IN THE MALAWI SUPREME COURT OF APPEAL

**AT BLANTYRE**

**MSCA CRIMINAL APPEAL NO. 12 OF 2002**

Being High Court Criminal Case No.28 of 2002

BETWEEN:

**AUSTIN SHABA …….. APPELLANT**

- and –

**THE REPUBLIC …… RESPONDENT**

**BEFORE: THE HON. THE CHIEF JUSTICE**
**THE HON. JUSTICE TAMBALA, JA**

**THE HON. JUSTICE MSOSA, JA**

Kanyongolo (Mrs.), Counsel for the Appellant

Nayeja (Ms), Counsel for the Respondent

Kaundama, Daudi (Mrs.), Court Officials

**JUDGMENT**

**MSOSA, JA**

The appellant was convicted of murder under section 209 of the Penal Code. The particulars of the offence were that the appellant on or about the 11th July, 1997, at Muweka Shaba Village in Mzimba District with malice aforethought caused the death of Donald Banda. He was sentenced to death. He now appeals against both conviction and sentence.

The appellant filed six grounds of appeal in which he essentially contends that the judge in the court below failed to properly direct the jury on: (a) what constitutes malice aforethought; (b) the defence of provocation and self defence; (c) the burden of proof and standard of proof in criminal cases. The appellant further contends that the conviction is against the weight of the available evidence. The appellant submits that the misdirection of the judge resulted in manifest injustice.

The facts of this case are not complicated. The deceased was seriously assaulted by a group of villagers during the night of 11th July 1997, because he was suspected of being a thief. The deceased sustained fatal injuries. The prosecution called two witnesses to testify against the appellant. The first witness was Yunisi Banda, the wife of the deceased. She told the court that she received information from her brother in-law that her husband, the deceased, was stabbed. She went to where the deceased was and observed that the deceased sustained injuries on his forehead and his leg. She asked him what he was doing and he did not answer her. She then carried him home on her back. She asked him how he had travelled and she said that the deceased replied that he was killed by Laston Shaba who was the first accused in the court

below. She told the deceased that she was going to report the matter to Police and she said that the deceased requested her to wait in case he was going to recover. It was her evidence that, all the same, she went and reported the matter to police where the police advised her to take the deceased to the hospital. Unfortunately, the deceased died before she could take him to the hospital. She, therefore, went back to police and reported the death of her husband.

The other witness for the prosecution was a police officer, Detective 2/Sgt. Mughogho. This witness tendered in evidence the caution statement of the appellant and his reply to the charge. He also tendered in evidence the postmortem report of the deceased. The appellant stated in his caution statement that during the night of 11th July 1997 he heard Gilbert shouting saying "thief". The appellant and his father who was the first accused went to their kraal to check whether all their cattle and goats were available. They found that nothing was stolen. Then, they heard people shouting and when they went where the people were shouting, they found a person lying down after he was assaulted by some people. The appellant could not identify the people who assaulted that person. The appellant admitted in his caution statement that he slapped that person just a little bit. Later he heard that the person had died.

The postmortem report of the deceased was that death was due to multiple injuries: "amputation". The clinical officer who compiled the report made the following remarks as regards to external appearance of the dead body:

"Pupils dilated not responding to light. Nutritionally sound. No head, no lower extremities. Amputated at the level of upper limb about 3cm from the Knee."

The appellant gave evidence in defence. He denied that he caused the death of the deceased. He repeated what he had said in his caution statement.

The main argument of the appellant in this court is that the prosecution failed to establish malice aforethought which is a prerequisite mental element for one convicted of murder. According to section 212 of the Penal Code malice aforethought is established, inter alia, when one or more of the following exist (a) an intention to cause death of or do grievous harm to any person, whether such person is the one actually killed or not; (b) knowledge that the act or omission causing death will probably cause death of or grievous bodily harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievously bodily harm is caused or not, or by a wish that it may not be caused; (c) an intent to commit a felony.

It is clear from the evidence that the deceased was a victim of mob justice. The injuries suffered by the deceased were serious, terrible and horrific to say the least. The head and one of the legs of the deceased were chopped off. These were fatal injuries according to the postmortem report.

The law requires that where two or more people jointly cause the death of another, for each of them to be liable the prosecution must prove that the accused embarked on a joint enterprise. When two or more persons embark on a common enterprise each is liable for the acts in pursuance of that joint enterprise. That would include liability for unusual consequences if they arise from the agreed joint enterprise Archbold 1994 2nd edition para19-25.

The only evidence implicating the appellant was his admission that he slapped the deceased a little. The evidence of PW1, the wife of the deceased was that the deceased told her, before he died, that he had been Killed by Shaba, the teacher. Mr. Shaba was the first accused and he was acquitted. We have problems in appreciating that a headless body with one leg chopped off could talk or indeed be alive several hours after the injuries were inflicted. Even if, for argument sake, it is accepted that the deceased made the dying declaration, only the first accused was mentioned. We are of the view that if the jury had directed their minds to this piece of evidence and examined it in the light of the postmortem report, they would have doubted its truthfulness.

The question is whether there was sufficient evidence to prove that the appellant, with malice aforethought caused the death of the deceased. Did the appellant intend to kill or to cause grievous harm? The available evidence shows that the appellant, after hearing people shouting, went to the scene and found the deceased lying down after he was already assaulted. The appellant only beat the deceased a little. There is no evidence that probably the appellant assaulted the deceased jointly with the other people or that he is the one who chopped off the head and the leg of the deceased. The appellant did not have and did not use any sharp instrument. If the Judge and the jury had directed their minds to all these questions, their verdict would not have been of murder. The circumstances of this case do not show that the appellant intended to cause the death of the deceased, to cause grievous bodily harm or to a commit a felony.

We have considered whether it was necessary for the Judge to give directions to the jury on the defence of provocation and self-defence. We have come to the conclusion that having regard to the facts and circumstances of this case, it was not necessary. We have also considered whether in the circumstances of this case the appellant committed a lesser offence of manslaughter. We are of the view that the facts fell short of establishing that the appellant committed the offence of manslaughter.

We conclude, in the circumstances, that there was no evidence to support the conviction. Consequently we quash both conviction and sentence.

**DELIVERED** in Open Court this 7th day of March, 2003, at Blantyre.

Sgd.: ……..

**L. E. UNYOLO, CJ**

Sgd.: ……..
D. G. TAMBALA, JA

Sgd.: ……..
A. S. E. MSOSA, JA