



IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY
(Sitting in Balaka)
CRIMINAL CASE (HOMICIDE) NO. 8 OF 2017

THE REPUBLIC

AND

PETER ITIMU

CORAM : NTABA, J.
: Ms. P. Chimwaza and Mr. S. Chisanga, Counsel for the State
: Mr. G. Chembezi, Counsel for the Defendant
: Mr. D. Banda, Court Interpreter
: Mrs. Chirombo, Court Reporter

Ntaba J.

SENTENCE

1.0 BACKGROUND

- 1.1 The convict, Mr. Peter Itimu, aged 60 years of Yao Tribe hailing from Mbatamila Village, Traditional Authority Nsamala in the district of Balaka was accused of causing the death of Saikonde Chigaru on 23rd September, 2011. He was charged with manslaughter contrary to section 208 of the Penal Code.
- 1.2 Mr. Itimu's trial commenced and concluded on 14th March, 2017. He pleaded guilty and the court accordingly found him guilty of the offence of manslaughter contrary to section 208 of the Penal Code and accordingly convicted and reserved his sentence.
- 1.3 The facts were recorded for sentencing purposes. The State stated that it was on 23rd September, 2011 at around 3 pm, the deceased went to the convict's house while drunk demanding he go and collect his panga knife from Joseph Matiki who

confiscated it for cutting down his trees without his consent. The convict assured the deceased that the message had already been delivered to his brother to return his panga knife when he comes back from Balaka town. The deceased became confrontational and started shouting which ensued into a fight. During the fight, the convict in defending himself used a stick on the deceased's head who immediately fell down on his death.

- 1.4 The deceased was later confirmed to have died at Balaka District Hospital and cause of death was brain damage secondary to a head injury. The convict was arrested on 8th November, 2011, cautioned and formally charged initially with an offence of murder contrary to section 209 of the Penal Code. Notably he has been in police custody ever since his arrest up to date.
- 1.5 In evidence, the State submitted the stick used as **Exhibit P1** and the medical report as **Exhibit P2**. The caution statement originally in Chichewa and its English translation were admitted as **Exhibit P3A** and **P3B**. Lastly the formal charge of murder in Chichewa and its translation were admitted as **Exhibit P4A** and **P4B**.

2.0 STATE'S AND DEFENCE SUBMISSION ON SENTENCE

- 2.1 The State and Defence, both made oral submissions in terms of sentence on 13th March, 2017. The State submitted that it was conceding that the deceased was troublesome and aggressive. According to the facts he instigated the fight thereby provoking the convict. It was their ultimate submission that a death had occurred which could have been avoided. Their sentence proposal to the court was seven (7) years.
- 2.2 The Defence pleaded that the convict was convicted on his own plea to the charge of manslaughter. Notably the plea of guilty saved the court time and resources. It also indicated that the convict has been in police custody since 2011. Furthermore, he was a first offender and having lived sixty (60) years as a law abiding citizen. He only found himself in the present situation upon being provoked by the deceased. His age also means he is too old to survive prison conditions. He indicated to the court that he is HIV positive and such makes prison conditions harsh for him. He also informed the court that he has a family of 8 children plus other relations he supports. Lastly, that the circumstances of the case should be considered especially since the State's own evidence showed that he was provoked. It was their prayer his sentence taking all these factors especially the term in custody, the court should impose one that leads to his immediate release.

3.0 COURT'S DETERMINATION ON SENTENCE

- 3.1 The court in determining the appropriate sentence herein reminded itself that Mr. Itimu was found guilty and convicted of unlawfully causing the death of Saikonde Chigaru after he had pleaded guilty to the charge of manslaughter. The court is mindful that the punishment for manslaughter under section 211 of the Penal Code

is life imprisonment. Therefore, this court is being called to examine all the relevant factors herein and determine whether Mr. Itimu should be imprisoned for life or less.

- 3.2 This court recognizes that manslaughter is a serious offence with a maximum sentence of life imprisonment. Further before sentencing I should take into consideration all the aggravating and mitigating factors of the case. Firstly, the law has stipulated that the maximum sentence of life is reserved for the worst offenders and this principle was pronounced in Namate v Republic 8 MLR 132. Arguably, it can be stated that this provision seems to be mandatory in nature but according to precedence, including Paisoni v R 1998 MLR 302 (SCA) have opted not to give mandatory life imprisonment for the offence of manslaughter. The rationale being that imposing mandatory life sentences to all manslaughter cases would result in grave injustice. Incidentally it is my belief that circumstances of each case have to be considered so that a well found conclusion and a proper sentence has to be made.

- 3.3 Notably sentencing issues have been articulated in the case of Mapopa Nyirenda v Republic (2011) (HC) which held that –

"It is the policy of the law that any punishment meted out to an offender must fit the crime. There should be a balance between the mitigating factors and the aggravating circumstances. A sentencing court must always have regard to the circumstances of the case, the offender and the safety of the members of the general public."

- 3.4 Malawian courts also recognize the value of an accused's plea at trial in terms of sentencing. In Republic v Dalitso Mathuso, Crim. Case No. 27 of 2008 (Unrep) where the convict pleaded guilty to a charge of manslaughter. He was aged 23 at the time the offence was committed and was a first offender. The court held that a plea of guilty without equivocation is a sign of remorsefulness for his wrong and a sign of repentance. The court went on to pronounce as to how sentencing in manslaughter offences should be dealt with. Justice Chipeta (as he was then) stated

"To me it amounts to an affront against the value of human life to treat a person who has killed a fellow human being as good as one who has just stolen property worthy, or money amounting to a few hundred kwacha. While circumstances will differ from one case to another, I cannot comprehend a court punishing a person who has broken into a house and stolen something more than one who has actually killed a person, and where clearly that person will not return to life. I am accordingly not persuaded that courts should be thinking of such sentences as 2 or 3 years in prison for the offences of this type. Fortunately all these courts that have been cited as having made these decisions exercise co-ordinate jurisdiction with me and their decisions can therefore be of persuasive authority to me"

- 3.5 Regarding the issue of age, Republic v Ng'ambi [1971] ALR (Mal) 457 held that the age of an accused person is an important factor as any other in assessing

sentence and should be accurately stated before the court or assessed as reasonably as possible by the court. The court further held that while, for the same offence, a sentence may be appropriate to a person aged 30 years, it might be considered manifestly excessive for a person aged 70 years. As such the law treats offenders of advanced age with some degree of leniency in as far as the sentenced to be imposed on them is concerned. However, it is trite law that each case must be decided on its own peculiar facts.

- 3.5 The circumstances of the case herein are that the convict having been provoked by the deceased, the amount of retaliation should have been proportional. However, the court takes note that the convict was a man advanced in age and the deceased was a young man, who was drunk and known to be aggressive. Therefore, taking into account the age and character of the parties, such would drive one to consider that the convict being frail could not withstand an energetic young man in his 20s.
- 3.6 It is evident and highly arguable that the convict is not a worst offender in terms of Malawi as such it is this court's opinion that the maximum sentence of life imprisonment should not be imposed on him. There are numerous and strong mitigating factors in favour of the convict in as far as his sentencing is concerned.
- 3.7 Additionally, the convict is a first offender as such he has not been in conflict with the law for sixty (60) years as such the court should treat this as a mitigation for his sentence. However, the following aggravating factors were evident in the case, the fact that the convict used a knife to stab the deceased and then run away. Secondly, the convict reacted disproportionately to the deceased's perceived provocation since the convict's wife attested that they were no longer together. Lastly, the seriousness of the offence as reflected in the maximum sentence provided for by the law also aggravates the offence.
- 3.8 Accordingly, I know it is important that at this juncture I take into account all the relevant issues and circumstances of provocation which was a finding of this court. Therefore, a careful examination of the provocative act, the conditions it took place, the sensitivity of the accused and the time lapse between the provocation and the act which caused the death. Notably, this court is mindful that provocation is very much linked to conduct and as the evidence for such must be meticulously examined as was the case herein. Understandably Malawian law states that provocation is a mitigating factor however I am inclined to agree with the *Mathuso and Chinguwo cases*, that courts must be reluctant to be seen to condone such appalling acts under the guise of provocation especially looking at the circumstances herein. However, it cannot ignore them when the deceased was the instigator either.
- 3.9 Lastly, the Defence requested that I take into account the HIV status of the convict in sentencing. Let me state that I am very sympathetic to the plight of persons infected and affected by HIV/AIDS. I realize that such a condition would worsened by Malawian prison conditions, however I do not think that being HIV positive is a guarantee that would subject one to less sentence when found guilty of a criminal

offence neither is it a licence to be committing crimes thinking that the courts will be lenient in sentencing. Everyone must be more than willing to abide by the Laws of Malawi regardless of his or her medical condition. The discretion still rests on the court to consider whether severity of an illness weighed against the circumstances of the case will justice demand less punishment for serious offences.

4.0 CONCLUSION

- 4.1 Upon examining the law and taking into account the aggravating and mitigating factors, I accordingly sentence Mr. Peter Itimu to an imprisonment term of 7 years with hard labour.
- 4.2 I further order that the above sentence should take into account the time he has spent on remand awaiting trial.

I order accordingly.

Made in open court this 20th April, 2017.



Z.J.V. Ntaba
JUDGE