IN THE HIGH COUT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL DIVISION

HOMICIDE CASE NO. 51 OF 2017

THE REPUBLIC

VS

RICHARD MAYESO

JOHN CHINSEU

CMAGANIZO NYAKHUWA

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

Mr Salamba, Principal State Advocate, of Counsel for the State

Mrs Sibale, of Counsel for the Accused

Mrs Chanonga, Official Interpreter

Mrs Chiusiwa, Court Reporter

RULING

Kalembera J

This is an order on the objection raised by Defence Counsel against the tendering of the statement made by one Sidney Yotamu, by any other person other than the said Sidney Yotamu. This is also a an order of the court as to whether the accused persons herein have a case to answer or not.

It is the State's case that their remaining witness was supposed to be the said Sidney Yotamu who unfortunately resides in the Republic of South Africa. Initially, Mr Salamba, of Counsel for the State had informed the court that this witness was on his way and that he would be available the next day. The next day the court was further informed that they had failed to summon him due to some logistical problems. Further, that it is difficult to secure the attendance of the witness without some undue delay. It was further argued and submitted on behalf of the State that in the wake of the situation the State finds itself in the statement of this witness be tendered by either Counsel for the State or the investigator. The State relied on section 173 of the Criminal Procedure & Evidence Code. It is further the submission by the State that the said statement of Sidney Yotamu is corroborated by the evidence of PW IV, S/Inspector Samuel, O/C of Mathambi Police Unit.

The defence through Defence Counsel, Mrs Sibale, has strongly objected to the tendering of the said statement in the absence of Sidney Yotamu. It is the argument and submission by the Defence that the said statement is very crucial in this case and it is in the interests of justice and fair trial that the court must assess the credibility of the statement, the credibility and demeanor of the said Sidney Yotamu. Further that considering the assurances the State had given the court as to the availability of the witness, it was hard to believe that he was not in the country. Counsel referred the court to section 184 (a); (b) of the CP&EC which requires the presence of the witness who perceived the event or incident to give oral evidence in court. Hence, State Counsel or the investigator cannot tender the said statement. Thus, the defence insists that fair trial would require that the said Sidney Yotamu be cross-examined.

The main issues for determination are:

1. Whether the statement of Sidney Yotamu be admitted in evidence in his absence or not.
2. Whether the Accused have a case to answer or not.

I must state that the parties have not filed any skeleton arguments. Thus, the court has not had the benefit of any detailed legal arguments from either party. The

starting point though must be the Republic of Malawi Constitution. Section 42(2)(f)(iv) of the said Constitution provides as follows:

"s.42 (2) –Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right –

(f) as an accused person, to a fair trial, which shall include the right –

(iv) ***to adduce and challenge evidence****, and not to be a compellable witness against himself or herself." (emphasis added)*

Thus, in the matter at hand, the Accused persons have the Constitutional right to challenge evidence adduced by the prosecution. That is commonly done, ***inter alia***, through cross-examining the prosecution witnesses. Most often times a witness must be present in order that he be cross-examined.

The Defence has relied on section 184 of the CP&EC which provides as follows:

"s.184 –(1) Oral evidence must, in all cases whatever, be direct, that is to say –

(a) If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;
(b) If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it.
(c) ……"

Therefore, the correct procedure and the general rule is that a witness who had a statement recorded or made must be the one to testify. However there are exceptions under section 173 of the CP&EC where the statement of a witness who cannot be called due to his or her death; or who cannot be found; or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, is itself a relevant fact –when the statement gave the opinion of such person as to the existence of any public right or custom. Or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen.

However, for such statement to be admissible in the absence of the maker of such statement, it must comply with the provisions of section 175 of the CP&EC which provides as follows :

"s.175 –(1) In any criminal proceeding, a written statement by any person shall, is such of the conditions mentioned in subsection (2) as are applicable are satisfied, be admissible as evidence in the like extent as oral evidence to the like effect by that person.

(2) ***The said conditions are –***

(a) the statement purports to be signed by the person who made it;

(b) the statement contains a declaration by that person to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that, if it were tendered in evidence, he would be liable to prosecution if he willingly stated in it anything which he knows to be false or did not believe to be true;

(c) before the hearing at which the statement is tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings; and

(d) none of the other parties, within seven days from the service of the copy of the statement, serves a notice on the party so proposing objecting to the statement being tendered in evidence under this section:

Provided that the conditions mentioned in paragraphs (c) and (d) shall not apply if the parties agree before or during the hearing that the statement shall be so tendered. (emphasis added)

(3) Notwithstanding that a written statement made by any person may be admissible as evidence by virtue of this section –

(a) the party by whom or on whose behalf a copy of the statement was served may call that person to give evidence; and

(b) the court may, of its own motion or on the application, made before or at the hearing, of any party to the proceedings require that person to attend before the court to give evidence.

(4) So much of any statement as is admitted in evidence by virtue of this section shall, unless the court otherwise directs, be read allowed at the hearing.

(5) A document required by this section to be served on any person may be served –

(a) by delivering it to him or to his legal practitioner;

(b) by addressing it to him and leaving it at his usual or last known place of abode or place of business or, in a case where he has given an address for service, at that address;

(c) by sending it in a prepaid registered letter or by the recorded delivery service addressed to him at his usual or last known place of abode or place of business, or, in a case where he has given an address for service, at that address, or

(d) in the case of a body corporate by serving it in one of the manners prescribed for the service of a summons upon such body corporate by section 91.

(6) ……"

In the matter at hand, disclosures, which included the statement by one Sidney Yotamu, were filed with the court and served on the accused through their lawyers, the Legal Aid Bureau. The statement in issue was part of the disclosures. In a normal sequence of events the Accused would have been required or expected, through counsel, to comply with section 175 (2)(d) of the CP&EC, and serve, within seven days of being served, a notice indicating their objection to the statement being tendered. Unfortunately, it is only after the matter was adjourned on 3rd May 2019, after the court was informed that the said witness had been killed in the Republic of South Africa, that the State was directed to file documentation verifying the death of the said State witness.

I must state that it is unfortunate that we find ourselves in this situation. However, there is no dispute that the witness was indeed killed in the Republic of South Africa and buried in his home village. It is therefore impossible to expect this

witness to testify and be cross-examined. However, his statement as already indicated herein was part of the disclosures served on the Defence. I am therefore inclined to allow that the said statement be tendered as part of the prosecution's evidence.

As regards whether the accused persons have a case to answer, I adopt the approach by Chikopa J (as he then was) in the case of Rep v Harry Mkandawire and Another, Criminal Case No. 5 of 2010 (unreported)(HC-MZ) when he said:

"*The burden placed upon the State at this stage is not to prove its allegations beyond reasonable doubt, which is the standard placed on the State at the close of trial, but simply to establish grounds for presuming that our accused persons committed the offences they are answering. In R v Dzaipa Revision Case Number 6 of 1977 [unreported] Skinner CJ adopted the definition of 'case to answer' contained in the Practice Note issued by the Lord Chief Justice of England Lord Parker at [1962] 1 ALL ER 448 which runs as follows:*

'A submission that there is no case to answer may properly be made and upheld:

a. *when there has been no evidence to prove an essential element in the alleged offence; or*
b. *when the evidence adduced by the prosecutor has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict upon it ....;*

The decision should depend not on so much whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer"".

In the matter at hand, looking at the evidence before this court including the testimony of PW IV, Sub/Inspector Samuel and the statement of the deceased witness, it is clear that the deceased, Baton Molen Nyale, was brutally killed during the night of 4th-5th January 2017 and that the accused are alleged to have caused the death of the said deceased person. I am therefore satisfied that a ***prima facie*** case against the accused has been established requiring them to enter their defence. The accused persons therefore, have a case to answer. They have a constitutional right to remain silent, or testify in their defence.

All in all, the accused persons have a case to answer.

PRONOUNCED this 11th June, 2019, at the Principal Registry, Criminal Division, sitting at Mulanje.

S.A. Kalembera

JUDGE