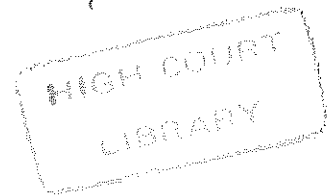




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IN THE HIGH COURT OF MALAWI

MZUZU REGISTRY

SITTING AT CHITIPA

HOMICIDE CASE NO. 57 OF 2020

REPUBLIC

VERSUS

MESTON SINKHONDE

CORAM: HON. JUSTICE T.R. LIGOWE

W. Nkosi of Counsel for the State

W. Chirwa and C.K Phiri of counsel for the Accused

G. Msukwa, Official Interpreter

R: Luhanga, Court Reporter

JUDGMENT

Ligowe J

1 The accused person is charged with two counts: The first is murder contrary to section 209 of the Penal Code and the second is attempted murder contrary to section 223 of the Penal Code. The particulars of the offences initially were that Meston Sinkhonde on or about 21st July 2017 at Mphangala Village in Zambia, with malice aforethought caused the death of Edgar Seme Mwambatata, and with intent to kill, attempted to unlawfully cause the death of Yahaya Mhango. Defence Counsel objected to the jurisdiction of this court over the offences in view of section 5 of the Penal Code as they were alleged to have been committed in Zambia. The provision states: -

“When an act which, if wholly done within the jurisdiction of the court, would be an offence against this Code, is done partly within and partly beyond the jurisdiction, every person who within the jurisdiction does or makes any part of

such act may be tried and punished under this Code in the same manner as if such act had been done wholly within the jurisdiction.”

- 2 Defence Counsel argued that it is only in offences committed by public servants and the offence of treason, where territorial jurisdiction of the Penal Code and this court would not matter, in accordance with section 6 and section 38 of the Penal Code respectively. The accused person is not a public servant and the offence is not treason.
- 3 In response, State Counsel stated that the evidence will show that the transaction started in Malawi and ended in Zambia, such that this court still has the jurisdiction. Upon this argument, I directed that the particulars of the offences should be amended to reflect that the alleged offences were partly committed in Malawi and partly in Zambia.
- 4 The accused pleaded not guilty to both counts. The State called two witnesses, Yahaya Mhango and Detective Sub Inspector Chipangula.
- 5 Yahaya Mhango’s evidence was that he and Edgar Seme Mwambatata had come to Kapoka to buy chickens. They had bought four chickens at K3 500 each when they met the accused person. He told them that they would buy chickens cheaper at his home village and so they agreed to go with him. They travelled together on a minibus from Kapoka to Chitipa Bus Stage where they had lunch together before they hired a motor bike to take them to the accused person’s home village. First rode the accused person and Edgar Mwambatata, and after they were dropped, the motor bike man came to pick Yahaya Mhango. Yahaya Mhango didn’t know where they were going. At some point after Mphangala he saw the accused waving them to stop. Yahaya asked the owner of the motor bike, whether that was where he had dropped the accused and Mwambatata earlier, and he said it was far ahead. The motor bike returned at this point and he proceeded to walk with the accused while he asked where Mwambatata had been left. The accused said he had left him at a certain village to rest. As they walked, the accused person suddenly stopped, as though he wanted to urinate by the roadside. Not knowing it was to reach out to a knife, Yahaya Mhango just realized the accused had stabbed him on the neck and he fell down. He was powerless, he

felt the accused searching his pockets for money and run away, leaving the knife on his neck.

- 6 After some time he woke up and managed to remove the knife and started running towards some light he could see ahead of him. He tied his shirt around the neck to control bleeding. He arrived at Nalutete School in Zambia. The people he found at the school were apprehensive to help him in his state, but they still helped and managed to bring him to the hospital at Chitipa the following morning. He was asked at the hospital by the police whether he could remember his assailants, but he said the owner of the motor bike would know better, because he had shared phone numbers with the assailant. The police brought motor bike riders to the hospital and Yahaya managed to identify the one they had hired.
- 7 It does not come out very clearly in the evidence of Detective Sub Inspector Chipangula how the accused person was arrested. This is perhaps because after Detective Sub Inspector Chipangula, the State had two more witnesses to testify who eventually did not turn up because the State failed to get them. From the Detective's evidence however, somehow the accused person was arrested the day after and found with a Vodaphone cellphone which he failed to open because it had a password. The police opened it and found it contained pictures of Edgar Mwambatata. The phone was exhibited but the Detective did not bring out the photographs for the court to see.
- 8 Detective Chipangula testified that when interviewed, the accused said he had taken Mwambatata to Misuku alive, but when they followed up, the owner of the house denied that the accused had brought Mwambatata to that house. Later, the Detective testified, the accused said he had damped Mwambatata at Mphangala forest in Zambia. He led them to the forest and they found the body decomposed. The body was taken to Chitipa District Hospital for post mortem examination and the report shows that death was due to severe head injury secondary to assault and severe haemorrhage.
- 9 The Detective also exhibited a caution statement in which the accused person admits having committed the offence.

10 On this evidence I found that a case had been made sufficiently against the accused person for him to defend. As we turn to his evidence in defence, it has to be remembered that his burden as an accused person, in accordance with section 188 (1) of the Criminal Procedure and Evidence Code is to prove the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within his knowledge; but so however that—

- (a) such burden shall be deemed to be discharged if the court or jury, as the case may be, is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist; and
- (b) the accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused in respect of that offence.

11 The story of the defendant is essentially different from that of the State witnesses. The accused paints a picture of a syndicate involved in illicit trade of Indian hemp and thuggery, comprising the accused person, Lameck Kayinga, Sekani Simkoko and Geoffrey Ngámbi with Lameck Kayinga as the leader. Lameck Kayinga is the accused person's neighbour and friend at Sanjemuleke location at Chitipa. He had Indian hemp for sale in Zambia and Yahaya Mhango and Edgar Seme Mwambatata wanted to buy this. On one Tuesday in July 2017, while in Lilongwe Lameck Kayinga called the accused to inform him to go to Misuku to meet visitors who were in need of the Indian hemp. He went there on Wednesday as he was escorting his daughter, Mary, to school at Kapoka. At Kapoka he did not find the people he wanted to keep his daughter, so he went with her to Misuku at Sokola and left her there. The said visitors were Yahaya Mhango and Edgar Seme Mwambatata. He spent a night with them at Misuku because they complained of being tired and left for Chitipa at night on Thursday. As they were coming Lameck Kayinga called that they would meet Sekani Simkoko at Kapoka. They indeed met Sekani at Kapoka and he bought them food before he left for Chitipa on a motorbike. The rest followed later on a car. When they

arrived at Chitipa, they bought sacks, perfume, papers and a thread, to use in packing the Indian hemp. Before proceeding to the place, the accused took the visitors to his house to take some more clothes to change when packing the Indian hemp to avoid its smell. Afterwards, just as Yahaya Mhango testified, they took a motorbike and the accused person went together with Mwambatata first. He kept on referring the place as in Zambia where Kayinga had kept the Indian hemp.

- 12 He speaks of arriving at a house and finding Lameck Kayinga and Sekani Simkoko already there. He further states that Mwambatata was the first to test if the Indian hemp was good. Then the motorbike man returned to fetch Yahaya Mhango. When he arrived, they measured the Indian hemp 14 tins per bag and they turned out to be six bags, with the last one measuring eight tins. They sewed the bags, perfumed them and loaded them on Kayinga's car, and started off, coming to Chitipa. Geoffrey Ng'ambi was ahead on Lameck Kayinga's motorbike to check for any policemen on the way. Near Chitipa, the accused asked to be paid for the work he had done. Lameck Kayinga stopped the car and told Mwambatata about it. Mwambatata was told to pay K350 000 for transport but he paid K200 000. Kayinga insisted for full payment and if not paid he would take away one full bag and the one which was not full. They started quarrelling because Mwambatata was wondering they were demanding payment before they reached their destination, and he threatened to take back his money and quit the whole deal. Then Lameck Kayinga started shouting at his boys, and so the accused took one full bag and gave it to Sekani. As Sekani was going with it, Yahaya followed to get it back. Meanwhile, the accused states, Kayinga held on Mwambatata's shirt on the chest. Mwambatata then tripped Kayinga on the legs and he fell. They struggled with each other and Mwambatata kicked Kayinga again. Then Kayinga went into his car and brought out a wheel spanner and hit Mwambatata with it on the back of his head. When Mwambatata fell, Kayinga trampled on him three times. The accused had taken a bag, but when he saw this he put it down and came back to see what was happening. He found Mwambatata groaning. Kayinga however, shouted at him that he had left what he had been instructed to do. So he left and followed where his friends went. He went up to a certain ant hill to hide the bag. While there he heard Yahaya crying "mayo ine" "mayo ine." When he walked down the slope to check what was happening, he met

Sekani Simkoko, who said he was quarrelling with Yahaya Mhango and he scratched him with a nail cutter and had run away. Then the accused and Sekani went to where Kayinga was with the car. They found Mwambatata in a serious condition. He was lying down and groaning and could not even talk. Kayinga instructed that they should take him to hospital and report that they had found him on the way injured. They offloaded the Indian hemp from the car and hid it in the bush together with Yahaya's bag and the clothes they wore when packing it. Later they refused to take Mwambatata to hospital, in case he died. So the accused left at dusk on a motor bike together with Geoffrey Ng'ambi. Yahaya had run away at this time and they didn't know where he went. The accused left Sekani at the place together with Kayinga. While at his house, it seems the following day, the accused received a call from Kondowe, a Policeman, warning him to go away because the police were coming to the house. So he left going to Sokola where he left his daughter. In the afternoon the following day he left Sokola for Kapoka on a motorbike. While at Kapoka Sekani called him to update him the circumstances of things, and as he was explaining, Sekani left and the police came immediately to arrest him together with his daughter. He had K350 000 Malawian, K9 000 Zambian and a Techno cell phone in which he recorded everything at the place they packed the Indian hemp. The police told him about Yahaya Mhango at the hospital and that Edgar Seme Mwambatata was missing. He told them that he had left Mwambatata with Lameck Kayinga. He then went with the police to the place where he said Lameck killed Mwambatata, to check, but did not find him. They also went to the place where the Indian hemp was hidden and collected it. He was together with Policemen Kondowe, Chipangula and Rodger. They searched in Mwambatata's bag and found a cardigan, 70 000 Tanzanian Shillings and a touch screen cell phone. They searched for Mwambatata for three days but they did not find him even at his village. The accused says he sent Kondowe the policeman to call Lameck Kayinga for him. In the presence of Kondowe, Lameck said Mwambatata died and they put sticks at the place they kept his body. The following morning they went with the police, except Kondowe, to the place and found the body. The accused was then wondering that Lameck Kayinga and Sekani Simkoko have not been arrested for this offence.

- 13 It is surprising this is not what is in the accused person's caution statement. It appeared to me, as he was testifying, that Defence Counsel was also hearing this for the first time. Yahaya Mhango was not cross examined on any of the issues raised in the accused person's defence.
- 14 The accused person's caution statement is actually a confession and it tallies with Yahaya Mhango's evidence, but he retracted it in cross examination, saying he cannot read so he did not read it before he signed. He was just told to sign for it while the police were beating him, so he was doing everything they told him to do.
- 15 Which one then is the truth between Yahaya Mhango's evidence and the accused person's evidence for they both swore to tell the whole truth and nothing else but the truth? As starkly different as their testimonies are, both of them may not be entirely true. At this point I am still alive to the requirement for the State to prove the case beyond reasonable doubt in criminal matters, and that the accused is entitled to an acquittal if evidence given either by the prosecution or the defence creates reasonable doubt. At the same time, I am aware of the wise counsel of Lord Denning in *Miller v Minister of Pensions* [1947] 2 All ER 372 that: -

“Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice.”

Analysis

- 16 I think I should start with the retracted caution statement. The accused person was not cross examined on the fact that he cannot read, he did not read it before he signed and that he was forced to sign while being beaten by the police. This part of his evidence is therefore undisputed and for this reason, the caution statement cannot be relied upon as a confession. Taking away the confession means there is no evidence by the prosecution regarding the charge of the murder of Edgar Seme Mwambatata. Yahaya Mhango's evidence is that he did not see the person who killed Mwambatata and he cannot say anything about how Mwambatata was killed. The accused person's defence is obviously that he did not commit

the offence. It is just as well that the accused should be acquitted right away on the first count.

- 17 It is normally the cross examination that helps to test the veracity of the testimony of a witness. I have gone through the testimony of Yahaya Mhango in cross examination carefully and I have not seen anything to discredit him in as far as he gave it before this court. Similarly Detective Sub Inspector Chipangula, save for the retracted confession which he exhibited, his testimony remains intact. My own assessment is that the witnesses would have been aggressively cross examined had the lawyer been aware of the story as given by the accused.
- 18 Just in case the accused made up his story for the sake of the defence, his cross examination by the State has to show. He was cross examined about the whereabouts of his daughter Mary, to which he responded negatively, and in my view very reasonable, because he has been in custody since July 2017. He was so firm regarding the syndicate led by Lameck Kayinga and that it is not just meant to tarnish his image and that of the Police at Chitipa including Kondowe. He was cross examined regarding whether he spent four days or three days at Misuku when he went to meet Yahaya Mhango and Edgar Mwambatata, but it turned out that Counsel was mistaken that he mentioned four days at one point and three days at another. The accused was consistent that it was three days, from Tuesday to Thursday. He was asked about where they went to take the Indian hemp and he said it was in Zambia.
- 19 The accused confirmed having heard the testimony of Yahaya Mhango and reiterated his position that it is not him who stabbed him but Sekani Simkoko. It is worth remembering at this point that the accused was arrested about two days after the incident and that at hospital Yahaya could not remember the one who attacked him but the owner of the motorbike they hired. It should be remembered also that the State brought no evidence about how the accused person got to be arrested for the offence. This makes it hazy whether indeed the accused person is the one who stabbed Yahaya.

20 Overall, the accused was also not cross examined to the extent that his testimony was shaken. As a result, his testimony balances with that of the State witnesses. To this end I find that he has managed to create reasonable doubt as to his guilt for the offences charged.

21 The other question that has not been addressed clearly by the evidence is where the offences were committed. It should be recalled I directed amendment to the particulars of the two counts to reflect that the offences were partly committed in Malawi and partly in Zambia upon State Counsel promising that the evidence will show that the transaction started in Malawi and ended in Zambia.

22 Section 5 of the Penal Code refers to “**an act** which ... would be an offence” to be done partly within and partly beyond the jurisdiction for the courts in Malawi to have jurisdiction over it. Here we are reminded that criminal offences are committed upon *actus reus* (a wrongful act) done with *mens rea* (a guilty mind). Section 5 of the Penal Code focuses on the *actus reus* as opposed to the *mens rea*. The acts of killing and stabbing in this case have not been shown to have partly been done in Malawi and partly in Zambia.

23 If we take Yahaya Mhango’s version, he cannot tell where Edgar Mwambatata was killed and he is not clear as to the place where he was stabbed but it was near Zambia. Detective Sub Inspector Chipangula testified that Edgar Mwambatata’s body was found at Mphangala forest in Zambia. On this evidence, the likely conclusion is that the offences were committed in Zambia as the charge originally stated, but then this court would have no jurisdiction over the offences and acquit the accused person.

24 If we take the version of the accused person, the incident occurred near Chitipa after the people left Zambia where Kayinga had kept the Indian hemp, but that he took no part in either offence.

25 Even if we took the aid of section 22 of the Penal Code, the accused cannot be convicted. Section 22 says: -

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an

offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

26 According to the accused person’s evidence, the common unlawful purpose was the dealing in Indian hemp. Murder and attempted murder however, in the circumstances, cannot be considered a probable consequence of the prosecution of such purpose. The accused cannot be convicted on that account.

27 In the final analysis, I find that there is reasonable doubt that the accused person may have committed the offences. He is acquitted on both charges.

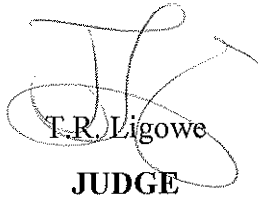
28 A word to the Police before I sign off is that convictions are not secured only on confessions. There is no point beating and torturing an accused person for the sake of obtaining a confession or for any other reason. All this is prohibited by the Constitution of this Country. Section 19 provides: -

- (1) The dignity of all persons shall be inviolable.
- (2) In any judicial proceedings or in any other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.
- (3) No person shall be subject to torture of any kind or to cruel, inhuman or degrading treatment or punishment.
- (4) No person shall be subject to corporal punishment in connection with any judicial proceedings or in any other proceedings before any organ of the State.

29 Given that the accused person’s confession was unlawfully obtained, it is more probable that the investigators were told his version of the story. Now I am wondering what stopped them from following up with Lameck Kayinga, Sekani Simkoko and Geoffrey Ngámbi. I am wondering also why the State failed to bring the owner of the motorbike Yahaya

Mhango identified at the hospital, to testify. My impression is that the Police did shoddy work in this case.

- 30 It is a fundamental principle under the Constitution that all legal and political authority of State derives from the people of Malawi and has to be exercised solely to serve and protect their interests. No one therefore exercising the power of the State should serve their own interests as it seems to be with this matter.
- 31 To clear the mess, it is proper that the Police should investigate the syndicate further and the possible involvement of some of their own with it.
- 32 Pronounced in open court at Chitipa this 24th day of November 2020.


T.R. Ligowe
JUDGE