I would agree that a human being who is being beaten with a pestle is most likely to cry out in pain, I must also state that it could well be that if the person was struck in the head and became immediately unconscious, they would not have had time to cry out in pain. However these are moot issues in as far as this case is concerned since the reality is that a 16 year old child and not an apparition or indeed the devil, was the one that was killed. ExP1 is graphically clear in that regard. The question is how this girl was killed.

In his evidence, Boyisi Lazaro (PW3), told the court that it was women who killed this young girl and that the women in question were his neighbours. PW3 told the court that he was used to the prayers that were conducted by the 1st accused person and her group as they would have the prayers every day, at the first accused person's house. On this particular day PW3 told the court that the group had gone overboard, which prompted him to go and see what was happening. However when he got to the Chalema's house, where the prayers were being done he was called 'chiwanda' by the women and that he went back to his house. He identified these women to be the 1st, 2nd, 4th, 5th and 6th accused persons and that it was the 1st accused person, specifically who called him a 'chiwanda'. He did mention the accused persons by name. PW3 then told the court that he returned to the house after noticing a fire burning. However it was his evidence that when he got there the fire had died down. Using his cell phone, PW3 told the court that he lit place where the fire was and that when he did that the 2nd and 3rd accused who he had seen earlier ran away from him. He tried to stop them from going into the bush and according to him they all entered PW1 and the 1st accused person's house. It was also his evidence that he did identify the body of the deceased and that at the time it was badly beaten up. He however could not say who did the beating. However what is worth noting in his evidence on cross-examination is also the fact that Mr Chisama,

purported to show that the 4th, 5th and 6th accused persons were somehow influenced to do something by the older accused persons.

The final witness for the state was Aide Detective Constable Saiti of Mwanza Police Station (PW4). His evidence basically confirmed that he went to the scene of the crime and found the body of the deceased with its head crushed and that it was partly burnt. He then proceeded to take photographs of the body which were tendered in court. Constable Saiti then went on to tender caution statements and formal charges which were recorded from the six accused persons, as well as their mental evaluation reports, which were done at the Zomba Mental Hospital. In his cross-examinations several suggestions seemed to have come up, ranging from the allegation that Constable Saiti might have forgotten to include certain details in the caution statement, one of which was that the accused persons had informed PW4 that on the night in question they had seen the devil or some kind of an apparition and that is who they were beating. Thus at this point it was noted that the accused persons did not seem to deny the fact that they had beaten the deceased on that particular night. However according to them, when they were beating the deceased she had taken the form of an apparition or a 'chiwanda', to put in their words. Indeed the only contention therefore with the caution statement (Exp2) of the 1st accused person for instance is that she is purported to have had the presence of mind to realise that she was beating her daughter Madalitso so as to exorcise her of 'ziwanda'. Indeed the caution statement of the 1st accused person is to the effect that she did state that she had beaten her daughter with a pounding pestle until her head was crushed and she died and that the 2nd and 3rd accused persons helped her. Exp2 also states that the pestle that was used to beat the deceased was collected by the 6th accused person on instructions from the 1st accused. Further Exp2 is also to the effect that 1st accused stated that she burnt her daughter's body using thatching grass after which she went to sleep after agreeing that if anyone came to wake them up they should not do so. The statement also continues to state that the 1st accused was asked by her husband (PW1) as to where the deceased was and that she told him that the deceased had gone to heaven and would come back with a Laston Mtemang'ombe, who apparently is deceased. Hearing this the statement is to the effect that PW1 went outside the house and found that his daughter was dead at which point he sent word to the chief. My immediate reaction to this is that that the caution statement does describe, for the most part, how the state said this young girl was killed. She was beaten with a pestle and her body was burnt using thatching grass. Whether this was done under mistaken identity or under the influence of some spirit(s) or indeed that the accused persons were not normal is something that this court will decide after reflecting on all facts. The only observation this court would like to

make at this point is that Exp2 is materially true in as far how the deceased was killed. Indeed to that extent the 1st accused did admit to have killed her daughter and not a 'chiwanda' as evidenced in Exp3, the formal charge.

As for the caution statement that was recorded from the 2nd accused person (Exp4), it too stated that on the night in question there was present at the material time all six accused persons and the deceased and that they were praying for the deceased. That the prayers were prayers were an apparent attempt to exorcise the deceased of witchcraft spirits which had possessed her and that the prayers were done at the request of the 1st accused person. Exp4 also talks of the deceased being thrown to the ground and that the accused persons sat on her. It then goes on to state that the 1st accused then asked the 6th accused to go and get a pounding pestle and that the same was used to hit the deceased on the head. That all the accused persons except for the 3rd accused person, took part in the beating and that the deceased was beaten until she died. Further, Exp4 also states that the 3rd accused then took some thatching grass from the roof of a kitchen which the 1st accused lit and placed on the stomach of the deceased. Further still, the statement also mentions of the accused persons being discovered and confronted by PW3 and of the 1st accused giving instructions to the group not to say anything. Clearly, there are some material differences in the caution statements of the 1st and 2nd accused persons, but the basic facts are the same, namely that the deceased was beaten to death by a pounding stick and that her body was burnt and that this was done as some kind of cleansing ritual. I must also add that the 2nd accused also admitted the charge in the formal charge which was marked Exp5.

In the caution statement recorded from the 3rd accused person (Exp6), there is quite a variation, in that it does state that the 3rd accused went to the Chalema's house on the material date to collect a wrapping cloth ('chitenje') but that when she got there she found that the 1st accused person was beating her daughter while saying that they should kill the beast. The statement then goes on to state that at the time that the 3rd accused got there she found the body of the deceased in a very limp condition and her head was crushed and she was bleeding. The statement further goes on to state that the 3rd accused was also given the pestle and that she took part in the beating because she was told that the deceased was a witch and that the deceased was beaten until she was dead. Of course at this point I did wonder whether the deceased would still have been alive in the condition that the 3rd accused is alleged to have found her in. Suffice to say that the statement also does state that the 3rd accused found the other five accused persons on the scene of this crime and that after the beating was done the 1st accused burnt the body of the deceased using thatching grass. After the

burning the statement also states that the 1st accused gave the group instructions that they should pray and that they should not answer anyone who was to question them about what happened. The third accused also apparently admitted the charge of causing the death of the deceased in ExP7.

In the caution statements recorded from the 4th, 5th and 6th accused persons (ExP8, 10 and 12), there are also some similarities in the sense that, they do indicate that the three accused, in the company of Dan and Kondwani Mtemang'ombe and the deceased had gone for prayers at Thawale Primary school and that they all went to the Chalema's residence where more prayers were conducted. Among the prayers that were done, apparently were to exorcise the deceased of the demons of witchcraft. According to the statements from these three children, it was during these prayers that the deceased was wrestled or thrown to the ground by the first accused person who then ordered them to sit on the deceased. In her statement (ExP12), the 6th accused apparently stated that while the rest of the group was sitting on the deceased she was asked by the 1st accused to go and collect a pounding pestle.

All the three children in the statements made mention of the fact that the pounding pestle was used to hit the deceased on the head until the same was smashed. The 5th accused actually described blood from the deceased spattering on her and hearing a cracking sound before noting that the deceased's head had been smashed. All these three children talked of being forced to hit the deceased with the pestle and while the 5th and 6th accused persons talked of actually hitting the deceased's body, the 4th accused said that she deliberately hit the ground as she could not bring herself to hit her friend. However in all the three statements, these children did state that they were forced to hit the deceased after her head had been smashed in mainly due to the beating of the 1st accused person and then the 2nd accused. The 4th and 5th accused also mentioned that while the 3rd accused came to the scene after the beating had already started, she too was given the pestle by the 1st accused and that she too took part in the beating of the deceased.

There are some various variations in the statements of these three children as noted, but the basic facts remain the same and which are that the deceased was beaten to death using a pounding pestle and then her body was burnt afterwards using thatching grass. One thing is notable though from their statement is that they all stated that they were forced to hit the deceased with this pounding pestle by the 1st accused person. More importantly though they all said that they were forced to hit the deceased after her head had been smashed, at which point I must seriously doubt if the deceased

was still alive. This means that their assault of the victim was most likely after the fact.

Suffice to say that from all these statements, what the court did note is that there are in most respects materially true in as far as they depict how the deceased girl was killed. The evidence that we have on record is that the deceased was beaten by a blunt instrument and her body was burnt. The blunt instrument was identified as a pounding pestle which can be seen lying next to the body of the deceased in one of the pictures that were tendered as ExP1. What is also notable from the statements, is that all the accused persons except for the 1st accused, did seem to realise that they were actually beating the deceased and not a 'chiwanda' which is what the 1st accused person described her daughter as. The question is then under such circumstances, can it really be accepted that, at the material time, the 1st accused person or indeed all the accused persons did not know that they were hitting a person and not a 'Chiwanda'? in this regard it must be noted that five of the six accused persons did sit on the deceased before beating her up so quite obviously they must have been in a position to 'feel' that they were sitting on a human being and not a 'Chiwanda' as the 1st accused wanted the court to believe.

With this view in mind the court went on to hear the defence's case. While the 1st, 2nd and 3rd accused persons elected to enter their defence, the 4th, 5th and 6th accused persons remained silent on the advice of counsel. However from the cross-examination that was done on behalf of the latter, the defence that seemed to be coming out was that they were forced to hit the deceased by the 1st accused person and the two others. This is in view of the fact that there was every suggestion from the questioning of the state witnesses that the three accused persons are of tender age and hence susceptible to adult influence. This was in addition to suggestions that the three accused persons might have been possessed or indeed that they were under the impression that they were hitting a 'chiwanda'. However these are but suggestions being made by this court since there are no submissions from the defence.

In her defence, the 1st accused told the court that she is a member of the Church of Christ Church and she also quite involved in fellowship prayers. It was her evidence that on the 28th of January 2009, she found the following children, Melina Chalema, Rhoda Chalema, Angelina Mtemang'ombe, Elifa Chibowa, Dan Mtemang'ombe, Kondwan Mtemang'ombe sitting on the veranda of her kitchen repeatedly shouting 'moto unyekeza mudzina la Yesu' (fire will burn in the name of Jesus). Upon asking them what was going on, the 1st accused told the court that the children told her that they had 'seen' a number of wizards and witches in a

congregation at a nearby football field and that they were heading towards the house. However she told the court that she could not see anything when she tried to look in the direction the children were pointing, which was behind her kitchen. Nevertheless the 1st accused told the court that the children went on to inform her that the sorcerers were now entering her house but that when she went into the house she did not see anyone, at which point she stated that she went out the house to continue washing plates. As she was washing the plates, the accused told the court that she heard Kondwani tell Angelina (5th accused) to pray for Melina (the 6th accused), which Angelina begun to do, urging Melina to open her life to Christ as Christ wanted to use her. At this point the court was told that Melina started speaking in tongues and then proceeded to shout the words 'lero! Lero! Simugona!' (you are not going to sleep today). The court was further told that Melina proceeded into the kitchen where, her father (PW1) was and told him the same words that he was not going to sleep that day. PW1 apparently told Melina that there was no person that could stay without sleep and that he was going to sleep on that day. However Melina insisted that PW1 was not going to sleep that day until he had repented his sins at which point PW1 apparently told her that he had already repented his sins. At this point apparently Melina threatened to push her father because he was being stubborn until Angelina came into the kitchen and calm her down by telling her that 'pepani mzimu wanu siwachisokonezo ndi wamtendere' (her spirit was one of peace and not violence). Angelina apparently went on to inform Melina that PW1 had heard the message at which point Melina went out of the kitchen.

From the evidence, there was a suggestion that was being made to the effect that at that particular point in time Melina had been possessed by a spirit of some sort. Of course this cannot be confirmed since Melina herself did not give any evidence as to whether she had any recollection of what had happened at that point in time or indeed that she had been possessed. What is curious to note though is that she was able to be 'controlled' by Angelina, who apparently stopped her from being violent.

The 1st accused then went on to inform the court that after Melina went out of the kitchen she kept on shouting the words that people were not going to sleep on that day and then went on to call (or summon) for the 3rd accused person. Apparently the third accused responded to the call or the summon, Melina started speaking in the third person. Apparently she asked the third accused person as to why she was not following her name. Further that if the 3rd accused wanted her husband to stop being polygamous she was told fast and pray at which point the 3rd accused said that she had

heard the words and that she would change. Suffice to say that there was an allegation that Mr. Chibowa had another wife besides the 3rd accused.

When the 3rd accused left, Melina apparently then called out Madalitso (the deceased) who was in the kitchen with her father. When the deceased responded to the call, Melina allegedly asked her as to why she had broken her fast. Apparently it was Melina who has asked the deceased to fast for some period, which was not specified, and the deceased was deemed to have broken the same because she had taken some water upon feeling weak. Having admitted to have broken the fast, the deceased apparently made a promise to Melina that she was going to resume the same the following day. At this point it must be noted that the picture that was being painted was that Melina was in control of this situation and that all were listening to her. Which I must say does contrast the suggestion that these children were susceptible to the control of the adult accused persons. However I must warn myself that this is evidence of a co-accused person and therefore I need not take it on face value.

The accused then proceeded to state that she again heard Kondwani tell Angelina to pray for the deceased and that the Angelina did as instructed. According to the 1st accused the deceased fell to the ground when Angelina prayed for her, at which point the 1st accused told the court that she left the plates that she was washing to go and attend to the deceased. It was the 1st accused person's evidence that she called out to the deceased but that the latter never responded, which made her ask her who she was. It seems here that a suggestion was being made by the 1st accused that her daughter was not herself but something else. Indeed it was her evidence that when her daughter did not respond to her she begun praying for her and that it was only after the prayer that the deceased responded to her by saying that she was Madalitso Chalema. At this point the 1st accused told the court that she was only praying for her daughter to wake up and that after she had woken up the 1st accused went to stand under a tree nearby, at which point also her husband PW1 went to sleep.

While standing under the tree, the 1st accused told the court that she saw her brother Likiseni Tsoka going to her house but not getting close, deciding instead to stand at a distance. We were not told what the brother wanted or was doing and no suggestion was offered in this regard. However the court was told that at the point when the brother came onto the scene, the deceased called out to her mother to go and pray for her as she was about to be taken. The 1st accused told the court that she did not know who was about to take her daughter. Of course it is also not clear as to why she juxtaposed her brother's arrival at the scene with her daughter calling out to her, except perhaps to suggest to the court that he was the one who was

about to take her away. Indeed it was the 1st accused person's evidence that when she went out to her daughter, took her hand and placed her other hand on her daughter's head and prayed for her protection and victory. The 1st accused told the court that when she said amen, she saw that her brother had left. The way this was being put was in my view an imputation that the brother was suspected of having tried to take the deceased, especially in view of what was to follow immediately after this incident.

What followed according to the 1st accused was that she said she took her daughter by the hand and started walking to the tree where the rest of the group was. Group here meaning the accused person's except for the 3rd accused. It would also seem that present at this time were Dan and Kondwani Mtemang'ombe since nothing was said about them leaving this place at any given point in time. Indeed there is evidence that Kondwani was the one who was giving instructions as to who Angelina was to pray for, meaning that he was quite involved in this whole situation and yet it is surprising that neither he nor his brother were called as witnesses or indeed charged with this offence. Suffice to say that it was the 1st accused person's evidence that while she was holding her daughter's hand and moving towards the group, she saw something or someone carrying a metal rod about to hit her. According to her this thing was amongst them and standing directly in front of her. All the while the accused told the court that she was holding her deceased daughter's hand in her left hand. Upon seeing this thing, the accused told the court that she told her relatives to pray as there was a 'chiwanda' in their midst and that it was about to kill them. The relatives she was referring to according to the accused were the persons she was with on that day and they included the 2nd, 4th, 5th and 6th accused persons, Dan and Kondwani Mtemang'ombe (which I am referring to as the group). The accused did also state that the 3rd accused person did join them.

When 1st accused told the group about the presence of this 'chiwanda' in their midst, they all apparently started shouting 'moto unyetsa mu dzina la Yesu!' apparently this meant that Christ was to fight their battle and defeat the 'chiwanda'. However it seems Christ did not fight this battle for them as the 'chiwanda' apparently became more persistent in wanting to beat them with the metal rod it was carrying. In view of this, the 1st accused told the court that she ran towards the 'chiwanda', grabbed it and wrestled it to the ground. She then sat on it and also apparently called to the group to come and sit on the 'chiwanda, apparently to stop it from getting up and killing them. All this time the accused said she never let go of her deceased daughter. Of course I must immediately state that I did find this hard to believe, considering that there must have been quite some effort for the accused to grab, this alleged 'chiwanda' and wrestle it to the ground. Indeed

the obvious assumption would be that the accused would have needed both hands to do this. Of course the accused, on being asked by counsel as to whether she was changing her statement, told the court that she never realised that she was no longer holding the deceased when she grabbed the 'chiwanda' and that she never realised how she let go of the deceased.

The accused then went on to describe the 'chiwanda' as being taller than her and that it was dark. That it looked like a person but that it did not have features of a person. She also stated that it was naked.

The 1st accused then went on to state that even though they were sitting on the 'chiwanda' it was still intending to hit them with the metal bar, which metal bar apparently they had not taken away from the 'chiwanda' which they had seemingly overpowered. However noting this the accused person told the court that she asked one of them, who now turns out to be the 6th accused person, to go and get a pounding pestle so as to stop the 'chiwanda' from overpowering them. In the 1st accused person's own evidence, in order to stop the so called 'chiwanda' from overpowering them she suggested that they should hit it using the pounding pestle and she asked her relatives for help and they obliged. The accused told the court that they all hit the 'chiwanda' on any place that they could and that after she called for grass so that they should burn it and indeed they did. After burning the 'chiwanda' they all went to sleep and this according to the accused was the end of their prayer session.

During the same evening the accused told the court that she was arrested by the police and taken to the Police station where she said she was beaten by the police who accused her of being a witch, apparently due to the way that they had killed the deceased. At this point, the 1st accused told the court that she told the police that her daughter was not dead and that it was only after the police had shown her the pictures of her daughter's body and told her that they were going to collect her body from the mortuary that she realised that her daughter was indeed dead.

Finally the 1st accused person told the court that she did not agree with the caution statement that was purportedly recorded from her, except for the part that she prayed for the removal of evil spirits from the deceased. She concluded her evidence in chief by stating that she regretted the death of her child. One thing though I never noted any sign of regret on the part of the accused person. Here is a woman who was shown the pictures of her dead child during her cross-examination and yet never expressed any emotion. Indeed the accused never expressed any emotion when she was talking about her daughter being dead, which made me wonder as to

whether she was normal. However her mental examination report did certify as being normal and indeed she was able to follow the proceedings.

In her testimony the second accused told the court that she did attend the prayers at the house of the first accused. According to her the prayers were organised by the 4th, 5th, 6th accused persons, the deceased, Rhoda Chalema, Daniel and Kondwani Mtemang'ombe. It was her evidence that she got to know of the prayers when she went to the house of the first accused person and found the persons listed above sitting on the veranda of the first accused person's house repeatedly shouting 'moto unyeketsa' (fire will burn). It was her evidence that when the first accused asked the children what was happening, to which they replied that they had seen a number of sorcerers at a nearby football pitch. She too talked of Kondwani asking Angelina to pray for Melina and that the latter started speaking in tongues. The second accused then also mentioned of Melina going into the kitchen and confronting her father, telling him that he was not going to sleep that night. Further that Melina had threaten to hit her father since he was being stubborn when he told her that he had already repented his sins when she suggested that he was a sinner. She then also went to narrate how Melina called the 3rd accused and then questioned as to why she was being she was not being obedient to Melina since the 3rd accused was her 'servant.' Again here the suggestion seems to be that Melina had been possessed by some kind of spirit, which then instructed the 3rd accused not to be envious but rather that she should fast and pray if she wanted her husband to stop being polygamous.

The second accused then also told the court what happened when Melina called out to the deceased, which was basically what the 1st accused stated in her testimony and I will not repeat it. Suffice to state that this was in relation to the deceased apparently breaking her fast and then Angelina praying for her in instructions from Kondwani, apparently because there were some 'big things' inside the deceased. Just like the 1st accused, the second accused also told the court that when the deceased was prayed for she fell down and that the 1st accused went to attend to her. That when the 1st accused was attending to the deceased, she did ask the deceased to state what her name was but that the deceased just remained silent on the first occasion but responded on the second occasion by stating that she was Madalitso Chalema. At this point apparently the deceased got up from where she had fallen but remained standing at the spot while the rest of the group went to sit under a nearby tree. While seated under this tree, the 2nd accused told the court that she heard the deceased shout to her mother to go and pray for her as she was about to be 'taken'. It was not clear who as to who wanted to 'take' the deceased and it was the 2nd accused person's

evidence that she never understood what the deceased meant. However the second accused did also state that the 1st accused had responded to her daughter's call and went to pray for her.

After praying for her daughter, the second accused told the court that the first accused took her daughter by the hand and walked her to the place where they were all sitting under the tree. According to the second accused, it is at this point that she heard the first accused shouting that something carrying a metal rod wanted to kill her. Apparently the first accused person appeared startled. However despite her apparent startled state, the first accused apparently gave instructions to the second accused and there rest of the people in the group to wrestle the thing that wanted to kill her to the ground and to sit on it. Apparently the first accused had told the group that whoever did not sit on the thing that wanted to kill her would be killed by the thing. From the testimony of the second accused, while they were sitting on the 'thing', the first accused gave instructions that they should collect a pestle to be used to hit the 'thing' since it was dangerous.

It was the second accused person's evidence that she never saw what the 1st accused was referring to though she did see the latter appear to grab something. Further, the second accused told the court that when the 'thing' was wrestled to the ground, all she could see was a dark silhouette of something which she was not able to identify. However the second accused told the court that when the first accused received the pestle she had sent for, she started beating the dark silhouette on the ground and that she further instructed them (including the second accused) to hit the dark shape on the ground and that if they did not something bad was going to happen to them. The second accused admitted before the court that she took part in the beating of what she described as the 'thing'. The second accused also confirmed the fact that after they had beaten this apparent 'thing' they set it on fire using thatching grass. She told the court that she did not know who brought the grass but that it was the 1st accused who had lit the fire. The second accused further told the court that after the fire had been lit they went into the first accused person's house and sat in the sitting room while the first accused went into her bedroom. The second accused concluded her evidence in chief by stating that the police came to arrest them while they were at the first accused person's house.

In cross-examination the main issue was around the second accused person's ability to see what was going on. In this regard it was noted that the second accused told the court that she was able to see the first accused take the deceased by the hand and walk to where they were sitting. This was at a distance of 5 meters. The witness however told the court that she was not able to see the people who were standing next to her. At this point the

witness became evasive and refused to answer questions that were put to her and it was only after being warned by the court to answer the questions in cross-examination that she was able to admit that she was able to identify the people who had been standing with her. This is in the sense that she was able to make out who they were. The second accused however refused to answer the question as to whether she was maintaining her stand that she was able to see the first accused and her deceased daughter at a distance of about 5 meters and yet was not able to make out what they were beating with a pestle and eventually burnt, who in fact was the deceased in this instance. The second accused refused to answer the question as to whether she was able to tell that the 'thing' or silhouette that they were beating was tangible or not but after some time she told the court that what they were beating was not tangible. However when she was shown ExP1, the second accused confirmed that the picture shown a person whom she identified as Madalitso (the deceased). She also admitted that they had beaten the deceased on the night in question though she maintained that she did not know that it was her when the beating took place. Even despite these admissions, the second accused still remained evasive and I do not intend to dwell much on her evasiveness. The second accused did however tell the court that Melina was quite authoritative on the night that the deceased was killed and she believed that something may have happened to her to put her in such a state.

In re-examination, the second accused told the court that she was able to tell who were present when the deceased was killed because it was still light.

Finally in her evidence, the third accused person did confirm that she had gone to the first accused person's house on the night in question and that she had been confronted by Melina regarding her neglecting to pray. The third accused then also proceeded to narrate how Melina told her to pray if she wanted her husband to stop being polygamous to which she agreed and then left for her house to continue cooking. When she finished her cooking, the third accused told the court that it was night and she went back to the first accused person's house, apparently to collect a blanket which she had hang to dry. When she was about to collect the blanket, the third accused told the court that the first accused, who must have seen her, asked her to give some grass, which grass it would seem was used to burn the body of the deceased. In her estimation, the first accused was about 4 meters from her when she asked for the grass, but the third accused seems not to have noticed that there was a body of Madalitso on the ground. In fact it was the third accused person's evidence that she did not know anything about the killing of Madalitso as all she did was to handover the grass to the first accused person (who apparently never told her what she wanted the grass

for) and then proceeded to her house after collecting the blanket. The third accused denied having made the caution statement which was tendered as Exp6, in which there was a statement to the effect that she had seen Madalitso body laying on the ground with the head having been crushed. I did of course pose a question here as to how the third accused could have handed over the grass to the first accused person? I do not honestly think that the third accused could have stretched over a distance of 4 metres to handover the grass to the accused. This in my view could be the only way that the third accused can claim that she could not have seen Madalitso's body. Looking at the facts though, my view is that the third accused was not telling the court the exact truth as to what happened as was clearly demonstrated in cross-examination when on one hand she told the court that the first accused was her sister and could not say something bad about her and then on the other hand said that her sister told the court lies when the latter told the court that the third accused also took part in beating Madalitso with a pestle. Apart from that I must also note that the third accused did also state that between them, it was the first accused who was closer to the house, meaning that the first accused could have gotten the grass from the roof herself and not asked the third accused to do so. The fact that the third accused was asked to collect the grass does show that she was part and parcel of what was going on at that particular time as was stated in Exp6, her caution statement. Indeed if the third accused says that she never made Exp6, how would the police have known about such details as that she went to collect a blanket from the first accused person's house? It must be noted that this is a point which the third accused herself did also make when giving her testimony. In view of this then I must also find that Exp6, which was tendered in court as a caution statement that was recorded from the third accused person to be materially true.

This was the evidence that was given in defence, as the 4th, 5th and 6th accused persons elected to remain silent on advice of their counsel Mr. Chisama. However, when they were arrested, the three gave caution statements which were tendered in evidence, together with their formal charges. In cautions statements, all three did state that they were given the pestle and that they took part in hitting Madalitso with it until her head was smashed. Indeed all three statements were specific about the detail of Madalitso's head being smashed. Indeed they all admitted to taking part in the killing of Madalitso when they were formally charged, though they said that they did so after being instructed by the first accused person. It must also be noted that all three accused persons are juveniles and during the presentation of their case, especially during cross-examination by their counsel, Mr. Chisama, he seemed to have been suggesting that the three

juveniles were forced into committing this crime by their mothers and aunties who happened to be the 1st, 2nd and 2rd accused persons.

However it must be noted that at some point before Madalitso was beaten up and killed, it was the 5th accused person who was telling the others what to do and that it was also her who threatened to beat up her father, who was PW1 in this case. Of course there were suggestions that when the 5th accused person was doing these things, she was not herself, that she was 'possessed' by some kind of spirit. Of course it is not clear as to whether she was still possessed by this spirit when she said she took part in the killing of Madalitso, but it seems that she was not since at that point she said that it was the first accused person who told her to take the pestle and beat Madalitso with it.

In looking at the evidence that was presented before this court, one can hardly understand why this child was so cruelly killed. However the suggestions that they wanted to exorcise her of spirits of witchcraft and that she 'turned' into some kind of apparition. Such suggestions to me point to the fact that this was a case of cultism. Cultism is defined as a system of religious beliefs and ritual, which normally involves manipulation and false teachings as to how one can become a 'true believer'. Cult members also believe that they are capable of performing certain acts and do often times engage in ritualistic activities. The killing of this girl in my view was ritualistic since it is stated from the evidence that the same was done in the name of praying for her to get rid of the spirits of witchcraft which had allegedly possessed her. The presence of cults in Malawi is a worrying development, especially considering the harm that they can do to society. Indeed while the Constitution of the Republic allows for religious freedom, but perhaps it is time that some of these religious sects start being regulated perhaps that would prevent deaths like these.

In terms of the case however, there is no doubt in my mind that all the six accused persons in this instance took part in the killing of the late Madalitso. The accused persons never offered any defence though there were suggestions that they may have acted under diminished capacity or automatism. This was stemming from the fact that they claim that they did not realise that what they were hitting Madalitso with the pestle, rather that they thought that they were hitting an apparition. This claim however can be discounted basing on the fact that the only person who from the evidence claims to have been 'possessed' by a spirit is the 5th accused person and this was before the group had started beating up the late Madalitso. Apart from that the evidence points to the fact that all six accused persons were coherent enough to realise what was going on. This is demonstrated by these facts: that a pestle was specifically asked for by the first accused and

collected by the 6th accused person; that the 3rd, 4th, 5th and 6th accused all stated in their caution statements that they knew that they were beating Madalitso with a pestle and that they did so until her head was smashed; that grass was called for by the 1st accused and collected by the 3rd accused and that the same was used to burn the body of the late Madalitso; that after setting the body on fire all six accused persons decided not to talk about what they had done if anyone was to ask them. In other words the actions of the accused persons do not show in any way that they were acting under some diminished capacity. More importantly though and I must agree with the state's submission on this point that the defence of diminished responsibility is a statutory defence in the England and Wales and is not applicable in Malawi. Further even if the defence were applicable, the burden of proof in establishing this defence is on the defendants (the case of **Durnbar** (1958) 1 QB 1 is in point). In this instance the defence was never pleaded by the defendants. At the same time the defence never handed in their submissions so we cannot assume that they wanted to rely on this defence. Suffice to state that there seem to be suggesting that much when they tried to paint the picture that the defendants had been 'possessed' by some spirits which could have altered their perception of things such that they did not realise that what they were beating was Madalitso. In this regard, it must be pointed out that that the other defence which would be available to the defendants within the context of what they were asserting, would be that automatism, the argument being that at that particular point in time the defendants were not consciously in control of their minds and body. While this may be the case, it is also noted that the defence never specifically raised the defence of automatism.

Of course in cases where the same is raised, the burden rests on the state to disprove the same. This however does not preclude the defence from producing evidence of automatism before the state can be called upon to address the same (see **Hill v Baxter** [1958] 1 QB 277). In this instance the defence never produced any evidence of automatism which this court could have asked the prosecution to consider. Further, I do not think that by merely suggesting through cross-examination of the prosecution witnesses the defence can be said to have laid down a proper foundation for the defence of automatism. In this context we are talking of the defence on non-insane automatism. This view is expressed considering the fact that the defence have not shown as to what could have made all six defendants fall into such a state. It is of course conceded that certain type of ritualistic praying can induce hypnotic states but this does not seem to have been the case in this instance as the evidence shows that by the time that the beating of Madalitso started the defendants had been standing under some tree chatting. In such a context I do not think that they can be considered as

being in a state to be suffering from a 'disease of the mind' as defined in **Sullivan** [1984] AC 156 and **Kemp** [1957] 1 QB 399. Diseases of the mind are physical or mental diseases that affect mental functioning but do not result from external factors such as drinking one's self into a stupor or being hit over the head or acting under hypnosis.¹ Indeed a classic example of non-insane automatism is where a person commits a crime whilst sleepwalking (see **Bratty v A-G for Northern Ireland** [1963] AC 386). The defendants were obviously not sleepwalking and there is no evidence that they had any other 'disease' that affected their mind when they sat on Madalitso, beat her to pulp with a pestle and then burnt her body.

Since neither the defence of diminished responsibility nor that of automatism is available to the defendants, the only plausible explanation for their actions has to be cultism or extremist religious beliefs. These are not defences and cannot justify what the accused persons did to the late Madalitso.

As for the issue of mistake of fact, which was also suggested by the defence in that they were saying that the deceased had transformed into something demon-like, I believe that the defence should have demonstrated that the six accused persons had the power to detect demons. Indeed there was no evidence from the defence to show that demons do exist and that they can possess and transform a human being to such an extent that someone would not recognise them as a person.

As for the fact that there was a general belief that the six accused persons were under attack from a demon, it must be pointed out that by their own evidence the six accused persons all stated in their caution statements and for some in their evidence that they were sitting on the deceased before they started beating her into a pulp. The mere fact that six people sat on the deceased who was a young girl clearly shows that they had overpowered her and that there was nothing else that she could do. Having so overpowered her I do not honestly think that there was any threat of attack to any one of the six accused persons which can justify what they did to her. Indeed why I would want to believe is that this was a clear case of the accused persons taking religious beliefs too far.

¹ [The Non-Insane Automatism Defence: Removing Criminal Liability for Involuntary Acts](http://www.suite101.com/content/the-noninsane-automatism-defence-a173081#ixzz105jxEh32) on <http://www.suite101.com/content/the-noninsane-automatism-defence-a173081#ixzz105jxEh32>

In view of this I must proceed to find the 1st, 2nd and 3rd accused person guilty of murder and convict them accordingly. I must also find the 4th, 5th and 6th accused persons liable for the murder of Madalitso.

Indeed by pinning Madalitso down and then beating her with a pestle on the head, the six defendant's did intend to kill her. This is also clear from the fact that the 1st accused did actually state that they should kill Madalitso and this exactly what the defendants did. I do not believe the defendants' assertion that they thought that they were beating an apparition as it is clear from the evidence presented and from the caution statements that they knew that they were beating the late Madalitso and that they were doing so to exorcise her of a demon.

Made in Open Court this.....day of.....2010

K.T. MANDA

JUDGE