



**REPUBLIC OF MALAWI  
MALAWI JUDICIARY  
IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY  
CRIMINAL CASE NO. 22 OF 2013**

**THE REPUBLIC**

**v**

**ISAAC ANDREW KAMWALA**

**CORAM : MWALE, J.**

: Gondwe, Gamadzi, Senior State Advocates, Counsel for the State  
: Ndalama, Senior Legal Aid Advocate, Counsel for Defendant  
: Kaferanthu, Court Interpreter  
: Jere, Court Reporter

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**Mwale, J**

**JUDGMENT**

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**A. FACTS**

1. July 20<sup>th</sup> and 21<sup>st</sup>, 2011 will go down in Malawi's otherwise peaceful history, as two of our darker days. In order to set the scene for the events that ensued on these fateful days, I take judicial notice of a Malawi Human Rights Commission Report<sup>1</sup> which provides the context. July 20<sup>th</sup>, 2011 started off with demonstrations or protests (now referred to as the "20th July Demonstrations") escalating into two days of unrest and rioting with wide scale

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<sup>1</sup> Malawi Human Rights Commission, April 2012, Report on the Demonstration of July 20<sup>th</sup>, 2011

looting of both private commercial property as well as public property. The crackdown by the Malawi Police Service in response to this intense situation led to a death toll of 20<sup>2</sup> and left a number of people injured. In response to this high death toll, the Malawi Police Service established an internal investigations team comprised of 8 police officers who were tasked, amongst other things, with documenting what had happened and determining whether there had been excessive use of force.

2. Edward Kang'ombe, a young man aged 24 years, met his death on 21<sup>st</sup> July 2011 as result of a gunshot wound to the head just outside the People's Trading Centre shop in Lumbadzi in Lilongwe District. He had been visiting a friend at Lumbadzi Trading Centre when he met his demise. The shooter was a policeman in uniform. The accused person Sub Inspector Isaac Andrew Kamwala, a policeman who was on duty and was armed on that particular day stands before this Court charged with the deceased's murder, contrary to section 209 of the Penal Code. According to the elements of this offence, the State must prove:

- (a) the death of a person;
- (b) that the death was caused by an unlawful act or omission; and
- (c) that such death was caused with malice aforethought.

3. At the conclusion of the prosecution's case in which 4 witnesses were called, the accused was found with a case to answer in March 2016. The accused then proceeded to his defence, testifying himself and calling 3 additional witness. In an interesting turn of events, the accused also recalled a prosecution witness for cross-examination under section 255(3) of the Criminal Procedure and Evidence Code.

#### **D. THE BURDEN OF PROOF AND STANDARD OF PROOF**

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<sup>2</sup> As above

4. According to the Postmortem Report tendered in evidence by the second prosecution witness (PW2), Sergeant Mkangamira, the deceased died at 10:00 hours on the morning of the 21<sup>st</sup> of July 2011. It also recorded that the cause of the death was a gunshot where the bullet entry point was marked on the upper right eye. In accordance with the elements of the offence of murder under section 209 of the Penal Code the State therefore has to prove that the accused person not only pulled the trigger of the gun that shot the deceased in the head, but also that in pulling the trigger, the accused person acted with malice aforethought. The proof required, pursuant to section 182 (1) of the Criminal Procedure and Evidence Code is beyond reasonable doubt.
  
5. The sanctity with which the law upholds the accused person's innocence until such time as the State has successfully discharged its burden, beyond reasonable doubt, is evident in our jurisprudence. In the case of *Namonde v The Republic* [1993] 16(2) MLR 657, for example, Chatsika, J. (as he was then) affirmed Lord Sankey's views in the English landmark case of *Woolmington v Director of Public Prosecution* [1935] AC 462, to the effect that:

“It should be remembered that subject to any exception at common law, cases of insanity and to various statutory provisions, the prosecution bears the burden of proof on every issue in a criminal case.”

The measure of “proof beyond reasonable” is not one that easily lends itself to quantification however there is no doubt that it requires a high degree of satisfaction that the prosecution must, through the evidence it presents, create in the mind of the courts. The overall effect is that even if the slightest doubt as to the guilt of the accused is created in the mind of the court, he is given the benefit of the doubt and must have his innocence proclaimed. This is lucidly illustrated in the words of Chipeta J. (as he was then) in the case of *Chauya and Another v The Republic, Criminal Appeal No. 9 of 2007*:

“Criminal law, it should always be recalled, thrives on the noble principle that it is better to make an error in the sense of wrongly acquitting a hundred guilty men than to err by convicting and sending to an undeserved punishment one innocent soul.”

6. Once the prosecution establishes a prima facie case at the close of its case and the Court finds that the accused has a case to answer, the defendant then bears the evidential burden of casting reasonable doubt on the prosecution's case. The incidence of the evidential burden in no way detracts from the State's responsibility in proving each and every element of the offence murder.
7. Based on the evidence of the four-prosecution witness as well as Caution Statement and the Postmortem Report, it is the State's case that the accused person must have caused the deceased because he was the only officer equipped with a rifle with live ammunition from Lumbadzi Sub Police Station on the day of the deceased's demise, 21<sup>st</sup> of July 2011. The State contends that the accused person actually fired live ammunition to protestors and since the deceased died of gun-shot wounds caused by live bullets, the accused must be the responsible party. Further, the State has argued that the injuries suffered by the deceased were intended to grievously injure him since the deceased was shot around 10 a.m. and the riots begun at 12 mid-day, hence the killing was with malice aforethought.

#### **E. ANALYSIS OF THE EVIDENCE**

8. None of the witnesses called by the State were eye witnesses to the actual shooting that led to the death of the deceased. The first prosecution witness (PW1), Ellias Kathira missed witnessing the shooting by a few minutes. PW1 was a friend to the deceased who worked in a Butchery at Lumbadzi Trading Centre. PW1 had opened the shop but soon got wind from people coming from Lilongwe that there was unrest in the city and the commotion was coming towards Lumbadzi. PW1 exercising caution, decided to close the Butchery and return the keys to the owner. He left the deceased outside the shop and as he was returning the keys, he heard gun shots. Upon his return some 30 minutes later, he realised his friend had been shot. All he could do was move the body, with the help of others, towards the road so they could get assistance. In the process, he saw a police vehicle coming from the direction of Lumbadzi shooting indiscriminately. He also stated that from what people around him were saying, a certain Banda was responsible for the shooting. The people went as far as to describe this Banda as a certain police officer who had a mobility impairment and walked with a limp.

9. Although PW1 did not see who shot the deceased, he saw a police vehicle shooting indiscriminately at around the time of the shooting. While I cannot accept the evidence of the people around the scene of the shooting who identified the police officer that shot the deceased as Banda for the truth of its content, I do take note of the fact that these allegations were made in the immediate aftermath of the shooting within PW1's hearing range and were part of the events that occurred at the time.

(i) *Was the accused the only officer who carried a weapon armed with live ammunition?*

10. The State's case is premised entirely on the premise that the accused was the only officer carrying live ammunition on the material day. This line of argument is based on the evidence of two prosecution witnesses who stated that the accused was the only person who signed for ammunition on the day and one of these witnesses produced documentary evidence to that effect. The other witness corroborated that the accused was armed and added that the accused had confided in him that he had shot a person during the riots.

11. My starting point in the analysis of the State's evidence is the testimony of the fourth prosecution witness, Ireen Kamphantengo Kainja (PW4). PW4 was based at Southern Region Police Headquarters, working as an investigator at the material time. She was one of 8 investigators appointed by the Malawi Police Service to investigate police conduct during the 20<sup>th</sup> July Demonstrations. PW4's evidence gave some important insights into Malawi Police Service rules for the recording of the movement of weapons and ammunition. The rules are conveniently summarised with the aid of a mnemonic acronym, "**ELBO**" as follows:

No **E**rasures (no alteration)

**L**egible handwriting only

No **B**lank spaces

No **O**verwriting (you must sign if you overwrite)

Further any person taking out ammunition must sign the Register without fail. PW2 testified that the manner in which the Register was kept raised a number of suspicions. There were alterations on numbers and no signatures on them. The Register therefore provided a very shaky basis for the contention that the accused was the only person who was armed with live ammunition on the material date.

12. The evidence of PW4 also provides a basis for an alternative theory to what actually happened on the material day and this is the theory that has been put forward by the defence. This theory largely contends that somebody else shot the deceased and records were doctored to implicate the accused. PW4 also testified that during her investigations she tried to meet and interrogate a certain Sergeant Banda whose name was mentioned in connection with the shooting, but he always managed to evade her. At one point she met him elsewhere and ordered him to meet her at the office but he defied her order and never turned up. That very day, her boss asked her to hand over the investigation file for prosecution. Even though she had indicated that it was not ready for court, the file was submitted for prosecution.
  
13. Further, the evidence of second prosecution witness (PW2), Sergeant Mkangamila who happened to have been the "Lines-in-Charge" at Lumbadzi Police Sub-Station at the material time, indicated a lot of inconsistencies in the manner in which the record of officers who took out weapons was kept. It was his responsibility to keep all combat equipment such as rifles, riot kits and tear gas. According to PW2, on the day in question, the accused person as Deputy Director of Operations and his boss, Inspector Msonda, presented themselves to him and were issued with one MK4 rifle, thirty rounds of blank ammunition, one R4 rifle with thirty rounds of blank ammunition and 8 tins of tear gas. It was his testimony that after they went outside, they came back within twenty minutes to request live ammunition. They collected one SMG rifle with 15 rounds of live ammunition. At 15:00 hours, reported at the charge office with 5 rounds of live ammunition having used 10 at Lumbadzi. Even though it was Inspector Msosa who had requested the live ammunition, it was the accused person who collected the SMG rifle. He also testified that the accused further asked for additional 35 rounds for further operations. He also stated

that on 22 July, 40 rounds were returned to the armoury. The request was not recorded in the Rifles and Ammunition Movement Book because the accused and Inspector Msosa were in a rush and there was no time to take a proper record. In fact, Inspector Msosa actually told him not to bother recording the request for that very reason.

14. Taken against the background of PW4's evidence, PW2's evidence was far from convincing. He failed to provide cogent reasons as to why established reporting protocols which a disciplined force like the Malawi Police Service adheres to religiously for record keeping in the event of arms allocation was not followed on this particular occasion. The argument that the officers were in a hurry failed to withstand cross-examination. When put to PW2 that the fact that Inspector Msosa had leisurely gone out for thirty minutes before he went to sign for weapons and therefore couldn't have suddenly been in a hurry later, PW2 failed to explain this discrepancy. It in fact defies logic to contend that the Malawi Police Force would disregard such a sacred rule because they were in a hurry when the bulk of Police work consists of emergency responses that must be done in a hurry and yet the rules for proper recording must still be adhered to. Further, being in a hurry does not explain why the record failed to comply with the "ELBO" rule and was rife with alterations and overwriting.

15. PW2's evidence was further weakened because he produced a copy of an extract from the Rifles and Ammunition Movement Book. It was almost too convenient that the original was unavailable considering how the copy was riddled with deletions and overwriting. The number of anomalies, both in substance and form, were quite substantial. Whoever made the entries relating to this particular incident in the record book was either unaware of the "ELBO" rule or deliberately flouted procedure because he or she had something to hide. In addition, no record of the accused person having been given a weapon and live ammunition was made in the Occurrence Book as is standard practice. This omission, taken together with the untidy nature with which Rifles and Ammunition Movement Book was kept correctly justified PW4's suspicions. In consequence, there is no doubt in my mind that this record was doctored and cannot provide the requisite proof to establish that the accused person was the only officer who was issued live ammunition on the date in

question.

16. To further compound matters, not only did the copy of the Rifles and Ammunition Movement Book not indicate who had actually carried the gun between the officers whose names appeared in it, it gave the wrong rank for the accused person. At the time of the incident in question, the accused person, did not hold the rank of Sub-Inspector. He was a Sergeant. When cross-examined about how the record anticipated his future rank when he was only promoted several months after the incident, PW2's response was simply that the wrong rank had been entered by mistake. Whoever made the entry must have either predicted that the accused would be promoted, or which is more likely, the entry was made was altered months after the incident with a view to implicating the accused. In light of the other revelations that were made in the course of PW3's testimony, the latter explanation is more plausible.
17. PW4's testimony with regard to the investigation she conducted over the death of the deceased also points to fundamental weaknesses in the prosecution's case. According to her testimony, her inquiry was based on information from two sources. The first source was Ellias Kathira (PW1) who named the deceased's killer as Banda, a police officer at Lumbadzi Sub-Police Station. Consistent with PW1's testimony, this name had come up from the crowd around Lumbadzi Trading Centre that had witnessed the shooting.
18. The other source was from within the Malawi Police Service. PW4 was told in the course of her investigations by Kaitano, a Deputy Commissioner, that she heard from Msosa that the accused had told him that he had shot one person on their return from field work. Consequently, she summoned the accused for interrogation. In his Caution Statement, the accused denied the allegation, stating that he had no live ammunition at the time the deceased was shot. PW4 went on to verify the accused's account and she established that it was indeed true that he did not have live ammunition at the material time. PW4 proceeded with her investigations by going to Lumbadzi Sub-Police Station where she met the Lines-in-Charge PW2. It was at this point that PW2, consistent with his testimony, told her that



the accused was given live ammunition and only returned with 5 rounds. PW4 then photocopied the relevant entry, purporting to support this claim, in the Rifles and Ammunition Movement Book. As discussed earlier, she found this record highly suspect. As alluded to earlier, PW4, however, never completed her investigations following up on the first source because she was ordered to hand over the file for prosecution.

19. Inspector Msosa who was mentioned in the testimonies of both PW2 and PW4, was the third prosecution witness (PW3). According to his testimony, once he reported for duty at around 08:00 hours on the material day, he received information that there was civil unrest at Lumbadzi Trading Centre. He was therefore instructed by the Station Officer to round up a troop to diffuse the situation at the *Peoples* and *Chipiku* shops there. The intelligence received by the Station Officer indicated that the crowds were about to loot the shops which were across the street from each other. When the troops arrived at the trouble spot, they divided themselves into two groups, controlling each side of the street. PW3 was stationed on the *Chipiku* side together with the accused and one other officer. This contingent remained at this position until around 12:00 hours. During this time, they shot at rioters using blank ammunition and tear gas. At some point during all this, a police vehicle loaded with police officer going towards Kamuzu International Airport passed them. The Officer-in-Charge told them that they were going to collect ammunitions at Kamuzu International Airport and ordered them not to leave the site but remain to keep the situation under control.
20. After the police vehicle left, the crowd noting the diminished, numbers attacked PW3 and his troop overpowering them and they had no choice but to flee. At this point, they had run out of ammunition and it was only the accused who was carrying a gun. According to PW3, amidst the fracas, the accused told that he had shot someone at which point PW3 called the Officer-in Charge to report that someone had been shot. PW3 maintained that he himself did not carry any live ammunition and he did not know who did as he was not there when the weapons were being issued. This was in direct contradiction to the evidence of PW2. He went further to state during cross-examination that according to the Malawi Police Service rules, no one is supposed to sign on behalf of a person when collecting ammunition. His testimony also established that there was no incident resulting in death at

the *Chipiku* side at which he and the accused were posted. Nothing happened prior to 12:00 hours and all this time he was together with the accused and did not see the accused shooting anyone.

21. Having considered all the evidence of the prosecution witnesses, it is very clear that the State have failed to prove beyond reasonable doubt that the death of the deceased was caused by the accused. To summarize, the cause of death according to the Postmortem Report, was caused by a gun shot. The type of gun used is not identified. The time of death is 10:00 hours. PW3 was with the accused at 10:00 hours and at that time, there was no incident at the post they were manning. In fact, until 12:00 hours when any shooting might have occurred or any time thereafter, PW3 did not see the accused shooting anybody. Whoever shot the deceased at 10:00 hours, it could not have been the accused. Further, the entry in the Rifles and Ammunition Movement Book indicating that the accused person was allocated ammunition has been severely discredited in both its form and substance and can by no means be used to sustain a conviction. It is very clear from the testimony of PW3 and PW4 that entries in this Book cannot be made on behalf of anyone. Any officer being assigned a weapon must sign for it and this procedure adheres in any circumstance. The wrong rank attributed to the accused in the Book as well as the fact that a copy of the Book which had names crossed out and others inserted casts such tremendous doubt that relying on such evidence would lead to an unsafe conviction. In my observation, PW2 was far from a credible witness and it was not surprising that he was re-called for cross-examination by the defence. There is therefore no evidence before the Court for it to conclude that the accused was the only person who was assigned live ammunition at the time he was deployed.

(ii) *The Defence Case*

22. Having found the State's evidence as falling below the standard of beyond reasonable, it behoves me to acquit the accused person without further ado. However, the accused person did make a defence and provided evidence that further solidifies the defence case. The accused's version of events in his or her defence is very important such that even if such a

version manages to convince the court, the prosecution will have failed to discharge its burden. This is very clear from the case of *The Republic v Msosa* (1993) 16(2) MLR 734, where it was stated that in such circumstances, the only question for the court to ask itself is:

“Is the accused’s story true or might it reasonably be true?”- with the result that if the answer is that the appellant might be reasonably be telling the truth, the prosecution would not have in that case discharged the burden of proof beyond reasonable doubt imposed upon it by law.”

23. I am also mindful in this case that a person lost their life and must be vindicated, in this case by sound reasoning on why the person accused of his death has been acquitted. It is for this reason why I shall proceed to analyse the Defence evidence, to determine if it true or might reasonably be true. Further, whilst the accused person has not been proved to have caused the death, the deceased’s killer is still at large and the evidence of the accused in this public record is important for bringing the real killer to justice. From the evidence of the investigator who investigated this murder, PW4, her investigation was far from complete when she handed over the file for prosecution.
24. According to the evidence of the accused as the first defence witness (DW1), after he reported for duty at around 07:30 hours on the material date, he went for general patrols around Lumbadzi Trading Centre at around 08:00 hours. He was armed with a rifle (SMG), with 5 live ammunition, and he signed in the Rifle and Ammunition Movement Register which was on the counter. The Occurrence Book keeper was supposed to reflect this in the Occurrence Book. Before arriving at Lumbadzi Trading Centre, they received a phone call instructing them to return to the station because rioters had assembled at the *Peoples* shop. When he returned, he found other police officers already at the counter being issued with different weapons including rifles and live ammunition and signing in the Rifle and Ammunition Movement Register.
25. The accused person’s evidence is also very useful in gaining an understanding of the importance of recording the deployment of arms and ammunitions. Officers are obliged to

individually sign the register upon being issued arms and ammunition so that if the weapons and ammunition are damaged or lost, or even wrongfully used, the officer who took them out is held accountable. The accused person's evidence which tallies with his Caution Statement, was consistent with the evidence of PW3 (who was with the accused at all material times) in as far as recounting what had happened prior to 12:00 hours when their troupe was forced to flee from the riot scene. By the time they were fleeing, the accused person had used up all his rounds of live ammunition shooting in the air, and he had not shot anyone.

26. The accused person also shed more light as to what had happened prior to his troupe fleeing the scene. As PW3 had testified, the officers had been divided into two troupes and after the Officer-in-Charge saw that the crowds were getting more uncontrollable she left for Kamuzu International Airport to get reinforcements. The Officer-in-Charge however came back some time after 09:00 hours with six R4 rifles that had live ammunition and no extra officers. She gave these weapons out to officers. It is clear from the accused person's testimony which withstood cross-examination that he was not the only person with a weapon with live ammunition out in the field that day. The only person who was injured during the time when the accused person was out in the field was shot in a sector that the accused had not been stationed in. The accused was merely asked to transport a person lying on the road into a vehicle and transport him to the Health Centre. The accused person also added during cross examination that when PW3 said he (the accused) confessed to shooting someone, he found that surprising because not only did he not make such a statement, no person was shot around the *Chipiku* zone which the accused was stationed at. The deceased died at the *Peoples* zone. The SMG gun he carried is a short-range weapon if the accused had shot someone, PW3 who was with him the whole time would have seen the shooting. The evidence of PW3 contradicted that of PW2 and the accused and I found his testimony rather dubious at times.

27. The accused person has, by contrast, consistently struck me as sincere in the course of his testimony. More to his credit, his version of events was corroborated not only by his own witnesses but also by some of the prosecution witnesses, especially PW4. By all accounts,

his version is more likely to be true than that of the State. The accused was able to bring to court the original Rifle and Ammunition Movement Register which he obtained after he was charged in order to bolster his defence, even though he could not tender it in evidence, the fact that the originals were available and PW2 did not tender them when he gave evidence further casts doubt on his evidence and the entire prosecution case. The Rifle and Ammunition Movement Register is always kept by the Lines-in-Command (PW2) who gave evidence that the accused described as untruthful. When the accused accessed the Register which he identified in court, the pages relating to the issuance of arms and ammunition from 2010-2012 had been removed. This period covers the material time. The only conclusion in view of the missing information would be that no weapons were taken out by any officer at Lumbadzi Sub-Police Station. Such a conclusion is overly fanciful and cannot be entertained.

28. The accused person also identified a second official Armoury Returns Register which like the first was equally highly suspect. The purpose of this type of Register was to record the armoury kept in any police station. When the accused accessed this register, he found that PW2 had testified that the accused had been issued 50 rounds of live ammunition for the SMG rifle that had been assigned to him. Since this Register was a record of all the arms in the armoury, each entry would indicate a starting balance and then the remainder after an officer had been issued with ammunition. Therefore, the Armoury Returns Register indicated that on 21<sup>st</sup> July the armoury had 556 ammunition and therefore if the accused had indeed been given 15, there would have been 541 left, however the record indicated something entirely different. The Register indicated instead that the accused was issued with 18 pieces ammunition and after that there were 538 left by the end of July. This would mean that the month of August would have started with a balance of 538 ammunition yet the entry for August started with 556 again. Such a conclusion is impossible if some ammunition was used in July.

29. Although other officers were given blank ammunition and other weapons, only the ammunition supposedly given to the accused was recorded in July. The numbers do not

add up and further confirm the unreliability of the evidence of PW3. It was this Register that raised the accused person's suspicions as it indicated that the accused was at the rank of Sub-Inspector in July 2011 when he was promoted in December 2011.

30. The accused also went as far as to read out a letter, purportedly written by PW2 addressed to the accused person's legal representatives, the Legal Aid Bureau, in which PW2 revealed that there was a conspiracy to implicate the accused person. According to the letter, which the accused identified in court and was signed by PW2, the Officer-in Charge had requested all record pertaining to the day in question. When the Officer-in-Charge instructed him to photocopy the entries pertaining to the material date a few days later, PW2 noted some alterations. When PW2 attempted to regain custody of the registers, the Officer-in-Charge told him that they were at reception. He found one register with pages removed and the Occurrence Book was missing. The letter continued to say no questions relating to these revelations were asked in court and o he only responded according to the questions asked. Finally, in the letter PW2 is also recorded as stating that he was surprised to hear PW3 testifying in court that only the accused had live ammunition because this was not true and that the Officer-in-Charge was in a better position to know the truth because she took the registers.
31. This letter as well as the Registers identified by the accused were only hearsay as they were not authored by him. It was for the purpose of tendering them in evidence that the defence then sought to recall PW2 pursuant to section 255 (3) of the Criminal Procedure and Evidence Code by which the accused may, "*without further process, at any time while he is making his defence be allowed to recall and re-examine any witness present in the court or its precincts.*"
32. When cross-examined on the anomalies in the two registers, PW2's response was that he made a mistake in the Armoury Returns Register when he did not deduct the ammunition used by the accused in July when he started the returns for August. He admitted that there were alterations in the Register on the figure of 538 which were made in a different ink to that originally used. These alterations were very clear to the court. PW2 stated that as

Lines-in -Charge he had to keep an accurate record and after he noted that he had previously made errors, he changed the dates, but he could not remember when he made the alterations. He concluded by refusing to tender this crucial piece of evidence since it had not been used on July 20<sup>th</sup> and 21<sup>st</sup>.

33. When recalled in cross-examination again to explain the anomalies in the Arms and Ammunition Movement Book, PW2 stated that he did not bring the Arms and Ammunition Movement Book when he came to court the first time because it was not used on 20<sup>th</sup> July and therefore, there was no reason to have brought it. The Occurrence Book had been used instead. He thus stated that between 18<sup>th</sup> November 2011 to 17<sup>th</sup> January 2013 there was no entry. According to him only the Occurrence Book Keeper could say with certainty whether the Register had in fact been used. PW2 also denied removing any pages and went on to add that it was impossible for any pages to have been removed even though it was very clear upon the Court's inspection of the Register which was kept in a hardcover book that pages had been pulled out. PW2 also insisted on his earlier testimony that even though it was procedural to issue weapons without recording, he had done so because of the exigencies of the situation, following what he termed "orders from above".

34. Further, when PW2 was cross-examined on the letter (purportedly written by PW2) and read out in court by the accused, PW2 denied the veracity of the contents of the letter sticking to his earlier testimony. According to PW2, the accused had refused to accept a letter that implicated the accused and threatened PW2 with unspecified action if he did not sign the letter that was read out in court. PW2 was scared because the accused was claiming to have help from outside authorities who were part of the accused person's machinery. This machinery would deal with PW2 if he did not sign the letter. PW2 therefore signed the letter fearing for his job and his life and was waiting for his day in court to tell the truth. He also had no channel to report the matter to the Inspector General of Police. His only recourse was to wait for his day in court when justice would prevail because he would refuse to tender the documents and deny the contents of the letter.

35. Again, PW2 failed to convince the court of his truthfulness. Whilst straining his imagination one could conclude that PW2 is bad at record keeping and accounting, predicting the future rank of the accused shows that the record was altered after the incident to implicate the accused. I am therefore more inclined to believe the accused when he says these pages were removed as part of a conspiracy to deliberately implicate him, especially bearing in mind that the investigator in this matter was ordered to hand over her file for prosecution before she had concluded the investigation. PW2 is therefore not a poor or incompetent record keeper, but a liar keen on suppressing what actually transpired on the material day.
36. It is inconceivable that a serving police officer with the backing of all his superiors at his disposal could be afraid of the accused who has been on interdiction at the time and was powerless to impose any manner of menace on him. The letter, which PW2 purportedly only signed under duress, cast very serious allegations against the Officer-in-Charge at Lumbadzi as the person who was responsible for doctoring the registers. It is implausible to believe that an officer would lie about his superior officer at the threat of an officer under interdiction. PW2 admitted knowing the implications of appending his signature to the letter but he claimed that since he was going to give evidence to the contrary in court, his signature was of no consequence. PW2 also says he had no access to the Inspector General yet the said letter was copied to the I find this claim totally lacking in veracity. At the time the letter was written, no processes to recall PW as a witness were underway. As far as matters stood, PW2 had testified and it was now the time for the defence witnesses to take to the stand. PW2 had therefore already had his day in court when the letter was supposed to have been authored and he had no way of knowing he would be recalled. All in all, the evidence of PW2 failed to withstand cross-examination and cannot impeach the testimony of the accused.
37. Moving on to the evidence of the second defence witness, Benedicto Banda (DW2), this evidence materially corroborates the testimony of the accused person. DW2 was actually an eye witness to the shooting. At the material time, he was a security guard at one of the shops at the Trading Centre at the time. He actually saw a person crouched on the ground



and this person was shot as he tried to get up and run away at the *Peoples* shop during the chaos. DW2 identified the shooter as a police officer who was wearing uniform, named Banda. DW2 said he identified him from his facial appearance and the way he walks, and his friends supplied the name Banda as the police officer fitting this description. Banda is tall, dark, medium built and moves with a limp as he has a problem with one of his legs. Once this man was shot, the crowd picked him up and left him on the road where he was picked up.

38. DW2 had a keen eye for detail. He testified that the police had long guns and short guns and that the gun that was used to kill the deceased was a short gun with holes inside. He is therefore a witness who was very observant and accurately described what he saw. Further, DW2 had worked at Lumbadzi for 4 years at the time of the incident and therefore knew the area and people well. It was not his first time to have seen the shooter although it was the first time to find out his name. The shooter was about 115-120 metres away from him and so it was easy for him to identify him. After the deceased was shot, a different group of police officers from the lot that shot the deceased then carried him away. This second group did not have many weapons. They just picked up the body and carried it away. This testimony corroborates that of the accused who also stated that all his troupe did was to carry a body they had found on the road. The accused person found the deceased person already lying on the road. Had he shot the deceased, DW3 who was with him would have seen this.

39. It is clear from the evidence of DW2, the only eye witness to have testified, that the accused was not the person who shot the deceased. The evidence of DW2 confirms what PW1 and PW4 were told at the time, that it was a certain Banda, who shot the deceased and that this Banda walked with the limp. The third defence witness (DW3), Stanley Kambalame, who was a relative of the deceased and was not an eye witness was also told after the event by eye witnesses that Banda was the shooter. It is very surprising that even though a witness who actually saw the shooting was available, the investigator never questioned him, and the prosecution case proceeded without an eye witness. This is again an indication that the investigations in this matter were never completed.

40. The fourth defence witness (DW4), Sergeant Zgambo, who is the current Lines -in-Charge at Kamuzu International Airport Police Station. Although he is the custodian of rifles and ammunition at the station, at the material time he was not. When the Accused went to find out what had happened on 21st July, DW4 showed him the Registers. There was an entry in the register to the effect that Mrs. E. Sato, who was the Officer-in-Charge at Lumbadzi Sub-Police Station collected 6 rifles (R4) and the serial number for each gun was recorded although she did not sign for them. She also collected 125 live ammunition, all for the purpose of controlling the demonstrations of 21st July. The records showed that the rifles were later returned but without ammunition. The rifles were returned by the Lines - in - Charge of Lumbadzi Sub-Police Station, (PW2). During cross-examination, DW3 admitted that not signing for the weapons was an error, but the return was signed for. The Register was tendered in evidence. This evidence confirms the accused person's testimony that he was not the only officer armed with live ammunition at the material time.

#### **F. ORDER**

41. For all I have reasoned above with reference to the evidence, **I find that the State has in this case failed to prove beyond reasonable doubt that the accused person Isaac Andrew Kamwala caused the death of the deceased Edward Kang'ombe and I accordingly acquit him.**

42. The State have a right to appeal within 30 days of this decision.

I so order.

Made in open court in Lilongwe this 16th day of March 2018.



**Fiona Atupele Mwale**

**Judge**