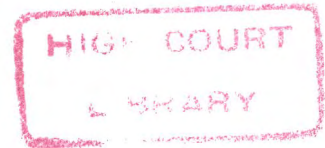




IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION
CRIMINAL CASE NO. 22 OF 2010



THE REPUBLIC

V

BELO KEMO

Coram: Hon Justice M L Kamwambe

Chisanga of counsel for the state

Mandala and Twea of counsel for the Convict

Amos...Official Interpreter

Mutinti....Court Reporter

JUDGMENT

Kamwambe J

The convict was charged with manslaughter contrary to section 208 of the Penal Code and was convicted on his own plea of guilty and admission of the facts as narrated by the State as correct.

The facts of the case are that the deceased person, Harrison Makwete married Rosemary Thomas in 1998 and the marriage lasted for three years. In 2002 the Convict, Belo Kemo, married the said Rosemary Thomas. Rosemary continued seeing the ex-husband, Harrison Makwete, secretly as lovers. The Convict was living at Mangamba while Rosemary was living at her home at Mwepetha. Convict was visiting Rosemary as his wife and was making daily provisions. On the evening of 13th September, 2006

deceased went to visit Rosemary Thomas. He knocked on the door which Rosemary opened. As she was attending to the deceased person, the Convict was watching everything from where he was hiding near the matrimonial house. Angered with what he had seen, he confronted the deceased person and a fight ensued, they wrestled over a burglar bar with which the convict hit the deceased person.

According to section 211 of the Penal Code, the maximum sentence for manslaughter is life imprisonment. Maximum sentences are reserved for the worst offenders. Sentences are discretionary after the court has considered the mitigating and aggravating circumstances and all circumstances surrounding the crime. However, such discretion shall be exercised judicially. Eventually, the court should come up with a sentence it considers appropriate. The sentence arrived at must meet the convict's expectation and that of the victim and his family. The sentence must also meet public expectation. Thus, a sentence should not be manifestly too high or too low. In sentencing process, there should be some measure of mercy and humane consideration (**Republic v Shauti, 8 MLR 69**).

Katsala J said in **The Republic v Tione Chavula, Criminal Case No. 93 of 2005** that *'the purpose of a sentence is first of all, to punish the defendant for his crime which the defendant has committed, secondly, to mark the disapproval of the community for the criminal actions which the defendant has committed, and thirdly, to act as a deterrent in future to this man and anyone else who might be minded to commit this sort of crime'*. In **S v Kuwalo 1973 (B)** Lord Denning said that *'every sentence must adequately reflect the revulsion felt by the great majority of citizens.'*

A plea of guilty reduces sentence up to one third of the possible sentence. This means you sentence the accused first with a sentence the court deems appropriate and then later, the court

reduces such sentence up to one third in its own discretion. Leniency will be shown to first offenders and those that are of young age. The court is at liberty to consider any other mitigating or aggravating factors not mentioned here. Its hands are not tied.

In the present case, the deceased was an intruder. He invited his own death by following his ex-wife into her new marriage. He was taking an unjustifiable risk. What he did was callous and inconsiderate. It was disrespectful of the Convict's marriage. He even went there armed with a burglar bar which was used against himself. The deceased should be deemed to have started the fight.

The actions of the deceased person are not enough to exonerate the Convict for bringing death to the deceased. The issue of self-defence does not come in and it was not pleaded. The Convict admitted that it was unlawful to hit the deceased with a burglar bar. In his caution statement he does not say that he wrestled the iron bar from the deceased. He hit the deceased once and deceased fell down and he hit him a second time and deceased fell down a second time and he started crying in pain. Convict went to inform the uncle of his wife who came at the crime scene. Later convict went to police to explain what he had done. He later heard that deceased had died at the house of Rosemary.

Convict is a first offender. He pleaded guilty to the offence of manslaughter. He deserves leniency of up to one third of the sentence to be meted (**Rep v Kachingwe [1997] 2 MLR 111**). What he did was not out of the ordinary in attacking somebody who was flirting with his wife. He was arrested on 14th September, 2006. He handed himself to the police. Courts should pass sentences in accordance with the circumstances of the offender and the offence. Under section 19 (3) of the Constitution courts are enjoined to pass sentences that are not inhuman, cruel and degrading. The unreasonably long delay in prosecuting the case is a violation of the convict's right to fair trial as guaranteed by section 42(2)(f) (i) of

the Constitution and Article 7 (1) of the African Charter of Human and Peoples' rights.

It is usual to extend leniency to a convict who demonstrates remorse and sincerely regrets his actions by admitting his wrong doing (**Rep v A/Sup Phillip Eneya and others Criminal Case No. 53 of 2000**). The convict was cooperative with the police. He handed himself over to the police. He stayed in custody at Zomba Maximum prison for 2 years and 8 months before he was granted bail. For about 9 years the prosecution failed to take him to court and he has proved to be a good citizen as there is no report of him coming into conflict with the law. To disturb the pattern of his established life today for an offence that happened in 2006 would be very inhuman and inconsiderate, especially in the light of Constitutional violation of convict's human right by the State and that the deceased provoked the fight. For this reason, the period he suffered in custody saves as sufficient punishment. He should be released immediately unless to be held for other reasons.

Pronounced in open court this 19th day of June, 2018 at Liwonde



M L Karriwaribe
JUDGE