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IN THE HIGH COURT OF MALAWI
CRIMINAL DIVISION
MZUZU REGISTRY SITTING AT RUMPHI
HOMICIDE CASE NO. 76 OF 2019

REPUBLIC
VERSUS
REGINA MULWAFU

CORAM: HON. JUSTICE T.R. LIGOWE
W. Nkosi of Counsel for the State
V. Gondwe, C. Sikwese and C. Lupande of counsel for the Accused
G. Msukwa, Official Interpreter/ Court Clerk
J. Chirwa, Court Reporter

JUDGMENT

Ligowe J

- 1 Regina Mulwafu is here charged with murder contrary to section 209 of the Penal Code. She is alleged to have caused the death of Tawananyasha Zuze and Tawonga Zuze at Chufo Rest house at Karonga during the night of 5th to 6th May 2019.

- 2 I heard evidence of Lovemore Itayi Zuze, Traffic Sub Inspector Ng'ambi of Kaporo Police Post, Benson Ambonisye Mwaipopo and Detective sub Inspector Mwalwanda of Karonga Police Station, for the prosecution. The facts I found from their evidence are that on 5th May 2019, Regina Mulwafu quarrelled with her husband, Lovemore Itayi Zuze, over her alleged illicit relationship with another man. They eventually decided to let her mother, who lived in Chitipa, know about it, and so, she had to travel to Chitipa the same day from Livingstonia where they lived. She left around 5 pm together with her two kids,

the deceased. She arrived at Karonga around 9 pm and could not proceed. She found a room to put up for the night at Chufo Rest house. It appears she was so affected with the argument she had with her husband, that she decided to commit suicide. It is recorded in her caution statement that she went out to the market to look for food, and also bought a rodenticide called TermiK which she mixed with the drinks she bought, so she could drink together with her children and die. They took the stuff and soon after, the children vomited before they slept. She also vomited a lot afterwards. In the course of the night she was able to see the children having difficulties to breathe. By morning she noted the children could not wake up.

3 She went out of the room and approached a policeman, who happened to be Traffic Sub Inspector Ng'ambi, to help her with the situation. Sub Inspector Ng'ambi testified that she explained the whole story to him, upon which he reported the matter to his superiors.

4 Investigators came and were led into the room by the accused. They found the two girls lying on two beds. They took them to Karonga District Hospital and there they were pronounced dead.

5 Detective Sub Inspector Mwalwanda testified that she also collected from the room, an empty 500 ml plastic bottle and plastic sachets containing residues of the suspected poison, which she sent to the Central Veterinary Laboratory in Lilongwe for analysis.

6 The diagnosis of the Lab reads: "A lab TLC analysis confirmed the presence of a chemical substance which did not match with any of the working standards including Termik."

7 Sub Inspector Mwalawanda also exhibited post-mortem examination reports for from Karonga District Hospital showing that the bodies had not been opened to get samples from visceral organs for laboratory examination in Lilongwe. But the bodies had foam coming from the mouths, for which the examiner formed the opinion that death was caused by taking poison in view of the sachets found in the room.

- 8 On this evidence I found a case sufficiently made out against the accused for her to defend, as it showed she had decided to cause her own death and that of her children.
- 9 Her defence is that she was incapable of appreciating her actions and the consequences of such actions at the time the offence is alleged to have been committed and after, for her to be held criminally liable. Alternatively she posits that in view of the evidence of both the State and the defence, it is inconclusive that she committed the offence.
- 10 Samuel Atupele Simfukwe, a Psychiatric Clinical Officer at Karonga District Hospital is the one who gave evidence for the defence. He managed the accused person as a patient when the Police brought her to the Hospital.
- 11 After conducting a physical assessment of her, he found that she was fully conscious. She had a pink conjunctiva indicating that she lost no blood. She had no fever. Her chest was clear. Her heart sounds were normal except that her heart beat was fast – tachycardia. Blood pressure was a little raised.
- 12 As for her mental assessment, she had a low mood. Her clothes and body were kempt. She had low volume of speech. No derailment i.e. shifting of sayings. No delusions. No hallucinations. But her judgment was poor as she wanted to kill herself with a rope. Her insight was also poor, as she did not recognise that she was sick and needed hospital attention. She had positive suicidal ideation, as she wanted to kill herself with rope upon discharge from the hospital. He diagnosed her with depression with suicidal ideation. Samuel Atupele Simfukwe tendered a copy of the progress report of the patient at the hospital as part of his evidence.
- 13 Asked what depression with suicidal ideation means in terms of the mental status of the patient, Samuel Atupele Simfukwe stated that: -
- “It means she has a mental illness because she was a woman who was able even to end her life. And depression is one of the key indicators that someone is not

mentally fine. She had features of depression and she wanted to end up her life. It indicates that mental status is not normal.”

14 Later in his testimony Samuel Atupele Simfukwe was asked to repeat what the particular condition entails to somebody’s behaviour and he said: -

“It means that she was unstable, she was unsound. We referred the patient to Zomba Mental Hospital for proper care and broad assessments.”

15 In cross examination Mr Simfukwe was asked the cause of depression with suicidal ideation. He responded that it is a psychological problem which exists in an individual when something has occurred to him. He confirmed that severe loss can cause the condition and he knew the patient had just lost her two daughters.

16 He was asked for other causes in re-examination and he categorised them into three – biological, psychological and social causes. Biological causes being things like diseases like brain tumour or any other cancers and long standing illnesses like diabetes. Social causes being issues like loss of what one used to have. For example, someone rich suddenly becoming poor. Psychological causes being thoughts like when one relates their present life to the past, they may have some sort of depression and sometimes decide to live in isolation.

17 To demonstrate that it is not conclusive that the accused committed the offence, Defence Counsel submitted that since the necessary procedure of post-mortem examination was not carried out on the bodies to determine what exactly caused the death of the kids, the cause of death was never established in this matter and any suggestion as to what constituted the cause of the death remains speculative. Counsel observes that the post-mortem report of Tawonga Zuze does not say anywhere that the death was due to poisoning. All it says is that poison was found by the side of the body and does not indicate whether the alleged poison found beside the body was the cause of the death. Although the post-mortem report of Tawana Zuze suggests that death was due to poisoning as there was foam coming from the mouth and poison was found by the side of the dead body, it does not show how they determined that the substance was poison and it

was the actual cause of the death. Counsel argues that the mere fact that the Police found it necessary to send the items collected from the room for analysis at the Central Veterinary Laboratory, meant they were even sceptical of the findings of the post-mortem reports. And the report from the Lab indicates that though the substance was a chemical, it did not match with any working standards of a poison, including Termik. Additionally, despite being requested whether the contents were a poison that could cause death, the report is silent on that aspect. Counsel argues that such an omission is not by mistake. It is because the findings are that the substance did not match with any working standards of a poison including Termik. Not every chemical is poisonous or capable of causing death. So, the post-mortem reports were made without a basis.

18 All these arguments focus on one aspect of the evidence in this case, the post-mortem examination reports. If the court were to do the same, indeed it would find it inconclusive that the accused committed the offence. The court however considers all the evidence in total. There is also the confession of the accused person in her caution statement and conclusions that may be inferred from all the circumstantial evidence.

19 Regarding the confession, Defence Counsel submits that it was retracted by the accused person's plea of not guilty. He submits further that the law is clear that any admission or confession should be disregarded by the court where at trial the said confession is followed by a not guilty plea. Such a plea puts every material fact in issue requiring the prosecution to prove. Thus, where the prosecution has failed to prove a material fact, like in the present matter, that the accused administered poison to the kids, her confession cannot be used.

20 I do not entirely agree with Counsel on this point. He cited the case of *Chisenga v. Republic* (1993) 16 (1) MLR 52 on this point. The Supreme Court of Appeal in that case acquitted the appellant who had been convicted on his confession because an essential element of the offence charged had not been proved. The court said at page 56: -

"The prosecution not having proved an essential element of the offence, cannot rely on a confession, denied confession, whether or not it is corroborated, bearing

in mind that a plea of not guilty puts every material fact in issue and anything in the nature of an admission by an accused person before the trial, ought, in such circumstances, to be disregarded by the court. In other words, the appellant's admission in his statement to the Police that he stole only part of what the fourth witness for the prosecution alleged was the shortfall, cannot be used to save the case for the prosecution where an element of the offence charged has not been proved, something the court below appears to have upheld."

21 It is important in my view, to understand the Supreme Court of Appeal in the context of that case. The appellant had been convicted of the offence of theft by a person employed in the public service, contrary to section 278 as read with section 283 (1) of the Penal Code. Section 283 (1) of the Penal Code provided that: -

"Where it is proved to the satisfaction of the court that any person employed in the public service has by virtue of his employment received and has in his custody or under his control, any money or other property, and such person has been unable to produce to his employer such money or other property or to make due account therefor, such person shall, unless he satisfies the court to the contrary, be presumed to have stolen such money or other property, and shall be convicted of the felony of theft."

22 The appellant was a Clerical Officer responsible for receiving boarding fees and general purpose fund at Ntcheu Secondary School. An audit of his office was conducted in his absence while in Police custody. The Supreme Court of Appeal held it an essential element of the offence charged in that case, for the presumption to arise, that the public servant must be allowed the opportunity to produce the money or property or make due account thereof. In his absence, the appellant had no such opportunity during the audit inspection.

23 Coupled with this, while the appellant was in custody and before the audit inspection, the first witness to that case had been keeping keys of the safe, some cash and accounting documents, handed to him by the appellant before arrest. He lost the key, and one day, on

his own, broke up the safe. There were documents in the safe which could have helped the appellant show how the money alleged stolen had been used, but they went missing.

24 Regarding confessions Section 176 (3) of the Criminal Procedure and Evidence Code provides that: -

“Evidence of a confession admitted under subsection (1) may be taken into account by a court, or jury, as the case may be, if such court or jury is satisfied beyond reasonable doubt that the confession was made by the accused and that its contents are materially true. If it is not so satisfied, the court or the jury shall give no weight whatsoever to such evidence. It shall be the duty of the judge in summing up the case specifically to direct the jury as to the weight to be given to any such confession.”

25 It is therefore not entirely true that any admission or confession should be disregarded by the court where at trial the said confession is followed by a not guilty plea. By the time section 176 (3) of the Criminal Procedure and Evidence Code comes into play in a case, the accused will have pleaded not guilty. Where he pleads guilty, there is no point getting into all what that provision requires to be done. The provision requires that the court should be satisfied beyond reasonable doubt that the confession was made by the accused and that its contents are materially true because the fact of the confession is actually, at that point, in issue.

26 The present case is distinguishable from *Chisenga v. Republic* (1993) 16 (1) MLR 52 in that regard.

27 Defence Counsel further submits that the accused was at the material time suffering from a Major Depressive Disorder. Traffic Sub Inspector Ng'ambi believed she was mentally ill and Samuel Atupele Simfukwe, the Psychiatric Clinical Officer diagnosed her as such. Counsel submits that it shows that she was not in the right mental state at the time of recording her caution statement. So they cannot be used against her.

- 28 This argument in my view, can better be dealt with together with Counsel's last argument on the mental illness of the accused. By the way, Counsel refers to the accused person's mental illness as Major Depressive Disorder, but the Psychiatric Clinical Officer referred to it as depression with suicidal ideation. I do not know whether they are the same or not, but I prefer to use the term the expert used.
- 29 In his last argument Defence Counsel refers to social causes of the accused person's mental illness and submits that since she had been sent away from her family on the grounds of illicit marital relationships, it is clear that if at all she decided to kill herself and her kids, the same was a result of poor judgment and lack of insight emanating from the depression as a result of the broken marriage. She therefore was not of sound mind at the time of committing the offence and even after. It was such that she could not appreciate her act and the consequences thereof, such that she should not be held criminally responsible.
- 30 This argument requires us to refer to refer to sections 11 and 12 of the Penal Code. I quote.
11. Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.
12. Subject to the provision of this Code with regard to persons suffering from diminished responsibility, a person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is, through any disease affecting his mind, incapable of understanding what he is doing, or knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission.
- 31 On these provisions, Defence Counsel brought to my attention the case of *Lusuwa v. Republic* [2002-2003] MLR 169 where the Supreme Court of Appeal stated: -

To: Mustafa Amidu t/a Atkin Chambers- Mzuzu

And to: Mr. Mclean Mkandawire, C/O Atkin Chambers - Mzuzu

“We have considered this and have borne in mind the provisions of section 12 and are of the views that when irresponsibility is raised as a defence, as is being raised now, it is important to ascertain the mental condition of the person concerned both before and after the commission of the act in order to be able to answer the question whether he was capable or incapable of understanding what he did at the time. And the position in law is that every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved – see section 11 of the Penal Code. It was therefore for the defence to have established, not beyond reasonable doubt but on a balance of probabilities, that the appellant was of unsound mind at the material time.”

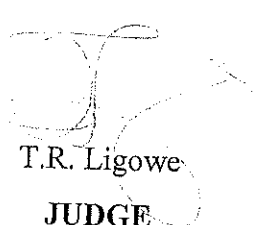
- 32 This is clear, that the mental illness must be such as making the person incapable of understanding what he is doing, or knowing that he ought not to do the act or make the omission. It must manifest both before and after the act or omission in question. Section 12 is very clear that some diseases of the mind may not have any of the effects mentioned above, and for such, the person becomes criminally responsible.
- 33 Yes the Psychiatric Clinical Officer diagnosed the accused person with depression with suicidal ideation, but in all his testimony, he said nothing to the effect that she was as a result, incapable of understanding what she was doing, or knowing that she ought not to do what she did. This is not a matter of balance of probabilities. It simply did not come out in his evidence. She therefore has to be criminally responsible. And consequently, she was well aware of what she was saying in her caution statement.
- 34 We now have a situation where the accused gave her deceased daughters a drink to which she added a chemical, after which they vomited and had difficulties to breathe and eventually died. She gave them that drink because she wanted them and her to die. Fortunately she survived. After analysis at the Central Veterinary Laboratory, the chemical did not match with any of their standards including Termik. Should the court conclude they died a natural death without her causing it for this reason? I do not think this court should be so naïve to make that conclusion.

35 I agree with Lord Denning in *Miller v Minister of Pensions* [1947] 2 All ER 372 when he stated:-

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. 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. If the evidence is so 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,” the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

36 I therefore find the accused guilty and convict her for the offence charged.

37 Pronounced in open court this 26th day of May 2012.


T.R. Ligowe
JUDGE