IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL CASE NUMBER 178 OF 2011

BETWEEN:

THE REPUBLIC

AND

MISHECK STEVEN **ACCUSED**

CORAM:
JUSTICE M.A. TEMBO,

Salamba, Counsel for the State

Magombo, Counsel for the Accused

Chanonga, Official Court Interpreter

JUDGMENT

This is the decision of this Court following the trial of the child on the charge of murder. The child was charged with the offence of murder contrary to section 209 of the penal code.

The particulars are that on or about the 9th of May 2009 at Chilwa Reformatory School in the district of Zomba, with malice aforethought he caused the death of Chifundo Amosi.

At the commencement of trial, the child denied the charge such that the prosecution bore the burden of leading evidence from their witnesses to prove their case.

The child in now makes his submission on whether there has been made out a case warranting him to enter his defence or not.

This Court has to consider the evidence of the prosecution. The first witness for the state was Joseph Haji. He is PW l.

This witness told the Court that he is aged 20 years and that he is residing in Soche and is currently employed. When asked by the State prosecutor, this witness told the Court that he did not know the offender. However, he told the Court that in around October 2008 he was at Chilwa where he was sent having been found in the wrong for committing a theft.

He recalled that whilst at Chilwa Reformatory Centre, on *7th* May 2009 in the evening at around 1800hours he was outside his hostel with some three friends who were James Mchenga, Chancy Mataya, and Chifundo Amos. He said that James Mchenga told them that he had seen two people jumping outside the perimeter fence of Chilwa Reformatory School and were fleeing. The said James Mchenga then asked this witness and the others to chase after the boys but that after chasing them for about 2 kilometres they could not see where the people were. They then decided to make a tum back to school.

However, suddenly they saw a person running after them and they too decided to start to flee from the scene while James Mchenga decided to hide somewhere. It was as they were drawing near the bridge to Chilwa that this witness saw two people come out from the bridge which prompted them to flee further. In the course of doing so, Chifundo Amosi fell down. Of the two unknown people, one kept chasing the rest whilst the other caught up with Chifundo Amos and started attacking him. The other assailant, on the other hand, was fighting Chancy Mataya but he managed to secure his own safety and Chancy run to where this witness was.

Ultimately, this witness and his friends managed to get back to their hostel. When he was asked the whereabouts of Chifundo Amos, this witness stated that Chifundo Amos sadly passed away at Zomba Central hospital but that this witness does not know the people who attacked him.

During cross examination, this witness stated that these events happened from around 1800 hours and that he is not the one who saw people jumping out from the perimeter fence at Chilwa. He also conceded that along the course of the road on which they chased the alleged people, there were maize fields on the road sides and that at the bridge there is a thick bush. He also conceded that throughout the said chase, they could not see nor recognize the ones they were chasing as they did not know where they had gone. In fact, he stated that at the time it was so dark and they could not see each other. This witness was not re-examined.

The second witness was Major Mahelu. He is PW2.

This witness told the Court that he in around May 2009 he was working at Chilwa Reformatory School as a Social Welfare Assistant and his main duty was counselling the children towards their reformation.

When asked about the deceased in this case, he stated that he knew Chifundo Amos as one of the juveniles at Chilwa Reformatory School but that he passed on at Zomba Central hospital on a date he could not recall. As regards the circumstances of his death, this witness stated that he only heard about the same from PW 1 and James Mchenga. When asked if he knew the alleged young offender in Court, he stated that he could not at all remember him.

During cross examination, he conceded that at Chilwa Reformatory School there is a records officer and that at the time the one person who was keeping records of the juveniles at the institution was Mrs Chilwa. He further conceded having no knowledge of the circumstances in which Chifundo Amos passed on save for what he was only told. Lastly, he confirmed that at around the month of May when the incident happened, the fields around Chilwa School had maize. There was no re- examination.

The third witness was Coxley Vincent Chiheka. He is PW3.

This witness stated that he is a Chief Clinical Officer at Zomba Central hospital since 2009 but that he has generally been working in that position for over fifteen years.

This witness told the court that in around May 2009, he was a Principal Clinical Superintendent and his duties included heading clinical services as well as assisting

in the conducting of post mortems. He was given and shown a copy of a postmortem report relating to the deceased herein which he tendered in evidence and was marked Exhibit P 1. This witness was not cross examined.

The fourth witness was Chancy Mataya. He is PW 4.

This witness was asked whether he knew the suspected young offender in court but he told the Court that he did not at all know him nor could he recognize him. He could only state that he knew Chifundo Amos with whom he was injured in 2011 whilst at Chilwa Reformatory School. He went on to state that whilst at Chilwa Reformatory School, he was supervising other juveniles and on the material day one juvenile who was new fled at about 1700 hours.

That together with three others they chased the juvenile up to as far as Govala. However, they failed to catch the juvenile and decided to return to their school. On the way back, along the road and near the bridge is where two people came out but that he did not know them.

He went on to tell the Court that the people who came out on the road near the bridge were in fact older people and that they, himself and his fellows, were kids. As they tried to flee, the deceased tripped on the bridge and that is when he was caught and then beaten by the people. At this point in time, he started fleeing whilst shouting for help and was ahead of the others and he was able to hear the deceased crying. He managed to shout for help to as far as the houses near the school and it is at this point when the people who were chasing them turned back. He also stated that around the area where this happened there were maize fields and the crop was still in the fields.

During cross examination, this witness told the Court that he is aged 21years old and that at the time he was sent to Chilwa Reformatory school, his age was 14 years. He restated that only a single juvenile on that day had fled the school at around 1700 hours and that he and three others chased the juvenile up to as far as Govala market but failed to catch him.

In his own words, he said that they started walking back to the school and that it was right at the bridge when the two *azibambo* (adult men) came out and attacked them. He was able to see them and that they were carrying small axes. He restated

that if he were to see the man who beat him he could recognize him and that it was this same man who beat up the deceased, Chifundo.

When asked again about the description of their attackers, this witness restated with emphasis that yes their attackers were *azibambo* (adult men) and that even the deceased in this witness' presence explained then to the principal back at school that he was attacked by *azibambo* (adult men).

During re-examination, he stated that when the deceased was being attacked, this witness was not far from him.

The fifth witness was James Mchenga. He is PW 5.

This witness told the Court that he is aged 21 years and that he is currently resident in Mangochi district. When asked if he knew the suspected young offender in Court, he conceded that he does not know him but on the other hand admitted that he knew Chifundo Amos the deceased with him he was at Chilwa Reformatory School from 2008.

He went on to state that on the day in question a juvenile had fled from the school and that he and three others chased him as far up to Govala market but never caught him. On their return to school, people came out from the bridge. At this time the witness was ahead of all others and that he heard a scream from the deceased who was then at the very back of them all. When this witness went back to check on the deceased, he found out that the deceased had then been assaulted, injured and stripped off his clothes. He managed to carry the deceased to the school where the principal arranged transport to take him to the hospital where he unfortunately died.

During cross examination, he told the Court that he did not know the name of the juvenile who had fled as that juvenile was new. He restated that they chased the juvenile up to Govala but failed to catch him. On their way back to school is where people came out from the bridge but that he could not recall how many they were and that he was not in a position to identify them as he was ahead and already past the bridge. In fact, when he had gone back to assist the deceased he did not find the assailants at the scene and did not see where they had gone. He was not re- examined.

The State then went on to tender the report of the police officer who investigated the matter, Detective Sub-Inspector Chirombo who is since deceased. His report was marked exhibit P2. An objection was however made in that the report speaks of matters that constitute hearsay evidence. The Court then went on to admit the said report to the exclusion of that part which alleges that the suspected young offender and another were hiding and ambushing passersby during night hours.

The prosecution again went on to read and tender in evidence the caution statement for the accused young offender as well as his evidence of arrest, they were marked exhibit P3 and exhibit P4.

Lastly, the prosecution tendered in Court the statement of Mrs Chirwa who was the principal of Chilwa Reformatory school at the material time. This was the evidence for the prosecution and it marked closure of the prosecution case.

The defence submitted on the law as follows.

That the Criminal Procedure and Evidence Code in section 254 (1) is clear as to the procedure on the close of the prosecutions' case and it provides as follows that

> If upon taking all the evidence referred to in section 251 and any evidence which the Court may decide to call at that stage of the trial under section 201, the Court is of the opinion that no case is made out against the accused sufficiently to require him to make a defence, the Court shall deliver a judgment in the manner provided for in sections 139 and 140 acquitting the accused.

Further that Justice Chatsika went on to postulate that the standard of proof required to establish a case which an accused person must be called upon to answer is *prima facie* proof and not proof beyond reasonable doubt sufficient to warrant a conviction. See *Director of Public Prosecutions v Chimphonda & Osman* 7 MLR 94 at p.101

Further that in *Republic v Gwazantini* Criminal Case No 208 of 2003 (unreported), Justice Anaclet Chipeta, as he was then, had the occasion to lucidly expound on the subject of finding a case or no case to answer. Among others, he said as follows

> Section 254 of the Criminal Procedure and Evidence Code is the authority for this mid-assessment exercise in criminal cases. It requires that once the prosecution case has been closed the Court should take stock of the

case so far presented before it. The provision mandates the Court to do one of two things depending on the opinion it forms after so assessing or evaluating the case. If, on the evidence so far on record, the Court be of the view that no case has been made out against the Accused sufficiently to require him/her to make a defence, it should outright acquit the accused. See: S 254(1) of Criminal Procedure and Evidence Code. If, however, the Court be otherwise of the mind that a case has been made out against the accused sufficiently to require him/her to make a defence in respect of the offence charged, it should proceed to put the Accused on his/her defence. S 254(2) of the Criminal Procedure and Evidence Code, makes this quite clear.

It is agreed and conceded by all that for an accused person to be said to have a case to answer, the prosecution ought to raise what is known as a prima facie case. Failure to raise such a case ought to result into the immediate acquittal of the Accused , while success in raising such a case ought to lead to the Accused being put on her defence.

What, therefore, is a prima facie case? Over the years in various Courts attempts have been made to define this concept or expression. In terms of English Law, from which our criminal law and practice has developed , to achieve uniformity in practice and to reduce blunders in the understanding of this expression, the Lord Chief Justice had to create and circulate a Practice Direction. This commendable effort of Lord Parker is reported in [1962] 1 All E.R. 448, among other Law reports. It has been welcomed into Malawian Law by this Court in various local cases, including Rep vs Dzaipa [1975-77]8 MLR 307 decided by the then Chief Justice Skinner and even earlier by the celebrated late Hon. Justice Chatsika (as he then was) in DDP vs Chimphonda [1973-74]7 MLR 94.

It will be necessary, I think, to capture the practice Direction in question for a clearer understanding of the same. It goes as follows:

"A submission that there is no case to answer may properly be made and upheld (a) when there has been no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it. (my emphasis).

Apart from these two situations a tribunal should not in general be called

upon to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If however a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer." (my emphasis).

The law on this question, therefore, happily appears to be well settled in Malawi by now.

I have in the Practice Direction just quoted deliberately underlined the words "could" in the first part of the Direction and "would" in the second part of the Direction. For those of us to whom English is a foreign language it might well not be easy to detect the difference between the use of those two words, but from my reading of the Practice Direction I have always gained the impression that Lord Chief Justice Parker used those two words advisedly and that they each carry their own distinct meaning in the Direction. There is certainly a difference in my view between what a Court "could" do and what it "would" do when a Court must evaluate evidence gathered by the close of the State's case.

My overall understanding of the Practice Direction herein is that it is sufficient in a Criminal Case for the Court to put the Accused on his/her defence if, on the evidence, a reasonable tribunal could, as opposed to, would, convict on it. Thus for a prima facie case to be said to have been established in any given case, the evidence need not be such as would cause a reasonable tribunal to convict, as was partly argued in this case. It is sufficient if it is merely such as could achieve such a result. The distinction may be fine but in my understanding "would" carries with it an element of more certainty than "could", which appears to connote mere possibility, does and, according to the accepted test for discovering whether or not in any given case a prima facie case has been made out, it is the "could" and not the "would" degree of evaluation that must be applied, per this Practice Direction."

The defence further submitted that in the case of *Director of Public Prosecutions v Chimphonda & Osman* 7 MLR 94 at p.101, Chatsika J (as he was then) followed and applied the procedure laid down by Lord Parker, C.J. in *Practice Note* [1962] l All ER 448, when he held that a submission of no case to answer may be properly

upheld when there has been no evidence to prove an essential element in the alleged offence and also when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could convict on it.

The defence submitted that further to the foregoing, it is also the law that where there is failure on the part of the prosecution to prove an essential element of an offence, automatically it leads to an acquittal of the accused person at the point of case or no case to answer. See *Muwalo v Republic* 5 ALR (Mal) 1

The defence further submitted that in the present case, the suspected young offender stands charged with the offence of murder contrary to section 209 of the Penal Code. That said section 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.

The defence then submitted that the foregoing provision imports a number of elements of the offence of murder. The first is that there has to be caused the death of a human being; secondly, that the death so caused must be connected to the accused person; thirdly, that the accused person must have acted with malice aforethought; and, lastly that the death so caused must arise from an unlawful act or om1ss10n

The defence also noted that as regards causing death under the Penal Code, section 215 of the Penal Code defines the same as follows

> A person is deemed to have caused the death of another person although his act is not the immediate or not the sole cause of death in any of the following cases-
>
> (a) if he inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes death. In this case it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith and with common knowledge and skill; but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith or was so employed without common knowledge or skill;

(b) if he inflicts a bodily injury on another which would not have caused death if the injured person had submitted to proper surgical or medical treatment or had observed proper precautions as to his mode of living;

(c) if by actual or threatened violence he causes such other person to perform an act which causes the death of such person, such act being a means of avoiding such violence which in the circumstances would appear natural to the person whose death is so caused;

(d) if by any act or omission he hastened the death of a person suffering under any disease or injury which apart from such act or omission would have caused death;

(e) if his act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons.

Further to the above, the defence submitted that the same Code m section 212 defines malice aforethought as follows

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-

(a) an intention to cause the death of or to do grievous harm to any person , whether such person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

The defence then submitted on whether on the evidence from the prosecution's witnesses there has been established a *prima facie* case warranting the entry of a defence on the part of the suspected young offender herein.

The defence submitted that from the totality of the prosecution, none of the witnesses points to the child herein as the one who caused the death of the deceased and as such there is not even made out a *prima facie* case against him.

The basis of this submission lies in that, analyzing the evidence led by the prosecution, not even does PW 1 or PW 4 and PW 5 state that the child herein is the one who came out from the bridge and attacked the other juveniles. In his own statement as made at police, the suspected young offender admitted to having fled from the institution with a friend. The defence points out however, that when the evidence of PW 1,4 and 5 is considered as a whole, certain aspects important to the case come out.

Firstly, all the witnesses state that the juvenile, or juveniles if any at all, who fled on that night fled to as far as Govala market and was, or were, never apprehended. Furthermore, none of the witnesses states of having ever identified or seen the juveniles they were then chasing that night. As such, the prosecution evidence raises questions of identification evidence considering that this was happening at night. If these witnesses had seen the child herein on that night, surely they would have identified him in court as well as the same person they chased on the night.

Secondly, PW 1 clearly stated that the events at the bridge when two people came out from the bridge happened in the dark and that they were not even able to see each other. PW 5 on the other end clearly stated that when the people came out from the bridge he was already ahead as they fled such that he could not see them nor would he identify them. When he went back to pick up the deceased, the assailants had disappeared so he never saw them. Most significant is the evidence of PW 4 who stated right from his examination in chief that the people who attacked them were *azibambo* (adult men) and that he and his friends were kids. He repeated in confirmation of this fact in his cross examination that the assailants were *azibambo* and also stated that the deceased told the principal of Chilwa, in the presence of this witness, that they were in fact attacked by *azibambo.*

The defence submitted that the foregoing factual revelation then begs the question whether at the time of the alleged offence the child herein was then an adult person or looked like one then? The defence stated that this Court surely throughout has been able to appreciate the youthfulness of the child herein and he cannot be

mistaken for an adult male even at present. Further that not even this very witness PW 4 could identify the child herein as anyone he knew or as one of the adult men who attacked them on the fateful day.

The defence contended that neither does the evidence from the report of the investigating officer helps as regards the identification of the attacker of the deceased. In fact, that report only makes hearsay assertions wanting to connect the young suspect as the assailant but according to the rules, such evidence is inadmissible as it is caught by the rule against hearsay. And further the same can be said with the evidence of PW 2 and PW 3 that it offers almost no help in establishing the identity of the alleged offender.

The defence contended that similarly, the evidence from the statement of the principal basically contains hearsay evidence as she herself was not present at the time the events happened. Further that, in fact, for the witness statement to purport to mention the child herein is in total contradiction to what PW 4 told this Court that the deceased in the presene of PW 4 told the principal, Mrs Chirwa, that they were attacked by adult men and not by a fellow juvenile. Thus in this respect alone, that there is a material inconsistency in the prosecution evidence as regards establishing the identity of the assailant.

The defence submitted that the position at law is clear on this point where there are material inconsistencies in the prosecution evidence, in this case the material inconsistency relates to the identity of the assailants. The defence pointed out that the law provides that such inconsistencies ought to be resolved in favour of the accused and this proposition had been cited and applied in the case of *Republic v Mankhanjiwa* Confirmation Case No. 811 of 1979 (unreported), the High Court stated it as a matter of principle that where there are material contradictions in the evidence given by the witness or witnesses for the prosecution, a trial court must acquit the accused person without calling him to enter defence. Further that the same was equally applied and approved in the recent homicide cases of *Republic vs Boxton Kudziwe* Criminal Case No 137 of 2010 (unreported) and in *Republic vs Major* Criminal Case No 36 of 2012 (unreported).

The defence further submitted that when the trial Court also considers the first argument that the prosecution has not established the identity of the actual assailant

who caused death of the deceased herein, then the prosecution evidence has failed to establish one of the essential elements of the offence charged . That is to establish as a fact that the death of Chifundo Amos was caused by the suspected young offender. And that from the authorities of *Muwalo v Rep* and *Director of Public Prosecutions v Chimphonda & Osman,* the prosecution having failed to establish an essential element of the offence of murder, the suspected young offender herein ought to be entitled to an outright acquittal.

In the foregoing circumstances it is the submission on the part of the child herein that the prosecution has not made a sufficient case requiring him to enter his defence and that he must be acquitted.

This Court must comply with the Child Care, Protection and Justice Act in conducting the proceedings involving the suspected child herein. This is clear from the provisions of the said Act in section 134 which provides that

> (1) Subject to subsection (2), a child justice court shall have jurisdiction over children matters.
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> (2) Where a matter involving a child is otherwise liable to be heard by the High Court, it shall be heard by the High Court, but the High Court shall comply with the requirements of this Act in respect of the child.

This Court entirely agrees with the submission by the child on the principle that this Court must determine at the close of the prosecution's case whether the prosecution's evidence is sufficient such that the child should be called to give an explanation if he so wishes. In that connection, this Court is bound in terms of section 144 (6) of the Child Care, Protection and Justice Act to consider if the evidence of the prosecution is sufficient for this Court to call upon the child herein to enter a defence if he so wishes. The principles to be considered by this Court are those as submitted by the defence.

This Court has considered the evidence of the state and entirely agrees with the defence that there is no evidence pointing to the child herein as being one of the assailants herein. None of the prosecution witnesses who were there at the time of the fateful events testified to seeing the child at the scene of the crime.

Consequently this Court finds that there is no sufficient evidence for this Court to call on the child herein to give an explanation. This Court agrees with the defence and finds that there is no case established against the child at this stage. The child is accordingly acquitted on the charge herein.

Made in camera at Blantyre this 4th May 2016.

M. A. Tembo
JUDGE