IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL DIVISION

HOMICIDE CAUSE NO. 127 OF 2011

THE REPUBLIC

V

KENNEDY SALIVASIO

KUNAKA KANTIRA PHILLIP BALIGA

CORAM: THE HON. JUSTICE MR S.A. KALEMBERA

Miss Mapemba, Senior State Advocate, of Counsel for the State

Mr Chakhwantha, Senior Legal Aid Advocate, of Counsel for the Accused

Mr Phiri, Official Interpreter

Mrs Chiume, Recording Officer

JUDGMENT

Kalembera J

This matter was heard by my learned brother Justice Manyungwa (deceased), may his soul rest in peace. I have taken over the matter after his demise, for purposes of writing and delivering this judgment.

The accused persons were jointly charged with murder contrary to section 209 of the Penal Code. The particulars of the offence alleged that Kennedy Salivasio and Kanaka Kantira on or about the 18th day of October 2010, at Lingawa Village, T/A Kasisi in Chikwawa District in the Republic of Malawi with malice aforethought caused the death of Obert Mulelemba. They pleaded not guilty to the charge. To prove their case, the State paraded five witnesses. The accused persons elected to remain silent.

PW I was Emily Goya, aged 16 years at the time, of Ling'awa Village, T/A Kasisi, Chikwawa. It was her testimony that in October 2010 on her way to the garden she found a dead person lying in the middle of the road. She had left her house around 5:00 am. There was something white in the mouth and the body was near a river. She retreated, and a certain man called Steven Kakodwa asked her to go back to the scene with him and when they arrived he discovered that the person was dead. When the police picked up the body she saw blood oozing from the nose. She didn't know the deceased. She knows the accused persons as they live in the same village. She didn't know who killed the deceased person.

She was not cross-examined.

PW II was Ellena Josiah, aged 22 years old at the time. She knew the second accused person, Mr Bariga, because last year in October 2010 he had been chasing a certain person. He was chasing a person they were drinking beer with at Mitekete. She had been drinking beer with her friend Ellesi (Alice) and later a Mr Limited joined them, then the deceased joined them. Later she left with Mr Limited and on their return they found Ellesi with a bump on her head and they were told that the deceased had hit her with a chair. The deceased and her apologized to Ellesi. The situation calmed down. Later the second accused, brother to Ellesi, came to the scene and said "Iwe ungandimenyere mlongo wanga ndi mpando, iwe ndine tithana." Then he started assaulting the deceased and the deceased started running away. He abandoned his bicycle. The second accused started chasing him

and assaulting him. The deceased fell down and then started running away. The deceased never responded to the assaults.

They decided to leave the bicycle with the village headman. They informed the village headman that the owner of the bicycle was being chased by the second accused person. The next day she heard that the deceased person's body had been found at Mitekete. She went to the mortuary and discovered that the deceased was the boy who was being chased by the second accused person.

In cross-examination she informed the court that she saw the second accused person assaulting the deceased. She saw the second accused chasing the deceased and the second accused never came back. The second accused person handed himself in.

PW III was Alice Khumbanyiwa, aged 27 years old, of Ling'awa Village, T/A Kasisi, Chikwawa. It was her testimony that she knew the accused persons. In most respects her testimony corroborates that of PW II since they had been drinking together. She further told the court that the deceased took a chair and a plastic pail and accidentally hit her with the chair on the forehead. The issue was resolved as the strange man (deceased) apologized. They continued chatting. Later, she just saw her uncle, Bariga, coming on the scene and began assaulting the boy. The boy began running away. Bariga began chasing him, and the deceased ran away leaving his bicycle behind. The following day on her return from the garden she heard that the person who had been chased by Bariga had been killed. She told the police what had happened the previous day.

In cross-examination she reiterated that she saw her uncle assault the deceased. That she was surprised when her uncle came and just started assaulting the deceased.

PW IV was D/Sub-Inspector Jere of Chikwawa Police Station. He testified that he knew the accused persons. On 19th October 2010, around 5:30 hrs he received information from Village Headman Ling'awa who came to the police station, that girls found a dead body within the village. At the scene they found the deceased lying beside the path leading to the gardens. After investigations they arrested PW II and PWIII. They took the ladies to the mortuary and they positively identified the deceased as the owner of the bicycle that had been left with the Village

Headman. They also told the police that the second accused person, Bariga, is the one who assaulted and chased the deceased. The second accused was at large, but on the night of 21st October 2010, he surrendered himself to the police. When the 2nd accused was questioned he mentioned that the 1st accused person joined in the chase and struck the deceased with a stone on the head. The 1st accused denied killing the deceased but stated that he had seen the 2nd accused chasing the deceased.

In cross-examination he stated that PW II and PW III had told him that there was a quarrel. That the 1st accused was arrested because he was mentioned by the 2nd accused person. The deceased according to his observation was not hit on the head.

PW V was Dr Precious Mphatso Champiti. He told the court that he was currently working at Mchinji District Health Office but previously was working at Chikwawa District Health Office responsible for clinical facilities. He admitted to have authored a postmortem report on a postmortem he conducted around October 2010. He concluded that the deceased had died probably from extensive external force particularly in the abdomen, it had to be a very strong blunt object not sharp like a knife but a rock or stick or bring hit by a car. These were possible causes of such trauma according to him. That the deceased had died due to extensive internal bleeding which was caused by external force which had caused him open his bowels.

In cross-examination he reiterated that cause of death was due to excessive internal bleeding (injury) because of an external force to the stomach.

After this witness the State closed its case. As earlier observed the accused persons exercised their constitutional right to remain silent.

This being a criminal case the burden of proving the guilt of the accused person lies with the State or prosecution –section 187(1) of the Criminal Procedure and Evidence Code (Cap 8:01) of the Laws of Malawi. It has been held that for the prosecution to discharge its burden it must prove the elements of the offence beyond reasonable doubt. There is no burden laid on the accused person to prove his/her innocence except in exceptional circumstances. In the famous and commonly cited case of **Woolmington –v- DPP** (1935) AC 462 at pp 487 Viscount Sankey, L had this to say:

"But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence.

Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception.....No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the Common Law of England and no attempt to whittle it down can be entertained.....It is not the Law of England to say as was said in the summing up in the present case: 'if the Crown satisfy you that this woman died at the prisoner's hands then he has to show that there are circumstances to be found in the evidence which has been given from the witness-box in this case which alleviate the crime so that it is only manslaughter or which excuse the homicide altogether by showing that it was a pure accident...."

In the case of **Miller –v- Ministry of Pensions** (1947) 2 ALL ER 372 at 373 Denning, J buttressed the point as regards the burden of proof required when he stated as follows:

"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable' the case is proved beyond reasonable doubt, but nothing short of that will suffice."

This statement by Denning, J was approved by Smith, Ag. J. in the case of **Rep –v- Banda** (1968-70) ALR Mal. 96 at p. 98.

It is therefore the duty of the State or prosecution to prove each and every element of the offence of murder. As has already been stated herein, the accused persons are charged with murder contrary to section 209 of the Penal Code which provides as follows:

"Any person who with malice aforethought causes the death of another person by an unlawful act or omission shall be guilty of murder."

For the accused persons to be found guilty of murder therefore, the prosecution must establish or prove through evidence, that the accused persons by an unlawful act or omission, caused the death of the deceased person; and that they did so with malice aforethought. As regards proof of availability of malice aforethought, section 212 of the Penal Code gives the following guidelines:

"Malice aforethought shall be deemed to be established by evidence proving any 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) ....."

In order for the state to prove its case against the accused persons, it must therefore be established that the accused persons had the requisite intention to cause the death of the deceased or to do him grievous harm. This can be established by direct or indirect evidence (circumstantial evidence). Most often times it is difficult to prove a charge through direct evidence, and the State most often times will rely on circumstantial evidence. In the case of **R –v- Taylor** (1928) 21 Cr. App. R 20 Hewart, C.J had this to say:

"Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."

In the matter at hand though, there is both direct and circumstantial evidence. There is evidence of witnesses who were present at the scene. There is direct evidence that the 2nd accused person assaulted the deceased and continued doing so while chasing him. The deceased never fought back, but the 2nd accused continued chasing him and assaulting him, even when he was running for dear life. The 2nd accused never came back to the drinking place after assaulting and chasing the deceased. The 2nd accused was therefore last seen assaulting and chasing the deceased person. In other words, PW II and PW III last saw the deceased being

assaulted and chased by the 2nd accused person. In the case of **Nyamizinga v Republic [1971-72] ALR Mal 258** held that burden of proving facts which justify drawing of an inference of guilt from circumstantial evidence to the exclusion of any other reasonable explanation is always on the prosecution and never shifts to the accused person.

The **Nyamizinga case** relied on the case of Dickson v R (1961-63) ALR Mal 252 at p. 260 where Cram J:

"....Where the evidence is circumstantial, the accepted and logical approach is by way of elimination, that is by negating all possible hypotheses of innocence,...Where the evidence is circumstantial, and if all the facts relied on by the prosecution are capable of innocent explanation, a mere allegation of separate facts all of which are inconclusive in that they are as consistent with innocence as with guilt, has no probative force. In order to justify from circumstantial evidence an inference of guilt the facts must be incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts which justify the drawing of these inferences from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused."

The evidence linking the 2nd accused person to the assault on the deceased, and continued assault on the deceased while chasing him has remained intact despite cross-examination. It is not in dispute that the 2nd accused assaulted the deceased in the presence of PW II and PW III. And he continued assaulting him while chasing him. In his caution statement the 2nd accused alleges that the 1st accused joined him in chasing the deceased and that it was him who hit the deceased with a stone in the head and possibly caused the death of the deceased. The testimony of PW V, the Doctor who conducted a postmortem on the deceased was clear that the deceased had no injury on his head. It cannot therefore be true that the 1st accused hit the deceased with a stone on his head. It was the 2nd accused who assaulted the deceased and continued so to assault the deceased despite the deceased not fighting back and running away.

On the evidence before this court the conduct of the 2nd accused person is not synonymous with innocence. He was the last person seen assaulting and chasing the deceased. Afterwards, he remained at large until the day he surrendered himself to the police. Why was he at large after the assault on the deceased and after the deceased's body had been discovered? How did he know that the deceased had died and that it was the 1st accused who had killed him? The only plausible explanation and conclusion is that the 2nd accused person's assault on the deceased

caused the death of the deceased. The 2nd accused person for no apparent reason was the aggressor and he is the one who assaulted the deceased leading to his death. He desperately tried to implicate the 1st accused in the death of the deceased. The 2nd accused ought to have foreseen or anticipated the consequences of his assault on the deceased. I therefore find that the 2nd accused person, with malice aforethought, caused the death of the deceased, Obert Mulelemba, by an ulawful act. The prosecution has proved the charge against the 2nd accused beyond reasonable doubt.

As regards the 1st accused person, his only link to the charge is that the 2nd accused person mentioned him to the police, of which the 1st accused denied the allegation made by his co-accused.

In the case of **Rep v Chizumila and Others [1994] MLR 288 at p. 293,** Mwaungulu J (as he then was) had this to say:

"Of course each accused person in his confession statement said that he had committed the offence jointly with the others. In law, however, a confession statement is only admissible against its maker. A statement in the confession statement implicating another is not admissible against that other unless the other adopts it. This is the position at common law. It now has statutory force under section 176 (2) of the Criminal Procedure & Evidence Code –Rep v Nalivata and others (1971-72) 6 ALR (Mal) 101, 103, per Skinner, CJJ. If a confession statement is worth anything at all, therefore, it is only to the extent that it implicates the maker."

And the said section 176 (2) of the Criminal Procedure and Evidence Code provides as follows:

"No confession made by any person shall be admissible as evidence against any other person except to such extent as that other person may adopt it as his own."

Thus, it would be wrong for any court of law, to convict someone on the confession evidence of a co-accused. The 1st accused person cannot therefore be convicted on the basis of the confession statement of the 2nd accused without him adopting the same. I therefore find that the State has failed to prove the charge against the 1st accused beyond reasonable doubt.

All in all, I am satisfied that on the evidence before me, the State has failed to prove beyond the required standard of proof, proof beyond reasonable doubt, the charge against the 1st accused person. Consequently I acquit the 1st accused, Kennedy Salivasio, forthwith. He must be set at liberty unless being held for other lawful reasons. As regards the 2nd accused person, it is the court's finding that the prosecution has proved beyond reasonable doubt that the 2nd accused person by an unlawful act, the assault on the deceased, caused the death of the deceased person, Obert Mulelemba. I therefore find the 2nd accused person, Kunaka Kantira Phillip Baliga, guilty as charged, and I hereby convict him forthwith.

PRONOUNCED in open court this 30th day of July 2018, at the Principal Registry, Criminal Division, sitting at Chikwawa.

S.A. Kalembera

JUDGE

SENTENCE

The convict, Kunaka Kantira Phillip Baliga, was on the 30th day of July 2018 convicted by this court of murder contrary to section 209 of the Penal Code. The particulars of the offence alleged that Kennedy Salivasio and Kanaka Kantira on or about the 18th day of October 2010, at Lingawa Village, T/A Kasisi in Chikwawa District in the Republic of Malawi with malice aforethought caused the death of Obert Mulelemba. Kennedy Salivasio was acquitted and set at liberty. The convict herein having been convicted, this now is the sentence of the court.

I am grateful to both the State and the Defence for their elaborate submissions on sentence.

The main issue for the court's determination is what is the appropriate sentence for the convict herein.

The convict has been convicted under section 209 of the Penal Code which provides as follows:

"Any person who with malice aforethought causes the death of another person by an unlawful act or omission shall be guilty of murder."

And section 210 of the Penal Code (Amendment No. 1 of 2011) provides as follows:

"Any person convicted of murder shall be liable to be punished with death or with imprisonment for life."

Prior to this amendment the said section 210 of the Penal Code imposed a mandatory death sentence on any person convicted of murder. This amendment followed the cases of **Francis Kafantayeni & Others v Attorney General [2007] MLR 104**; and **Twoboy Jacob v Republic [2007]MLR 414.** In the **Kafantayeni Case** the High Court sitting as a Constitutional Court decided that imposition of mandatory death sentence is unconstitutional. And the Supreme Court of Appeal in the **Twoboy Case** agreed with the view taken by the Constitutional Court in the **Kafantayeni Case**. Thus, where a person is convicted of murder the court should still retain the discretion to impose the sentence of death or a lesser sentence. The amendment to section 210 fortified that.

This court therefore has the discretion to sentence the convict to either a death sentence or life imprisonment or any term of imprisonment. I am mindful that the sentence of the court must indeed fit the crime as well as the criminal. In the case of Rep v Shauti [1975-77] 8 MLR 69 at p.71, Jere, Ag. J. cited with authority the case of State v Kumalo (1973)(3) S.A 697, where at p. 698 the court had this to say:

"Punishment must fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances.....The last of these four elements of justice is sometimes overlooked."

In the matter at hand it is clear that the convict assaulted the deceased and continued doing so while chasing him. The deceased never fought back, but the convict continued chasing him and assaulting him, even when he was running for dear life. The convict never came back to the drinking place after assaulting and chasing the deceased. The convict was therefore last seen assaulting and chasing the deceased person. Both parties agree though that this convict is not a worst offender warranting the maximum sentence of death. I am mindful that the sentence to be imposed lies in the discretion of the court after considering, among others, the seriousness of the charge; the circumstances of the offence; and the

circumstances of the offender. Thus, the court must exercise its discretion judicially.

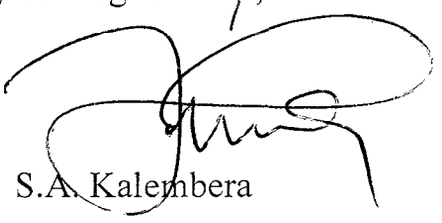
I have considered the aggravating and mitigating factors in this matter. It is clear that this is a very serious offence considering that a life was needlessly lost. The convict intervened in a matter which had already been resolved and inflicted his own punishment through assaulting the deceased. It was the evidence of PW V Dr Precious Mphatso Champiti that the deceased had died probably from extensive external force particularly in the abdomen, it had to be a very strong blunt object not sharp like a knife but a rock or stick or being hit by a car. Thus, the deceased had died due to extensive internal bleeding which was caused by external force which had caused him open his bowels. It therefore means the convict used a weapon in assaulting the deceased. However, I have also considered in mitigation that the convict is a first offender, he was 31 years old when he committed this offence. Meaning that he lived for 31 years as a good citizen and without any conflict with the law. Indeed, death sentence or a sentence of life imprisonment would not be appropriate in the circumstances.

In **Winston Ngulube and Michael Ngulube v R, MSCA Criminal Appeal No. 35 of 2006,** the sentence of death, for murder, was set aside and replaced with one of 20 years imprisonment with hard labor because the assault which led to death of the deceased was not done using any dangerous weapon, and the quarrel which led to the assault was influenced by intoxication, no clear motive for causing the deceased death was disclosed by the evidence, and there was no evidence that the appellants were persons of previous bad character. And in the case of **The State v Manje Silumbu, Lingison Msukwa, Lackson Chapewa and Lusekelo Chapewa, Criminal Case No. 39 of 2009 (HC)** Mzuzu District Registry, although the offence was committed in a very gruesome manner, a sentence of 30 years imprisonment with hard labor was imposed. The use of a dangerous weapon is thus an aggravating factor.

Having considered the aggravating and mitigating factors, I am of the considered view that indeed a sentence of a term of imprisonment, not life imprisonment, would be appropriate in the circumstances. I therefore consider a sentence of 20 years imprisonment with hard labour appropriate in the circumstances. Consequently I sentence the convict, Kunaka Kantira Phillip Baliga, to 20 years

imprisonment with hard labour with effect from 21st October 2010, the date of his arrest. The convict retains the right to appeal against both the conviction and sentence.

PRONOUNCED this 24th day of August 2014, at the Principal Registry, Criminal Division, Blantyre.



S.A. Kalembera

JUDGE