



**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION
HOMICIDE CAUSE NO. 265 OF 2016**

**BETWEEN:
THE REPUBLIC
V
DAVIE NKHALAMBA**

CORAM: Hon Justice M L Kamwambe

Salamba of counsel for the State

Panyanja of counsel for the Accused

Amos.... Official Interpreter

SENTENCE

Kamwambe J

Davie Nkhalamba was found guilty on his own plea of guilty of a manslaughter charge and for his admission of facts narrated by the State as correct, and this court convicted him accordingly. To the facts he added that the other people mentioned in the police docket to have been his drinking mates were all fighting him, and that he committed the offence alone. The original facts were that on 23rd day of December, 2000, the convict was drinking with others at a beer place at Majiga trading centre, Mangochi district. There came a certain man who sat on his own drinking his beer when for no apparent reason the convict's group went to assault him. When the convict saw that the man was resisting, he took a knife and stabbed the man on the chest four times. His colleagues ran away. He was arrested by people as he was trying to flee.

The State did not object to the factual additions by the convict, as such, the story of the convict reflects a true record. This is not the time to consider the statements of other witnesses compiled by the police. In any case, the police did not get statements from any eye witness. All other persons recorded as would be witnesses gave hearsay statements. They would not be useful if we proceeded into full trial.

I am now considering what would be the appropriate sentence for the convict. There are aggravating and mitigating factors to an offence. A plea of guilty obviously is a strong mitigating factor and is capable of reducing sentence which would have been imposed by one third. This has been said a myriad times by our own courts although the measure of one third should not be strictly construed, though it is a useful guide.

An adult of youthful age also deserves a measure of mercy from the courts because of his/ her inexperience in the ways of life and the need to give him/her another chance on life outside confinement. The convict then was 19 years old. The law and practice favours the young and the old (R v Ngambi [1971-1972]) ALR Mal. 457. Further, if the convict offended for the first time, it mitigates sentence. It is advisable not to impose long sentences for first time offenders especially in not serious offences and where the manner of offending was not hideous. The convict had not committed any other offence before or after this offence he is convicted of, and the manner in which he committed the offence, though it may appear hideous, but it was due to youthful impulses.

The first time the convict came before this court he intimated that he was ready to plead guilty. When we met later for trial he said the same thing. Such conduct demonstrates remorsefulness. It also shows that one is ready to start a new life and that he is unlikely to offend again. However, I should emphasise that remorse must

mean more than just a mere admission (**Rep v Gift Chapata Criminal Case No. 378 of 2010**).

The court will take into consideration the influence of beer on him which made him unable to prevent his callous actions which led to murder (**Winston Ngulube and another v The Republic, Malawi Supreme Court of Appeal No. 35 of 2006**). Even if intoxication is not a defence, it may suffice as a mitigating factor.

*In **Ayami v Rep [1990] 13 MLR 19 (SCA)** the court stated that 'considering the appropriateness of the sentence, it is imperative to evaluate the extent of the crime, the effect on the victim and the circumstances in which it was committed, and come up with a sentence which is appropriate in that particular case.'*

Admittedly, where full circumstances are not before the court as is the case here since we did not go into full trial, and witnesses were not brought for sentencing purposes according to section 260 of the Criminal Procedure and Evidence Code, thereby making it difficult to consider the effect of a sentence on the victim, and the convict did not speak for himself in mitigation so that he explains why he did what he did, the court will do with whatever information that is available. However, every sentence must be well reasoned so that the public and legal fraternity are in no doubt why a particular sentence was arrived at. A sentence must fit the crime and the convict and be acceptable generally to society. It must not astound society due to its absurdity. Sentence must be in its right levels, not manifestly low or high.

In aggravation, the offender used a lethal and sharp object (knife) to stab the victim. He inflicted four fatal wounds. One stab was not enough for him. He should have known the consequences of using such an implement on another person in such a manner. It is not surprising that he pleaded guilty. His actions were callous. He

had no regard of the victim's life. However, all in all, the mitigating factors are more weighty than the aggravating ones. He deserves a good measure of leniency.

On another note, the convict was arrested in 2000 and since then he has been in custody. This is a whopping period of 17 years of incarceration without trial. This shows that the victim has suffered injustice as he is entitled to speedy trial. There could be no justification for all this inordinate delay which left him in suspense wondering what his fate would be. Such delays should at all cost be avoided if we are going to have a meritorious criminal justice system. The convict must have been psychologically affected and at times thoughts of suffering the death sentence may have visited him. Let me be bold enough here to say that for this reason alone I would just set the convict free. He deserves it without any iota of doubt. The criminal justice system can do better than this.

Despite having freed the convict, let me go further to show how the injustice through unwarranted delay has affected freedom of the convict. I will do so by considering some previous judgments on sentence so that we see what would have been the proper level of sentence for the convict. In **Rep v Frances Kamwendo Criminal Case No. 308 of 2010 (HC Thyolo) (unreported)** the convict was sentenced to 12 years imprisonment for manslaughter after a full trial.

In **Rep v Peter Jumbe Criminal case No. 20 of 2012 (HC Principal Registry)** after full trial for a manslaughter charge, a sentence of 9 years imprisonment was imposed.

In **Paison v Rep [1998] MLR 302 (SCA)** 9 years imprisonment was meted for manslaughter involving a stabbing with a knife. In **Rep v Dalitso Mathuso Criminal Case No. 27 of 2008** the offender pleaded guilty to manslaughter. He was a young offender at 23 years old

and was a first offender and 10 years imprisonment term was imposed.

In the case of **Rep v Tepeya Katimbe Criminal Case No. 29 of 2009** the High Court imposed a sentence of 14 years imprisonment where the offender stabbed the deceased in the stomach with a bicycle spoke when he was angry that the deceased prevented a girl from going out with him. The offender was a first time offender who pleaded guilty.

In **Rep v Walusa Manyowa Criminal Case No. 78 of 2010** the accused stabbed the deceased to death after a brief quarrel. A 10 year sentence was imposed. In **Rep v Martin Amin Criminal Case No. 10 of 2013** the convict stabbed the deceased to death with a sharp knife when he found him having sex with his wife with whom he was under separation. For manslaughter, he was sentenced to 12 years imprisonment as a first offender. The court said that the convict acted disproportionately to the deceased's provocation.

In the present case, the convict attacked the deceased without being provoked. He may also have been defending himself from his other attackers, but he used excessive force in the circumstances. Manslaughter is a serious offence attracting a life sentence because there is irretrievable loss of precious life. Sentences to be imposed must reflect the sanctity of life. However, the circumstances of the offender must also be taken into account. This is not a proper case where sections 339 and 340 of the Criminal Procedure and Evidence Code can be used. Manslaughter being a serious offence, a suspended sentence would be a mockery to the justice system. I have outlined the other mitigating factors above and it is my view that a 12 year sentence is appropriate in the circumstances.

This is how the injustice is manifested. If sentence were passed within 5 years after commission of the offence, he was going out of prison in about 2008 after considering prison remission period. To date he has suffered extra incarceration period of about 9 years. This is gross injustice to the convict. He should be released immediately and forthwith.

Pronounced in Open Court this 12th Day of December, 2017 at Chichiri, Blantyre.



M L Kamwambe

JUDGE