

IN THE HIGH COURT OF MALAWI
LILONGWE REGISTRY
SITTING AT MCHINJI

CRIMINAL CASE NUMBER 90 OF 2018

THE REPUBLIC

-VS-

DOUGLAS MWALE AND 3 OTHERS

CORAM: HON. JUSTICE ESME J. CHOMBO

Dziko Malunda/Gamadzi, for the State

Mwenefumbo/Masiye, Counsel for the Accused Persons

Mbewe, Court Reporter

Ng'ambi, Court Interpreter

JUDGMENT

BACK GROUND

When proceedings started in court, for purposes of legal representation, the 1st and 4th accused persons were represented by one counsel and 2nd and 3rd accused persons were also represented by another counsel. However, the court maintained the order in which the four accused persons, Douglas Mwale, Sofia Jere, Pontino Folosani and Alick Kambani, were first charged and first presented in court. The accused persons will therefore hereinafter be referred to as 1st, 2nd, 3rd and 4th accused respectively and not in the order in which their evidence in defence was presented in court.

The four accused persons were charged with four counts under the Penal Code:

1. Murder contrary to section 209 of the Penal Code. The particulars aver that the four accused persons, on or about the 9th August 2015 at Manja Village T/A Chikweo in Mchinji District caused the death of one Prescott Pepuzani with malice aforethought.
2. Conspiracy to Harm a Person with a Disability, contrary to section 224B of the Penal Code. The particulars of the offence are that the four accused persons between the months of July and August 2015 at Pazani Village in the District of Mchinji, with malice aforethought and intent to cause harm and for an unlawful purpose, conspired to kill Prescott Pepuzani, being a person with albinism.
3. Selling of Human Tissue, contrary to section 224A(c)(i) of the Penal Code. The particulars of the offence are that the four accused persons in the month of August 2015 at Pazani Village in the District of Mchinji, unlawfully and without justifiable reasons, were offering for sale human tissue.
4. Possession of Human Tissue, contrary to section 224A(b)(i) of the Penal Code. The particulars of the offence are that the four accused persons during the month of August 2015, at the garden of the 1st accused, at Pazani Village in the district of Mchinji unlawfully and without justifiable reasons, had in their possession, human tissue

THE ISSUES

1. Whether the four accused persons, with malice aforethought caused the death of Prescott Pepuzani
2. Whether the four accused persons, with malice aforethought and ill intent conspired to kill Prescott Pepuzani being a person with albinism
3. Whether the four accused persons were found in possession of and offering for sell human tissue.

THE LAW AND ARGUENDO

1. Murder, according to section 209 of the Penal Code is defined 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

Section 212 goes further to provide instances where *malice aforethought* has been established from the circumstances thereof as including the following:

Malice aforethought shall be deemed to be established by evidence proving any one or more 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) *An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony;*

Evidence was submitted in court that between 11th and 16th August 2015 PW2 and PW3 were looking for Mr. Prescott Pepuzani, the deceased, a single man with albinism, of Mphamba Village in Mchinji District. PW3 said that when he heard from PW2 that the deceased, his cousin, could not be found, he immediately feared for the deceased's life; the deceased being a person with albinism. PW3 joined in the search of the deceased. When efforts to trace him proved futile, it was decided that the door to the house of the deceased should be broken to gain access into the house. Inside the house was sterile nsima and dried up vegetables, a sign that the food had been cooked and left there for a number of days. The matter was immediately reported to the local chief and to police. Police immediately instituted investigations.

What prompted the search for the deceased was that PW2, a friend of the deceased, wanted to get back his phone from the deceased. He could not find the deceased after a three day search. Then he went to the deceased's village to inquire about him, but he was told that the deceased had not been to the village for some time. This is when heard PW3 heard about missing man and PW3 decided to join in the search for the deceased, his relative. PW3 was not the only one who joined in the search; other concerned relatives conducted the search for the deceased. The search party forced open the door of the house of the deceased only to find sterile food.

PW3 then went further, so he stated in his evidence, to ask for the deceased from his neighbor. This neighbor then informed him that on or about 5th August 2015, she heard the 2nd accused telling the deceased that he should meet her at Matutu Market to introduce him to a prospective wife on 10th August 2015. However, this particular witness was one of those witnesses that the State said could not be traced because she had since moved to Mozambique. When the concerned people could not find the deceased they reported the matter to Police.

On 30th August 2015, after investigations were instituted, Detective Sub-inspector Mgala of Mchinji police received a report from PW3 that dogs had dug up human tissue in the garden of the 1st accused. The scene was visited and the human tissue recovered. PW3 said he recognized the limb as that of his cousin, the deceased, a man with albinism. The 1st accused was arrested and when questioned on the matter he admitted that that was his garden but denied taking part in the killing of the deceased and burying the body parts of the deceased in his garden at the *dhimba*. 1st accused was released on bail.

In December 2015, after the arrest of the 2nd accused person, the 1st accused was again arrested and questioned on the matter. In his evidence at Police the 1st accused mentioned that he was with 3rd accused when the heinous attack on the deceased was effected. The 1st accused then revealed that 4th accused was to source the market for the sale of the human tissues, after a few parts had already been sold.

When asked how the deceased was killed and how the body of the deceased was disposed off, 1st accused is said to have revealed that he used a hoe handle and iron bar to kill the deceased and transport the body with his bicycle. The police then impounded the bicycle and found the hoe handle and the iron bar in the house of the 1st accused. Efforts to recover the full body were fruitless.

Fresh investigations were instituted and in December 2015. On or around 24th December 2015 Police arrested the 2nd accused. The 2nd accused and some of her relatives were arrested and taken to Mchinji Police where, upon being questioned about the matter, revealed that some time before 10th August 2015 she was approached by the 1st accused, her cousin. The 1st accused told her that they could make money from the bones of the deceased and that that would boost her business. The 2nd accused was only to facilitate the luring of the deceased to the house of the 1st accused. It was agreed that she should do that on 10th August 2015. On the agreed date and time the 2nd accused led the deceased to the house of the 1st accused where she found the 1st and 3rd accused persons together. She left the deceased there and that the deceased was killed by the 1st and 3rd accused persons. The said revelations were made during the same night that the 2nd accused was arrested. It was her evidence that Police told her that she would be a prosecution witness. Then the 2nd accused led the police to the house of the 1st and 3rd accused persons. The two accused persons were arrested the same night and questioned on the matter. The 2nd accused only admitted to luring the deceased to the house of the 1st accused where the deceased was killed by the 1st and 3rd accused persons and that she did not take part in his killing.

The defence argued that the Prosecution failed to prove that there was a death since there was no body of the deceased to prove the same. According to the defence, death must be proved by production of a body because an amputation may not always cause death. PW1 admitted that he was never presented with the body of the deceased.

Evidence on record was that the deceased was not found in his house since 10th August 2015 and up to the time of hearing the case in 2018 the deceased nor his body cannot be found. When people broke into his house they found that the food had gone stale. This was a sign that the deceased had not been home for some time. The 2nd accused had confessed to have lured the deceased to the house of the 1st accused where it is purported he was murdered. When the charge was first read out and explained to the 2nd accused she did actually state in open court that she was involved in the murder of the deceased. However, later, on the advice of her counsel, she changed her plea to one of not guilty.

Evidence of the forensic officer, PW1, was that he was presented with a limb of an unknown person. He carried out tests and was able to establish that this was a limb of a person with albinism. According to his evidence the pigmentation of the limb was of a lighter colour but not

that of a Caucasian which is brownish pink. It was his evidence that the skin of a person with albinism lacks melanin and so the colour is much lighter than and different from that of a Caucasian or black person. PW1 explained that all that he had was the limb and not the body so he could not testify as to the cause and time of death. But it was his evidence that death of a person does result from excessive loss of blood due to exposure of blood vessels. An amputation of a limb, and in case of the deceased, his hand was severed, thus leaving the blood vessels exposed and, unless the deceased was immediately treated, the deceased must have died from hypodermic. These circumstances led PW1 to conclude that though there was no physical body found death must have occurred as a result of excess loss of blood in this way.

The said limb was still identifiable as that of a person with albinism because only slight decomposition had taken place. In his evidence PW1 stated that once buried decomposition of the human body is slower than when the same is not buried but exposed to the natural elements of wind and sun.

In the course of searching for the deceased but before Police came to the village, dogs were found digging up a hand in the garden of the 1st accused. PW3 stated that the hand was not decomposed and he managed to identify it as that of a person with albinism and being that of the deceased. The matter was again reported to Police

In court, although she had admitted being involved with the death of the deceased, the 2nd accused retracted the statement that she made at police. A retracted statement ordinarily is not admissible in evidence. However, section 176 (1)(3) provide that:

(1) Evidence of a confession by the accused shall, if otherwise relevant and admissible by the court notwithstanding any objection to such admission upon any one or more of the following grounds (however expressed) that such confession was not made by the accused or, if made by him, was not freely and voluntarily made and without his having been unduly influenced thereto. (underling supplied)

(2) ,,

(3) Evidence of a confession admitted under subsection (1) may be taken into account by a court, or jury, as the case may be, if such court or jury is satisfied beyond reasonable doubt that the confession was made by the accused and that its contents are materially true. If it is not so satisfied, the court or the jury shall give no weight whatsoever to such evidence. It shall be the duty of the judge in summing up the case specifically to direct the jury as to the weight to be given to any such confession. (underlining supplied)

Although the 2nd accused had retracted her statement when giving her evidence in defence, in court when first asked about the matter she actually admitted being involved in the matter but not killing the deceased. This she admitted after the court took time to explain the elements of the offence of murder. Understandably, if she did not take part in the murder of the deceased, the 2nd accused was at liberty to deny it. According to her confession statement, her part was only to lure the deceased with the promise of a wife and take him to the house of the 1st accused who would then know what to do with the deceased.

In her statement the 2nd accused said she sells *nsima* at various 'chiimilire' markets (these are like mobile markets) including Matutu. She also said that the 1st accused is her cousin and that on 10th August 2015 he went to her house. She had in her statement that the deceased was a man of albinism who used to sell newspapers and tobacco at Kalonga Trading Center but he came from Mpamba Village. The deceased was not a stranger to her and they used to greet each other, the 2nd accused knew he was a single man. The 2nd accused confirmed these as facts that she had submitted at Police, the same facts that she admitted here in court under oath; and the same facts too that are in the said retracted statement. The evidence of the 2nd accused corroborates her statements made in court which she now retracts so much yet one would not separate the retracted statement from her evidence in court.

When considering whether or not a retracted statement is admissible the courts also take into account all other evidence tendered in court. If such evidence corroborates the statement so retracted then the court must find that the statement is materially true and admissible in court. In this case we have the statement made by the accused herself that the 1st accused went to her house on 5th August 2015. PW2 testified that the 2nd accused was heard telling the deceased that she must meet him at Matutu Market on a particular date to be introduced to a woman to marry; which evidence has not been refuted. I find that the said statement to be materially true and find that it was made by the 2nd accused and therefore admissible. The test of a retracted statement that is found to be materially true and admission in court were outline in the case of *R V SYKES* (1938 8CR. App. R 233 (236-237))

... [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 on it of facts so far as we can 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? (underlining supplied)

In *Useni and Others v R* (1964-66) the court held that where a confession statement is corroborated it is presumed to be true and admissible in court. Where such statement is later retracted it is left to the court to disbelieve the retraction.

In her evidence in court she admitted that the 1st accused is her cousin that he came to her house on 5th August 2015. It was her evidence that the 1st accused came to ask her to go check a woman that he wanted to marry. In her evidence she said that she did not know the name of the woman his cousin wanted to marry except the name of her child. When pressed about the name she said the woman, whom she said she only knew as *make* (the mother of) Maggie and stay together in Chiti village and they worship in the same church. The said woman was pregnant at the time the four accused persons were transferred to Maula prison and now she has a baby boy. The 2nd accused denies conniving with and taking the deceased to the house of the 1st accused for slaughter on 10th August 2015.

The 1st accused stated that he is Chief James II and that his sister, one Rahabe Maganga, has been plotting something evil against him. According to his brother in-law, one Sandifolo from

Mnawa Village, his sister felt that the 1st accused wanted to take over his late father's chieftaincy when she was the one entitled to replace their father as chief. Sometime in June 2015 Rahabe reported to police that the 1st accused was selling body parts and police searched his house but did not find anything relating to her allegation. At the funeral service of his father he told his relatives that he wanted to handover the chieftaincy to another so that the evil plot against him would stop. Several meetings were held to try and resolve the issue but his embittered sister never attended the Chiefs' meetings.

On 29th August 2015 as he was coming from a meeting at Sikaliyoti Village his father told him to go to his *dhimba* where human body parts had been found. He went to his *dhimba* and found many people gathered. Chief Pazani informed the 1st accused that one Mr. Sakala told him that he found his dog eating the human body part. Police came and took the human body part and arrested the accused. Accused was recorded statements and released on bail after two days. Accused used to report on bail but on 23rd December 2015 he was arrested and on 27th December 2015 he was recorded a caution statement. He found the 2nd accused and her son Chikondi and some other people at Mchinji Police. After his arrest Chikondi and the other people were released except the 2nd accused. He was informed that he was arrested as a suspect for the murder of the deceased. He denied the allegation but CID M'gala and other police officers tortured him by spraying teargas on him and beating him with belts and a panga knife. They told him that the 2nd accused had informed the Police that he was the one who killed the deceased. He disowned the statement that was tendered in court; he admitted to have signed the same under duress. The 1st accused denied conniving with the 2nd accused to kill and killing the deceased together with the 3rd accused.

The court would like to remind itself that a confession made by one accused person does not bind another accused person unless the said confession is adopted by the second accused person in the same case. The statement of the 2nd accused person cannot there bind the other three accused persons.

This court would like to first deal with the retracted statements of the 1st 3rd and 4th accused persons. As observed by defence counsel, the said statement of the 1st accused has a lot of detailed information about the 1st accused. The same was also signed by the accused, although 1st accused now claims that he was forced to sign the same.

The defence submitted an article from the University Of Miami School Of Law Institutional Repository entitled *You Can't Handle the Truth: A Primer on False Confession*. This article highlights the dangers of what is called '*false confessions*' which are confessions made by accuses persons as a result of power imbalance which, over the years have seen hundreds of innocent people being imprisoned and the guilty going scot free. Under different types of pressure an accused person admits certain facts that may not necessarily be true. This is to avoid further psychological manipulation and coercion or physical brutal techniques used by those in power to extract a confession; thus the term – false confession. The article went on to state that '*[C]onfessions are desired because they are very powerful evidence of guilt. Having a confession makes a successful prosecution easier and punishment more severe. Not only does the confession sway jurors, it sways prosecutors, defence lawyers, investigators, forensic*

scientists, judges and the general public. It is precisely for this very reason that the courts, not only in Malawi, but in many other countries require that where an accused person claims duress or undue influence in recording a confession statement that the courts should look for corroborative evidence outside the said confession. Section 176(3) of the Criminal Procedure and Evidence Code requires, among other things, *that the jury or court must be satisfied beyond reasonable doubt that the confession was made by the accused and that its contents are materially true*. After reflecting on these provisions the question before the court is whether or not the confession statement of the 1st accused could be put in the class of false confessions or whether it is materially true and having been made by the same 1st accused.

In his statement the 1st accused had said that he is a chief in his village, that both the 2nd and 3rd accused persons are his cousins that he went to the house of the 2nd accused on 10th August 2015. One would ask whether it was a coincidence that he went to the house of the 2nd accused on 10th August 2015, the same day that 2nd accused stated that 1st accused went to ask her to bring the deceased to his house. In his own words he went to ask the 2nd accused to check up a woman he wanted to marry. The accused also signed the confession statement but he claims it was under duress, being threatened with beatings and teargas. The garden in which the amputated limbs were found belongs to him and that it was Mr. Pazani who called him to inform him about the limbs being found in his dhimba garden. The 1st accused stated in court that the 2nd and 3rd accused are his cousins. The only contents of his statement that he seeks to refute are the issues of receiving the deceased in his house and brutally killing him. These contents of the said retracted confession were repeated in court by the same accused person almost word for word. The 1st accused had told court the police wrote the purported confession statement from what the 2nd accused had told the police. Surprisingly, what he told admitted in court as facts that he told police are no different from what he said in his confession statement. Having gone through these contents I find that the facts are materially true and find the retracted confession admissible in evidence.

The 1st accused called one witness who gave evidence about the wrangles of the chieftaincy. However, the same was not connected with the issue of the murder of the deceased and I do not attach any relevance to the matters in court.

There was the story of the 1st accused asking the 2nd accused to check on a woman that he wanted to marry at Chiti Village. Both him and the 2nd accused could not remember the name of the lady he wanted to propose to. Evidence of the 2nd accused was that the 1st accused married this woman; however the 1st accused said that he did not marry the woman because she was HIV positive. One tends to get the impression that this was a badly concocted story that just puts bad light on the two accused persons as having coming up with this as a cover up for their meeting on 5th August 2015. On this day, according to the evidence of the 2nd accused is when the two conspired to kill the deceased and 1st accused outlined what role the 2nd accused, neighbor to the deceased, would play in the criminal act.

Likewise the 3rd accused, Pontino Folosani, retracted the statement that he made at police as having been signed under force. The 3rd accused was arrested on the same night that 1st and 2nd accused were arrested. In his statement at police he told the investigators that on the appointed

day he was at the house of the 1st accused when the 2nd accused brought in the deceased. It was his evidence that it was the 1st accused who gave him a sign that they should kill the deceased. The 1st accused was armed with an iron bar and he was armed with a hoe handle. These weapons were recovered from the house of the 1st accused and tendered in court. In his confession statement he had admitted cutting off a limb from the dead body which he took to Zambia for sale and that he was robbed of the said limb. It was reported that he then solicited the 4th accused, Alick Kambani, to carry some body parts for sale and that the 4th accused agreed to look for customers in Zambia and the same was done.

The 3rd accused does not deny being arrested on the same night that the 1st accused was arrested on and that he is the one who led police to the house of the 4th accused. In his evidence he stated that the police asked him to name his friend and he named the 4th accused. He told the police what he does and the fact that the 1st and 2nd accused persons are his cousins. Apart from denying the facts of getting a limb to sell in Zambia and the same being stolen there are adequate grounds for believing that the confession statement was made by the accused and it is materially true. Again, I find most facts corroborated with what accused said in court.

The duty to prove a charge to its requisite standard in every criminal case lies on the prosecution at every point of the trial. The said standard of proof is one of proof beyond reasonable doubt. Proof beyond reasonable doubt does not mean proof beyond a shadow of doubt as the same would be humanly impossible to do. Any doubt that the court finds, in respect of an accused person must be exercised to the benefit of the accused and the court must acquit such accused person.

The 4th accused, Alick Kambani, gave evidence of being away in Zambia at the material time of the murder of the deceased having left his village on 4th June 2015. At first Prosecution sort to challenge the defence of alibi but finally decided not to do so. Section 193(A) provides for the defence notifying the prosecution about entering a defence of alibi. Failure to do so should have been grounds for throwing the defence of alibi out of the window. However, when prosecution decided not to challenge the failure to give notice of the alibi, the court must accept the evidence of the 4th accused that he was not in the country at the time of the murder of the deceased. The 4th accused called one witness. The witness gave evidence that on or around 29th August is the time that the wife of the 4th accused asked the witness to help her call her husband when their child was sick. This witness could not remember the number he called but it was his evidence that it was a Zambia number and he spoke with the 4th accused. It was alleged that when the 4th accused went to Zambia it was to look for market of human tissue in Zambia. However, in his own evidence the 4th accused left in June, long before the heinous crime was committed and returned after the commission of the crime. The 4th accused could not therefore have taken part in the murder of the deceased and must be acquitted on the charge of murder.

Section 209 of the Penal Code provides that:

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

The 1st and 2nd accused, by an unlawful act of assaulting the deceased, caused his death. The said assault was by done by the 1st accused using a steel weapon and the 2nd accused using a hoe handle; both deadly weapons. Assaulting a person is an act that can and does cause death, and in this case did cause the death of the deceased, though his body has, up to now, not been found. One can only concluding that by using such weapons the two accused had an intention to either kill or cause actual bodily or grievous harm to the deceased.

Section 212 of the Penal Code states that malice forethought is established when *there is an intention to cause death or to do grievous harm to any one, whether such person is the person actually killed or not. This could include knowledge that an act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is 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.*

The accused persons conspired that they would cause the death of the deceased. They planned to draw away the deceased, with full knowledge that the deceased is a person with albinism, from his place to the house of the 1st accused and had him brutally murdered. Section 224B (1)(a) of the Penal Code which provides that:

'Any person who, knowing another person to be a person with any type of disability, for the purpose whatsoever, conspires with a third person or causes or attempts to cause a third person, to (a) kill a person with disability, commits an offence and is liable, on conviction, to imprisonment for life'

In order to satisfy the elements of conspiracy it was held in *R v Anderson* [1986] A.C. 27 as follows:

But, beyond the mere fact of agreement, the necessary mens rea of the crime, is in my opinion, established if, and only if, it is shown that the accused, when he entered into the agreement, intended to play some part in the agreed course of conduct in furtherance of the criminal purpose which the agreed course of conduct was intended to achieve. Nothing less will suffice; nothing more is required.

I find therefore this meets all the elements of the offence of conspiracy under the said section and, according to the evidence on record, that the 1st, 2nd and 3rd accused persons conspired to harm a person with albinism, Prescott Pepuzani, and guilty of conspiracy and murder.

The State also charged the four accused persons with the offences of possession and selling of human tissue. Selling of human tissue is contrary to section 224A (c) of the Penal Code and it provides as follows:

Any person who (c) sells (ii) human tissue extracted from the human corpse or living person commits an offence and shall be liable, upon conviction, to imprisonment for life

Then the charge of being in possession of human tissue is provided for under section 224A (b)(ii) of the Penal Code as follows:

Any person who is found in possession of (ii) human tissue extracted from a human corpse or a living person commits an offence and shall be liable, upon conviction, to imprisonment for life.

'Possession', according to section 4 of the Penal Code is defined as follows:

'Possession' 'be in possession of' or 'have possession' includes not only having in one's own personal possessions, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to, or occupied by oneself or not) for the use or benefit of oneself or of any other person; and if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them.
(underlining supplied)

While prosecution did show that the said limb was in the garden of the 1st accused, there was no other evidence tendered in court that the three had consented together that the limb be kept in the garden. The mere fact of the limb being found in the garden, on its own, is not conclusive evidence of an agreement by the three accused persons that would satisfy the definition of possession as outlined in section 4 of the Penal Code above. Further, nowhere do the confession statements of the accused mention anything about agreeing where to keep the human tissue. If anything, there is a suggestion that one limb was removed and taken to Zambia by the 3rd accused person but the same was stolen. I find that the evidence tendered in court did not prove the matters of selling and possession of human tissue to the requisite standard as required by law. I therefore acquit the 1st, 2nd and 3rd accused persons of the offences of possessing and selling of human tissue.

In the circumstances I find the 1st, Douglas Mwale, 2nd accused Sofia Jere, and 3rd accused Pontino Folosani guilty of the offences of conspiracy and murder and convict them accordingly.

MADE in court this day of the Lord 4th June 2019 at Mchinji


CHOMBO

JUDGE