



IN THE HIGH COURT OF MALAWI

MZUZU REGISTRY

CRIMINAL CASE NO. 92 OF 2018

THE STATE

VERSUS

HEWELLIE MULUNGU

CORAM: HON. JUSTICE T.R. LIGOWE

D. Shaibu of Counsel for the State

Chithope Mwale and C. Kolezi Phiri of Counsel for the accused

G. Msukwa, Official Interpreter

R. Luhanga, Court Reporter

JUDGMENT

Ligowe J

- 1 Hewelie Mulungu stands in this court charged with murder contrary to S. 209 of the Penal Code. It is alleged that he on or about 27th November 2016 at Kayanda village, T/A Mwenemisuku in Chitipa, caused the death of Symon Mulungu, with malice aforethought.
- 2 This court heard evidence from Manson Msukwa and Detective Sargent Chisi upon which I found him with a case to answer. The evidence is that Manson Msukwa found Symon Mulungu dead in the kitchen at his house. When death was reported to the Police on 14th September 2016, they went to the deceased person's house and found the body in a pool of blood. The post-mortem examination report indicates that death

was due to severe haemorrhage secondary to multiple cut wounds. The body had multiple cut wounds on the shoulder and head. While the Police were still investigating as to who could have caused the death, Hewellie Mulungu presented himself to Police on 13th October 2016, confessing that he had caused the death of the deceased. The deceased was his father.

3 Detective Sargent Chisi read and exhibited a caution statement in this court, recorded from the accused in which it is stated that he was admitted to Chitipa District Hospital for several months, and his father claimed responsibility for his illness as he wanted him sick. Hewellie Mulungu referred the matter to his relatives to help, but it yielded nothing. Eventually on 13th September 2016, he became so angry and went to his father's house around 2100 hours, went behind him with a stick and hit him on the head and he died. He ran away and did all he could to conceal it, until after the funeral. He felt so bothered with the death of his father that he could not contain it but surrender himself to Police. He states in the caution statement that even in his death, the father had been coming to him and his children at night.

4 His defence is that he did not cause the death of his father and he did not make the confession. He admits that he was sick in September 2016. He had a problem with his lungs and was also found anaemic. He was hospitalized at Chitipa District hospital for two weeks. He was staying at Namatuli village. He was called to Kayanda village by members of his family. The family suspected he had caused the death of his father because he had been ill and they wanted Village Headman Kayanda to help take him to Police to confess. The Village Headman agreed and he was taken to Kapoka Raod Block by the Community Policing Forum. He was thereafter taken to Chitipa Police Station where he met Detective Sargent Chisi. When asked about the case he refused but the police man forced him to confess. The confession that was exhibited was not read over to him at Police. He refused to sign it but the Detective assaulted him so as to sign.

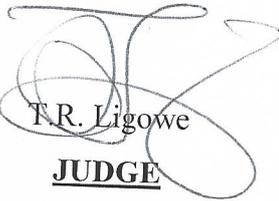
- 5 In cross examination, Counsel for the State went through the caution statement asking the accused to confirm if the facts are true. He confirmed that he comes from Kayanda village but he moved to Namatuli village after he got married. He has four children. He was taken ill between 2014 and 2016 on several occasions and hospitalized at Chitipa District Hospital, referred to Mzuzu Central Hospital and then back to Chitipa District Hospital. But he was not worried when he got no cure from the hospitals. Symon Mulungu was his father and was living with his wife (Hewellie's step mother) who left him at some point. He did not give the exhibited statement to the investigator. He thinks the statement was recorded with his relatives.
- 6 Here is an issue of a retracted confession. According to the Supreme Court of Appeal in *Kara v. Rep* [2002 -2003] MLR 122, and *Bokhobokho and another v. Rep*, MSCA Criminal Appeal No. 10 of 2000 (unreported), the law relating to the reception and treatment of confessions in criminal trials is as provided in section 176 (1) and (2) and (3) of Criminal Procedure and Evidence Code as interpreted and applied by such cases as *Rep v. Nalivata and others* 1971-72 ALR Mal. 101 and *Chiphaka v. Rep* 1971-72 ALR Mal. 214.
- 7 In *Rep v. Nalivata* 1971-72 ALR Mal. 101, the High Court held that after the passing of S. 176 of the Criminal Procedure and Evidence Code, a retracted confession is admissible in evidence against an accused person but the court must be satisfied beyond reasonable doubt that its contents are materially true before it takes them into account when considering the question of the guilt of the accused. And for this the court has to see if there are pointers in the evidence confirming the admissions of guilt in the confession. The court cited *R v. Sykes* (1913) 8 Cr. App. R. 233, where the Court of Criminal Appeal of England said:-
- “... [A]nd the first question you ask when you are examining the confession of a man is, is there anything outside it to show it was true? Is it corroborated? Are the statements made in it of fact so far as we test them true? Was the prisoner a man who had the opportunity of committing the murder? Is his confession possible? Is

it consistent with other facts which have been ascertained and which have been, as in this case, proved before us?”

- 8 In *Chiphaka v. Rep* 1971-72 ALR Mal. 214 the majority decision of the Supreme Court of Appeal confirmed the High Court’s decision in *Rep v. Nalivata* (op cit). Chatsika J added at page 219:-
- “At common law, proof of physical violence or inducement would be a ground to exclude a confession altogether. In Malawi, after the enactment of S. 176 of the Criminal Procedure and Evidence Code, proof of threats, ill-treatment, inducement and the like, go not to admissibility but to weight, and if any allegation of any of these factors is established, it is difficult to conceive of any reasonable court accepting a confession to be materially true in the absence of pointers of such cogency as virtually to amount to corroboration as that term is understood in law. Conversely, of course, and at the other extreme, if the court is satisfied that a confession has been spontaneously volunteered – free and voluntary in the language of the old law – the pointers would not require to be anything like as strong.”
- 9 In *Maonga v. Republic* [2002-2003] MLR 175 the Supreme Court of Appeal dismissed the appellants appeal against his conviction because his caution statement although retracted was sufficiently detailed and elaborate and there was external evidence confirming some details stated in his confession statement.
- 10 It appears to me we need to look for corroborative evidence in the present case because the accused person’s claims that he was forced to confess and were not discredited by State Counsel’s cross examination. According to *Chakana v Republic* 12 MLR 219 at 222, corroborative evidence may be direct or circumstantial but has to be independent testimony confirming the evidence that the offence was committed and committed by the accused person.
- 11 Four witnesses gave evidence in this case. The fourth is Paul Chakhala, a Clinical Officer at Chitipa District Hospital who gave interpretation of the records in the

accused person's health passbook regarding his illness. It was mainly to do with the extent of his anaemia and whether it could not have caused the accused mental illness, so as to explain the confession. The record closest to the date of death and the date of arrest is on 9th September 2016 in the passbook. It shows that the accused person's haemoglobin level was 6.6 g/dl. Paul Chakhala described this as moderate anaemia. He further said that when anaemia reaches very critical levels it causes other systems in the body to shut down one after the other and the last is the brain. The patient has some sort of mental confusion before they die. The records however do not show that the accused was ever treated for psychiatric problems

- 12 I have carefully considered the evidence given by the four witnesses and I find nothing in their testimony corroborating the confession statement. It is therefore not safe to convict the accused merely on the confession statement. He is acquitted.
- 13 Delivered in open court this 15th day of April 2019.


T.R. Ligowe
JUDGE

