



MALAWI JUDICIARY

IN THE SUPREME COURT OF APPEAL

SITTING AT BALANTYRE

MSCA CRIMINAL APPEAL NO. 06 OF 2019

(BEING HIGH COURT PRINCIPAL REGISTRY, HOMICIDE CAUSE NUMBER 58 OF 2012)

BETWEEN

DAVID TCHALE.....1ST APPELLANT

DANKEN THAWANI.....2ND APPELLANT

WITNESS MACHESO3RD APPELLANT

AND

THE REPUBLICRESPONDENT

CORAM

HON. THE CHIEF JUSTICE A.K.C. NYIRENDA SC

HON. JUSTICE R.R. MZIKAMANDA SC, JA

HON. JUSTICE L.P. CHIKOPA SC, JA

HON. JUSTICE F.E. KAPANDA SC, JA

HON. JUSTICE H.S.B. POTANI, JA

HON. JUSTICE J. N. KATSALA, JA

HON. JUSTICE M.C.C. MKANDAWIRE, JA

Chidothe/Kapoto, Counsel for the Appellants

Chisanga, Counsel for the Respondent

Msowoya/Shaiibu/Mankhwazi, Judicial Research Officer

Minikwa/Masiyano, Recording Officer

Z. Mthuzi, Reporter

JUDGEMENT

The appellants, Tchale, first appellant, Thawani, second appellant and Macheso, third appellant, were charged with of murder of Kasole Bello. Upon full trial the court below found that the appellants acted with malice aforethought in causing the death of the deceased. Each of the appellants was convicted and sentenced to fifteen years imprisonment with hard labour. The appellants appeal against their conviction as well as the sentences imposed against them. This is a unanimous judgement of this Court.

By their joint grounds of appeal, the appellants contend, substantially, that their conviction was against the weight of the evidence. They stress, in particular that the court below relied on the testimony of one witness, a witness whose testimony should in fact not have been relied upon because most of what she testified was retracted in cross examination. Further it is contended that the witness, being a sister to the deceased, naturally exaggerated what she told the court in order to secure the appellant's conviction.

Each appellant submits that the sentence of fifteen years imprisonment with hard labour is manifestly excessive regard being had to all the attendant facts and circumstances as evidenced.

We start with the arrestive facts. Kasole Bello, deceased, of Nkumbira Village, Traditional Authority Kanthumanji in Zomba District was brutally assaulted to death on 19th May 2009 at his home area. This fact is not in dispute. According to the Report of Post-Mortem Examination death occurred due to:

“Brain damage as evidenced by open fracture occipital skull-Big cut wounded (R) (right) lip-multiple fractures of ribs”

Obviously the question is whether the appellants caused the death of Bello and that they so did with the intention to cause death as defined under Section 212 of the Penal Code. The critical witness for the prosecution was Mariam Bello, the deceased's sister. Mariam personally witnessed most of the events on this fateful day.

She was first alerted by the deceased's wife who came to her house to find out if she knew where her brother was because a group of people, who included Chale, Thawani and Macheso came to their house looking for him. The three mentioned are the appellants. Mariam also heard noise coming from a crowd that had gathered nearby. She rushed to where the noise was coming from, at a drinking place and there she found the three appellants assaulting the deceased.

This was in broad day light around three o'clock in the afternoon. According to Mariam each of the three appellants were armed with a weapon. Tchale had a knob-kerry, Thawani had a momba and Macheso had a metal bar. When she saws what was happening to her brother, she was fearful of her own safety, so she left the place.

The deceased was later brought to Tchale's house which is near to her home. She gathered courage and went to the house and found the three appellants continuing to assault the deceased. Although it was now early night, she was able to see what was happening because the appellants had torches. While there, the second appellant noticed her presence and threatened to assault her as well at which moment she again retreated.

Later the appellants, now surrounded and accompanied by a bigger mob, decided to take the deceased to police. Mariam followed them and along the way she heard the deceased cry out why Tchale was killing him. She informed the court that eventually that evening the deceased passed out and died.

When she was cross examined she remained emphatic that all the three appellants were armed and that she saw them assaulting the deceased. Yes, she accepted, that there was a mob also assaulting the deceased but she came out very strongly that the three appellant personally took part in assaulting the deceased at the bar where they found him and later from Chale's house all the way as they took him to police. She said the deceased had cuts all over his body. She stood her ground that the three appellants were armed and that she actually saw them assaulting the deceased.

The witness admitted that there were instances when she did not tell the truth. In particular, she said his brother's private parts were severed by a lady named Christina. The Report of Post Mortem Examination does not support this allegation. There was therefore no truth in it, otherwise such an important feature of the deceased's body could not have been missed by the Medical Examiner. The witness also mentioned Tchale's wife as one of the assailants which was challenged in cross examination

The next witness for the State was the Medical Practitioner who examined the body of the deceased. The important part of the Report of Post Mortem Examination has been quoted earlier, confirming that the deceased was assaulted with blunt objects and also that there were open cuts wounds on the body. He also established that there were multiple fractures of the ribs. The deceased must also have suffocated due to multiple fractures of the ribs. The cause of death was primarily due to brain damage.

The third prosecution witness was the police officer who witnessed recording of a caution statement; not much came from him for useful evidence.

The first appellant and the second appellant gave evidence in person. The third appellant did not. For the defence there was also Mr. Akidu Amani

The first appellant confirmed, that in the company of the second appellant, they arrested the deceased because he had been informed by Mr. Hastings Kalosi that it was the deceased who had stolen his seven goats and his bicycle. According to the appellant, when they confronted the deceased with the allegation of theft, the deceased readily admitted to have stolen the goats and the bicycle. This was around three o'clock in the afternoon. The appellant informed the court that the deceased confessed and revealed that he was with Akidu Amani. With that information, the appellant and the mob that had gathered took the deceased to Akidu's house. From Akidu's house they took the deceased to police. That all this time the deceased was not being assaulted. It was when they were going to police that the deceased attempted to run away and was soon apprehended and assaulted by the mob. He said neither him nor the other appellants took part in assaulting the deceased.

According to the first appellant, he invited the people who constituted part of the mob to help him apprehend the deceased who was a habitual thief. It is important to mention that none of the property that was said to have been stolen was found with the deceased. What is also worth mentioning is that the informer, Hastings Kalosi, does not feature further in the testimony of the first appellant beyond being mentioned as the informer and for some unclear reason Kalosi was not called to come and explain when and where he saw or found the deceased with the appellant's goats and the bicycle.

The first appellant's testimony confirms that they apprehended the deceased around three o'clock in the afternoon. The deceased was under his charge and control together with the other two appellants, in the midst of the mob, until as far late as ten o'clock at night. In fact, upon apprehending the deceased they took him all over the surrounding villages. It was only around seven o'clock at night that they decided to take him to police. It is not clear why they did not take the deceased to police immediately they apprehended him, especially upon noticing the charging mob.

The second defence witness, although called by the appellants, served to support the case for the prosecution. He confirmed that the deceased was heavily assaulted to the point that he cried for his life. All that time the deceased was under the charge of the three appellants. Unlike the explanation given by the first appellant suggesting that the deceased attempted to escape, this witness informed the court that in fact the deceased was attempting to save himself from the heavy onslaught. When they caught up with him, the assailment got even heavier and more brutal.

The second appellant, Danken Thawani, confirmed that the three appellants were the ones responsible for the arrest of the deceased. He was brother in-law to the first and third appellant. He was the chairman of community police. The three set out to arrest the deceased and indeed arrested him around three o'clock in the afternoon. In his testimony they questioned the deceased about the theft of the third appellant's goats and a bicycle. He told the court below that initially the deceased denied stealing the first appellant's goats and bicycle. Upon further interrogation, he is said to have admitted.

From that point they took the deceased to several places in an attempt to trace some of the stolen property. Nothing was found at the places they went. Eventually the deceased was taken to police and this was after seven o'clock at

night. Like the first appellant, his version of events was that the deceased was only assaulted when he tried to run away as he was being taken to the police station; that it was the mob that followed them that assaulted the deceased.

We have had occasion to thoroughly analyse the events in this matter and raised doubts about some aspects of the evidence and testimony of the critical witness, Miriam Bello. We observe that the witness was not truthful in some respects of her testimony. It was not true that the deceased's private parts were severed and we were in doubt if the first appellant's wife took part in assaulting the deceased with a pounding stick.

On the whole though we found that the testimony of this witness was first hand and largely truthful. The witness responded to information that her brother, the deceased, was being sought by the mob that she was hearing. She instantly rushed to the place where her brother was found and apprehended. She was emphatic that the three appellants were the leaders of the operation. She was clear in her testimony that the three appellants were armed and that they were assaulting the deceased. One of the appellants actually threatened to turn to her if she stayed around. She temporarily left but came back to the scene. She followed the mob the whole afternoon into the night when her brother was eventually taken to police and there he died.

We are in no doubt that Kasole Bello died the night of 19th May 2009. Bello died an extremely painful death resulting from heavy assault unleashed by the appellants and no doubt by the mob that surrounded the deceased. The deceased experienced one of the most harrowing and heart-rending ordeal which went on for close to, if not over, seven hours; from three o'clock in the afternoon to around ten o'clock at night when he died. Throughout the seven hours it was the three appellants who were in-charge and in control of the events. Apart from taking

part in assaulting the deceased, they held on to him while he was being tormented by the mob.

What is clear, on the testimony of the appellants themselves, is that they were out to fix the deceased whom they perceived as a perpetual thief and they were convinced that he was the one who had stolen the first appellant's goats and bicycle. For that reason and the picture that clearly comes out, is that the three appellants were all out to deal with the thief, which they did. They cared less about the consequences of the assault on the deceased.

Section 212 of the Penal Code explains malice aforethought, the intention to cause death, as follows:

"Malice aforethought shall be deemed to be established by evidence providing any one or more of the following circumstances:

(b) Knowledge that an act or omission causing death will probably cause the death of or grievous harm to some person.....although such knowledge is accompanied by indifference whether death or grievous harm is caused or not, or by a wish that it may not be caused;

(c) An intention to commit a felony"

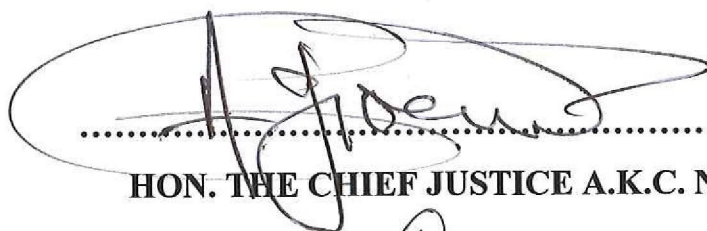
On the facts, the evidence and the law, there was a clear intention on part of the appellants to cause the death of the deceased or they cared less if, by their action, death resulted. They certainly intended to commit a felony when they assaulted the deceased with the weapons that they carried.

The prosecution case was well supported by evidence which measured well beyond the required standard, we so find. It was well beyond reasonable doubt

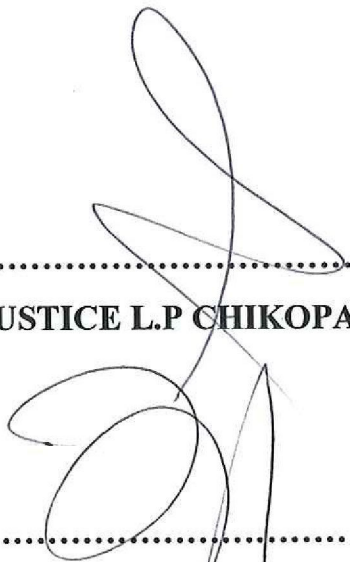
that the three appellants took part in assaulting the deceased. The evidence was not circumstantial. It was directly what the first prosecution witness saw and what the second prosecution witness established. It was further well beyond reasonable doubt that as a result of the assault the deceased sustained serious and grievous injuries on the head and all over his body, including broken ribs, from which he died. This Court has said, in *Nankondwa v. Republic* [1966-68] 4 MLR 388 at 394 that the standard of knowledge required to establish malice aforethought in terms of *Section 212(b) of the Penal Code* is not foreseeability beyond reasonable doubt that the act will cause death, or grievous harm; it is no higher than knowing that the act will probably have such a result. We are in no doubt, that the three appellants knew that the not less seven-hour onslaught on the deceased would have the result of causing him grievous harm, if not causing his death. The guilt of all the three appellants was therefore well established. The appeal against their individual conviction is thus dismissed.

The court below carefully looked at aggravating and mitigation factors on call in the case and as presented by counsel on behalf of each of the appellants. We do not find anything remiss with the assessment of sentence by the court. The appeals against sentence in respect of each of the three appellants is dismissed. In the result, the entire appeal fails.

PRONOUNCED in open court at Blantyre this 14th day of February, 2023


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HON. THE CHIEF JUSTICE A.K.C. NYIRENDA SC


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HON. JUSTICE R.R. MZIKAMANDA SC, JA

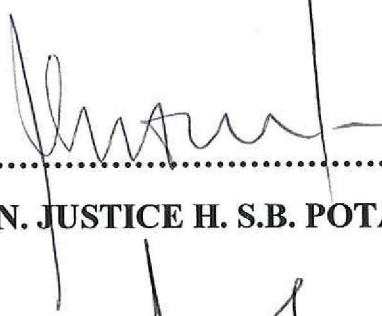


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HON. JUSTICE L.P. CHIKOPA SC, JA

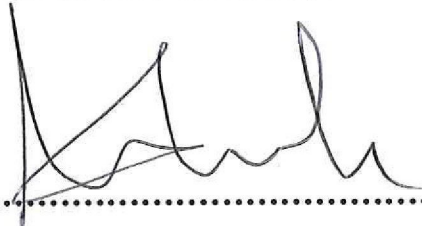
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HON. JUSTICE F.E. KAPANDA SC, JA



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HON. JUSTICE H. S.B. POTANI, JA



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HON. JUSTICE J.N. KATSALA, JA



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HON. JUSTICE M.C.C. MKANDAWIRE, JA