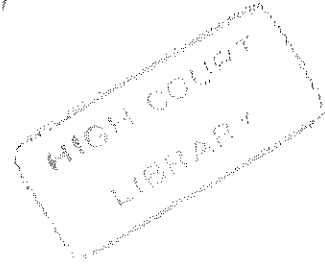




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**IN THE HIGH COURT OF MALAWI**  
**CRIMINAL DIVISION**  
**MZUZU REGISTRY SITTING AT RUMPHI**  
**HOMICIDE CASE NO. 28 OF 2020**

**REPUBLIC**  
**VERSUS**  
**SMART JOHN PHIRI**

**CORAM:** HON. JUSTICE T.R. LIGOWE  
W. Nkosi, of Counsel for the State  
C.S. Duke and J, Chiwalo, of counsel for the Accused  
F. Mwakhwawa, Official Interpreter  
J.N. Chirwa, Court Reporter

**JUDGMENT**

Ligowe J

- 1 The accused is charged with murder contrary to section 209 of the Penal Code on allegations that on or about 5<sup>th</sup> February 2020, at Kamwe in Rumphu, he caused the death of Isaac Chitekwe with malice aforethought.
  
- 2 Evidence for the prosecution was given by Ishmael Mbewe, a member of the community policing forum in the area, Felix Tembo, a farmer for whom the deceased was working at the material time, Detective Sargent Cynthia Chilongo, the one who investigated the matter and Cathy Rose Patrick, the wife of the accused. Evidence for the defence was given by the accused himself.

- 3 The facts as I find them are that at the material time, the accused had a cassava field at Mlalachi village, Kàmwe area, near Felix Tembo's farm. He noticed that the cassava was being stolen and decided to start guarding for it on or about 5<sup>th</sup> February 2020. He went there that evening carrying a panga with him. He indeed found the deceased stealing cassava. Upon seeing the accused, the deceased started to run away. The accused chased him and managed to catch him when he fell on some shrubs in the garden. There the deceased produced a knife and tried to stab the accused on the head. The accused blocked it by pushing the hand that held it away, and the knife fell down. The accused then picked it and threw it away. They however continued to fight. According to the accused, the deceased was overpowering as at some point he held the neck of the accused down to the ground. He says by God's grace, he managed to push the deceased and stood up about a meter away. When he wanted to run away, the accused testified that the deceased jumped towards him. As a way of defending himself from being pressed down to the ground again and may be killed, the accused slapped the deceased on the cheeks with the sides of the panga until he became weak. He then told the deceased to go with him to the village headman or any member of the community policing forum. So, they walked together from the field to the nearby path but the deceased was too weak to proceed from there. A man called Zisonga Mbunge passed and with his torch the accused managed to find the knife of the deceased which he had thrown away.
- 4 The accused first went to report to his wife and her father. The wife testified that she saw the deceased alive and sitting down with blood on his body. She asked her husband to put him along the path.
- 5 After he reported to Mr Ishmael Mbewe, the member of community police, he also came to the garden to see the thief and he saw him lying down but could not talk and failed to rise up. Ishmael Mbewe's evidence was that he was breathing a little bit at this time. Together they went to report to a Mr Makaliyo Paulo and Felix Tembo. When they came back, they found the deceased dead. That is when they reported to chiefs and the accused was arrested.

6 According to section 209 of the Penal Code, murder is committed when death is caused by an unlawful act or omission of the accused person, done with malice afore thought.

7 I find in this case that the deceased died after being slapped with the panga knife on the cheeks by the accused person. So, he caused the death. The post mortem examination report exhibited by the police investigator shows that death was due to severe head injury secondary to trauma. The report shows that the body was bleeding from the nose, eyes and mouth and that this was a sign of basal fracture of the skull. It also shows that the body had a cut on the left ear and upper lip and a fracture on the left wrist joint.

8 The question is whether the accused had malice aforethought at the time he slapped the deceased with the panga. His own defence is that it was in self-defence. Counsel for both sides were ordered to file written submissions three weeks before this judgment is delivered but both failed for no apparent reason. I have to proceed with the decision without their views.

9 If death is caused in self-defence, it means the accused had no malice aforethought and has to be acquitted. The law on this point was well discussed in *Ngozo v. Rep*, [1997] 1 MLR 192. Justice Mwaungulu in that case applied the law as stated in *Palmer v R* [1971] A.C. 814 and followed in *E v MacInnes*, 55 Cr. App. R. 551. It is proper that I also quote from *Palmer v R* as the Judge in *Ngozo v. Rep*. Lord Morris of Borth-Y-Gest said: -

“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. Of these the jury can decide. It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If the attack is serious that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert by some instant reaction. If the attack is over and no sort of peril

remains, then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence. Of all these matters the good sense of the jury will be the arbiter. There are no prescribed words which must be employed or adopted in a summing up. All that is needed is a clear exposition, in relation to the particular facts of the case, of the concept of necessary self-defence. If there has been an attack so that the defence is reasonably necessary, it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his defensive action. If the jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought necessary that would be the most potent evidence that only reasonable defensive action had been taken ... But their Lordships ... that if the prosecution have shown that what was done was not done in self-defence then that issue is eliminated from the case. If the jury consider that an accused acted in self-defence or if the jury are in doubt as to this, then they will acquit. The defence of self-defence either succeeds so as to result in an acquittal or it is disproved, in which case as defence it is rejected.”

- 10 The above quote from *Palmer v R* was also applied in *Joseph Nomale and others v. Rep*, Criminal Appeal Case No. 178 of 2008 (Principal Registry) (unreported)<sup>1</sup>.
- 11 *Ngozo v. Rep* and *Joseph Nomale and others v. Rep* pretty much outline the principles of common law for determining criminal responsibility for the use of force in the defence of person or property in Malawi. The Supreme Court of Appeal held in *Twalibu Uladi v. Rep*, [2009] MLR 475 at 477 that homicide committed under reasonable self-defence, does not involve the killer in any legal liability, and the position is pretty much the same in respect of homicide committed in defence of property.
- 12 The Supreme Court of Appeal also held in *Nyirenda v. Rep*, [2004] 250 that, use of a greater force than is necessary in the circumstances may lead to loss of the defence of self-defence.

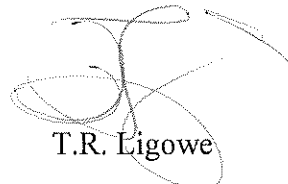
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<sup>1</sup> Republic v Nomale and Others; In Re: Application for Bail under S 355 (1) of the Criminal Procedure and Evidence Code (Criminal Appeal Number 178 of 2008) ( of ) [2008] MWHC 158 (14 August 2008); | Malawi Legal Information Institute (malawilii.org)

And, where the defence of self-defence fails merely because the person used excessive force than was reasonably necessary for the exercise of that defence, that person would normally be entitled to be convicted for the lesser offence of manslaughter. See *Jackson v. Reginam* 1961-63 ALR Mal 175, *Paison v. Rep.*, [1998] MLR 302 (SCA) at 305 and *Nyirenda v. Rep.*, [2004] 250.

- 13 It was held in *Attorney General of Nyasaland v. Jackson*, 1923-60 ALR Mal 488 as well as *Rep v. Lufazema*, 1966-68 ALR Mal 355 that the deliberate killing of a person in self-defence can only be justified if the conduct of the person killed led the killer to believe that he was immediately threatened with death or grievous harm. This emphasizes that the act in self-defence must be reasonably necessary in the circumstances. For example, in *Jackson v. Reginam* 1961-63 ALR Mal 175, Jackson had a quarrel with the deceased over a bicycle. Later the deceased came to Jackson's house where he attacked him using a fist. During the attack Jackson was sitting on the veranda of his house, but the blow knocked him down. The deceased was about to strike him again when Jackson seized a hoe which was lying nearby and struck the deceased with it three times on the head. The Federal Supreme Court found that Jackson used more force than was reasonably necessary.
- 14 While the force applied has to be reasonably necessary in the circumstances, the law also recognizes that when a person finds himself in a situation which demands self-defence and is compelled to act in the agony of the moment, he cannot be expected to have time to select the right weapon and to target the correct part of the body. See *Paison v. Rep.*, [1998] MLR 302 (SCA) at 306 applying *Turner v. MGM Pictures Ltd*, [1950] All ER 449.
- 15 With regard to the burden of proof, it was held in *R v. Alayina*, 1923-60 ALR Mal 510 applying *Chan Kau v. R.*, [1955] 1 All ER 266 and in *Zabroni v. R.*, 1923-60 ALR Mal 353 that the onus is never on an accused to establish a defence such as self-defence or provocation. The onus remains throughout on the prosecution to show that the means employed by the accused in defending himself went beyond what was reasonable, and if the evidence discloses a possible defence of self-defence or provocation then the court is called upon to examine this possibility whether the accused has raised it or not.

- 16 My considered judgment in the present case is that the accused used excessive force than was reasonably necessary in the circumstances. It should be remembered that at the point he used the panga on the deceased, the deceased's knife had been thrown away. If anything, what was reasonably necessary was such force as would prevent the deceased from holding the neck of the accused down to the ground again. Not as much as would lead to death in the manner it did.
- 17 Following the cases of *Nyirenda v. Rep*, [2004] 250, *Paizon v. Rep*, [1998] MLR 302 (SCA) at 305, and *Jackson v. Reginam* 1961-63 ALR Mal 175, I find the accused guilty of manslaughter contrary to section 208 of the Penal Code and convict him accordingly.
- 18 Delivered in open court this 17<sup>th</sup> day of February 2021.



T.R. Ligowe  
**JUDGE**