



**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION
SITTING AT MULANJE MAGISTRATE COURT
CRIMINAL CASE NO. 364 OF 2010**

BETWEEN:

THE REPUBLIC

VERSUS

JOSEPH MULIYA

CORAM: HON. JUSTICE M.L. KAMWAMBE

Miss Banda and Mr Lemucha, of Counsel for the State
Mr Chungu and Miss Kumwenda, of Counsel for the
Accused

Mr Manda, Official Interpreter

Mrs Chiume, Court Reporter

Kamwambe, J.

The accused person was charged with the offence of murder contrary to section 209 of the Penal Code. It is alleged that on 6th



August, 2009 at around 7.00 p.m. at Mkuthuwa village, T.A. Nazombe, Phalombbe District, Joseph Muliya caused the death of Wilson Bokosi with malice aforethought and by an unlawful act or omission.

The facts of the case are that the deceased that evening went to Mkuthuwa village at his sister's as well as brother in-law's place, (the accused). He started to torch their house. The fire was extinguished. He started fighting his own sister when her husband the accused intervened and started fighting the intruder. They tussled, accused took a pole that was used to support the house and used it to hit the deceased on the head. The deceased collapsed. By this time his sister had rushed to report to the chief about the intruder. The accused then got hold of a pestle and used it twice to hit the already subdued intruder whose identity was not known by then. The deceased lay there lifeless while the accused locked himself in the house leaving the teenage girls 10 and 14 years old outside watching over the deceased.

I should thank the State for submitting their arguments which are premised on provocation. I am persuaded to take that time line of thought. The accused did not just act out of provocation but also in defence of another and property. But maybe what matters most is the final outcome of the case. The State has argued that the accused is not entitled to the partial defence of provocation because he used very brutal force to strike the deceased. Such force is not expected of a reasonable person of the society. I would counter this by saying that once you are acting in a heat of passion you are unable to measure how much force to use. This has been propounded by many cases decided locally and internationally. Hence the defence of provocation would apply in the circumstances where one is threatened by the torching of his house, by an intruder who later on attacks one's wife.

On the other hand the defence of in defence of property or another person would also apply. This is not covered by the State. I find that the accused was entitled to this defence. But I should admit that he employed excessive force by resorting to a pestle and striking the deceased twice in the head after the initial attack. The law in Malawi which follows English Common law principles unlike in United Kingdom and Australia's statute law, would make the accused liable to manslaughter and not murder. (DPP v Chipaye 1966-68 ALR Mal. 43, Kaipa v Rep 1964-66 ALR Mal.142).

Earlier in the day the deceased had told the Chief that he would go to his sister's place and that anything bad might happen. When he arrived at the sister's place he had a panga knife on his bicycle which was noticed by all. The accused could have taken him to be a dangerous criminal. His approach at his sister's place was very warlike. The accused should be commended for keeping his cool at first until he saw his wife in danger.

In this regard I find the accused guilty of the lesser offence of manslaughter and I convict him accordingly.

Pronounced in Open Court this 12th day of May, 2011.


M.L. Kamwambe
JUDGE