JUDICIARY

IN THE MALAWI SUPREME COURT OF APPEAL
AT BLANTYRE
MSCA CRIMINAL APPEAL NO. 6 OF 2007
(Being High Court Case No. 165 of 2003 sitting at Mulanje)

BETWEEN:

CHARLES KHOVIWA..APPELLANT

-and-

THE REPUBLIC...RESPONDENT

BEFORE: **HON. JUSTICE D.G. TAMBALA, SC, JA**
HON. JUSTICE A.K.C.NYIRENDA, SC,JA
HON. JUSTICE E.M. SINGINI, SC, JA
Mlenga & Chungu,Counsel for the Appellant
Ms Kayuni & Nkosi, Counsel for the Respondent
Mwale, Recording Officer
Singano (Mrs), Senior Personal Secretary

JUDGMENT

TAMBALA, SC, JA

On 16th September, 2003, the appellant was convicted of murder contrary to section 209 of the Penal Code, by the High Court sitting with a jury at Mulanje. He was sentenced to suffer death. The appellant's case moved through the High Court System with commendable speed. The crime was committed on 1st January, 2002. On 16th September, 2003 full trial commenced before the late Chimasula, J; the trial was concluded on the same day, resulting in the conviction and sentence of the appellant. The trial court handled the case with remarkable

efficiency. But the appellant is dissatisfied with his conviction and sentence. He decided to bring this appeal.

Fortunately for the prosecution, the crime was committed in full view of eye witnesses who readily gave evidence, in the court below, on the side of the prosecution. The first witness, who gave evidence for the prosecution, was Aramson Muchiwa. He is an uncle of the appellant. He said that on 1st January, 2002, he found the deceased struggling with the daughter of Waheliwa over a chair. The deceased wanted to take away the chair claiming that it was brought there by his father. The witness got hold of the deceased and asked him to leave the place. The deceased refused to listen. He insisted that he wanted to take away the chair. He assaulted the witness. Then the appellant and one Roid Peter came to the place and intervened. They beat up the deceased. The witness pleaded with them to stop assaulting the deceased, but they did not listen. The deceased began to run away from the place. The appellant and Roid Peter pursued him. The witness tried to call them back, but he was unsuccessful. They continued with the chase.

The second witness was Dalitso Walasi. His evidence was that on the material day he had gone to a grocery to buy soap and as he was walking back from the grocery he saw the appellant and Roid Peter chasing the deceased. He noticed that the deceased fell down after one of his pursuers had tripped him. Then he saw Roid Peter stabbing the deceased with a knife. The appellant also stabbed the deceased with a knife. They both stabbed him in the chest. After stabbing the deceased the handle of the appellant's knife broke away leaving the blade embedded in the victim's body. The deceased managed to stand and run briefly before he collapsed and fell down. He died later, on the same day.

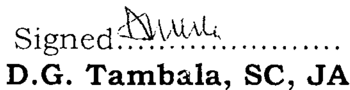
The appellant's appeal is grounded on the partial defence of provocation. It was argued that this possible defence was not fully explained to the jury. It is true that the deceased assaulted Aramson Muchiwa who is an uncle of the appellant. But the deceased used bare hands during the assault. Besides, the person who was assaulted pleaded with the appellant and his colleague to stop assaulting the deceased. He also pleaded with them and requested them to call off the chase against the deceased, but the appellant and his accomplice refused to pay attention. Clearly the deceased had given up the fight and ran away to save himself from further trouble, but the appellant and his colleague could not give him a chance to escape. They pursued him, caught up with him and stabbed him to death. We do not think that the evidence left sufficient space for grounding the defence of provocation. We have examined the learned judge's direction to the jury and we think that the learned judge did not err in the manner in which he addressed the jury, considering the overwhelming evidence supporting murder

which was adduced in the court below. We are not satisfied that there is any merit in the ground of appeal on which the appellant relies.

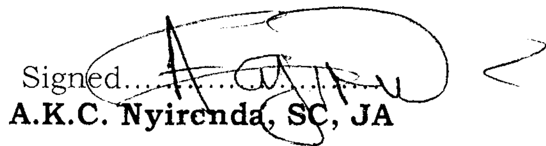
We must now consider the appeal against sentence. It is true that in the case of ***Twoboy Jacob v. Republic M.S.C.A. Criminal Appeal No. 18 of 2006***, this court accepted the High Court's decision that the mandatory imposition of the sentence of death in every conviction of murder, regardless of the presence of mitigating circumstances, is unconstitutional. We also agreed that the trial judge must at all times possess discretion in relation to the gravity of sentence which must be imposed, even in cases where the defendant is convicted of murder: see ***Constitutional Case No. 12 of 2007 Kafantayeni and Another v. Attorney General.*** In the present case however, we take the view that the appellant does not deserve the court's lenience. The appellant and a colleague assaulted and stabbed a defenceless person who was fleeing the scene of a fight to save himself from trouble. The appellant and his accomplice did not want to give the deceased a chance to live. His conduct on the material day was inexcusable. He deserves the death sentence.

The appellant's appeal is unsuccessful. It is dismissed.

DELIVERED in Open Court this 1st day of July, 2010 at Blantyre.



Signed.........................
D.G. Tambala, SC, JA



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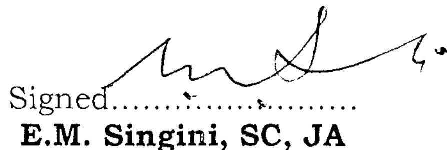
A.K.C. Nyirenda, SC, JA



Signed.........................
E.M. Singini, SC, JA