



**IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY
HOMICIDE NO. 13 OF 2018**

THE REPUBLIC

AND

MAXWELL MATCHINA SOSOLA AND ELEVEN OTHERS

CORAM : **HON. Z NTABA, J.**
: Dr. S. Kayuni, Mr. D. Malunda, Mr. P. Masanjala, Mr. Matonga, Counsel
for the State
: Mr. M. Chamkakala and Mr. T. Kalua, Counsel for 1st to 5th, 8th to 11th
Accused
: Mr. T. Chirwa, Counsel for the 7th and 8th Accused
: Mrs. V. Jumbe, Counsel for the 6th Accused
: Mr. D. Banda and Ms. C. Nyirenda, Court Interpreters
: Mrs. G. Chirombo and Mrs. L. Mboga, Court Recorders

Ntaba J.

ORDER OF RECUSAL

1.0 BACKGROUND

- 1.1 The 12 Accused persons are answering seven (7) charges under the Penal Code (Cap. 7:01)(hereinafter referred to as the 'Code') and Trafficking in Persons Act, Act No. 3 of 2015. The first count of murder contrary to section 209 of the Code was levelled against Maxwell Matchina Sosola, Dickson Manesi Ndengu, Bashir Lilongwe, Alfred Yohane and Cassim White Masambuka. The particulars were that on or about the 9th day of March 2018 at Manja Village under T/A Chikweo in the district of Machinga, with malice aforethought, caused the death of Macdonald White Masambuka.
- 1.2 The second count of causing another person to harm a person with disability contrary to section 224B(1)(a) of the Code was levelled against Master Mphulanya Injesi, Lumbani Kamanga, Cassim White Masambuka and Luckness Magombo whereby between the months of November 2017 and

March 2018 at Manja Village under T/A Chikweo in Machinga District, with intent to cause harm and for an unlawful purpose, caused Maxwell Matchina Sosola, Dickson Manesi Ndengu, Bashir Lilongwe and Alfred Yohane to kill Macdonald White Masambuka being a person with disability, namely albinism.

- 1.3 The third count is causing another person to harm a person with disability contrary to section 224B(1)(c) of the Code. The particulars of the offence alleged that Master Mphulanya Injesi and Lumbani Kamanga on or about 9th day of March 2018 at Manja Village under T/A Chikweo in Machinga District with intent to cause harm and for an unlawful purpose caused Maxwell Matchina Sosola, Dickson Manesi Ndengu, Bashir Lilongwe and Alfred Yohane to extract tissue from Macdonald White Masambuka being a person with disability, namely albinism.
- 1.4 The State proffered a fourth charge of transacting in human tissue contrary to section 224A(e)(ii) of the Code. The particulars of the offence alleged that Alfred Yohane, Thomas Muhosha, Chikondi Chileka, Innocent Walasi and Mussa Lilongwe during the month of March 2018 at Manja Village under T/A Chikweo in Machinga District, unlawfully and without good or justifiable reason, offered to conduct business in human tissue extracted from a human corpse.
- 1.5 Extracting human tissue contrary to section 224(a)(i) of the Code was the fifth count levelled against Maxwell Matchina Sosola, Dickson Manesi Ndengu, Bashir Lilongwe and Alfred Yohane whereby it is alleged that on or about the 9th day of March 2018 at Manja Village under T/A Chikweo in Machinga District, unlawfully and without good or justifiable reason, extracted tissue from a human corpse.
- 1.6 The sixth count of possession of human tissue contrary to section 224A(b)(ii) of the Code was proffered against Alfred Yohane, Chikondi Chileka, Innocent Walasi and Mussa Lilongwe and stated that during the month of March 2018 at Manja Village under T/A Chikweo in Machinga District unlawfully and without good or justifiable reason, were found in possession of human tissue extracted from a human corpse.
- 1.7 The final count of trafficking in persons contrary to section 14(1) of the Trafficking in Persons Act, Act No. 3 of 2015 whose particulars were that Maxwell Matchina Sosola, Dickson Manesi Ndengu, Bashir Lilongwe, Alfred Yohane, Master Mphulanya Injesi and Cassim White Masambuka on or about the 9th day of March 2018 at Manja Village under T/A Chikweo in Machinga District in the Republic of Malawi, by means of deception for the purpose of exploitation, obtained Macdonald White Masambuka, being a person with a disability, namely albinism.

- 1.8 The trial commenced on 23rd August 2018 with twenty two (22) accused person but ten (10) accused persons had their charges dropped by the State and their trial discontinued under section 77 and 303 of the Criminal Procedure and Evidence Code (Cap. 8:01)(hereinafter referred to as the ‘Criminal Code’). All the remaining 12 accused pleaded not guilty to the charges levelled against them. The Court during trial also disposed of two (2) preliminary issues raised by the 6th and 12th accused as well as the 7th accused before the State called evidence through witnesses. The State’s case was closed on 27th November, 2018 after it had paraded thirteen (13) witnesses and the court held that matter over for a case to answer whereby all parties were to provide submissions by 28th December, 2018. The ruling on case to answer was delivered on 28th January, 2019 and all the accused persons were found with a case to answer on all charges against them.
- 1.9 Following the case to answer ruling, a number of issues have taken place including the 6th accused retaining new counsel following a number of adjournments. A significant ruling from the Court was delivered on 5th March, 2019 for the defence and which ruling was again reiterated on 7th May, 2019 for the defence to provide witness statements. The Legal Aid Bureau, defending nine (9) accused persons, was ordered to file and serve their witness statements on 8th May whilst Counsel Jumbe and Counsel Chirwa were ordered to file theirs on 10th May, 2019. Legal Aid Bureau accordingly filed and served the said witness statements and their defence commenced with the calling of Alfred Yohane as their first witness. His witness statement was duly noted by the Court. However, as he started narrating his testimony, a number of objections were raised by the State namely; he could not give his testimony whilst reading from a book and not answering questions put to him. This objection was sustained by the Court. As he continued with his testimony, another objection was raised on section 303(5)(c) and (d) of the Criminal Procedure and Evidence Code as regards paragraph 4 of the witness statements not disclosing the issues on which the witness shall be testifying on. In response to the objection, Legal Aid Bureau argued that the Court needed to admit the evidence which was in contention as it was relevant and admissible. The Court again made its ruling and sustained the objection but also ruled on the Defence’s prayer that the evidence was inadmissible and it was also hearsay. The Court accordingly expunged the evidence from the record and reminded the press that the evidence so removed evidence cannot be reported on. It should not be reported on because it does not form part of the record in the present proceedings. The case was then adjourned. On resumption, Legal Aid Bureau brought an application to amend the witness statement which in essence attempted to overrule my ruling as well as adding issues which expanded on the aspects that were already overruled. They also made amendments to other paragraphs which are the issues that have necessitated this order.

2.0 THE ISSUES

- 2.1 Firstly, it is imperative that a chronology of the case herein be provided to highlight the genesis of this order –
- 2.1.1 23rd August, 2018 - Plea and directions ruling which included requirement for the defence to provide list of witnesses
- 2.1.2 12th October, 2018 - Inspector Zimba’s testimony is admitted (Legal Aid Bureau during questioning raise the name of Dr. Ntaba and Court asks for clarification on issue of recusal)
- 2.1.3 27th November, 2018 - Dr. Dzamalala’s testimony is admitted (Legal Aid Bureau during questioning raise Dr. Ntaba name and Court again seeks clarification on issue of recusal)
- 2.1.4 25th February, 2019 - Audio recordings of Alfred Yohane and Chikondi Chileka recorded in prison where phones are not allowed were released and circulating with a lot of allegations including the Court’s involvement
- 2.1.5 5th March, 2019 Section 303(5)(c) and (d) order for Defence to file and serve witness lists as well as witness statements is made
- 2.1.6 8th March, 2019 Defence witness lists filed and served including defence of alibi notices
- 2.1.7 7th May, 2019 Defence non-compliance to 5th March, 2019 Order on witness statements raised by the State
- 2.1.8 7th May, 2019 Fresh order for Defence to file witness statements
- 2.1.9 9th May, 2019 Ruling on objection ruling on inadmissibility of some of Alfred Yohane’s testimony
- 2.1.10 9th May, 2019 Ruling on application by Legal Aid Bureau to amend Alfred Yohane to include inadmissible evidence as well as include Dr. Hetherwick Ntaba
- 2.2 For purposes of making it clear why this Court is continuously highlighting Dr. Hetherwick Ntaba, it is because he is my paternal uncle. He is my deceased’s father brother and judicial ethics require that where there is potential conflict of interest due to familial ties, the court take steps to address those issues including recusing oneself from handling that matter. Furthermore, my continuous raising of this matter with the Defence especially Legal Aid Bureau was not to pre-empt them from

raising it in their defence but it was because if raised then this Court could not proceed to preside over the trial. Additionally, this issue of recusal which both Legal Aid Advocates defending this matter were continuously made aware of by this Court.

2.3 This Court has painstakingly been clear to the prosecution and defence that issues needed to be properly raised in this Court. Furthermore, this Court has inquired from Legal Aid Bureau to where they were going with the arguments on Dr. Hetherwick Ntaba including asking them if they thought it appropriate that I recuse myself from the matter. Counsel Chamkakala as well as Counsel Kalua have continuously indicated that they were not pursuing any avenue on this matter. Therefore on 9th May, 2019 when they made an application to add Dr. Ntaba into the witness statement of Alfred Yohane, this Court decided to allow that because it was obvious that they were intending for this all along. This Court should state that the Court was very disappointed in Counsel's conduct as this is an issue it has raised with them to indicate to the Court early on. The disappointment stems from the fact that we have wasted so much time in trying this matter and to get to this stage to have recusal issues be raised in this manner. This Court holds in high regard members of the bar and believes that the Court has been open to entertain this matter from the beginning and during trial, every time this issue was raised.

2.4 Apart from the issues raised above regarding fundamental recusal issues, the press has also greatly affected the perception of the Court in the public and for this the Court's attention was in drawn to various media reports carried by several media houses and as well as those circulating widely on social media regarding its ruling of 9th May, 2019. The Court has noted with concern how the ruling has inaccurately been reported as well as the Court's alleged 'gag order' on members of the press.

2.5 Let me remind the press herein of my 23rd August, 2018 ruling were I stated –

“2.8 For the media covering this trial, this Court orders that they do so responsibly and ensure that people's privacy and dignity is respected throughout the trial especially for the victim's family. This is a sensitive issue and should be treated as so. In terms of the children, to ensure if they learn of their identities through court records but shall not report nor disclose their identities. Such should be anonymized for reporting especially regarding their testimony.”

2.6 This Court when it ruled on all the preliminary applications before it including an application which expunged evidence from the court record based on applicable rules of law and the reasons for which were clearly explained in open Court including reminding members of the press present in Court that following the removal of the said evidence, they could not publish on the same especially the identifies of people mentioned. The Court reminded the press that the printing or otherwise of removed evidence would be contempt of court. This Court did not put

a ‘gag order’ on the Press in terms of reporting any other names apart from the evidence which was removed. It is therefore imperative that at this point, I should commend Cassim Aubi of Zodiac Broadcasting Corporation who painstakingly took time to accurately report the 9th May, 2019 ruling to the nation and thereby not misinforming the general public.

- 2.7 The Court appreciates when the press takes opportunity to verify issues in proceedings through a reading of the Court file in order to understand what the court is deciding or to contact the Registrar’s office for an explanation of the court’s decision. This Court’s openness can be noted even from the 3rd April, 2019 ruling on the MBC application where it stated so. This Court strongly believes that this particular issue was one such aspect where such clarification should have been sought by the press before reporting.
- 2.8 The Court greatly values the role of the media in our society, but also reminds the press that there are some necessary limitations when reporting on certain issues which are based on law. Such limitations are necessary in an open and democratic society to safeguard the rights of others and in the public interest. It would be appreciated, therefore, that when reporting on such issues, the legal bases for the court’s decisions on such matters should be clearly highlighted and explained to avoid public misinformation and distortion of context. This is more so in sensitive cases such as the present one which concerns the killing of a person with albinism. The Court remains committed to the principles of open justice within established legal bounds
- 2.9 This Court should state that it is highly unfortunate that it finds itself having to deal with recusal of this matter at this stage and not at a much earlier stage when it had continuously requested Counsel for the Defence to clarify in advance on the same. This Court would like to stress and emphasize that these turn of events solely rests on the Legal Aid Bureau counsel because they have failed in their duty to the court.
- 2.10 Lastly, this Court strongly believes in and is committed to its Constitutional mandate of administering justice impartially to all and without fear or favour for every person in the Republic of Malawi. Further, it is committed to promoting, protecting and upholding the rule of law.

3.0 CONCLUSION

- 3.1 This Court strongly believes in the integrity of the Malawian justice system as well as the independence, integrity and impartiality of judicial officers including myself. It is obvious at this point that the perception created as well as the conduct by the Defence including the issues they have brought herein require that I recuse myself from this case. It is evident that it is the desire of the Defence to lead evidence

concerning my uncle and therefore it is not my wish to stand in the Defence's way to lead such evidence. Further, judicial ethics state that I should not preside over a case where the conduct of a close relative such as my uncle is brought in as a very significant issue. Therefore, I hereby recuse myself from continuing to try this matter.

- 3.2 Accordingly, I order that this file is hereby transferred to the High Court Criminal Division at the Principal Registry in Blantyre to be assigned to a Judge. I do not consider it appropriate to transfer this matter to Honourable Justice Kapindu at this Registry as he is currently already attending to various trials for persons with albinism and other highly involving criminal cases in other Registries.
- 3.3 The Assistant Registrar shall ensure that the file is transferred to Blantyre by 20th May, 2019 following a compilation of all issues and proper marking of the volumes of files.
- 3.4 Let me make these final statements to everyone in the court room with respect to this highly important and sensitive matter –
 - 3.4.1 to the members of the Bar, I wish you all the best as you continue with this case but wish to remind you that you are officers of the Court and as such that comes with it a huge responsibility and duty;
 - 3.4.2 to the members of the Press as you continue reporting on this matter, I remind you that you have a huge duty and responsibility to report accurately but more so to ensure justice is seen to be done;
 - 3.4.3 to the accused persons, you shall be informed through your counsel as to when your matter shall resume or restart depending on the next Judge's directions at the High Court Criminal Division, Principal Registry in Blantyre; and
 - 3.4.4 to the Masambuka family, I wish you all the best as you continue to seek justice for your son. I am sorry that the process of justice delivery could not be completed in my court room due to the circumstances that have happened herein. But I believe and be assured that you shall get justice in the next court where this case is going.

I order accordingly.

Made in open court at Zomba this 10th May, 2019.



Z.J.V. Ntaba
JUDGE