IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL DIVISION

SITTING AT THYOLO

CRIMINAL CASE NO. 86 OF 2011

THE REPUBLIC

V

LAWRENCE KAPALAMULA

CORAM: THE HON. JUSTICE MR S.A. KALEMBERA

Ms Kumwenda, State Advocate, of Counsel for the State

Mrs Penama, of Counsel for the Accused

Mrs Masowa, of Co-Counsel for the Accused

Mrs Chawinga, Official Interpreter

Ms Msimuko, Court Reporter

JUDGMENT

Kalembera J

This is an order on whether the Accused has got a case to answer or not. The accused person, Lawrence Kapalamula, stands charged with the offence of murder contrary to section 209 of the Penal Code. The particulars of the offence allege that **LAWRENCE KAPALAMULA** on or about the 15th day of March 2019, at about 20:35 hours at Hau Village, T/A Kanduku, Mwanza District in the Republic of Malawi near Mlambe Sub Station, in the district of Chikwawa in the Republic of Malawi, with malice aforethought caused the death of **DAVID KUDZALA.**

The accused pleaded not guilty to the charge. It therefore became incumbent upon the State to prove the case against the accused through evidence. The State paraded four witnesses to prove their case.

At this stage though, the court is being called upon to determine whether a prima facie case has been established against the accused warranting him to enter his defence or not.

PW I was Dave Kapakasa. He identified the statement he gave to the police. It was his testimony that on the material day the deceased's mother who was his sister, came and asked him to go and I ntervene in a fight between the deceased and the accused. He asked his nephew what was going on and as he responded he was struck with a brick on the head and he fainted. The accused is the one who stoned the deceased with a brick. He rushed to where the deceased had married. And he came back to the scene with the deceased's wife and his relatives. He did nothing at the scene for he was in sorrow.

In cross-examination he told the court that he could not confirm if it was his nephew who started the commotion or caused trouble. He admitted that he told the police that it was his nephew who caused the conflict that day. At the scene there was no electricity and he was about 20 metres away when he saw the accused throw the brick. It was half a brick. It did not take long to take the deceased to the hospital. The deceased died in hospital.

PW II was Jacob Semu. He identified and tendered his witness statement. It was his testimony that on the 15th day of March 2019 PW II came and told him that the deceased had been stoned. They went to the scene and found the deceased on the ground with hands tied and bleeding. They asked what had happened. They were told that the deceased had given the accused K2, 000 and when he asked for change

the accused stoned him. The deceased's relatives to him to the hospital. It was his further testimony that he arrived at the scene when the incident had already occurred.

In cross-examination he reiterated that he went to the scene around 9 pm in the evening. It was dark. He admitted that what he told the court is what he had heard.

PW III was Michael Joseph. He admitted his statement into evidence. It was his testimony that on the 15th day of March 2019 he was told that Dave, the deceased, had been assaulted by the Accused at the Accused's grocery. In the morning of the 16th he took the deceased to the hospital. He was complaining of pain in the ribs and his wound on the left side near the ear. At the hospital he was examined and they were told that he had no fracture but that he needed an ex-ray. As it was Saturday they were told to come back on Monday for the x-ray. On Monday, he went through the x-ray and was found with no fracture. He was still complaining of pain in his ribs though.

On 21st they again took him to the hospital and upon examination he was found with malaria and he was given medication, and told to collect further malaria medication from the pharmacy. A boy who was sent to collect the same was turned back as there was no stamp from the laboratory. Early morning of Sunday 24th they got a message that the deceased did not sleep well. He found a taxi and the deceased was not talking as they put him in the taxi. He was admitted and they reported his condition to the police. The Station Officer came and met the Medical Officer who upon checking the deceased's health passport realized that it was indicated that he had to take LA.

She prescribed a different drug and put him on oxygen as he had difficulties in breathing. Around 2 pm on the 26th the Doctor called him and told him that the deceased had passed away due to pneumonia. A postmortem was conducted at Queen Elizabeth Central Hospital on the 27th .

In cross-examination he admitted that he was not present when the incident occurred. He further reiterated that the deceased was taken to the hospital on the 16th and not 15th. He was treated as an outpatient. Two days later he was taken back to the hospital where he was diagnosed with malaria. He went for an x-ray on the 18th . He was not given any malaria drug until the 25th and he died on the 26th. He further reiterated that he was told by the Doctor that he died due to pneumonia.

PW IV was Detective Sub-Inspector Joel Dzinza. He tendered the Caution Statement, Evidence of Arrest and Investigation report.

After this witness the State closed its case.

As earlier indicated herein, we are at a stage where the court is being called upon to determine whether the Accused has got a case to answer or not. Section 254 of the Criminal Procedure & Evidence Code (CP&EC) provides as follows:

"s. 254 –(1) If, upon taking all the evidence referred to in section 253 and any evidence which the court may decide to call at that stage of the trial under section 201, the court is of opinion that no case is made out against the accused sufficiently to require him to make a defence, the court shall deliver a judgment in the manner provided for in sections 139 and 140 acquitting the accused.

(2) If, when the evidence referred to in subsection (1) has been taken, the court is of opinion that a case is made out against the accused sufficiently to require him to make a defence in respect of the offence charged or some other offence which such court is competent to try and in its opinion it ought to try, it shall consider the charge recorded against the accused and decide whether it is sufficient and, if necessary, shall amend the same, subject to section 151.

(3)……"

It is very clear that the provision under section 254 (1) is mandatory and the court, when it forms an opinion that, on the evidence adduced by the prosecution, there is no case made out against the accused, the court shall deliver a judgment in the manner provided for under sections 139 and 140 of the CP&EC acquitting the accused. Thus, the judgment shall be pronounced in open court and it shall, except provided otherwise by the Code, be in writing and shall contain the point or points for determination, the decision thereon and the reasons for the decision and shall be dated and signed by the presiding officer.

On the other hand, it is not mandatory under section 254 (2) for the court to give detailed reasons as to why the accused has a case to answer. In **David Newman Manual of Criminal Procedure, K.E. Mapemba** at p.136 it was succinctly stated as follows:

"A ruling of no case to answer is one of law, not fact, and it is important, therefore, that the magistrate's reasons are recorded. Where a magistrate rules that a sufficient case has been made out for the accused to answer, he is not expected at this stage to express any opinion or to make any findings on the prosecution's evidence but may simply record: "Court rules that the accused has a case to answer and complies with section 254 (1) of the Criminal Procedure & Evidence Code."

It may well be the case that the evidence adduced by the prosecution is not sufficient to establish the Charge laid against the accused, but nevertheless is enough to show a prima facie against him with regard to a lesser offence. In such a case the magistrate should amend the Charge in accordance with section 151 of the Code,"

As regards whether the accused person has a case to answer, I adopt the approach by Chikopa J (as he then was) in the case of **Rep v Harry Mkandawire and Another, Criminal Case No. 5 of 2010 (unreported)(HC-MZ)** when he said:

"*The burden placed upon the State at this stage is not to prove its allegations beyond reasonable doubt, which is the standard placed on the State at the close of trial, but simply to establish grounds for presuming that our accused persons committed the offences they are answering. In R v Dzaipa Revision Case Number 6 of 1977 [unreported] Skinner CJ adopted the definition of 'case to answer' contained in the Practice Note issued by the Lord Chief Justice of England Lord Parker at [1962] 1 ALL ER 448 which runs as follows:*

'A submission that there is no case to answer may properly be made and upheld:

a. *when there has been no evidence to prove an essential element in the alleged offence; or*
b. *when the evidence adduced by the prosecutor has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict upon it ....;*

The decision should depend not on so much whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer".

And Mead J in **Chidzero v Rep 8 MLR 229 at p. 231** had this to say:

".... A prima facie case requiring an accused to enter on his defence is not made out if, at the close of the prosecution, the case is merely one which on full consideration might possibly be thought sufficient to sustain a conviction. A prima facie case must mean one on which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the accused."

In the matter at hand, has the State established a ***prima facie*** case against the Accused person requiring him to enter his defence?

As has already been stated herein, the accused person is charged with murder contrary to section 209 of the Penal Code which provides 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."

For the accused person to be found guilty of murder therefore, the prosecution must establish or prove through evidence, that the accused person by an unlawful act or omission, caused the death of the deceased person; and that she did so with malice aforethought. As regards proof of availability of malice aforethought, section 212 of the Penal Code gives the following guidelines:

"Malice aforethought shall be deemed to be established by evidence proving any 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) ....."

In order for the state to prove its case against the accused person, it must therefore be established that the accused person had the requisite intention to cause the death of the deceased or to do him grievous harm. And that he did an act, ***actus reus***, which caused the death of the deceased. This can be established by direct or indirect evidence (circumstantial evidence). Most often times it is difficult to prove a charge through direct evidence, and the State most often times will rely on circumstantial evidence. In the case of **R –v- Taylor** (1928) 21 Cr. App. R 20 Hewart, C.J had this to say:

"Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."

In the matter at hand, only the deceased, the accused person and PW I were present when the incident happened. PW I told the court that the Accused struck the deceased with a brick in his presence, and that as a result the deceased lost consciousness. The other witnesses did not witness the alleged assault on the deceased. What is clear from the evidence though is that the incident happened at night and it was dark. PW III told the court that the deceased was taken to the hospital the next morning where he was treated as an outpatient. He was found with no fracture but they were advised that he needed an x-ray, which could be done on Monday as this was a Saturday. On Monday, he went through the x-ray and was found with no fracture. On 21st they again took him to the hospital and upon examination he was found with malaria and he was given some medication, and told to collect malaria medication from the pharmacy.

A boy who was sent to collect the same was turned back as there was no stamp from the laboratory. Early morning of Sunday 24th they got a message that the deceased did not sleep well. He found a taxi and the deceased was not talking as they put him in the taxi. He was admitted and they reported his condition to the police. The Station Officer came and met the Medical Officer who upon checking the deceased's health

passport realized that it was indicated that he had to take LA. She prescribed a different drug and put him on oxygen as he had difficulties in breathing. Around 2 pm on the 26th the Doctor called him and told him that the deceased had passed away due to pneumonia. A postmortem was conducted at Queen Elizabeth Central Hospital on the 27th . The deceased was not given any malaria drug until the 25th and he died on the 26th. He further reiterated that he was told by the Doctor that he died due to pneumonia.

PW III also explained to the court that a postmortem was conducted at Q.E.C.H. Unfortunately the State elected not to tender the postmortem report. The reasons for not tendering the same being that it was an inauthentic and unauthenticated. Whatever PW III said pertaining to the postmortem, was therefore hearsay and inadmissible. What comes out clearly is that it has not been established by evidence that the Accused's act caused the death of the deceased. It is in evidence that the deceased was diagnosed with malaria, was not administered with any malaria drug and he died of pneumonia. I am aware that neither malaria nor pneumonia is caused by being struck with a half brick.

Was the act or acts of the Accused the cause of the deceased's death? Section 215 of the Penal Code provides as follows:

"s.215 A person is deemed to have caused the death of another person although his act is not the immediate or not the sole cause of death in any of the following caused —

(a) If he inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes death. In this case it is immaterial whether the treatment was proper or mistaken. If it was employed in good faith and with common knowledge and skill; but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was employed in good faith or was so employed without common knowledge or skill;

(b) If he inflicts a bodily injury on another which would not have caused death if the injured person had submitted to proper surgical or medical treatment or had observed proper precautions as to his mode of living;

(c) If by actual or threatened violence he causes such o ather person to perform an act which causes the death of such person, such act being a means of avoiding such violence which in the circumstances would appear natural to the person who whose death is so caused;

(d) If by any act or omission he hastened the death of a person suffering under any disease or injury which apart from such act or omission would have caused death;

(e) If his act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other person."

Thus, it is clear that each person is responsible for his or her actions. It suffices if the conclusion is that an act of an individual immediately caused a particular result, and there is no need to ask if anything made the individual act in that way. However, it has been held that the defendant's act must be a substantial cause of the result. It must contribute to the end result to a significant extent, not be a slight or stifling link. And the defendant's act must be an operating cause of the result. In the matter at hand, was the injury suffered due to the act of the Accused the substantial and operating cause of the death of the deceased?

In the case of **R v Smith [1959] 2 QB 35** applied in **R v Cheshire [1991] 3 All ER 670 (CA)** with approval, Parker CJ giving the decision of the Court Martial Appeal Court had this to say at **pp. 42-43:**

"It seems to the court that, if at the time of death the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating. Only if it can be said that the original wounding is merely the setting in which another cause operates can it be said that the death does not result from the wound. Putting it in another way, only if the second cause is so overwhelming as to make the original wound merely part of the history can it be said that the death does not flow from the wound."

I fully subscribe to these views. In the matter at hand, it is in evidence that the deceased did not suffer any fracture from the injury caused by the Accused. The deceased was even treated as an outpatient. Meaning that his injuries were not life threatening. The subsequent x-ray further confirmed that he suffered no fractures.

What is also clear from the evidence is that he was diagnosed with malaria, of which he was not treated. He further developed pneumonia from which he succumbed to death. There is no evidence that the injuries he suffered at the hands of the Accused caused the malaria, pneumonia and his subsequent death. I cannot dispute the assertion by the Doctor that the deceased died of pneumonia. If the deceased had died due to his injuries the Doctor would have said so. And if the pneumonia was caused by the injury or injuries suffered at the hands of the Accused, the Doctor would definitely have said so. Clearly from the evidence, the deceased died of pneumonia.

On the evidence before this court it would be unsafe to conclude that the Accused caused the death of the deceased. Thus, the State/Prosecution has failed to establish grounds for presuming that the Accused committed the offence charged. On the evidence so far laid before this court, at the close of the prosecution's case, no reasonable tribunal would convict the Accused. The State has failed to establish that the death of the deceased was caused by the Accused. The Accused cannot therefore be held responsible for the death of the deceased. Thus, the Accused has no case to answer.

All in all, on the charge against the Accused no prima facie case has been established requiring him to enter his defence. The Accused did not cause the death of the deceased. Consequently I find the Accused not guilty of the murder of **DAVID KUDZALA** and I acquit him forthwith.

PRONOUNCED in Open Court this 22nd day of April 2022 at the Principal Registry, Criminal Division, sitting at Mwanza.

S.A. Kalemba

JUDGE