



REPUBLIC OF MALAWI

IN THE SENIOR RESIDENT MAGISTRATE COURT
SITTING AT ZOMBA
CRIMINAL CASE NO. 66 OF 2015

THE REPUBLIC VS.
BELO DINESS – 1ST ACCUSED
KAUDENI JANATI – 2ND ACCUSED
MUDU YUSUFU – 3RD ACCUSED
AYILU LORDSON – 4TH ACCUSED
SINGINALA KAJENALA JOSAYA – 5TH ACCUSED
INJESI MALENGA – 6TH ACCUSED

CORAM: H/W TAMANDA C. NYIMBA : Senior Resident Magistrate
Assistant Superintendent Lungu : Public Prosecutor
Miss Chimwemwe Nyirenda: Court Clerk and Official Interpreter
Wame Pearson: Of Counsel for Accused Persons
Belo Diness: 1st Accused (Represented)
Kauseni Janati: 2nd Accused (Represented)
Mudu Yusufu: 3rd Accused (Represented)
Ayilu Lordson: 4th Accused (Represented)
Singinala Kajenala Josaya: 5th Accused (Represented)
Injesi Malenga: 6th Accused (Represented)

RULING

1. BACKGROUND

- 1.1. In this action, the six accused persons submit that there is no case to answer on the charges levelled against them under the Penal Code¹ and Anatomy Act². On the other hand, the State submits that my court should find the accused persons with a case to answer on all the counts.
- 1.2. In count one the 1st, 2nd, 3rd and 5th accused are jointly charged with the offence of criminal trespass contrary to section 314 of the Penal Code. The particulars allege that Belo Dinesi, Kaudeni Janati, Mudu Yusufu and Singinala Kajenala Josaya on or about the 8th day of February 2015 at Khaiwa village in the district of Machinga entered upon the graveyard belonging to village Mbalwe with intent to remove body tissues from deceased persons therein.
- 1.3. In count two the 2nd, 3rd, 5th and 6th accused stand jointly charged with the offence of criminal trespass contrary to section 314 of the Penal Code. The State allege that Kaudeni

¹ Chapter 7:01 of the Laws of Malawi

² Chapter 34:03 of the Laws of Malawi

Janati, Mudu Yusufu, Siginala Kajenala Josaya and Injesi Malenga on or about the 7th day of February 2015 at Ngwale village in the district of Mangochi entered upon the graveyard belonging to village Ngwale with intent to remove body tissues from deceased persons therein.

- 1.4. In the third count the 1st, 2nd, 3rd, 4th and 5th accused are jointly charged with the offence of selling human bones contrary to section 16(a) of the Anatomy Act. The allegation is that Belo Dinesi, Kaudeni Janati, Mudu Yusufu, Ayilu Lordson and Siginala Kajenala Josaya on or about the 8th day of February 2015 at Khaiwa village in the district of Machinga were found selling human bones of the late Samson Kawenda. For convenience, I shall hereinafter refer to the late Samson Kawenda as the “the first deceased”.
- 1.5. Finally in the fourth count the 2nd, 3rd, 4th, 5th and 6th accused stand jointly arraigned with offence of selling human bones contrary to section 16(a) of the Anatomy Act. The particulars aver that Kaudeni Janati, Mudu Yusufu, Ayilu Lordson, Siginala Kajenala Josaya and Injesi Malenga on or about the 7th day of February 2015 at Ngwale village in the district of Mangochi were found selling human bones of the late Florence Manuel an albino. For convenience, I shall hereinafter refer to the late Florence Manuel as the “the second deceased”.
- 1.6. Upon arraignment on 17th February 2015, all the accused denied all the charges. However, on 27th February 2015 in respect of the first count and in the absence of their Counsel, the 1st, 2nd and 3rd accused changed their pleas from not guilty to guilty. The State proceeded to parade six witnesses and thereafter informed my court that they would adopt the evidence of the witnesses in respect of the facts supporting the guilty plea in the first count. In view of the various testimonies adduced, my Court felt that it would be rather untidy and burdensome to the court for the State to simply rely on the evidence of its witnesses. The cumbersomeness of that exercise comes in because it would have meant; (a) the court extracting from the vast prosecution witnesses’ evidence the facts forming the basis of the elements of the offence in the first count; (b) reading the facts to the relevant accused persons; (c) asking the accused to confirm the truth or untruth thereof and depending on their responses thereto entering convictions.
- 1.7. To obviate this apparent unwieldy task, my court made a direction that the State should, today and before pronouncement of the ruling herein, isolate and narrate the facts substantiating the charge in the first count for the 1st, 2nd and 3rd accused persons to admit to the correctness thereof or indeed make subtractions or additions thereto and for the court to ultimately determine whether or not the facts in law establish the offence in the first count. However, having gone through the testimonies out of which the prosecution were to harvest the pertinent facts, my court hereby withdraws the said direction for reasons which shall become evident by the time I conclude delivering the ruling herein.
- 1.8. At this stage, the case for the prosecution is closed and a total of six (6) witnesses were paraded. PW1 was Enelesi Labion, the brother of the deceased the subject of the third count. PW2 was Moffat Lanjesi, the incumbent village headman Khaiwa. PW3 was Malita Wisiki, the mother of the deceased the subject of the fourth count. PW4 was Kenneth Kandulu, the current village headman Ngwale. PW5 was Molesi James, a Community Policing Officer and finally PW6 was Detective Inspector Isaac Mndala who conducted police investigations in this matter.

2. THE APPLICABLE LAW ON CASE OR NO CASE TO ANSWER

2.1. At this juncture in the trial, my court's task is to review the evidence and make a ruling on whether or not the accused persons have a case to answer on the offences levelled against them. This is in keeping with the dictates of Section 254 of the Criminal Procedure and Evidence Code.

2.2. In principle my court, as *Republic v Dzaipa*³ shows, is guided by the Practice Direction (Submission of no Case)⁴ issued by Lord Parker, CJ wherein it is stated as follows:

“A submission that there is no case to answer may properly be made and upheld (a) when there has been no evidence to prove an essential element in the alleged offence, (b) when the evidence adduced by the prosecution has been so discredited as a result of cross examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it”.

2.3. In this connection, I shall extensively quote the remarks of Mwaungulu, J (as he then was) in the case of *Rep v. Shabir Suleman and Osman Islam*⁵ on the exact considerations in rulings of case or no case to answer. This is what the learned judge had to say:

“In practice all decisions on this point, [.....], point to availability, quantity and quality of evidence sufficient to require the defendant to make a defence. The available evidence, its quantity and quality, in turn depend on the facts in issue to prove the offence. Evidence must be available to establish all the facts in issue for the crime. The available evidence must be such that, without rebuttal, a reasonable tribunal could convict. This is what Practice Direction (Submission of no Case) suggests. A court, therefore, faced with the duty, whether under section 254 (1) of the Criminal Procedure and Evidence Code or at common law, to decide whether a defendant in criminal proceedings has a case sufficiently to require her to make a defence must decide concerning the particular offence (a) whether there is evidence and (b) whether that evidence establishes a case sufficient for the defendant to make a defence. The answer to (a) depends on the nature of the offence. There is no case sufficiently to require the defendant to make a defence where there is no evidence to prove that the defendant's acts accounted for one element or all elements of the offence. The answer to (b) goes to the quality of evidence available to the court in (a).....At the close of the prosecution case, unless the court acts under section 201 of the Criminal Procedure and Evidence Code, only the prosecution evidence is available to the court. Consequently, only such evidence shorn of debilitating contradictions and inconsistencies or survives cross-examination raises a case sufficient to require the defendant to enter a defence. Evidence with mortal inconsistencies or contradictions or undermined by cross-examination does not raise a case sufficiently requiring a defendant to make a defence”.

2.4. Differently stated, where the essential elements of the offence are found to be missing from the evidence of the prosecution, the law mandates the Court to acquit the accused persons. In this regard this Court cautions itself that it should not merely call upon the accused persons to enter their defence in the hope that, in the course of adducing their

³ [1975-77] MLR 307

⁴ [1962] 1 WLR 227

⁵ Criminal Case Number 144 of 2003 (unreported)

evidence, the accused may say something which might give strength to the case for the prosecution.

3. THE LAW APPLICABLE TO THE CHARGES

3.1. As laid out in preamble to this ruling, the accused persons herein stand variously arraigned before my court on four counts. It is the charges which determine the elements of the offence and, consequently, the facts in issue the prosecution must establish.

3.2. The offence of criminal trespass as charged in the first and second counts is defined in section 314(a) of the Penal Code and couched in the following terms:

Any person who—

- (a) enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person lawfully in possession of such property....shall be guilty of the misdemeanour termed “criminal trespass” and shall be liable to imprisonment for three months....If the property upon which the offence is committed is any building.....used as a human dwelling....or as a place for the custody of property the offender shall be liable to imprisonment for twelve months.

Thus, at this stage of the trial, the ingredients the prosecution must prove in order to make out a prima facie case of criminal trespass are as follows:

- (a) That the trespasser must have entered into or upon property in possession of another.
- (b) That the real or dominant intent of entry must be to commit an offence or to intimidate, insult or annoy the occupant.

3.3. The offences in the third and fourth counts are provided for section 16 (a) of the Anatomy Act as follows:

A person who—

- (a) sells or buys the body of a deceased person or a tissue removed from the body of a deceased or living person; [.....] shall be guilty of an offence and liable to a fine of fifteen thousand Kwacha and to imprisonment for a period of ten years.

Section 2 of the Anatomy Act provides that “body” means the human body; and “tissue” means any human tissue including any human flesh, organ, bone, body fluid or derivative of any human tissue.

According to Black’s Law Dictionary 6th Edition the word “sell” means to dispose of by sale; to transfer title or possession of property to another in exchange for valuable consideration⁶.

Therefore to make out the offence as charged under section 16 (a) of the Anatomy Act the prosecution must at this stage of the matter adduce prima facie evidence establishing that the suspects were found selling bones removed from the body of a deceased person. In

⁶ At p1360

other words there must be prima facie evidential material that the accused were found disposing of the bones by sale or transferring the same to another in exchange for valuable consideration.

3.4. Section 22 of the Penal Code is also relevant and enacts thus:

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence”.

4. THE EVIDENCE

- 4.1. PW1 and 2 testified chiefly in relation to the first count. PW3 and 4 testified primarily regarding the second count. The testimony of PW5 was principally in relation to the third and fourth counts. PW6's evidence covered all the four counts. I am mindful that my court is only required to subject the evidence to “minimal evaluation” (for lack of a better phrase) for purposes of a prima facie case. This is because the burden placed upon the State at this stage of the trial is not to prove its allegations beyond reasonable doubt, which is the standard placed on the State at the close of trial, but simply to establish grounds for presuming that the accused committed the offence they are answering. However, as we shall see shortly, it is important that I bring to bear most of the applicable evidence. In summary the prosecution witnesses' relevant evidence after being subjected to thorough cross examination by the accused through their learned counsel is as follows:
- 4.2. PW1 testified that the first deceased, whose cadaver is the subject of the charge in the first and third counts, was her brother. He died in the year 2013 and was buried at a graveyard in Khaiwa village. Khaiwa village is within Senior Chief Mbalwe's jurisdiction. PW1 never attended the burial of her brother as she was admitted in hospital at the time of his demise. However, during a traditional ceremony called “Kusesa” she came to know and viewed the exact graveyard and grave where the remains of her late brother were interred. The rest of PW1's evidence regarding the alleged interference with her late brother's grave and the cadaver therein was inadmissible hearsay, the same having been relayed to her by her folk and therefore “at one remove” vis-à-vis her perception or lack thereof of the pertinent events.
- 4.3. PW2 testified that he is the incumbent village headman Khaiwa. He knows the 1st accused as he is a subject of Senior chief Mbalwe. In December 2014, as a chief he got word that one of the graves at a graveyard in his village had been dug open. He confirmed the news by visiting the graveyard where it was also unquestionably established that the grave was that of the first deceased and his cadaver had been removed. Subsequently, Machinga Police came to PW2's village with the suspects who allegedly confessed to have dug the deceased's body out. The 1st accused led a contingent which included PW2 to the graveyard and the particular grave (i.e. the first deceased's) the suspects dug. PW2 stated that he would never have known who came to disentomb the first deceased's body if it were not for the suspects confessing to the same.
- 4.4. PW3's evidence was that the second deceased, whose cadaver is the subject of the charge in the second and fourth counts, was her daughter and an albino. She died three years ago and was aged three at the time of her death. Since Muslims do not permit women to escort

the remains of a dead person to the graveyard for burial, she told the court that she was only informed by her relations that the cadaver of her daughter had been exhumed by the pertinent suspects herein. To the extent that PW3 cited this hearsay evidence for the purpose of establishing the truth of its contents, it is inadmissible hearsay.

- 4.5. PW4 testified that he is the sitting village headman Ngwale. He is also PW3's brother. As a chief he got word that one of the graves at a graveyard in his village had been tampered with. Through a visit to the graveyard, he realised that the grave contained the remains of the second deceased who, as a matter of fact, was PW4's niece and an albino. Subsequently, Machinga Police came to PW4's house with the suspects who allegedly confessed to have disinterred the cadaver of the second deceased. In similar manner to the events depicted by PW2, PW4 stated that the 1st and 2nd accused led a group which included PW4 to the graveyard and the actual grave (i.e. the second deceased's) the suspects unearthed. Thereat the 3rd accused also revealed that he was with the 1st, 2nd, and 5th accused persons but the 5th accused was not among the accused brought to PW4's village by Machinga Police. PW4 stated that he saw the bones which police brought with the accused persons but they were those of an adult and not PW3's late daughter. PW4 equally stated that he would never have known who came to disinter the second deceased's body if it were not for the suspects confessing to the same. He further told the court that nobody dug up the second deceased's grave to verify whether or not her dead body was in there. He stated that he was personally convinced that the second deceased's remains were exhumed because he simply believed the suspects' confessions that they removed the same therefrom. With regard to the bones of an adult PW4 viewed, he testified that the same were indeed human bones because the accused said so and he had no reason to disbelieve them since they were the ones who knew where they exactly obtained the bones.
- 4.6. PW5's evidence was that on 7th February 2015 and in the course of investigating an offence allegedly committed by the 3rd accused which offence is separate and unrelated to the charges the 3rd accused is answering herein, he fortuitously recovered the accused's rucksack which containing bones. The 3rd accused stated that the bones were for a Mr Jafali who escaped. The 3rd accused offered PW5 K50,000-00 for the matter to end there. PW5 would have none of that and reported the 3rd accused to police leading to his arrest. He identified the bones in court which were marked as IDP1 but stated that the same were not distinctively marked when he handed them over to police. However, he stated that he identified them because they looked very similar to the ones he handed over to police comprising long and short bones. He testified that he does not know whether the bones are those of a cow, dog or human being.
- 4.7. PW6 testified that upon receiving 3rd accused together with IDP1 following his arrest by PW5, the 3rd accused in his interview mentioned the 1st, 2nd, 5th accused and another person who bolted as his accomplices. Briefly, according to the interrogations of the aforementioned suspects, they confessed to have exhumed the cadavers of the first and second deceased. He tendered in evidence IDP1, the bones of the first deceased which were received in evidence as EXP1. The bones of the second deceased were not recovered the same having been allegedly sold by the accused. Learned counsel for the accused persons successfully objected to PW6 tendering in evidence a medical report identifying the bones as human bones since the report needed to be tendered by its author to comply with the rule against hearsay evidence. The report was however identified and marked IDP8.

- 4.8. PW6 went on to state that the relevant accused persons led PW6 and his fellow police officers to Mbalwe and Ngwale villages where they showed police the specific graveyards and graves they sourced the bones from. The 4th and 5th accused persons were connected to the charges herein because they were allegedly the ones to buy the bones retrieved by the 1st, 2nd, 3rd and 5th accused. PW5 tendered in evidence the caution statements and formal evidence of arrest for the 1st, 2nd, 3rd, 4th, 5th and 6th accused which were marked in pairs of EXP2a and EXP2b through to EXP7a and EXP7b for caution statement and evidence respectively. Therein the 1st, 2nd, 3rd and 5th accused made confession statements admitting the offences herein. The 4th and 5th accused denied the charges in their caution statements.
- 4.9. Just to digress a little, the caution statements of the accused having been received in evidence are part and parcel of the evidence I shall consider in this matter. I shall have occasion to comment on issues of admissibility and weight to be attached to the said caution statements. Meanwhile it is essential that I set out the particular statements of the accused persons who confessed to perpetrating the offences.
- 4.10. The 1st accused confesses to have gone to a graveyard at Mbalwe village accompanied by the 2nd, 3rd accused and another suspect who is at large. Thereat they disinterred the first deceased's cadaver and harvested bones therefrom. He goes on to allege that the bones were taken to be sold to the 4th accused who did not have the wherewithal so that the bones were taken to another unnamed customer. The 2nd accused equally confesses to have accompanied the 1st, 3rd accused and the suspect who is at large and went to Mbalwe village and collected human bones from a body they dug up. The 2nd accused also claims that the buyer of the bones was the 4th accused but since he could not pay, they reclaimed them from him. The 3rd accused's statement is mixed as it is partly exculpatory and partly inculpatory. Partly exculpatory in the sense that although he mentions digging up graves he does not specifically state that he travelled to any particular grave or unearthed a human body therefrom. Partly inculpatory in that he states that he obtained human bones from certain unnamed boys. The 3rd accused is also the only accused who mentioned the 6th accused as having attempted to buy the bones only to return them to the 3rd accused. The 5th accused confesses to have exhumed the cadaver of the second deceased. He also alleges that the 4th accused was the designated buyer. PW6 told the court that he did not use force or improper ways to obtain the accused statements so that the accused gave the statements under caution and voluntarily.

5. SUBMISSIONS, ANALYSIS AND DETERMINATION THEREON

- 5.1. Before I revert to the charges in light of the evidence proffered, I must place it on record that all the parties herein filed substantial written submissions with my court. I sincerely express my profound gratitude for the said submissions which have aided my court in coming up with this ruling. However, it will not be possible in the course of this ruling to recite every argument advanced by each side. In the same vein neither will it be practicable nor necessary for me to make reference to every piece of evidence adduced. This will not be out of disrespect to the State or counsel but because when I was going through both sets of submissions, I could not help to observe that the parties' application of the law to the facts is understandably or unsurprisingly selective. I am using the words understandable and unsurprising advisedly in view of the fact that our criminal justice system is inherently adversarial so that each party ordinarily highlights aspects of the

evidence favourable to its case. Be that as it may, I must reiterate and underscore that my court has conscientiously examined the contents of all the submissions and I shall bear them in mind wherever relevant in my ruling herein.

- 5.2. Turning to the charges and the evidence, firstly the particulars of the charges as set out in the preamble to this ruling indicate all the facts in issue. Learned counsel's attack on the prosecution evidence is three-pronged although I shall not set out counsel's submissions in the order he pleaded them. Firstly, in respect of the first and second counts learned counsel for the accused submits that there is no shred of evidence that the relevant accused persons entered into the property belonging to another person. He asserts that the only evidence relied upon is the accused caution statements and that in tendering the caution statements by PW6 there was an infraction of Rules 4, 5(b) and 6 of the Criminal Procedure and Evidence (Documentary Evidence) Rules as promulgated under section 245 of the Criminal Procedure and Evidence Code hereinafter called "the Code". In the second place and respecting all the counts, counsel submits that PW1 to PW5 testified that they heard confessions from the accused on how they committed the offences and that the said confession evidence does not comply with section 176 (2) of the Code to the extent the prosecution witnesses failed to testify on whether the confession was adopted by other accused persons. In the third place and in relation to the third and fourth counts, counsel contends that the State failed to adduce any iota of evidence to establish that the alleged bones were those of a human being because there was a need of evidence from an expert (i.e. a physician) to give opinion evidence. In view of the foregoing arguments, counsel boldly submits that all the accused persons should be found with no case to answer on all the charges and be acquitted. On the other hand, the prosecution's overarching submission is that there is sufficient evidence establishing the elements of all the offences in the four counts.
- 5.3. I shall dispose of the matter herein starting with an examination of counsel's first two submissions. But in making my final determinations informed by my analysis, I shall start with the fourth and third counts ending with the second and first counts. I should begin by stating that counsel, perhaps inadvertently, partially misquoted the evidence in that it is not true that PW1 to PW5 testified that they heard confessions from the accused on how the offences were committed. Rather the evidence on record is that when the accused were taken to the pertinent graveyards, PW2 stated that he saw and heard the 1st accused confess while PW4 testified that he saw and heard the 1st, 2nd and 3rd accused confess. The substantial confessions statements were recorded by the relevant accused persons to PW6.
- 5.4. On counsel's argument that the caution statements evidence oversteps Rules 4, 5(b) and 6 of the Criminal Procedure and Evidence (Documentary Evidence) Rules, I observe that counsel's argument is rather misplaced because, with all due respect, I am unable to appreciate counsel's contentions that the aforecited rules are applicable in the manner he suggests. Here is a compelling reason for my reasoning disagreeing with counsel. In the case of *Sulaimana and others v Republic*⁷ Unyolo JA had this to say:

"In terms of section 176 of the Criminal Procedure and Evidence Code, a caution statement is admissible in evidence in its entirety. Counsel for the accused may of course cross-examine the recording officer thereon and may also comment on it in his address to the [presiding judicial officer]".

⁷ [1998] MLR 377 (SCA)

5.5. Further in the case of Rep v Chinthiti and others (1)⁸ Nyirenda J (as he then was) stated as follows on confession statements:

“Confession statements as admissible evidence and as an exception to the hearsay evidence rule is no new concept. It is based on the common law axiom that what a man says against his own interest is likely to be true”.

5.6. The learned judges in the Sulaimana and Chinthiti cases make no reference to a need for further recourse to the Criminal Procedure and Evidence (Documentary Evidence) Rules. For ease of communication it is apposite that I reproduce hereunder the provisions of section 176 of the Code which provides as follows:

- (1) Evidence of a confession by the accused shall, if otherwise relevant and admissible, be admitted by the court notwithstanding any objection to such admission upon any one or more of the following grounds (however expressed) that such confession was not made by the accused or, if made by him, was not freely and voluntarily made and without his having been unduly influenced thereto.
- (2) No confession made by any person shall be admissible as evidence against any other person except to such extent as that other person may adopt it as his own.
- (3) Evidence of a confession admitted under subsection (1) may be taken into account by a court, or a jury, as the case may be, if such court or jury is satisfied beyond reasonable doubt that the confession was made by accused and that its contents are materially true. If it is not so satisfied, the court or the jury shall give no weight whatsoever to such evidence. It shall be the duty of the judge in summing up the case specifically to direct the jury as to the weight to be given to any such confession.”

5.7. In my considered view what the learned judge envisaged in the Sulaimana case by stating that “counsel for the accused may of course cross-examine the recording officer [regarding the caution statements] is a situation where there are suggestions that the confession was not made by the accused or, if made by him, was not freely and voluntarily made. In other words any question or material tending to suggest that the caution statement was improperly obtained may be put to the recording officer and further to that counsel for the accused may also comment on it in his address to the presiding judicial officer. So as an illustration if the accused’s counsel suggests or leads evidence that the accused’s confession statement was procured by some inducement for him to ingratiate himself with the prosecution or by threats or subjecting the accused to torture, then it follows that the pertinent confession statement must be given no weight at all and must be expunged from the mind of the trier of fact.”⁹

5.8. In the within case PW6 was the recording officer who testified that he documented the accused statements under caution. It is on record that counsel asked PW6 only one question and that question called for PW6 to confirm whether or not he was the particular officer who recorded the caution statements from the accused. PW6’s answer was in the affirmative. Before PW6 stood down from the witness box this court noting that the statements of the 1st, 2nd, 3rd and 5th accused were confession statements asked PW6 to confirm if the relevant accused persons gave the statements voluntarily under caution. Again PW6 answer was in the affirmative. The accused did not in any way shape or form

⁸ [1997] 1 MLR 59 (HC)

⁹ Stanley Richard Palitu & 5 Others vs The Republic Criminal Appeal No 30 Of 2001, unreported

retract the confession statements. It is also to be observed that the relevant confession statements are detailed and elaborate, and reading them through from beginning to end, one can understand why counsel did not even attempt to suggest that they were made involuntarily. Consequently, absent any suggestions that the caution statements were unduly obtained or that the relevant accused persons who confessed in the presence of PW2 and PW3 did so under duress or against their will; and further in keeping with the dictates of section 176 (3) of the Code, I see absolutely nothing unseemly to prevent my court from considering the caution statements as part of the prosecution evidence. In the words of Nyirenda J (as he then was) in the Chinthiti case “voluntary confessions remain admissible”. In short, counsel’s arguments that the confession statements of the relevant accused are inadmissible are totally misguided and I reject them for the reasons I have just given.

- 5.9. Notwithstanding my exposition of the law above, the law in section 176 (2) of the Code is clear that no confession made by any person shall be admissible as evidence against any other person except to such extent as that other person may adopt it as his own. The section forbids the use of the confession against another except, of course, in the circumstances the section itself mentions, namely that the other adopts it. In the case of Stanley Richard Palitu & 5 Others vs The Republic¹⁰ Mwaungulu J (as he then was) opined as follows on the rationale for the rule:

“There are three justifications for the rule. First, the statement is in the absence of the other. Unless the other subsequently adopts it, one cannot infer the other adopted it. It is a question of fact, where the statement is in the presence of the other, whether the other adopts the statement.....Secondly, the statement is hearsay and inadmissible to prove the facts asserted in the statement. Thirdly, allowing such statements would leave a possibility, not remote in the circumstances that a defendant has only to mention others to implicate them. That may lead to miscarriages of justice. Section 176 (2), therefore, codifies the common law. Under the statute and common law therefore, unless the other adopts it, the confession is evidence only against the maker.”

- 5.10. On the other hand, there is a further caveat that once a defendant goes into the witness-box and gives evidence in the course of a joint trial, then what he says becomes evidence for all the purposes of the case including the purpose of being evidence against his co-defendant¹¹¹²¹³.

6. FOURTH COUNT

- 6.1. It is obvious from the evidence that the 4th and 6th accused persons are linked to the fourth count exclusively through the confession statements of their co-accused. It is also clear that at no point did the 4th and 6th accused adopt the confession statements of their co-accused as their own. I have already remarked that section 176 (2) of the Code, in no uncertain

¹⁰ Ibid

¹¹ R. vs. Rudd , 32 Cr.App.R. 138; Also see Archbold Criminal Pleading Evidence and Practice 2015 Ed para
¹² -341

¹³ In this scenario it is of course desirable for the court to warn itself of the danger of acting on the uncorroborated evidence of an accomplice.

terms, outlaws the use of the confession against another except upon that other adopting it. Put shortly, shorn of their co-accused confession statements implicating them, there is no iota of evidence establishing a prima facie case against the 4th and 6th accused in the fourth count. In my most careful opinion, this is a proper case in which my court should not merely call upon the 4th and 6th accused to enter their defence in the hope that, in the course of adducing their evidence, the accused may say something which might add strength to the prosecution case. In the result, I find the 4th accused, Ayilu Lordson, and the 6th accused, Injesi Malenga, with no case to answer on the fourth count. I proceed to acquit them accordingly.

6.2. As to the 2nd, 3rd and 5th accused, there is, in my considered opinion prima facie evidence linking these accused persons to the offence in the fourth count. Counsel's unresolved contention in this regard is that there being no expert evidence to establish that the bones were those of a human being, the accused must be acquitted. In my judgment, bearing in mind that the 2nd, 3rd and 5th accused voluntarily confessed to have unearthed the remains of the second deceased, I am of the considered view that the evidence of an expert physician would have been not only indulgent but also redundant. Be that as it may, looking at the elements of the offence in the fourth count, there is in my opinion no prima facie evidential material showing that the 2nd, 3rd and 5th accused were found disposing of the bones by sale or transferring the same to another in exchange for valuable consideration. Indeed as per their confession statements, the 2nd accused only claims that the buyer of the bones was the 4th accused but the bones were reclaimed from him because he could not pay; the 3rd accused mentions the 6th accused as having attempted to buy the bones but allegedly returned them to the 3rd accused; the 5th accused also alleges that the 4th accused was the designated buyer. Having acquitted the 4th and 6th accused of the offence in the fourth count it follows that no persons remain to whom the 2nd, 3rd and 5th accused were selling the bones. Even if the bones of the second deceased remain unrecovered the crux of the matter is that these accused persons were not found disposing of the bones by sale or transferring the same to another in exchange for valuable consideration. The charge in the fourth count therefore equally falls away in relation to the 2nd, 3rd and 5th accused. That said, this is not fatal to the prosecution's case because the evidence establishes a different offence under section 18 (1) (a) of the Anatomy Act which provides that:

(1) A person who—

(a) removes any tissue from the body of a deceased person or the body of a living person otherwise than in accordance with this Act or any other written law or, in pursuance of a profession or calling he lawfully practises;
shall be guilty of an offence and liable to a fine of [two hundred and fifty thousand Kwacha] and to imprisonment for a period of three years.

6.3. Therefore my court exercising the power under section 254 (2) as read with section 151 (2) (b) of the Code shall at the end of this ruling substitute the fourth count and ask the 2nd, 3rd and 5th accused to freshly plead to the substituted fourth count which shall read as follows:

Offence (Section and Law)

Removing bones from the body of a deceased person contrary to section 18 (1) (a) of the Anatomy Act

Particulars of Offence

Kaundeni Janati, Mudu Yusufu, and Siginala Kajenala Josaya between the months of December 2014 and January 2015 at a graveyard at Ngwale village in the district of Mangochi removed bones from the body of the late Florence Manuel an albino cadaver.

7. THIRD COUNT

- 7.1. On the third count and regarding the 4th accused, my reasoning in the fourth count apply with equal force. For the avoidance of doubt, it is plain that the evidence connecting the 4th accused to the third count wholly derives from the confession statements of his codefendants. It is also clear that the 4th accused did not expressly or by implication adopt the statements as his own. Once again, absent his co-accused confession statements implicating him, there is no jot of evidence establishing a prima facie case against the 4th accused in the third count. In the premises I inescapably find the 4th accused with no case to answer on the third count. I proceed to acquit the 4th accused, Ayilu Lordson, accordingly and having acquitted him on all the charges levelled against him herein, he must be released forthwith unless held for other lawful reasons.
- 7.2. In respect of the 1st, 2nd, 3rd and 5th accused, there is, in my considered view prima facie evidence linking these accused persons to the offence in the third count. But again for the reasons outlined in relation to the fourth count in so far as the 1st, 2nd, 3rd and 5th accused were not found disposing of the bones by sale or transferring the same to another in exchange for valuable consideration, I find that the offence as charged in the third count is not made out. Having respectively acquitted the 4th and 6th accused of the offences in the third and fourth, the unavoidable conclusion is that there are no individuals to whom the 1st, 2nd, 3rd and 5th accused were selling the bones. In any event, EXP1, the bones of the first deceased were tendered in evidence meaning that they were not sold to anyone and if anything the pertinent accused persons only attempted to sell the bones. Nevertheless my decision is similarly that the charge in the third count cannot stand in respect of the 1st, 2nd, 3rd and 5th accused. Once more, this is not disastrous to the prosecution's case as their evidence establishes the offence under section 18 (1) (a) of the Anatomy Act.
- 7.3. Likewise my court invoking the power under section 254 (2) as read with section 151 (2) (b) of the Code shall at the end of this ruling substitute the third count and call the 1st, 2nd, 3rd and 5th accused to take a fresh plea to the substituted third count which shall be couched as follows:

Offence (Section and Law)

Removing bones from the body of a deceased person contrary to section 18 (1) (a) of the Anatomy Act

Particulars of Offence

Belo Dinesi, Kaundeni Janati, Mudu Yusufu, and Siginala Kajenala Josaya between the months of December 2014 and January 2015 at a graveyard at Khaiwa village in the district of Machinga removed bones from the body of the late Samson Kawenda.

8. SECOND COUNT

- 8.1. Turning to the second count respecting the 2nd, 3rd, 5th and 6th accused. For starters there is absolutely no iota of evidence against the 6th accused ever trespassing a graveyard in

Ngwale village. Inevitably, I find the 6th accused, Injesi Malenga, with no case to answer on the second count. I acquit him accordingly and having acquitted him on all the charges levelled against him herein, he must be released forthwith unless held for other lawful reasons.

- 8.2. In relation to the second count, learned counsel contends that there is no shred of evidence that the relevant accused persons entered into the property belonging to another person. I must admit that there is force in counsel's submission. The threshold element the prosecution must overcome for the offence of criminal trespass to hold is that the trespasser must have entered into or upon property in possession of another [My emphasis].
- 8.3. The questions which greatly exercised my mind are as follows: For purposes of construing the ingredient of "possession" in law and in the circumstances of the facts in issue in the second count, does possession entail actual possession or constructive possession? Can an entire village be properly described as being in possession of a graveyard? I think that the answer to the latter question is in the negative. In my humble opinion I think that the way section 314 is worded connotes that the possessor of the purportedly trespassed property must have a legal personality of some sort with rights and obligations as well as capacity to sue and be sued. Can a village achieve these characteristics? Even if we were, for the hell of it, to substitute the "village" with the "incumbent chief", of whatever rank, for the particular village, I still entertain grave doubt that such a chief would properly be described in law as being in possession of the village's graveyard.
- 8.4. I have ruminated and cogitated over this conundrum by combing through numerous Acts of Parliament including the Chiefs Act as well as a myriad of case authorities to no avail. Perhaps our local customs provide that chiefs are the custodians of graveyards but I am aware that some graveyards are privately owned. To cut a long story short, I do not want to take matters for granted and in that regard I shall be very slow to accept that village Ngwale was in possession of the pertinent graveyard. Consequently the threshold element of possession having not been surmounted, the charge in the second count falls way. Again this is not fatal to the prosecution's case because their evidence on the second count establishes a prima facie case under section 129 of the Penal Code which enacts as follows:

"Every person who with the intention of wounding the feelings of any person or of insulting the religion of any person, or with the knowledge that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted thereby, commits any trespass in any place of worship or in any place of sepulture or in any place set apart for the performance of funeral rites or as a depository for the remains of the dead, or offers any indignity to any human corpse, or causes disturbance to any persons assembled for the purpose of funeral ceremonies, shall be guilty of a misdemeanour".

- 8.5. Therefore my court bringing to bear the power under section 254 (2) as read with section 151 (2) (b) of the Code shall substitute the second count. Further to that the evidence shows, prima facie, that 1st accused also went to the graveyard at Ngwale village. Thus at the conclusion of this ruling, my court shall call the 1st, 2nd, 3rd and 5th accused to freshly plead to the substituted second count which shall read as follows:

Offence (Section and Law)

Trespassing on burial place contrary to section 129 of the Penal Code

Particulars of Offence

Belo Dinesi, Kaundeni Janati, Mudu Yusufu and Siginala Kajenala Josaya during the month of December 2014 at Ngwale village in the district of Mangochi with the knowledge that the feelings of the relatives of the late Florence Manuel are likely to be wounded, committed trespass upon a burial place at Ngwale village removing late Florence Manuel's remains therefrom.

9. FIRST COUNT

9.1. Finally regarding the first count respecting the 1st, 2nd, 3rd and 5th accused, all my observations and comments in relation to the second count apply with equal validity to the first count. I am acutely aware that this is the particular count which the 1st, 2nd and 3rd accused pleaded guilty to though the facts were not narrated. As I promised above to give reasons why I withdraw my direction for the State to narrate the pertinent facts, I now reveal the reason as being that even if the state had set out the facts, for the reasons stated in the second count, the charge of criminal trespass cannot hold. As such my court invokes section 254 (2) as read with section 151 (2) (b) of the Code and substitutes the first count with an offence under section 129 of the Penal Code. At the conclusion of this ruling, my court shall call the 1st, 2nd, 3rd and 5th accused to take plea to the substituted first count reading as follows:

Offence (Section and Law)

Trespassing on burial place contrary to section 129 of the Penal Code

Particulars of Offence

Belo Dinesi, Kaundeni Janati, Mudu Yusufu and Siginala Kajenala Josaya during the month of December 2014 at Khaiwa village in the district of Machinga with the knowledge that the feelings of the relatives of the late Samson Kawenda are likely to be wounded, committed trespass upon a burial place at Khaiwa village removing late Samson Kawenda's remains therefrom.

10. CONCLUSION

10.1. In the interest of clarity, the 4th accused, Ayilu Lordson, and the 6th accused, Injesi Malenga, have been found with no case to answer on all the charges preferred against them and have been accordingly acquitted. The 1st, 2nd, 3rd and 5th accused have had all their original charges substituted and shall now take fresh pleas but the State shall not adduce further evidence since the basis of the substituted charges is contained in the evidence already led by State witnesses. I so order.

DELIVERED IN OPEN COURT THIS 13TH DAY OF APRIL 2015 AT ZOMBA

H/W TAMANDA C. NYIMBA
SENIOR RESIDENT MAGISTRATE (E)



REPUBLIC OF MALAWI

IN THE SENIOR RESIDENT MAGISTRATE COURT
SITTING AT ZOMBA
CRIMINAL CASE NO. 66 OF 2015

THE REPUBLIC VS.
BELO DINESS – 1ST ACCUSED
KAUDENI JANATI – 2ND ACCUSED
MUDU YUSUFU – 3RD ACCUSED

CORAM: H/W TAMANDA C. NYIMBA : Senior Resident Magistrate
Assistant Superintendent Lungu : Public Prosecutor
Miss Chimwemwe Nyirenda: Court Clerk and Official Interpreter
Wame Pearson: Of Counsel for Accused Persons
Belo Diness: 1st Accused (Represented)
Kauseni Janati: 2nd Accused (Represented)
Mudu Yusufu: 3rd Accused (Represented)

SENTENCE

1. INTRODUCTION

- 1.1. On 13th April 2015, this court exercising the power under section 254 (2) as read with section 151 (2) (b) of the Criminal Procedure and Evidence Code, and for reasons duly appearing on record, substituted all the four charges the defendants were originally answering. The defendants were variously convicted after freshly pleading to the four substituted charges. The convictions emanated from the defendants' own pleas of guilty and admission as correct the state-narrated facts.
- 1.2. The 2nd and 3rd defendants' convictions apply to the following offences: the first and second counts of trespassing on a burial place contrary to section 129 of the Penal Code; the third and fourth counts of removing bones from the body of a deceased person contrary to section 18 (1) (a) of the Anatomy Act. The 1st defendant's convictions pertain to the first and second counts of trespassing on a burial place contrary to section 129 of the Penal Code and the third count of removing bones from the body of a deceased person contrary to section 18 (1) (a) of the Anatomy Act.
- 1.3. This Court reserved the convicts' sentences after their legal representative successfully prayed for the matter to be adjourned to prepare submissions in writing in mitigation of his clients' sentences. I should place it on record that counsel duly filed the said written submissions with my Court. A copy of the same was also served on the State. The State

chose not to respond to counsel's submissions but communicated to this Court that they would rely on the oral submissions they made soon after the Court convicted the defendants.

1.4. This Court is very grateful for the submissions from both sides which have assisted my Court in deciding the sentences herein. However, I must swiftly indicate that it will not be practicable or necessary to make reference to every piece of law and argument advanced. This will not be out of impudence to the State or counsel but due to reasons of brevity and simplicity. Suffice it to say that I have carefully studied the contents of all the submissions and I shall bear them in mind wherever relevant in my decision.

2. SUBMISSIONS BY THE PROSECUTION

2.1. A rundown of the oral submissions made by Assistant Superintendent Lungu, RPI, on behalf of the prosecution which submissions are, in the main, aggravating factors, is as follows. The convicts have no previous criminal records. However, Assistant Superintendent Lungu impressed upon this court that the convicts' hitherto clean slate should not eclipse the fact that the offences herein are becoming rampant particularly cases involving albinos. He submitted that albinos are human beings but bones harvested from their cadavers are being treated as a source of wealth. He further submitted that a meaningful sentence should be meted out on the convicts to act as a lesson to like-minded criminals. He added that the sentences to be meted out would act as a reference point that transacting in human bones is illegal and evil.

2.2. Assistant Superintendent Lungu went on to state that trespassing upon a burial place and extracting bones from dead persons therefrom is not only criminal but also a cultural taboo. He concluded his submissions by beseeching this Court to subject the convicts to the full fury of the penal prescription attendant to the offence herein irrespective of the fact that they are first offenders.

3. SUBMISSIONS IN MITIGATION

3.1. In his mitigation submissions, learned counsel for the defendants, Mr Wame Pearson, submitted that the convicts are first offenders; that they pleaded guilty and therefore did not waste Court's time; that the 1st and 3rd convicts are youthful and will doubtless be productive and reliable citizens; that the 2nd convict is an elderly man; that all the convicts have been in custody since February 2015; that they are willing to carry out community sentence as opposed to custodial sentences; that they appeared to be remorseful and their faces showed how regretful they were and still are for their criminal actions.

3.2. Informed by the foregoing mitigating factors, the essence of counsel's submissions, which I shall dwell on, is that the convicts' sentences should be suspended on condition that they perform community service. In the alternative, should the penalties the Court decides to mete out encompass custodial sentence, the same should not be excessive and should run concurrently.

3.3. I shall bear in mind the foregoing aggravating and mitigating factors when meting out sentence.

4. THE APPLICABLE SENTENCING LAW AND PRINCIPLES

- 4.1. The offence of trespassing on a burial place contrary to section 129 of the Penal Code in counts one and two is a misdemeanour. Pursuant to section 34 of the Penal Code, the charge attracts a maximum penalty of a fine or imprisonment for a term not exceeding two years or both. The maximum punishment respecting the offence of removing bones from the body of a deceased person contrary to section 18 (1) (a) of the Anatomy Act is a fine of K200,000-00 (upon employing conversion under the Fines (Conversion) Act)¹⁴ and imprisonment for a term of three years.
- 4.2. It is trite that sentencing is not an exercise that can be achieved with some kind of mathematical precision. Sentencing courts are guided by, among other things, the personal circumstances of the offender, circumstances of the victim, severity of the crime, the interest of society at large as well as the prevailing sentencing trends.
- 4.3. This Court is acutely alive to the law and policy, as correctly submitted by learned counsel, that as a general rule, first offenders should ordinarily be afforded leniency and not be sent to prison haphazardly. This is a salutary principle aimed at giving first offenders the chance not to be contaminated with hardened and serious offenders. Sections 337, 339 and 340 of the Criminal Procedure and Evidence Code are the guiding law in this regard. Nonetheless, it does not mean that first offenders do not ever get prescribed custodial sentences. Where the circumstances necessitate a custodial sentence, it is incumbent on a sentencing Court like this one to justify with good reasons¹⁵ such a sentence on a first offender.
- 4.4. This Court is similarly mindful of the rule that in sentencing, a critical consideration about the offender is age. In the case of *Rep v. Felix Madalitso Keke*¹⁶, Mwaungulu J (as he then was) propounded some very useful and practical guidelines pertinent when a sentencing court is considering punishment of a convict in the age range of the convicts herein. The esteemed judge stated as follows:

“For offenders between [25 to 60 years] a sentencer may allow a full rigour of the sentence that fits the crime on the assumption that at that age the offender is supposed to have developed a mature temperament towards and mature understanding about crime and consequences about crime and its impact on the offender, the offender’s family and the society of which the offender is integral. On the other hand the sentencer could reduce the sentence considering that an offender at that age has lived longer without trouble with the law”.

5. ANALYSIS

- 5.1. The 3rd convict is aged 19 years. It is an old and well-established principle of sentencing that the youth of an offender should normally lead to a lower sentence. The ages of the 1st and 2nd convicts are 26 and 49 years respectively. They are therefore fully grown men and this Court regards them as being capable of appreciating the repercussions of their criminal adventure.

¹⁴ Chapter 8:06 of the Laws of Malawi

¹⁵ *The Republic v Genti* [2000–2001] MLR 383 (HC)

¹⁶ Confirmation Case No 404 of 2010

5.2. On counsel's submission that the convicts pleaded guilty and therefore did not waste Court's time, with due respect, I observe that the submission is not entirely accurate insofar as the convicts only pleaded guilty after the prosecution witnesses had been subjected to the strain of adducing evidence. Perhaps to be fair to the convicts, the burden and expense of a full trial was only averted to the extent that the convicts admitted the substituted charges thereby obviating the need to enter their defence. In any event, even if they had pleaded not guilty to the substituted charges, no new witnesses were to be paraded by the State since the prosecution's evidence, prima facie, already established the offences substituted. On the counsel's submission that the convicts were remorseful, I am deeply aware that a plea of guilty is necessarily a sign of contrition. However, in the within case and with all due respect, the convicts did not expressly show any sign of compunction about their criminal actions. They did not even offer an apology to the family of the deceased persons whom they harvested their bones. No wonder their learned counsel couched the submission on this point in the following terms which I fully reproduce as follows:

g) "the accused persons appeared to be remorseful and their faces showed how regretful they were and still are". [Emphasis supplied].

5.3. I further take judicial notice and concur with the State regarding the fact that cases of this nature have proliferated particularly in the Eastern Region. There are a number of un concluded cases in various Courts at this station whose subject matter is sale of human bones especially of persons with albinism. This Court is also in agreement with the prosecution that trespassing upon a burial place in circumstance of the present case is not only culturally reprehensible but also immoral and evil. In my most careful view a graveyard is one of the most sacred places which must not be visited willy-nilly. Significantly, a grave as a specific final resting place of a dead person is equally sacrosanct.

5.4. It is in evidence that the two deceased persons whose bodies were tampered with died in the past three (3) years. It is a fact of life that time heals. Therefore, just when the deceased's folk were in healing stage in mourning their departed family members, the act of unlawfully disinterring the deceased persons' remains surely reopened the sorrow and grief that the relatives experienced after the loss of their dear and loved ones. Disentombing a cadaver is also a mockery of the departed (at least looked at through the lens of the surviving relations).

5.5. I similarly observe that, in furtherance of safeguarding the remains of the dead, section 115 of the Public Health Act¹⁷ equally criminalizes unearthing dead bodies by providing that subject to the Act it shall not be lawful to exhume any body or the remains of any body which may have been interred in any authorized cemetery or in any other cemetery, burial ground or other place without a permit. I also venture to opine that the convicts' criminal actions of interfering with the deceased's bones were also a potential public health hazard for those in contact with the harvested bones since for all we know some communicable diseases can feasibly be contracted assuming that the deceased persons died from contagious diseases.

¹⁷ CAP 34:01 of the Laws of Malawi

5.6. The offences are also aggravated by the fact that, at the graveyard at Ngwale village, the convicts specifically chose to dig up the cadaver of an albino child. It is in evidence that the convicts were actuated by money to extract the bones of the deceased albino child. As a matter of fact, although the bones of the late Samson Kawenda were retrieved, those of the albino cadaver remain unrecovered. At the time of the currency of persecution of people with albinism, whether dead or living, the foregoing circumstances aggravate the offence. In this connection this Court takes further judicial notice of numerous media reports on the plight of albinos. Specifically, this Court cites a press release by the Minister of Gender, Children, Disability and Social Welfare entitled "Reported Murder Cases Involving Persons

With Albinism in the Country" reported in Volume 22 No 30 of The Nation Newspaper of Wednesday 11th February 2015. Therein and in numbered paragraphs 5 and 6, the Minister states that government would like to:

- 5) Call upon traditional leaders and communities to be on the alert and report any suspicious activities of any nature surrounding people with albinism; and
- 6) Request the general public to assist in providing the Police with information which may lead to the arrest of such criminals and also take the responsibility of protecting each other; relatives; neighbours; and colleagues with albinism from such unlawful acts.

5.7. Moving on, I observe that the offences herein were perpetrated in quick succession over a short period of time. The convicts also acted in concert with each other. Plainly, the convicts did not commit the offence on spur of the moment basis. The fact that the convicts calculated the lucrative gains that their criminality would bring them is certainly suggestive of a planned criminal mission. This Court's view is that the penal laws' response should be a tough one.

5.8. In the final analysis, I have conscientiously placed the mitigating and aggravating factors into an equation and given them due weight in arriving at condign sentences. The aggravating factors certainly dwarf the mitigating elements. Respectfully, I am not persuaded to suspend the sentences I shall pronounce shortly in preference of performance of community service. The primary sentencing objective in the circumstances of this case must be punishment as well as deterrence. The sentences I shall impose must satisfy the public that this Court has taken adequate measures within the law for the dead not to be exposed to undignified actions and for their grieving relatives not to be subjected to further and needless grief. By the same token, this Court's sentences should not be of such severity as to be out of all proportion to the offences, or to be manifestly excessive, or to break the offenders, or to produce in the minds of the public the feeling that the defendants have been unfairly and harshly treated. This court's sentences shall properly reflect the overall criminality. Hopefully, the sentences shall afford the convicts the opportunity to learn from their mistakes and become better citizens.

6. DETERMINATION AND ORDER

6.1. In the premises and regard being had to the foregoing evaluation, I sentence the defendants as follows:

6.2. FIRST COUNT

6.2.1.I sentence Belo Diness, Kaundeni Janati and Mudu Yusufu to serve 12 months I.H.L. for the offence of trespassing on a burial place contrary to section 129 of the Penal Code.

6.3. SECOND COUNT

6.3.1.I sentence Belo Diness, Kaundeni Janati and Mudu Yusufu to serve 12 months I.H.L. for the offence of trespassing on a burial place contrary to section 129 of the Penal Code.

6.4. THIRD COUNT

6.4.1.I sentence Belo Diness, Kaundeni Janati and Mudu Yusufu to serve 18 months I.H.L. for the offence of removing bones from the body of a deceased person contrary to section 18 (1) (a) of the Anatomy Act.

6.5. FOURTH COUNT

6.5.1.I sentence Kaundeni Janati and Mudu Yusufu to serve 18 months I.H.L. for the offence of removing bones from the body of a deceased person contrary to section 18 (1) (a) of the Anatomy Act.

6.6. The sentences are to run concurrent of each other and to be reckoned from the date the convicts were arrested. As stated hereinabove, I am deeply mindful that a custodial sentence for a first offender should be passed at the peril of reasons. In my most considered view, the aggravating factors ventilated herein have amply warranted immediate custodial sentences in this matter.

7. ORDER ON DISPOSAL OF EXHIBITS (BONES)

7.1. This Court's order respecting the recovered bones of the late Samson Kawenda is that the same be returned to the deceased's relatives for a proper and dignified reburial.

8. RIGHT OF APPEAL

8.1. Any party aggrieved by the convictions, sentences and order herein is at liberty to appeal to the High Court within 30 days of the date hereof. It is so decided.

DELIVERED IN OPEN COURT THIS 4TH DAY OF MAY 2015 AT ZOMBA

H/W TAMANDA C. NYIMBA
SENIOR RESIDENT MAGISTRATE (E)