

# **IN THE HIGH COURT OF MALAWI**

## **PRINCIPAL REGISTRY**

**(Sitting at Blantyre)**

**Criminal Case No. 90 of 2011**

**THE REPUBLIC**

**Versus**

**JACKSON KADUYA**

**STEWARD 'THOLO' GAMA**

**Coram: HON. JUSTICE MANDA**

**Lemucha and Nkosi** for the State

**Chisama and Magombo** for the defendant

**Mrs Matekenya** Court Clerk/Official Interpreter

## **JUDGMENT**

The two accused persons in the present instance were charged with the offence of Manslaughter which is contrary to Section 208 of the Penal Code (Cap 7:01) of the Laws of Malawi. The both pleaded not guilty to the charge and the matter proceeded to trial. Trial was concluded on the 28<sup>th</sup> of February 2011, after which the State and the defence were given 14 days during which to file their final submissions. This is now the 30<sup>th</sup> of March 2011, which means that the 14 days have since elapsed and yet I still do not have the submissions. Rather than wait in abeyance for the said submissions, I elected to proceed with my judgment in this matter.

The facts of this case are that on or about the 25<sup>th</sup> day of June 2008, a fight erupted between Jackson Kaduya (first accused) and the deceased Eliya Raphael. The cause of the fight remains unknown but there were suggestions that the deceased made allegations to the effect that the first accused person was always demeaning him. The allegations culminated into a full argument and the two then proceeded to square-off but did not start fighting immediately. Rather, the deceased and the first accused continued

arguing. All this apparently was taking place this was at or near a 'shebeen' in Limbe Market which is run by Lali Jackson (PW1).

It was PW1's evidence that he saw the deceased and the first accused person square-off and arguing but that he felt that the two would talk things over. With this, he said he stopped paying attention to what was happening until he heard someone screaming 'mayo!' The scream apparently made PW1 return to the scene and that as he was getting near he saw the second accused person (who he said he knows by the name of 'Tholo'), running away. Apart from this PW1 also told the court that he found the first accused person and the deceased holding each other by their shirts. At the same time PW1 said that he noted that the deceased was bleeding and that when he asked the deceased what had happened, the latter told him that he had been stabbed by the first accused. Having told PW1 what had happened the deceased fell to the ground at which point he was taken to the hospital but was pronounced dead on arrival. PW1 also told the court that they then also arrested the first accused person and handed him over to the police.

From the evidence of PW1 he did obviously not see the events prior to the deceased being stabbed. His only evidence of the stabbing was apparently the words that were said to him by the deceased before he fell to the ground. Indeed considering that the deceased was pronounced dead on arrival when he was taken to the hospital, his words to PW1 were apparently his last, creating the suggestion that this was a 'dying declaration'.

As for the involvement of the second accused person, in the commission of this offence, PW1 did not apparently see what part the second accused took. The only thing that PW1 stated that he saw was that he saw the second accused person running away after the deceased had been stabbed. PW1 did seem to suggest in cross-examination though that apart from telling him that, it was the first accused person who had stabbed him, the deceased apparently also told PW1 that the knife that was used to stab him was brought by the second accused person. Of course PW1 was not sure if the second accused brought the knife with the intention of assisting the first accused in his fight against the deceased or whether indeed the knife was dropped accidentally by the second accused.

Indeed the only evidence of what role the second accused person took in this fight is contained in a witness statement by on Paul Majawa who is also now deceased. Due to the fact that Paul Majawa died, his witness statement was produced in evidence by the police investigator in this matter and was marked ExP6. In the witness statement, Paul Majawa, who was at the time employed by PW1 to sell illicit alcohol in the shebeen, stated that he saw the first accused person quarrelling with a man whom Paul did not recognise.

During the fight, Paul stated that he saw the first accused fighting with a person whom he did not recognise. However Paul went further to state that as the first accused and this other person were fighting, a man who he identified as Joseph Mukhala threw a knife between the two fighters and spoke these words in Chichewa “inu munayamba kalekale kukangana osangolosana bwanji?” (Loosely translated: “the two of you have been arguing for a long time, why don’t you just stab each other”). At this point, Paul stated that his brother called him and he did not see what followed. Suffice to state that Paul stated that he later heard that someone had been stabbed and that he went on to confirm that it was Joseph Kaduya who had stabbed his friend on the thigh.

As noted from the evidence of these two witnesses, there is no mention of the second accused person being directly involved in the fight between the first accused and the deceased. In fact, the only evidence of what the second accused did is that he was seen running away from the scene of the fight. As for this Joseph Mukhala, according to PW1 he did not see him at the scene but then he did state in his evidence that at some point during the quarrel between the first accused and the deceased, he did stop paying attention to what was happening. More importantly, from PW1’s evidence Joseph Mukhala and the second accused person is not one and the same person. On the other hand it was the evidence of Detective Sub-Inspector Kaufulu (PW3 and the investigator in this matter), that the second accused person is also known by the name of Joseph ‘Tholo’ Mukhala. There was therefore clearly a contradiction in the state’s own evidence as to the exact identity of the second accused person and what role he took in the death of the deceased. Basing on the issue of the contradiction in identity alone, I was of the view that the second accused should have been given the benefit of doubt and not be charged with this offence in the first place.

Further, I believe that there was a need for the state to demonstrate how the second accused could be deemed to have taken part in the commission of the offence of manslaughter within the provisions of Section 21 of the Penal Code. In other words if we were to assume that the second accused did indeed throw down a knife between the first accused and the deceased, can he be deemed to have:-

1. Committed an act for the purpose of enabling or aiding the first accused to commit the offence of manslaughter?
2. Aided and abetted the first accused person in committing the offence?
3. Counselling or procured the first accused to have committed the offence?

In dealing with these questions, one will of course have to bear in mind that there was a fight between the first accused and the deceased and therefore that the questions which I have asked above would also apply to the deceased. Indeed it is precisely for this reason that perhaps the starting point in dealing with the case against the second accused, that is if indeed he had thrown the knife between the two fighters, would be Section 85 of the Penal Code, which makes it a misdemeanour for a person to attempt to provoke any person to challenge another to fight a duel. Thus the question which the State should have dealt with first should have been as to whether the act of throwing down a knife between the deceased and the first accused constituted an offence under the Section 85 of the Penal Code? In this regard it must of course be noted that by definition a duel is that it is a prearranged fight between two people who must both be armed with weapons. In this instance, clearly the person who threw down the knife between the two fighters did not prearrange the fight. In fact the evidence states that the deceased and the first accused person were already fighting and arguing when the knife was thrown between them. Further there being only one knife that was thrown between the two fighters, I do not think that this would qualify as a duel. In this instance then Section 85 of the Penal Code would not apply.

The fight between the deceased and the first accused having fallen out of the ambit of a duel, the next question would be that can the act of throwing down a knife between two people that are fighting be deemed as counselling or procuring either one of the fighters to commit manslaughter? Of course in this regard one must bear in mind the fact that there is a high likelihood that if a person is stabbed with a knife, they will suffer grievous harm or wounding, which in the context we are looking at, will be unlawful. Under Sections 238 and 241 of the Penal Code, the offences of causing grievous bodily harm and unlawful wounding are both felonies, which will then beg the question as to whether manslaughter would be an appropriate offence to be charged in the circumstances.

Further there is the question of intent; if the argument is that by throwing down the knife between the two fighters, the intention of the knife thrower was that the fighters should cause each other grievous harm or wound each and that death results; wouldn't the charge be one of murder? Further still, there would also be a question as to whether there was a common intent between the knife thrower and the two fighters that the two should kill each other, which would in my view not only upgrade the offence to murder but also raise the issue as to whether the knife thrower was an accomplice to both fighters. These I believe are questions which the State ought to have addressed in this instance.

As it is the evidence is simply that the deceased and the first accused were involved in an unlawful act of fighting in public, which is an offence under Section 84 of the Penal Code. The fact that the deceased was killed during this fight would indeed make his death unlawful and the offence of manslaughter would be appropriate. However if the second accused was to be charged with the offence of manslaughter, I believe that it should have been shown that, he too was involved in the fight and that he did side with the first accused person in the fight. On top of this, I believe that it should have been demonstrated that by throwing down the knife between the two fighters, if indeed the same is true, the second accused specifically meant that the first accused should kill the deceased and not vice versa. In turn, I believe that the State ought to have demonstrated that the act of throwing a knife between the two fighters was in itself unlawful and this could only have been done by charging the second accused with such an offence, if indeed there is one under the Penal Code. The fact that the State only charged the second accused person with manslaughter when there was no evidence of common intent with the first accused or indeed any evidence that he was the one who actually threw down the knife between the two fighters, created some serious doubt in my mind as to his culpability, which doubt I did exercise in his favour at the close of the Prosecution's case by acquitting him. I did seriously believe that there was no point in delaying the verdict against the second accused person after the closure of the state's case when the evidence that had been laid before me did not support the offence charged.

Having acquitted the second accused, the matter proceeded to defence and the first accused gave evidence in his defence. The first accused person's defence was that on the day in question they were indeed drinking at a shebeen in Limbe Market with a group of his friends while the deceased was in another group. As they were drinking, a man whom the accused described as 'Rasta Rashid Musolini' entered Limbe market being followed by a group of people. Apparently the people following this man were attracted by the fact that the said Rasta Rashid had stolen some money from someone in Limbe and that the people wanted a share of the same. Having given the people following him K200 each from the stolen money, Rasta Rashid apparently went on to buy a cup of liquor for the first accused and asked him to share it with the deceased. However according to the first accused, the deceased simply took the cup to his group which apparently annoyed the first accused causing him to go and ask Rasta Rashid for more money. After narrating what had happened, Rasta Rashid apparently gave the first accused person K100 for the latter to buy his own alcohol. At this point, the deceased apparently approached the first accused and asked him how much money he had received from the Rasta, and that he immediately

started beating the former, accusing him of being jealous of him. It was the first accused person's evidence that he and the deceased wrestled each other to the ground and that while he was down there someone threw down a knife. According to the first accused he was informed after he had been arrested that the person who had thrown down the knife was Joseph Mukhala, and that this Joseph Mukhala was the second accused person. It is of course not clear as to who gave the accused person this information and under what circumstances it was given. This is more so considering that the accused was apparently in custody at this time, in any case this being something that was apparently reported to the first accused, it would be hearsay. Nevertheless, the accused person went to state that it was the deceased who grabbed the knife from him first and used it to stab him on head. The accused did try to point to an old scar that was on his forehead but there was no supporting medical evidence that the accused suffered this injury during the fight. What is also curious to note is that the accused person never said anything about this Joseph Mukhala challenging him and the deceased to stab each other, as stated in his caution statement, which would in effect mean that the first accused was in a position to see who had thrown down the knife. Indeed in his caution statement, the first accused stated that after the deceased grabbed the knife the two of them started struggling for it and that the deceased was stabbed on the thigh during the struggle. Indeed if the accused person and the deceased were struggling with each other on the ground, it would necessarily mean that the two were holding each other, which would mean that there would not have been any room between them for someone to throw a knife. Of course this would raise a further question as to how either the accused or the deceased came to be aware of the presence of the knife or indeed if the first accused was in any position to see who threw down the knife.

Nevertheless, what is important to note is that the deceased was killed during a fight. The act of stabbing the deceased with a knife was also an unlawful and a dangerous one. In this context I am persuaded by the decision in **R v Coutts** [2006] UKHL 39 (also being [2006] 1WLR 2154), that the accused was guilty of manslaughter and I do thus convict him of that offence.

Made in Open Court this.....day of.....2011

K.T. MANDA

**JUDGE**