



REPUBLIC OF MALAWI  
MALAWI JUDICIARY  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY (SITTING AT LIWONDE)  
CRIMINAL DIVISION  
HOMICIDE CAUSE NO. 7 OF 2011

BETWEEN

THE REPUBLIC

-and-

SKENARD MPWECHE

**Coram:** Honourable Mr. Justice J. M. Chirwa  
M. Kalua/A. Salamba, of the Counsel for the State  
Mr. P. Magombo/Ms S. Malova, of the Counsel for the Accused  
H.Amos/D. Mithi, Official Court Interpreters

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JUDGMENT

The Accused person, **Skenard Mpweche**, stands charged with the offence of murder contrary to Section 209 of the Penal Code. The particulars of the offence are that the Accused person on or about the 23<sup>rd</sup> day of October, 2002 at Mtambalika Village, Traditional Authority Mposa in the Machinga District of the Republic of Malawi, unlawfully caused the death of **Veronica Kamwendo** (hereinafter called "the Deceased person").

When the charge was read out to him, the Accused person pleaded not guilty thereto. As a consequence, the prosecution became obligated to prove the charge

against him beyond reasonable doubt (see: Section 187 (1) of the Criminal Procedure and Evidence Code and the cases of **Republic v Phiri** [1997] 2 M.L.R 68 and **Woolmington v Director of Public Prosecution** [1935] A.C. 462). In the **Woolmington case** (supra) **Viscount Sankey L.C.** at pp 481/482 had this to say:

*“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.”*

As regards, the standard of proof the same is beyond reasonable doubt (see: **Miller v Minister of Pensions** [1947] 2 All ER 372). **Denning J** (as he then was) at p373 said:

*“If the evidence is 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, then the case is proved beyond reasonable doubt, but nothing short of that will suffice.”*

The charge against the Accused being that of murder contrary to Section 209 of the Penal Code, for the prosecution to succeed they must prove the following: -

- (a) *that the Accused person caused the death of the Deceased person;*
- and*
- (b) *that the said death was caused by malice aforethought.*

In their quest to prove the charge against the Accused person, the prosecution paraded 5 witnesses, namely, **George Lipenga (PW1)**, **Rex Mahowanya (PW2)**, **Yohane Chida**, a son to the Deceased person (**PW3**), **Dinga Mussa**, the Chairperson of the Community Policing Unit in the Village (**PW4**) and Sub-Inspector **Chimndomo**, who was at all material times based at Machinga Police Station (**PW5**). The prosecution also tendered the following Exhibits as part of their evidence;

- (i) “P1” and “P1A”, the caution statement recorded from the Accused person;
- (ii) “P2” and “P2A”, the evidence of arrest;
- (iii) “P3”, the order for post mortem examination; and
- (iv) “P4”, the statement recorded from **Bernard Mpama**, now deceased.

The Accused person also gave evidence in his own defence.

**The summary of the evidence of the witnesses is as follows:**

**PW1, George Lipenga**, told this Court that he knew the Deceased person as a brewer of the local beer (kachasu). Her name was **Mpepesa**.

On the 23<sup>rd</sup> of October, 2002, whilst they were at the Deceased person’s house where they had gone to drink beer, there came the Accused person. The Accused person kicked him with his leg. And when the witness’ friend, **Rex Mahowanya (PW2)**, queried the Accused person as to why he had kicked PW1 the Accused

person in turn started beating him up as well. PW1 and PW2 decided to leave the place soon thereafter.

**PW2's** evidence was not very different from that of PW1.

**PW3, Yohane Chida**, told this Court that when the Accused person arrived at the scene of the crime, he started beating up people. He took the Accused person away from the place to the village where he is married. To his surprise, the Accused person returned to the place with a stick of the size of an arm and hit his (**PW3's**) grandmother with the same on the head. His grandmother yelled "mayo" and fell to the ground. She was taken to the hospital where they were told that she had already died.

In cross-examination, PW3 told this Court that he did not know from where the Accused person had picked up the stick which he was carrying on his return. It was his contention that he was able to see clearly what was happening from where he was seated at his house, though it was getting dark.

**PW4, Dinga Mussa**, the Chairman of the neighbourhood policing unit from Mtambalika Village, told this Court that during the material night people from the village went to his house as Chairperson of the neighbourhood to inform him that the Deceased person had been assaulted by the Accused person. The people had the Accused person with them. PW4 proceeded to report the matter at the Police Station where the Accused person was locked up.

In the cross-examination, PW4 conceded that he could not explain the circumstances of the assault because he was not present at the scene of the assault. It was however, his evidence that he believed what he had been told that it was the Accused person who had assaulted the Deceased person.

**PW5, Sub-Inspector Chimndomo**, told this Court that he was present when Sub-Inspector Phiri was interrogating, recording a caution statement and finally charging the Accused person with the offence of murder. It was his evidence that after recording the statement, the same was read out to the Accused person who signed both the caution statement and the charge sheet on which he admitted the offence. PW5 signed as a Police witness, while Sub-Inspector Phiri signed as the recording officer at the material time. PW5 produced the caution statement as Exhibits "P1" and "P1A", the Evidence of Arrest as Exhibits "P2" and "P2A" and the Order for post-mortem examination as Exhibit "P3".

In cross-examination PW5 told this Court that he was not aware that the Accused person had been assaulted to the point of losing consciousness.

The prosecution then with the consent of the defence produced the statement recorded from **Bernard Mpama**, now deceased, as part of their evidence.

It is the recorded evidence of Mpama that when he was asleep in his house, he heard his mother (the Deceased person) yelling "mayo". When he came out of his house, he saw someone running away from the scene of the assault. After shouting for assistance, the neighbours came and began to chase the Accused

person and managed to arrest him near Mchilima F.P. School, at a distance of about half a kilometre from the scene of the assault. They brought him back to the scene of the assault. His mother was then lying down with a big fracture on her head and bleeding profusely. A piece of the mango stick used in the assault was also at the scene of the assault. The assailant was identified as **Skenard Mpweche** of Mtwiche Village, T/A Malemia in the Zomba District. He was at the material time married at Chipole Village, T/A Mpama in the Machinga District.

This marked the close of the prosecution's evidence.

The Accused person (DW1) in his evidence in-chief told this Court that he had gone to the Deceased person's house where he bought some beer for K20.00. He was given his change after requesting for the same. He told **PW3** that **Masiku** had poured out his beer. He then left the drinking place at around 8pm. He was arrested by the neighbourhood police around past 11 or 12 o'clock at night.

In cross-examination DW1 told this Court that he committed the offence in October, 2002. Although this was a long time ago, he could recall everything which happened on that material day. He admitted knowing the following persons: **Bernard Mpama, George Lipenga, Rex Mahowanya, Binga Mussa and Yohane Chida**. It was his further evidence that **Bernard Mpama** was the son of the Deceased person but was not present on that material time. It is only **Yohane Chida**, the other son of the Deceased person, who was then present. He denied having quarrelled with Bernard Mpama on that material night. He also denied the suggestion that he had intended to assault Bernard Mpama with the stick but instead ended up assaulting the Deceased person. He conceded to having given a statement to the police but denied the contents of Exhibit "P1" and "P1A". He also denied fighting with Bernard Mpama but with **Masiku**. He could not recall if he had returned to the scene of the assault after leaving the same earlier on.

And when the caution statement was read out to him, he surprisingly, confirmed the truth of most of its contents. It was his evidence that the only statement which was false in Exhibit "1" or "1A" is that Bernard also came along.

DW1 was however, not re-examined.

**The issues for determination are as follows:**

- (i) whether or not the Accused person caused the death of the Deceased person; and
- (ii) whether or not the death of the Deceased person was caused with malice aforethought.

**Determination:**

**(1) Whether or not the Accused person caused the death of the Deceased person.**

PW3, **Yohane Chida**, stated in his examination in-chief that he saw the Accused person taking a stick with which he assaulted the Deceased person. He maintained this assertion in his cross-examination and contended that albeit the incident took place when it was dark, he was able to see clearly from where he was sitting at his house what was taking place at the scene of the crime.

It was also the evidence of PW5, **Sub-Inspector Chimndomo**, who was present when Detective Sub-Inspector Phiri was interrogating the Accused person at the Machinga Police Station, that after the statements had been taken from the Accused person, the Accused person admitted the charge. Exhibits "P1" and "1A" is, in fact, very clear about this admission. This is what the Accused person is recorded to have said.

"Sure, I was wrong for killing innocent person instead of killing her son whom I was quarrelling with. The tree is this one mango tree".

Albeit the Accused person in the evidence in his defence attempted to dispute the contents of Exhibit "P1" and "P1A", in cross-examination he admitted the truth of most of the contents of the said Exhibit. As a matter of fact, Section 176 of the Criminal Procedure & Evidence Code permits the admission of evidence of a confession by the court, notwithstanding any objection to any such admission, say, on grounds that it was not freely and voluntarily made by the accused person and without his having been unduly influenced thereto. (See also: the case of **Zulu v Republic** [1992] 15 MLR 496 at p.504). This Court has examined the contents of the said Exhibits very carefully and finds the same to be materially true. The same were, as a matter of fact, confirmed by Accused person in his cross-examination.

And in the recorded statement of **Bernard Mpama** (Exhibit "P4") it is stated that whilst he was sleeping in his house, he heard his mother yelling "mayo". He immediately rushed out to the scene of the crime only to find the Accused person running away from the scene with a stick. After being apprehended the Accused person was brought to the scene of the crime where they found the Deceased person with a big fracture on the head and bleeding profusely.

The above-stated evidence, in this Court's judgment, is so strong against the Accused person as to leave not even a remote possibility in his favour as it points to the fact that he is the person who had the stick and assaulted the Deceased person with the same. In the premises, this Court is inclined to find that the State has proved beyond reasonable doubt that the death of the Deceased person was indeed caused by the Accused person.

**(2) Whether or not the death of the Deceased person was caused with malice aforethought.**

Section 212 of the Penal Code provides as follows:

*“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 a 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”.*

There is authority for the proposition that the offence of murder can be committed without an intention to kill, and even where there may be a wish that death should not be caused - see **Osman v Republic** [1964-1966] 3ALR (M) 595 at p.606 per **Bolt J.** It is also trite that malice may be implied where death occurs as a result of a voluntary act of the accused person which was intentional and unprovoked. (See: Archbold Criminal Pleading Evidence & Practice, 35<sup>th</sup> edition by Butler & Garsia, paragraph 3487).

In the present case, there is overwhelming evidence before this Court to show that the Accused person intended to assault the son of the Deceased person but unfortunately, ended up assaulting the Deceased person. Exhibit “P1A” has the following recorded as the words uttered by the Accused person:

*“While quarrelling Bernard took a mango tree and beat me on the head and I grabbed the same mango tree and threw it with force to hit him but unfortunately it hit the head of his mother, the deceased, Miss Veronica, who shouted saying “mayo”,.....*

But even if there had been no such evidence there is no doubt in this Court’s judgment that the only reasonable inference that can be drawn from the conduct

of the Accused person when he returned to the scene of the crime with a mango stick of about the size of an arm, is that he intended to do grievous harm to some person thereat. It is immaterial, in this Court's further judgment, that the grievous harm was intended against someone other than the Deceased person in this case (See: Section 212 *supra*). What is material is that there was that intention to cause death or grievous harm or knowledge that the act would probably cause the death or grievous harm.

This Court would, in the premises, be inclined to find that the State has also proved beyond reasonable doubt that the death of the Deceased person was caused by the Accused person with malice aforethought.

**Conclusion:**

This Court having found that the State has proved beyond reasonable doubt that the death of the Deceased person was caused by the Accused person with malice aforethought, thus finds the Accused person guilty as charged and proceeds to convict him accordingly. This Court however, reserves the sentence to be imposed on him to a date to be fixed by the Court after hearing submissions, if any, to be made by both the parties hereto.

**Dated this 13<sup>th</sup> Day of March, 2020.**



J. M. Chirwa

**JUDGE**