

**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY**

CRIMINAL CAUSE NO. 68 OF 2008

BETWEEN

THE REPUBLIC COMPLAINANT

AND

HENRY KEFA RESPONDENT

CORAM : **HON. JUSTICE MZIKAMANDA**
: Nita, Counsel for the Applicant(s)
: Kalasa, Counsel for the Respondents
: Kabaghe, Court Reporter
: Mr. Njirayafa – Court Interpreter

JUDGMENT

MZIKAMANDA, J.

The accused person appeared before me on a charge of manslaughter contrary to Section 208 of the Penal Code. The allegation was that the accused on or about 31st October, 2006 at Msangu location in the District of Salima unlawfully caused the death of Peter Mkhutamadzi. He pleaded not guilty to the charge.

The case for the State opened with the evidence of Evance Issa as PW1. According to him, on the material evening he was coming from the market in the company of the accused person going home. On the way they met Chimwemwe Gama who was in the company of Peter Mkhutamadzi, now the deceased. Upon their meeting, the accused person confronted Chimwemwe Gama alleging that he was boastful. Chimwemwe Gama asked why the accused alleged this and the accused retorted by saying "Don't you know?" Instantly the accused person began hitting Chimwemwe Gama as a result of which a fight ensued. PW 1 tried to stop the fight as did Peter Mkhutamadzi who was also an uncle to PW 1. The fight proved difficult to stop even as Yosefe Longwe and Tobiasi Zigwetsa joined in the efforts to stop the fight. At that point the accused injured the arm of Tobiasi Zigwetsa with a knife and told him to go away or else he would see.

In cross-examination he said that at the material time both him and the accused person were sober although during the day the two did business separately. He did not know why the accused alleged that Chimwemwe Gama was boastful. The accused produced a knife with which he wounded Tobiasi Zigwetsa.

According to PW 2, Chimwemwe Gama, he and Peter Mkhutamadzi were returning from the market on the material evening when they met the accused person who was in the company of PW 1. The accused then said to him that whenever he was with Peter Mkhutamadzi he was boastful. No sooner had he said this than he began to beat the witness. Efforts to stop the accused from beating him failed as the accused proved to be more powerful. Tobiasi Zigwetsa

and Yosefe Longwe joined in to stop the fight but the accused then produced a knife with which he injured Tobiasi Zigwetsa. Then the accused turned to Peter Mkhutamadzi and stabbed him on the chest. The witness had become weak as a consequence of the fight.

It transpired during cross-examination that the accused carries on a business of selling roasted meat at the nearby market, Msangu. He did not know why it was said that he was boastful but he never quarreled with the accused person. He did not know of any enmity between the accused person and Peter Mkhutamadzi. The accused stabbed Tobiasi Zigwetsa first before stabbing the deceased. He just heard a cry saying *"I have been stabbed."*

PW 3 was Tobiasi Zigwetsa. That night he had been with Yosefe Longwe returning from video show and going home. On the way they found the accused and Chimwemwe Gama fighting with Evance Issa and Peter Mkhutamadzi trying to stop the fight. The witness joined in to try and stop the fight. The accused warned him against stopping the fight or he would teach him a lesson. The accused then stabbed the witness with a knife of the left arm. The accused then proceeded to stab Peter Mkhutamadzi with the same knife. He stabbed the deceased on the left chest. At that point the witness and Yosefe Longwe picked up Chimwemwe Gama who had become so weak that he could hardly walk home. It was only the following morning that he learnt that Peter Mkhutamadzi had died. Frightened by the knife, they left Peter still struggling with the accused and heard Peter's cry that *"He has stabbed me!"* Peter had just walked a short distance before he dropped dead at Masambabise.

During cross-examination he said he had not drunk any beer that day. The fight took place near Lukumbo Grocery close to the market at Salima Boma. There were several bars nearby. The accused produced the knife from his pocket and stabbed him and the deceased. He was not treated at hospital for his wound. He did leave the accused and Peter fighting as he took Chimwemwe away. It is not correct to say that all the people were fighting the accused person. Peter Mkhutamadzi fought in self-defense.

PW 4 was Yosefe Longwe whose evidence was virtually a repeat of the evidence of PW 3. He also stated that after the accused beat up Chimwemwe Gama, Peter Mkhutamadzi said, *"You can not beat the child like this. Beat me as well."* At that point the accused produced a knife and stabbed Tobiasi Zigwetsa on the arm and said, *"Go or else you will die over other people's matters."* Then he stabbed Peter Mkhutamadzi on the left chest. He saw the accused stab Peter Mkhutamadzi. The deceased did not die at the scene. He walked and they parted company. It was only the following morning that they learnt of the death of Peter Mkhutamadzi after having walked a short distance from the scene of fight. When the accused learnt of the death of Peter Mkhutamadzi he disappeared.

In cross-examination he said that it would be wrong to say that Tobiasi Zigwetsa joined the fight although it may not be wrong to say Peter Mkhutamadzi joined the fight at the point when the accused produced a knife.

PW 5 Mrs. Catherine Nkhoma is a Psychiatric Nurse and midwife at Salima District Hospital. She carried out a mental examination on the accused person and found that the accused was mentally sound at that time, being 9th November, 2006. His speech was loud and clear. His mental thinking had no delusions and he had no hallucinations. His memory was good. He was well oriented in all spheres. He was conscious. It was from these findings that she made the conclusion that the accused was mentally sound. She has a certificate in psychiatry having qualified in 2005 although she had been a nurse and midwife for almost 15 years.

During cross-examination she said that at the time she examined the accused she found that he did not exhibit any mental abnormality.

PW 6 was the police investigator who assisted in the investigations of the present case. According to him the investigator was away and it was not possible to have him at the hearing. On 1st November, 2006 early in the morning a report was made at Salima Police Station by Emmanuel Phiri that his nephew Peter Mkhutamadzi had died at Masambabise within Salima township. The witness went to the scene in the company of the investigator and they found the dead body lying. He and the investigator saw stab wounds on the chest of the dead body. The body was taken to Salima District Hospital for Postmortem. Thereafter they took the body for burial. Investigations connected the accused person to the murder. The accused was arrested after a week and some days as he had disappeared from the moment he learnt of the death of Peter Mkhutamadzi. When the witness and the investigator interviewed the accused, the accused

denied causing the death of Peter Mkhutamadzi. The accused was cautioned and charged with murder.

During cross-examination he stated that investigations did not reveal that there was a fight between the accused and the deceased and he never established that the deceased was stabbed because he asked to be hit. Investigations revealed that the deceased was stabbed as he tried to separate Chimwemwe Gama and the accused who were fighting. He found two deep stab wounds on Peter Mkhutamadzi. The knife used in the stabbing was not recovered.

The accused person exercised his right to remain silent in accordance with Section 42 (2)(f)(iii) of the Republic of Malawi Constitution.

It is trite that the duty to prove a criminal charge rests on the prosecution and that to discharge that duty the prosecution is required by law to prove the case beyond reasonable doubt. The accused person is presumed innocent and has the right to remain silent during plea proceedings or trial and not to testify during trial. The accused is not a compellable witness against himself. (See Section 42 (2) (f) (iii) and (iv) of the Constitution).

In the present case the accused is charged with manslaughter contrary to Section 208 of the Penal Code which provides that:

“Any person who by an unlawful act or omission causes the death of another person shall be guilty of the felony termed “Manslaughter.””

In the case at hand therefore the charge against the accused is that he by an unlawful act or omission caused the death of Peter Mkhutamadzi. The duty placed on the prosecution therefore was to establish that:

- (i) The accused caused the death of Peter Mkhutamadzi, and
- (ii) That he cause the said death by an unlawful act or omission.

On whether the accused caused the death of Peter Mkhutamadzi I must examine in particular the evidence of PW 1, PW 2, PW 3 and PW 4. The material part of their evidence relates to a fight which they all stated involved the accused person during the fateful night. There is ample evidence that during the material night the accused fought with PW 2, Chimwemwe Gama. Prior to the fight the accused had been in the company of PW 1, walking from the market to their home. The evidence of PW 1 is firm that as the two of them walked they met Chimwemwe Gama who was in the company of the deceased. PW 2 was also firm that he was in the company of the deceased when PW 1 and the accused met them. I am satisfied and I find that when the two pairs met it was the accused who first accused PW 2 of being boastful. I am satisfied and I find that a fight ensued between the accused and PW 2. I am also satisfied that when the fight ensued PW 1 and the deceased made efforts to stop the fight. I also find that when PW 3 and PW 4 arrived at the scene they found the accused fighting with PW 2 while PW 1 and the deceased were trying to stop the fight. It is correct to say that at that point the fight proceeded using bare hands. PW 1, PW 3 and PW 4 all said that as the fight progressed the accused tried to repel the persons who were trying to stop the fight. In particular he threatened PW 3 to go away or he would

die over other people's affairs. It is also in evidence that at that point the accused produced a knife and stabbed PW 3 on the arm near the elbow. Then the accused using the same knife stabbed the deceased on the left chest. I have made a careful assessment of the evidence. I find that the witnesses were consistent and firm on these points. I do not see any divergence in their evidence as counsel for the accused argued in his submissions. I find that the accused in attempt to repel the persons who were trying to stop his fight with Chimwemwe Gama, produced a knife and stabbed both PW 3 and the deceased. The deceased did not die instantly but died as he walked home having walked only about 100 metres. I am satisfied and I find that the deceased died as a result of the stab wounds inflicted on his left chest by the accused person using a knife. I am satisfied and I find that there is overwhelming evidence to establish that the accused person caused the death of Peter Mkhutamadzi on the night of 31st October, 2006.

I must now turn to the second aspect on whether the accused caused the death of the deceased by an unlawful act or omission. In this case the focus is the act of the accused person stabbing the deceased with a knife. Counsel submitted that the deceased joined the fight between the accused and Chimwemwe Gama, challenging the accused to beat him just as badly as the accused had beaten Chimwemwe Gama. Counsel then argued that the joining in the fight by the deceased was an act of provocation.

S 214 of the Penal Code defines provocation as meaning and including any wrongful act or insult of such a nature as to be likely, when done or offered to an ordinary person, or in the presence of an ordinary person to any other person in

close relation to deprive him of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered. (See also Menyani v Republic 4 ALR (Mal) 79; Sitolo v Republic 4 ALR (Mal) 506). The question might be whether the joining in the fight by Peter Mkhutamadzi, if at all, was such that it would have made the accused to lose self-control. Again it is not every act or provocation that has an effect on a crime. The provocation must be of sufficient gravity to cause an ordinary man of the accused's community to lose his self-control (Sitolo v Republic 4 ALR (Mal) 506). The case of Rex v Andrea S/O Kamoto 1 ALR (Mal) 219 is clear on the effect of provocation on a crime. Provocation can never justify the commission of a crime. Provocation can only operate as a defense in mitigation in certain circumstances and in relation to certain offences for the purpose of reducing the gravity and seriousness of those offences and making the person committing one of those offences while under the stress of provocation guilty of a lesser offence. I am aware that the *onus* to establish the defense of provocation or self-defense is never on the accused but remains throughout on the prosecution (See Regina v Alayina 1 ALR (Mal) 510). I am aware that a court must examine the possible defense of provocation or self-defense in any given case of the present nature whether the accused has raised in his defense or not. Provocation if successfully established has the effect of reducing murder to manslaughter (Attorney General for Nyasaland v Jackson ALR (Mal) 488. In the present case I have examined the evidence. I am satisfied that there was no provocation by the deceased directed at the accused. I am satisfied and I find that Peter Mkhutamadzi's determination was to stop the fight between the accused and Chimwemwe Gama and not to challenge the accused to continue the fight and not with him. I reject the suggestion in the defense submission that

the accused only reacted to mounting pressure as all the witnesses PW 1, PW 2, PW 3, PW 4 and the deceased were fighting the accused. Such a suggestion would ordinarily be interpreted as if the accused person acted in self-defense. Again self-defense may reduce murder to manslaughter where there was excessive use of force (See DPP v Chipaye 4 ALR (Mal) 43). The question is whether the accused could have been said to have been under reasonable belief that there was imminent danger to him. Even if the accused were to be said to have acted in self-defense it will have to be conducted that in all the circumstance he used excessive force. Peter Mkhutamadzi was never armed with a knife. None of the witnesses PW 1, PW2, PW3 and PW 4 were armed with a knife or a dangerous weapon. The accused had no justification whatsoever to produce a knife and stab the deceased. After all he had an upper hand in the fight. In all the circumstances of the case I find that the accused's act of stabbing the deceased with a knife and causing his death was unlawful. I am satisfied beyond reasonable doubt that the charge of manslaughter contrary to Section 208 of the Penal Code charged has been proved against the accused. I find him guilty and I convict him as charged.

PRONOUNCED in Open Court this 22nd day of April, 2009 at Lilongwe.

R.R. Mzikamanda

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