

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL CASE NO. 53 OF 2000**

THE REPUBLIC

Versus

- 1. A/SUPT COSMAS PHILLIP ENEYA**
- 2. PAUL CHINGALA**
- 3. HAROLD CHIKAFUKA BANDA**
- 4. RAPHAEL BANDA**
- 5. FRANK BOMA**
- 6. THOMAS MANDA**
- 7. JAMES MWANDIRA**

CORAM: HON. JUSTICE A.C. CHIPETA

Kamwambe, Chief State Advocate, for the State

Manyungwa, Assistant Chief State Advocate, for the State

Kayira, Chief Legal Aid Advocate, for the Accused

Lameck, Senior Legal Aid Advocate, for the Accused

Kamanga, Official Interpreter/Recording Officer

SENTENCE

The five accused persons herein, namely, Cosmas Phillip Eneya, Paul Chingala, Harold Chikafuka Banda, Raphael Banda and James Mwandira were yesterday, after being duly found guilty by a jury, convicted of the Offence of Manslaughter contrary to Section 208 of the Penal Code. The offence they committed took place on 6th July, 2000 at Zomba Central Prison. At the material time they were all Prison Officers of deffering ranks in the Malawi Prison Service and were discharging their duties at the Zomba Central Prison. The victim of their crime, to wit, the person whose death they unlawfully caused, was a prisoner under their care by the name of Kwacha Ghambi.

Following their conviction I listed to their pleas in mitigation, eloquently put forward by the learned Chief Legal Aid Advocate, Mr Kayira, who has throughout ably represented them in this

case. This was after the learned Assistant Chief State Advocate Mr Manyugwa, had advised the court to the effect that none of the accused persons had a previous record. Indeed in mitigation, Mr Kayira also took up the point that the accused persons are just offenders and pleaded that as such they deserve the leniency of the court for hitherto being persons of good character. The ages of the accused persons were disclosed as respectively being 47 years, 34 years, 36 years, 26 years, and 40 years from the first to the last.

I must here observe that it is true that where a convicted person has been shown to have led a clean and blameless life prior to his conviction such factor goes to his credit and ought to be given meaningful consideration as the court addresses its mind to the question of sentence in his case, I will therefore in this matter duly take that point into account as well as the fact that for the ages disclosed the accused persons have throughout been law abiding citizens.

I have further been told that the accused persons are remorseful for what they did and have been asked to consider that the offence they committed occurred in the course of their line of duty. Following this Mr Kayira recited in respect of each a litany of mainly family responsibilities covering their spouses, children their parents and other dependants who are said to look up to them for provision of maintenance education, are general support. It was also pointed out that the accused persons have this far been incarcerated as remandees at prison for a period of almost 9 months since arrest. He asked that apart from considering the other mitigating factors the court should take the period so far already spent in prison into account.

It was well acknowledged in the same mitigation statement that the offence of Manslaughter, such as the accused persons have been convicted of herein, is a crime of severe gravity and that the fact that the legislature has attached to it life imprisonment as the appropriate penalty speaks for itself in this regard. It was however argued that as per sentencing principles occasion will be for a court of law to impose the maximum penalty. Indeed as argued the maximum sentence for every crime under sentencing principles is reserved for the worst offender and for the worst instance of the crime in question. I will accordingly duly bear this in mind as I impose sentence in this case. By way of winding up, in the light of the mitigating circumstances highlighted and after considerable reference to the principles of sentencing as practiced in England as covered in Blackstone's Criminal Practice 1994 edition, Mr Kayira asked this court to be considerate when passing sentence on the accused persons herein.

I have to say in situations where an accused person is truly sad about the crime he has committed and when he has shown that he sincerely regrets his crime courts are mandated to extend leniency to him for that remorseful spirit. On that point in this case the only indicator of remorse that has come to my attention is the word of Mr Kayira on it. It makes it difficult to ascertain both the existence and extent of the remorse, if any, when it comes to the attention of the court in this fashion. The normal manner in which an accused person demonstrates remorse is by way of sincerely admitting his wrong-doing in a prompt and unequivocal manner and thus saving the court's time through shortening of the trial procedure. Where however the fights took and nail against the allegation levelled against him and only says he is remorseful for his crime after being convicted, courts will take that statement with a pinch of salt. At this stage it becomes rather blurred whether the accused expresses remorse because he is now pitying himself or whether indeed he repents for the wrong-doing he is told he committed. I am not convinced that

the point of alleged remorsefulness in this case should play any significant role in the sentence that has to be passed in this case.

Regarding the point raised that thus court should consider that the offence the accused in the course of their line of duty, I am rather at a loss now that is supposed to operate as a mitigating feature in this case. It is not quite clear to me whether the court is being asked to be considerate because then line of duty allows for such offences to occur or because of duty they could not have avoided committing this offence. To my mind the fact that the accused persons herein committed this offence in their line of duty rather aggravates them mitigates the offence.

This factor in fact raises the serious question of the safety of our prisoners. True a prison is a place where an offender is sent to serve his penalty for the crime he is convicted of, but it is also supposed to be a place of rehabilitation and reflection. Behind every sentence of imprisonment is a hope that the criminal thus dispatched will eventually come out with a mended life and return to society as a useful citizen. A person is not sent to jail at the risk that he might or might not come back alive. This is why there is a specific law in place, the Prisons Act, setting up an establishment and the rules for operating such a delicate institution. This Act is supposed to be, so to speak, the bible for raising prisons and the likes of the accused persons by victim of their job are supposed to be faithful to its comments. To demonstrate that the life of a prisoner enjoys the same sanctity as that of a free man the Prison Act even provides for appointment of a medical officer for each person, for frequent health checks, and for adequate medical care and attention for prisons in event of illness. The message is clear that no efforts should be spared to preserve life even if a person is a prisoner. Further the Act places great emphasis at the protection of a prisoner's life even in situation of emergency. Since who looks after prisoners undergo special training and are supposed to observe standing regulations in the course of their job and in their general treatment of the inmates left under the care. It amounts to a matter of grave concern therefore when people who are entrusted with this heavy responsibility, who know or are supposed to know the rules, to whom discipline is supposed to be second nature, turn around as they did in this case and going up in multitude with even weapons the Act does not recognize against a single prisoner just because he has annoyed and severely angered one of them and kill him like a pack of hunters would like a rabbit. If our country at the dawn of the 21st century has amongst its staff manning prisons persons of such base, coarse and savage character then we require not just a reform but a complete revolution of the prison system. Let us look at prisons as institutions that are open to us all. For some reason or another any of us could land these for to err is human. Should people go there fearing that if displease an officer while there may will end up dead? This cannot be and must not be. I am inclined to think that the fact that this offence was committed by responsible officers of the prison service in their line of duty in full defiance of the rules and regulations they know and ought to apply adds rather than subtracts to the gravity of the offence. I will accordingly view that point, in that light and not otherwise as pleaded.

Next I have had to consider whether the family circumstances and responsibilities of the accused persons as passionately dealt on in mitigation should have any impact on the sentence dire in the case. Under the applicable principles of sentencing in criminal procedure courts are normally guided by the principle that before one embarks on a path of crime, it is incumbent on him to take these circumstances on board. A man who opts for and goes ahead to commit a crime should

factor in the possibility that if the long arm of the law catches up with him and accords him a custodial penalty his family will suffer and that courts are not encouraged to be moved by such pleas.

What should be borne in mind is that the considerations which bother accused persons as covered in this pleas are in instances like this equally applicable to the families and dependants of the victims of their crime. The deceased too probably had a family and relatives and other dependants looking up to him for maintenance, education and, other general support. Since he is dead he will not ever be able to extend them this support. If he had returned alive from his prison term he could have resumed these responsibilities, but in this case since he is dead, and it had to be remembered that he died at the hand of these men he will not come back to resume that responsibility. Really will it be fair for the court to give the accused person less than an appropriate sentence just because their families will suffer when the man they killed will never come back and alleviate his family's suffering? I think not. The law is settled that family responsibilities should not influence courts when they pass sentence. The reasons behind that make sense and some of them are the ones I have demonstrated above. I am under obligation to follow these rules of sentencing and will accordingly do so by rejecting this plea.

The point Mr Kayira made about the remand persons the accused persons have already been subjected to is quite valid. Although in truth the accused persons have been tried much faster than most homicide remandees, it is a point I will duly take into account as I pass sentence. As prison officers I am sure the accused persons are well aware that most homicide remandees spend five, seven, or even more years in custody before they are tried and that they are comparatively considerably lucky to be tried in less than one year. This is not however to pay that what happens is right. The criminal justice system needs to be revamped to shorten the painful waiting period. Thus although the period these accused persons have spent in custody is much shorter than usual, it still deserves consideration in the passing of this sentence.

I have tried to evaluate the crime the accused persons committed. It emerges from this evaluation that the aggravating features of the offence herein outweigh its mitigating features. This offence of manslaughter herein as committed by the accused persons was as close to murder as manslaughter can get. It was committed in a most cruel and gruesome style and manner, paradoxically by the very people in whose hands the law entrusted the life and safety of the deceased prisoner. It is my view that the offenders richly deserve a substantial sentence that will reflect the reprehensible nature of their crime. The High Court of Malawi has over the years, time and again, held in its pursuit of appropriate principles of sentencing that the punishments the courts pass in any case must fit both the criminal and the crime and that they be fair to society, while at the same time blended with a measure of mercy. The *locus classisus* case here is the case decided by the late lamented Justice Dr. Jere of *Republic -vs- Shauti* (1975-77) 8 MLR 69; by then an Acting Judge.

As I have said however that while viewing this case with due gravity I have to give due attention to matters standing in the accused persons favour in determining the appropriate sentence. In this regard I have already pointed out that while the limit is life imprisonment, in the light of the guiding principles I must consider a lower sentence. Coupled with this I must give the accused persons a good discount on sentence in the light of the fact that this only comes as their first

offence in the State records. The period they have so far spent in custody I will resolve through ordering some backdating of their sentence. I have also taken time to reflect on the circumstances that immediately proceeded the commission of the offence on that fateful day. It certainly cannot be glossed over that on his part it appears that the deceased was needlessly insulting and offensive in the manner he related with the 1st accused on that day and that this severely tested the self-restraint of the provoked prison officer. On due balance of both the aggravating and mitigating circumstances of the case and to fully endorse the sanctity of human life, free or in bondage, I sentence all five accused persons to imprisonment for 18 years with hard labour. I further direct that this sentence takes effect from 1st August, 2000.

The accused persons are at liberty to appeal to the Supreme Court of Appeal against both conviction and sentence should they so desire. In this regard I believe as they are represented by Chief Legal Aid Advocate will fully enlighten them on how to go about this exercise. I order accordingly.

Pronounced in open Court this 20th day of March, 2001 at Blantyre.

A.C. Chipeta

JUDGE