



MALAWI
CAPITAL
RESENTENCING
PROJECT

*Selected
Jurisprudence*



Cornell University
Law School



Introduction to Compendium.....	1
Sentencing Guidelines - Case Digest.....	5
The Republic v. Wintala Chioko.....	17
The Republic v. Margret Nadzi Makolija.....	46
The State v. Laston Mukiwa.....	54
The Republic v. Limbikani Wilson Mtambo.....	58
The Republic v. William Mkandawire.....	63
The Republic v. Funsani Payenda.....	75
The Republic v. Lackson Dzimbiri.....	108
The Republic v. Chiliko Senti.....	122
The Republic v. Francisco James.....	134
The Republic v. Gilbert Masiye.....	141
The Republic v. Mabvuto Elias.....	147
The Republic v. Clitus Chimwala.....	153
The Republic v. James Galeta.....	156
The Republic v. Richard Chipoka.....	162
The Republic v. Bisket Kunitumbu.....	172
The Republic v. Kachepa Tsogolani.....	176
The Republic v. Kingsley Karonga.....	185
The Republic v. Edson Khwalala.....	193
The Republic v. Richard Maulidi and Julius Khanawa.....	202
The Republic v. Geoffrey Mponda.....	208
The Republic v. Richard Jiba James, Charles Dick, Charles Nyalapa and Gray Zimba.....	218
The Republic v. Venita Maiche.....	233
The Republic v. Gift Ngwira.....	269
The Republic v. Michael Khonje.....	275
The Republic v. Stoneki Kachala.....	282
The Republic v. Charles Khoviwa.....	288
The State v. Stenala Nashele, Edwin Uladi and Mkoma Kaputeni.....	296
The Republic v. Jack Makasu and Daniel Teputepu.....	300
The Republic v. Patson Mtepa.....	304
The Republic v. Godfrey Thawe.....	310
The Republic v. Peter Kusaina and Amosi Augustine Shama.....	314
The Republic v. Abraham Phonya.....	320

Introduction to Compendium

In **Kafantayeni v. Attorney General of Malawi**, Constitutional Case No. 12 of 2005 (hereinafter, **Kafantayeni**), the High Court struck down the mandatory death penalty on the grounds that it violated the accused's constitutional rights to a fair trial, access to justice, and protection from inhuman treatment or punishment. The Supreme Court of Appeal agreed with the rationale of **Kafantayeni** in **Jacob v The Republic**, MSCA Crim. App. No. 18 of 2006, noting "that offenses of murder differ, and will always differ, so greatly from each other that we think it is wrong and unjust that they should attract the same penalty or punishment". In **Mclemence Yasini v The Republic**, MSCA Criminal Appeal No. 25 of 2005, the Supreme Court of Appeal held that all persons sentenced to the mandatory death penalty were entitled to sentence rehearings before the High Courts, where they could present mitigating evidence relating to the personal circumstances of the offender as well as the circumstances of the offence. Further, in **Chimenya v The Republic**, MSCA Crim App No. 8 of 2006, the Court stated that before imposing sentence, the courts should take into account "the manner in which the murder was committed, the means used to commit the offence, the personal circumstances of the victim, the personal circumstances of the accused and what might have motivated the commission of the crime".

At the time of the **Kafantayeni** judgment, approximately 190 prisoners were incarcerated in Zomba Central Prison after being sentenced to death pursuant to the now-unconstitutional mandatory regime. The affected prisoners included 23 prisoners on death row as well as approximately 164 men and 4 women whose mandatory death sentences had been commuted to life in prison by the President. These numbers dwindled in subsequent years, as certain prisoners died, were released, or had their sentences reduced on appeal.

In 2013, the Malawi Human Rights Commission (MHRC) initiated a resentencing project to ensure that the affected prisoners were given an opportunity to present mitigating evidence at a new sentencing hearing. With the support of Tilitonse Fund, the MHRC brought together a coalition of stakeholders to carry out the project. They included the Director of Public Prosecutions; the Judiciary; the Legal Aid Department; the Law Society; the Paralegal Advisory Services Institute; the Centre for Human Rights Education, Advice and Assistance; Chancellor College School of Law Malawi; Professor Babcock of Cornell University School of Law; and the international legal charity Reprieve.

The stakeholders involved in the project came together to honour and implement the court's directive in **Kafantayeni**, thereby demonstrating Malawi's commitment to the rule of law, the

values entrenched in the Malawian Constitution and the country's international human rights obligations. The stakeholders' common aims were to ensure access to justice for prisoners that had received an unconstitutional sentence; to develop, in the course of the resentencing process, best practices in sentencing for capital cases following the abolition of the mandatory death penalty; to build capacity for the handling of capital cases by training key stakeholders in the criminal justice system; and to facilitate community sensitization and offender reintegration through community outreach and education.

Sentence rehearings began in February 2015. As of now, March 27, 2017, the High Courts have conducted 140 hearings. One hundred fourteen prisoners have been released from prison after serving their sentences; another twenty-six remain incarcerated but will be released in the future. Ten prisoners are awaiting judgment, and twenty-five have not yet received a resentencing hearing.

In connection with the resentencing project, the High Courts have issued at least sixty written judgments addressing the nature of mitigating evidence, the issue of missing case files, burden of proof, and other matters. These judgments provide the most comprehensive jurisprudence on the factors relevant to capital sentencing in Malawi, not only in the resentencing project but in capital prosecutions more broadly. This publication brings together thirty-three judgments that explain the mitigating and aggravating evidence presented in each case to justify the sentence imposed. Some of these judgments discuss offenders' rights under the Malawi Constitution and international law; others address the rights of victims; and several debate the relevance of post-conviction conduct in the capital sentencing process. Among the themes addressed in the judgments are the following:

- A death sentence is only appropriate if the prosecution has rebutted the presumption in favour of life by proving that the offence is one of the worst of its kind, the "rarest of the rare".
- In determining sentence, the court must consider the aims of punishment, of which the first and foremost is reform and rehabilitation, not retribution or vengeance.
- In choosing an appropriate sentence, the court must base its decision firmly on the principles of proportionality and avoidance of arbitrariness.
- The court shall consider any and all mitigating circumstances regarding the offence and the offender that might earn the convict the court's compassion.
- The death penalty should not be imposed on certain categories of offenders, such as the mentally ill and juvenile offenders.
- Previous serious violations of the convict's constitutional rights, such as a long period on remand; the denial of the convict's right to appeal; and inhuman

conditions of incarceration may preclude the imposition of the death penalty and mitigate in favour of a lesser sentence.

- Where a case file is missing, the convict may not be penalized and is entitled to the benefit of the doubt with regard to the facts.
- The severe psychological torture caused by a prisoner's protracted confinement on death row merits special consideration as a mitigating factor.

In order to aid the legal profession in reviewing the significant number of judgments on sentence issued by the High Court to date, this publication further includes a table summarising the sentences delivered in the resentencing project, along with a description of the aggravating and mitigating factors considered in each case.

We hope you will find this compendium both enlightening and useful in your work.

Mr Peter Chisi
Director of Civil and Political Rights
Malawi Human Rights Commission

Professor Sandra Babcock
Faculty Director, Center on the Death
Penalty Worldwide
Cornell University Law School

March 27, 2017

Sentencing Guidelines - Case Digest

The principle of proportionality was central to the decision in **Kafantayeni**. The High Court recognised that respect for human dignity is violated by a sentencing process which allows for a sentence that would be wholly disproportionate to the defendant’s criminal culpability. During the Malawi Capital Resentencing Project, 150 prisoners have been heard on resentencing, and 140 have received new judgments. The judgments in these cases are instructive regarding the range of sentences imposed on rehearing, as well as the mitigating and aggravating factors considered by the High Courts. Included in this publication is a table summarising 70 sentences delivered since February 2015, along with a description of the facts of the offences. This description does not reflect the entire range of aggravating and mitigating factors considered. There are approximately 50 cases in which written judgments are yet to be received from the High Court, and therefore it has not been possible to summarise all sentences delivered during the project in this publication. It is further noted that of the 140 prisoners that have received new judgments, 105 have received sentences leading to their immediate release. The sentencing table included here should therefore be read with caution to avoid any misinformed conclusion that sentences were, on average, higher than the actual practice.

Case Name	Trial Record	Circumstances of Offence	Sentence
<u>R. v. Aaron John</u> , No. 15 of 2015 (Kamwambe)	Missing	Because the record is missing, case cannot be considered the “worst of the worst”. Court considered good character of convict and his long stay on death row in difficult conditions.	24 years
<u>R. v. Abraham Galeta</u> , No. 06 of 2015 (Potani)	Located	The deceased beat his wife. Following the beating, the wife’s son and brother followed the deceased and assaulted him with a wire and a chain. The court found that the murder was premeditated and that dangerous weapons were used. Galeta was 20 years old at the time of the offence and thus received a lower sentence than his co-defendant, Zaima Makina.	25 years
<u>R. v. Abraham Phonya</u> No. 02 of 2017 (Kalembera)	Missing	The convict attacked the deceased in a group during commission of a robbery. The deceased was killed, and his car was stolen. It was unclear whether any weapon was used during the offence.	27 years (with hard labour)

<u>R. v. Adani Sonyezani Banda</u> , No. 09 of 2016 (Kamwambe)	Located	After a disagreement with the deceased about the sale of land, the convict, at age 24, bought an insecticide (termic) and put it into the drink of the deceased. The deceased drank it and complained of stomachache. Convict offered to find medicine but instead intentionally delayed assistance. The victim died the following day. The murder was found to be premeditated and intentional.	28 years
<u>R. v. Alex Njoloma</u> , No. 22 of 2015 (Kalembera)	Located	The convict, a first offender, used a stick to assault the deceased who was already fighting with another person. The court found that the stick was a weapon (but not a dangerous weapon), and that the offence was not premeditated.	20 years with hard labour
<u>R. v. Alidi Thomas Akimu</u> , No. 11 of 2016 (Kamwambe)	Located	The convict, at age 20, got into a disagreement with the brother of the deceased. On his way home the convict was confronted by the deceased and his brother(s). The convict left and came back with a knife and stabbed the deceased in the chest.	22 years
<u>R. v. Altaf Tayub</u> No. 13 of 2016		The convict entered into an agreement to rob his friend, the deceased. A weapon was used to kill the deceased. The convict was a first offender and was relatively young at 24 years old. He was in dire straights at the time of the crime and had a family to support.	30 years from date of arrest
<u>R. v. Baison Kaula</u> , No. 5 of 2015 (Kamanga)	Located	He spent a long time on pre-trial remand (7 years), was a first offender, served 23 years in prison and was elderly (64 years). Life imprisonment should be limited to life expectancy (55 years).	Immediate release (served 23 years in prison)
<u>R. v. Bisket Kunitumbu</u> , No. 59 of 2015 (Chirwa)	Missing	The convict caused the death of his niece. He was a first offender with past good character. He stayed 6 years on remand and had served 23 years in prison. He was elderly (70 years), which makes it unlikely that he will re-offend.	Immediate release (served 23 years in prison)
<u>R. v. Njiratenga Banda</u> , No. 8 of 2015 (Tembo)	Located	The convict and the deceased were drinking together. They quarreled and fought; the convict stabbed the deceased in the chest with an Okapi knife, causing him to bleed to death.	Immediate release

<u>R. v. Boniface Kamanga</u> , No. 1 of 2016 (Potani)	Missing	The deceased was killed by a mob as she was accused of witchcraft. The convict's degree of participation in the mob was unknown. He was a first offender.	28 years
<u>R. v. Chiliko Senti</u> , No. 25 of 2015 (Kamwambe)	Located	The convict, a first offender, quarreled with his friend. He went to his house to get a panga knife, chased his friends and hacked off the arm of the deceased. The convict was intoxicated. His friends had provoked him; the offence was not premeditated. The convict cannot bear the entire blame for the death of the victim because the police were negligent and delayed the transport of the victim to the hospital. The court took into consideration the convict's past good behavior, and the 15 years served in prison in difficult conditions.	Immediate release (term of years: 23)
<u>R. v. Chiukepo Chavula</u> , No. 11 of 2015 (Chirwa)	Located	The convict who was 23 years old at the time of the offence got drunk with the deceased and a fight ensued. The offence was not premeditated. The convict was a first offender.	20 years with hard labour
<u>R. v. Clement Master</u> , No. 33 of 2015 (Chirwa)	Located but incomplete	After a dispute between the deceased and her daughter (the convict's wife), the convict beat his mother-in-law to death without a weapon. The deceased had provoked the convict: she had gone to her daughter's house (the convict's house), had poured maize and water on the floor, and had broken plates and cups with an axe. The convict was 23 or 24 years old at the time of the offence, he was a first offender and had served 23 years in prison.	Immediate release (20 years with hard labour)
<u>R. v. Clitus Chimwala</u> , No. 56 of 2015 (Nyirenda)	Missing	The convict was 19 at the time of the offence. He had suffered from serious mental health disorders prior to his arrest. It was his first offence and his participation in the offence was minimal. The convict reformed during his 21 years in prison and seemed capable of reintegration.	Immediate release (served 21 years in prison)

<u>R. v Dan Saidi Zonke</u> No. 7 of 2016 (Nyirenda)	Mostly complete (ruled to be sufficiently complete in this judgment)	The convict was intoxicated when he got into a quarrel with the deceased. He grabbed a knife from someone and stabbed the deceased. The convict was a first offender, and the crime was not premeditated. He spent 15 years in prison, is remorseful, and has the capacity to reintegrate into society.	Immediate release (served 15 years)
<u>R. v. Edson Khwalala</u> , No. 70 of 2015 (Kamwambe)	Located for first offence; missing for crime in prison	The convict, who was 21 years old at the time of the offence, started a fight in a bar with the deceased. He came back after the first brawl and stabbed the deceased with a weapon (knife). It was premeditated as the convict waited for the deceased. Once on death row, he committed a second murder. He is a repeat offender and a risk to society.	25 years for first murder and 23 years for second murder to run consecutively
<u>R. v. Elenelewo Sakondwera</u> , No. 18a of 2015 (Kapindu)	Located	The convict participated with a group in an armed robbery with panga knives, stones and projectiles. The deceased, the mother of the household, pulled a gun to protect herself, but one of the gang members took it and shot her in front of her own children. It was premeditated. The convict was 23 years old at the time of the offence. He did not show remorse and received a longer sentence than his co-defendant.	36 years with hard labour to run concurrently with 25 years for armed robbery
<u>R. v. Ernest Adam</u> , No. 18a of 2015 (Kapindu)	Located	The convict participated with a group in an armed robbery with panga knives, stones and projectiles. The deceased, the mother of the household, pulled a gun to protect herself, but one of the gang members took it and shot her in front of her own children. It was premeditated. The convict was 22 years old at the time of the offence. He showed remorse and received a lower sentence than his co-defendant Elenelewo Sakondwera.	25 years with hard labour to run concurrently with 20 years for armed robbery
<u>R. v. Francis James</u> , No. 28 of 2015 (Kamwambe)	Located	The convict, at age 19, intervened to stop a fight between the intoxicated deceased and another. The convict then followed the deceased and continued to beat him with fists and feet, which the court considered not to be premeditated. The court considered the convict's ill health at the time of sentencing and his previous good character.	Immediate release (served 19 years in prison)

<u>R v. Fumu Chunga</u> No. 15 of 2016 (Kalemba J)	Missing	The convict, while intoxicated, grabbed a wooden pole and struck the deceased on the head, because he believed the deceased had poisoned the convict's father. The court consider that he was a first offender and that he "likely acted on impulse".	22 years imprisonment with hard labour (resulting in immediate release)
<u>R. v. Funsani Payenda</u> , No. 18 of 2015 (Kapindu)	Located	The convict was found guilty of participating with a group in an armed robbery with panga knives, stones and projectiles. The deceased, the mother of the household, pulled a gun to protect herself, but one of the gang members took it and shot her in front of her own children. It was premeditated. The court imposed a lighter sentence for this defendant because of the lack of evidence of the convict's direct participation in the offence.	20 years with hard labour, to run concurrently with 25 year sentence for armed robbery
<u>R v Geoffrey Mponda</u> No. 68 of 2015 (Kapindu)	Missing	The convict's wife (state alleged she was an ex-wife) was killed in a house fire (state alleged he set it). The convict escaped, with his 7 month old baby. The court's decision to give immediate release was based on the fact that the convict submitted a pro se appeal, which was still not heard 15 years, creating a constitutional violation of the convict's right to appeal. However, the court noted that, the constitutional violation notwithstanding, it would have ordered immediate release based on time served.	Immediate release (following 21 years in custody)
<u>R. v. Gift Ngwira</u> No. 22 of 2016	Missing	Gift Ngwira was working as a night watchman. The deceased was found dead at the place he was guarding. When the police came to arrest Gift, they arrested his cousin, Timoti Mfuni, by mistake, and tried him as Gift Ngwira. (This could not be the foundation for the court's decision in the context of rehearing, but was mitigation). There were no eye witnesses. The convict was only 25 years old when he was arrested. He has spent his incarceration on death row	Immediate release (about 12 years imprisonment)
<u>R. v. Gilbert Masiye</u> , No. 37 of 2015 (Potani)	Located but incomplete	The convict, at age 18 or 19, was intoxicated and got into a quarrel with the deceased, during which he stabbed the deceased in the chest with a knife. The court found that there was provocation.	22 years

<u>R. v. Godfrey Thawe</u> No.28 of 2017 (Kalembera)	Located	The convict killed his wife so that he could marry his girlfriend. He cut her throat with a sharp object.	30 years (with hard labour)
<u>R v Godwin Kamanga</u> No 2 of 2016 (Mbvundula)	Missing	The convict, following a loss of all his money to the deceased in gambling, was very upset. The deceased taunted him about his loss, and the convict confronted the deceased with an axe, and killed him. The Court followed the sentencing guidelines as laid out in Yale Maonga, and considered his post-conviction good behavior, deplorable prison conditions, frustration or right to appeal, capacity for reintegration and conviction by a jury in mitigation.	26 years imprisonment
<u>R. v. Henry Dickson</u> , No. 57 of 2015 (Mbvundula)	Missing	The convict, a juvenile at the time of the offence, was committing a robbery with others when a watchman was shot and killed. It was unknown who did the shooting.	Immediate release (served 22 years in prison)
<u>R. v. James Chirwa</u> , No. 16 of 2015 (Mbvundula)	Located	The convict was intoxicated and beat the deceased severely in the chest for thirty minutes in a bar fight. No weapon was involved.	20 years
<u>R. v. James Galeta</u> , No. 47 of 2015 (Nyirenda)	Located	The convict and two other men killed the deceased in the course of a robbery. It is uncertain whether the convict actually committed the homicide and circumstances suggest the convict was mentally unbalanced due to excessive intoxication. "Evidence of 'mental or emotional disturbance', even if it falls short of meeting the definition of 'intoxication', may nonetheless make an offender less culpable on a murder charge and this should be considered in mitigation of sentence". The convict was only 23 years old and cooperated with authorities.	Immediate release (served 15 years in prison)
<u>R. v. Jamu Kalipentala Banda</u> (case notes only) (Ntaba)	Missing	The convict, a first offender, attempted to detain the deceased who was not in control of his mental faculties; the deceased entered a latrine and somehow set it on fire. He died from his injuries.	Immediate release (20 years with hard labour)
<u>R. v. Joe Kamoto</u> , No. 57 of 2015 (Mbvundula)	Missing	The convict, at age 18, was committing a robbery with others when a watchman was shot and killed. It was unknown who did the shooting.	Immediate release (served 22 years in prison)

<u>R. v. John Chikayiko Nthala</u> (case notes only) (Ntaba)	Missing	The convict, a first offender, attempted to detain the deceased who was not in control of his mental faculties; the deceased entered a latrine and somehow set it on fire. He died from his injuries.	Immediate release (20 years with hard labour)
<u>R. v. Julius Khanawa</u> , No. 65 of 2015 (Kamwambe)	Missing	The convict was 21 and his co-defendant was 18 years old when they, under the stress of poverty, decided to rob an older woman who lived alone. One convict entered the home while the other stood guard. Whilst stealing food, the convict inside attracted the attention of the woman, whom he hit with bare hands, causing her to fall and subsequently die. The convicts were found not to have the intent to kill.	Immediate release (served 20 years in prison)
<u>R. v. Kachepa Tsogolani</u> , No. 52 of 2015 (Chirwa)	Missing	The convict was part of a mass brawl over a land issue and hit the deceased on the head with a club after watching the deceased club the convict's brother into unconsciousness. The convict was intoxicated.	Immediate release (20 years with hard labour)
<u>R. v. Kamuloni Chiwaula Luphiya</u> , No. 07 of 2015 (Potani)	Located	The convict, at age 20, stabbed the deceased with a knife at a festival event and fled. The court found premeditation but that the homicide was committed largely due to peer pressure "to show off his powers of aggression."	25 years
<u>R. v. Keyaford Malata</u> , No. 32 of 2015 (Chirwa)	Located	The convict, in his 20s, got into a quarrel with his estranged wife and her mother, then returned with a panga knife and struck the mother in the head, resulting in her death. The court found premeditation. The convict lacked remorse.	Immediate release (25 years with hard labour)
<u>R. v. Kingsley Karonga</u> , No. 60 of 2015 (Kalembera)	Missing	The convict was at the time of the offence a juvenile, aged 15 or 16. The murder was committed with a panga knife. He was not the main aggressor. He was a first offender with past good behaviour.	Immediate release (20 years with hard labour)
<u>R v. Peter Kusaina and Amosi Augustine Shama</u> , No. 4 of 2017 (Kamwambe)	Located	The convicts came to a grocery store, at night, on a pretense of needing aspirin for a sick child. They subsequently attacked the deceased and her husband in their house with an AK47, stealing money in the process, and shooting the deceased dead.	First convict, who was younger at the time, 31 years; Second convict 35 years

<u>R. v. Lackson Dzimbiri</u> , No. 04 of 2015 (Nyirenda)	Missing	The convict, age 61 at the time of re-sentencing hearing, held an honest belief that the deceased had bewitched the convict's children. The convict killed the deceased with an axe and hid the body in a well. The court found premeditation.	22 years with hard labour
<u>R. v. Laston Mukiwa</u> , No. 21 of 2015 (Kalemberra)	Located	The convict, suspecting the deceased of witchcraft, and of using witchcraft to harm his children, attacked him with an axe and deposited the body of the deceased in a well. At time of re-sentence the convict was 61 years old.	22 years imprisonment (with hard labour)
<u>R. v. Lawrence Kanada</u> , No. 62 of 2015, (case notes only) (Potani)	Missing	The convict was attacked by the deceased after refusing a request for cigarettes. The convict retaliated, killing the deceased.	Immediate release (served 22 years in prison)
<u>R. v. Petro Lifa and Luwish Ingilesi</u> , No. 12 of 2017 (Kalemberra)	Located	The convicts, from Mozambique, crossed the border in a group of 10 and robbed a store where the deceased worked. The deceased was shot several times in the course of that robbery.	36 years (with hard labour)
<u>R. v. Lightwell Chima</u> , No. 30 of 2015, (case notes only) (Kamanga)	Located	The convict, aged 67 at the time of re-sentencing, held an honest belief that the deceased was practicing witchcraft and killed the deceased with stones. He then set the house of the deceased on fire.	20 years without hard labour
<u>R. v. Limbikani Wilson Mtambo</u> , No. 02 of 2015 (Kamwambe)	Located but incomplete	The convict, at age 16, allegedly killed his wife in the forest. The court found that there was no clear motive for the homicide.	Immediate release (served 17 years in prison)
<u>R. v. Mabvuto Elias</u> , No. 45 of 2015 (Kamwambe)	Located but incomplete	The convict, who was 17 years old at the time of the offence, was attacked by a group of people at night and in retaliation used a knife resulting in death. The convict carried the knife for common daily uses.	Immediate release (served 22 years in prison)
<u>R. v. Jack Makasu and Daniel Teputepu</u> , No. 7 of 2017 (Kamwambe)	Missing	The convicts were involved in a night robbery in which the deceased was killed. They were 27 and 28 years old respectively, and the first convict was a repeat offender.	First convict 27 years imprisonment; Second convict 24 years imprisonment (Both served 11 years in prison)

<u>R. v. Margret Madzi Makolija</u> , No. 12 of 2015 (Nyirenda)	Located	The convict forced her two sons to drink poison (tamek) with her, and while the convict survived the poisoning, her two sons did not. Circumstances at the time of the incident suggest that the convict was mentally imbalanced.	20 years with hard labour on both counts of murder to run concurrently
<u>R. v. Michael Khonje</u> No. 28 of 2016	Missing	The convict agreed to participate in the robbery of the deceased, who was killed in the course of the robbery with a gun. The convicted cooperated with the police investigation. He was a juvenile (17 y/o) at the time of the incident. He was a first offender and committed the crime while he was grieving for his mother. He was suffering from depression at the time, and had spent over 12 years in grueling conditions on Zomba's death row.	Immediate release
<u>R. v. Patson Mtepa</u> , No. 9 of 2017 (Kamwambe)	Missing	The convict, aged 21, robbed a shop owned by the deceased at gunpoint, and shot the deceased in the process. At the time of the offence the convict was a prison escapee, under sentence of imprisonment for a previous robbery.	25 years imprisonment (served 14 years in prison)
<u>R. v. Njiratenga Banda</u> , No. 8 of 2015 (Tembo)	Located	The convict and the deceased got into a drunken brawl, provoked by the deceased. The convict ended the fight by stabbing the deceased with an okapi knife. The court found no premeditation in the killing.	Immediate release (served 15 years)
<u>R. v. Paulo Jasi</u> , No. 3 of 2015 (Kamanga)	Located	The convict, at age 25, killed his mother by "hacking." There was some evidence of provocation from the deceased and the convict was known to have mental health problems at the time of the incident.	Immediate release (served 20 years in prison)
<u>R. v. Richard Chipoka</u> , No. 39 of 2015 (Nyirenda)	Missing	The convict, as a 21 year old, participated in an armed robbery alongside a co-defendant. During the course of the robbery a man was wounded and died, yet it is unknown who caused this death.	20 years with hard labour

<p><u>R v Richard Jibe James, Charles Dick, Charles Nyapala and Gray Zimba</u> No. 69 of 2015</p>	<p>Missing</p>	<p>The deceased was stabbed numerous times when cycling to get some bedding to go to a funeral. The 1st and 2nd convicts, whilst extremely drunk, encountered the deceased and got into a fight with him, and took his bike. The 3rd and 4th convicts were convicted only on accounts of being seen with the bicycle at some point. With respect to the 1st and 2nd, the court considered their youth (20s) and that they were first offenders in mitigation, but also considered the use of a weapon and robbery as serious aggravators. With respect to the 3rd and 4th ds, the court considered the lack of evidence of their involvement, and particularly highlighted the 4th d's youth (14 years) at the time of arrest and trial (he was tried as an adult)as a particular injustice deserving immediate release.</p>	<p>30 years with hard labour for 1st and 2nd convicts; immediate release for 3rd and 4th convicts</p>
<p><u>R. v. Richard Matabwa</u>, No. 57 of 2015 (Mbvundula)</p>	<p>Missing</p>	<p>The convict, at age 18, was committing a robbery with others when a watchman was shot and killed. It was unknown who did the shooting.</p>	<p>Immediate release (served 22 years in prison)</p>
<p><u>R. v. Richard Maulidi</u>, No. 65 of 2015 (Kamwambe)</p>	<p>Missing</p>	<p>The convict and his co-defendant were 18 and 21 years old when they, under the stress of poverty, decided to rob an older woman who lived alone. One convict entered the home while the other stood guard. Whilst stealing food, the convict inside attracted the attention of the woman, whom he hit with bare hands, causing her to fall and subsequently die. The convicts were found not to have the intent to kill. They served 20 years in prison.</p>	<p>Immediate release (served 20 years in prison)</p>
<p><u>R. v. Richard N'dala</u>, No. 42 of 2015 (Nyirenda)</p>	<p>Missing</p>	<p>The convict, then 22 years old, spent the day drinking with the deceased until a fight ensued in the evening. In the quarrel the convict stabbed the deceased. The convict was found to be mentally imbalanced due to his high level of intoxication at the time of the incident.</p>	<p>Immediate release (served 14 years in prison)</p>
<p><u>R. v. Samson Chakwana</u>, No. 10 of 2015 (Chirwa)</p>	<p>Located</p>	<p>Convict stabbed the deceased with a knife. It is disputed as to whether the convict was 16 or 21 years old at the time of the offence.</p>	<p>25 years with hard labour</p>

<u>R. v. Stenala Nashele, Edwin Uladi, and Mkoma Kaputeni</u> No. 36 of 2016 (Kalembera)	Located	The convicts believed that the deceased was practising witchcraft against them, and had by means of witchcraft killed a relative of theirs. They therefore attacked the deceased in a group, with sticks, having tied his legs up. The eyes of the deceased were found removed from the body, in a plastic bag, in a pit.	22 years imprisonment (with hard labour)
<u>R. v. Steven Jere, Alijenti Ngulube and Vincent Ngulube</u> No. 10 of 2016	Located	Convicts killed their relative because they believed he was involved in witchcraft. The convicts were part of a group of nine or more people involved in the incident. A weapon was used to kill the deceased. The convicts were unarmed when they confronted the deceased, but picked up a weapon from the deceased's home. They were all first offenders, and one – Mr Jere – was only 18. The convicts have had excellent conduct prior to and in prison, and are not likely to reoffend.	20 years imprisonment with hard labour.
<u>R. v. Stoneki Kachala</u> No. 30 of 2016 (Kamwambe)	Missing	The convict, aged 17, killed the deceased and was given a mandatory death sentence. No other facts about the offence were available as the case file was missing.	Immediate release (served 13 years in prison)
<u>R. v. Thom Pofera Phiri</u> No. 25 of 2016	Missing	Convict stabbed the deceased with a knife during a fight over the convict's former lover. The convict was the aggressor, and brought the weapon with him. The convict benefits from doubt as to facts due to lack of record. He was also a first offender, and the death may not have been premeditated. He was a good man prior to arrest, and has shown good behavior in prison.	18 years imprisonment
<u>R. v. Tonny Thobowa</u> , No. 15 of 2015 (Kamwambe)	Missing	Because record is missing, case cannot be considered the "worst of the worst". Court considered good character of convict, his long stay on death row in difficult conditions and his relatively young age at the time of the offence.	20 years
<u>R. v. William Mkandawire</u> , No. 20 of 2015 (Nyirenda)	Located	The convict started a fight with the deceased while intoxicated for no apparent reason, but the fight was broken up. When the deceased left, the convict followed, and proceeded to club him to death. The convict was found to be mentally imbalanced due to his high level of intoxication at the time of the incident.	Immediate release (served 11 years in prison)

<p><u>R. v. Wilson Mkandawire</u>, No. 13 of 2015 (Mbvundula)</p>	<p>Located</p>	<p>After a day of drinking, the convict accused the deceased of bewitching his relatives, a claim which the deceased did not deny; the deceased then told the convict he would be “next.” The two began to brawl and the convict grabbed a pestle and used it to bash the deceased’s head multiple times. The convict showed immediate remorse after the crime and turned himself into the police.</p>	<p>18 years</p>
<p><u>R. v. Wilson Msimuko</u>, No. 24 of 2015 (Kamwambe)</p>	<p>Located</p>	<p>After a family quarrel, the deceased was walking home when the convict came from behind and hit the deceased in the head with a piece of wood. The court found that the convict had no intention to kill the deceased, and that the act was a family quarrel gone wrong.</p>	<p>20 years</p>
<p><u>R. v. Wintala Chiwoko</u>, No. 9 of 2015 (Tembo)</p>	<p>Located</p>	<p>The convict found the deceased having an affair with his wife, but the deceased escaped. Three weeks after this event, the convict snuck up on the deceased and stabbed him to death.</p>	<p>25 years</p>
<p><u>R. v. Wiseman Phiri</u></p>		<p>The convict committed two murders in the course of a robbery, together with some accomplices. Dangerous weapons were used to kill the deceased. The convict participated under duress, and without premeditation. The convict was a young man and he cooperated with authorities.</p>	<p>22 years</p>
<p><u>R. v. Yale Maonga</u>, No. 29 of 2015 (Kamwambe)</p>	<p>Located</p>	<p>The convict, who was 20 years old, along with other men plotted to rob the deceased and his friend of a small amount of money, i.e., just enough for transport from Lilongwe to Blantyre. The convict’s group was armed with a hammer and knives, while the deceased and his friend were unarmed and drunk, and therefore totally unable to defend themselves. The convict’s group used their weapons against the deceased, resulting in his death, as well as against the friend, who was stripped of his clothes and seriously injured.</p>	<p>42 years</p>

<u>R. v. Zaima Makina</u> , No. 06 of 2015 (Potani)	Located	The deceased beat his wife. Following the beating, the wife's son and brother followed the deceased and assaulted him with a wire and a chain. The court found that the murder was premeditated and that dangerous weapons were used. The co-defendant, Abraham Galeta, received a sentence of only 25 years because of his youth.	30 years
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The Republic v. Wintala Chioko

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

HOMICIDE SENTENCE RE-HEARING NUMBER 9 OF 2015

CORAM: JUSTICE M.A. TEMBO,

Salamba and Chitsime, Counsel for the State

Kayira, Counsel for the Defendant

Kakhobwe, Official Court Interpreter

ORDER ON RESENTENCING

On 18th February 2015, this Court set aside the mandatory sentence of death imposed on Wintala Chioko upon his conviction of the offence of murder contrary to section 209 of the penal code. This Court resented him to serve 25 years imprisonment for the offence of murder. The following are the full reasons for the decision of this Court which was arrived at after a resentencing hearing at which both the State and the defendant were heard by this Court.

The convict herein was charged with the offence of murder contrary to section 209 of the Penal Code. The particulars of the offence were that the convict, with malice aforethought caused the death of Chimwemwe Bernado Miti on the 22nd August 1999 in Mchinji district. He stabbed the deceased with a knife.

After full trial he was convicted as charged on 5th November 2001. The brief facts of this case show that the deceased was having a love affair with the convict's wife, Caroline Wintala. The convict knew about this and on 2nd August 1999 the convict caught the deceased having sex with the deceased. He chased the deceased but did not catch him. On the 22nd August 1999, that is three weeks later, the convict caught up with the deceased and stabbed him to death. The deceased was unarmed and was at that time going to his house from another village and he was not seeing the convict's wife. The convict was found guilty by jury trial and was sentenced to the mandatory death sentence. The defendant asserted that he stabbed the deceased herein two weeks after the defendant had found the deceased cheating with his wife and further that at the time of the stabbing the defendant had again found the deceased with his wife. These assertions were rejected by the jury which returned a verdict of murder despite the direction of the Judge that a verdict of manslaughter was open to the jury on the defence of provocation that the defendant had advanced at trial herein. Therefore this Court cannot at this

stage agree with the defence that this is matter in which a manslaughter verdict was the correct one. If that were the case the defendant should have appealed against the murder conviction before the Supreme Court of Appeal for that appeal court, and not this trial court, to consider the conviction. Consequently, this Court can only resentence the defendant on the murder conviction by which the jury rejected the defence of provocation. The jury also rejected the assertion that the defendant stabbed the deceased after finding him with his wife at the time of the stabbing.

The defendant and the prosecution did not give evidence before the court on the proper sentence due to the mandatory nature of the sentence imposed on murder convicts then.

This Court agrees with both the State and the defence that following the landmark decision in *Kafantayeni and others v Attorney General* [2007] MLR 104 (HC) which held that the mandatory death sentence for murder was unconstitutional and further ordered that all murder convicts prior to this ruling be resented, this Court heard both the State and the defendant so as to resentence the defendant herein. This Court agrees with both parties that indeed that landmark decision was affirmed by the Malawi Supreme Court of Appeal in its subsequent decisions in the cases of *Jacob v Republic* [2007] MLR 414 (SCA) and *Yasini v Republic* MSCA Criminal Appeal number 9 of 2005. This Court agrees with the defendant that he is one of nearly 200 individuals sentenced to death prior to 2007 who are entitled to resentence hearings following the foregoing decisions.

The issue for consideration by this Court therefore is what is the proper sentence for the defendant herein the sentence of death being the maximum sentence for the offence of murder.

As rightly noted by the State section 209 of the Penal Code states that any person who of malice aforethought causes the death of another person by unlawful act or omission shall be guilty of murder.

Further, section 210 of the Penal Code (by Amendment number 1 of 2011), provides as follows any person convicted of murder shall be liable to be punished with death or with imprisonment for life.

Prior to this amendment section 210 of the Penal Code imposed a mandatory death sentence for the offence of murder.

This Court agrees with the submission by both the State and the defendant that the High Court in the *Kafantayeni case* held that the imposition of a mandatory death sentence for murder regardless of the circumstances of each case is a violation of the country's

Constitution. In delivering its decision the court said

In the final analysis, we hold that the mandatory requirement of the death sentence for the offence of murder as provided by section 210 of the Penal Code is in violation of the constitutional guarantees of rights under section 19 (1), (2), and (3) of the Constitution on the protection of the dignity of all persons as being inviolable, the requirement to have regard to the dignity of every human being and the protection of every person against inhuman treatment or punishment; the right of an accused person to a fair trial under section 42(2)(f) of the Constitution; and the right of access to justice. In particular the right of access to the court of final settlement of legal issues under section 41(2) of the Constitution. Pursuant to section 5 of the Constitution, we declare section 210 of the Penal Code to be invalid to the extent of the mandatory requirement of the death sentence for the offence of murder. For the removal of doubt, we state that our declaration does not outlaw the death penalty for the offence of murder, but only the mandatory requirement of the death penalty for that offence. The effect of our decision is to bring judicial discretion into sentencing for the offence of murder, so that the offender shall be liable to be sentenced to death only as the maximum punishment.

This Court further agrees with both the State and the defence that in the *Jacob case* the Malawi Supreme Court of Appeal agreed with the view taken by the High Court sitting as a Constitutional Court in the *Kafantayeni case*. The position taken by the Malawi Supreme Court of Appeal is that where a person is convicted of murder the court still retains the discretion to impose the sentence of death or a lesser sentence depending on the availability of aggravating or mitigating factors affecting the case. In its judgment in the *Jacob Case* the Supreme Court laid down the following principles

- (a) Offences of murder differ, and will always differ, so greatly from each other and it is therefore unjust and wrong that they should attract the same penalty and punishment;
- (b) **A matter of sentence is a legal issue for judicial examination and determination. The mandatory requirement of the death sentence under section 210 of the Penal Code denies an offender a right to a fair trial under section 42(2)(f) of the Constitution by prohibiting the court from judicial examination and determination of sentence.**

This Court also agrees with the State's submission that using the jurisprudence developed in the cases cited above, the Malawi Supreme Court of Appeal in the case of *Ngulube and Another v Republic* [2008] MLR 413 (SCA) set aside the sentence of death imposed by the High Court for murder and replaced it with one of 20 years imprisonment with hard labour after it found that the assault that led to the death of the deceased was not done using any dangerous weapon, the quarrel which led to the assault was clearly influenced by intoxicating drink, no clear motive on the part of the appellants to cause the deceased's death was disclosed by evidence, and that there was no evidence that the appellants were persons of previous bad character.

This Court also agrees with the State's further submission that in the case of *Uladi v Republic* [2009] MLR 475 (SCA) again the Malawi Supreme Court of Appeal set aside a sentence of death and substituted it with one of 20 years IHL after it observed that that the appellant was fighting with bare hands and only resorted to the panga knife in the course of the fight. The appellant and the deceased had been drinking together. A quarrel ensued as the appellant apparently accused the deceased of attempting to steal a window frame which was inside the appellant's house but apparently found itself outside. A fight ensued and in the course of the fight the appellant took a panga knife and used it to hack the deceased.

This Court also considered the State's further submission that in the *Jacob case*, the appellant killed his second wife on suspicion that she was bewitching him such that he was failing to have sexual intercourse with his first wife. He appealed against the sentence of death imposed by the High Court. The Supreme Court noted that the facts of the case did not show that it was a matter for a lesser sentence than that imposed by the High Court. The appeal was dismissed.

The State further referred to the case of *Republic v Pasipanadya* Criminal Case Number 41 of 2008 (High Court) (unreported) in which the High Court imposed a sentence of life imprisonment on the convict. In that case the convict cut the thumb of his seven months old child to prevent it from sucking the thumb. The child then started crying. The child's mother quarreled with the convict for what he had done and she went to report to her mother and the village head man about the incident. This time the convict then took the child to the river and killed it in cold blood.

The State then correctly submitted that the foregoing exposition of the law points to the fact that as it stands now the court will not pass a sentence of death in all cases of murder. Each case will have to be decided on its own peculiar facts.

Where the offence is so gruesome and where the aggravating factors far outweigh the mitigating factors the court will exercise its judicial discretion in passing a death sentence. However, in other cases the court will pass a life imprisonment sentence or a term of imprisonment for a number of years depending on the aggravating and mitigating factors affecting that particular case. This Court agrees.

The State then submitted, rightly again, that with regard to the consideration of sentences in individual cases it was held in *Nylrenda v Republic* (2011) MWHC 4 that it is the policy of the law that any punishment meted out to an offender must fit the crime. There should be a balance between the mitigating factors and the aggravating circumstances. A sentencing court must always have regard to the circumstances of the case, the offender and the safety of the members of the general public.

However, the State noted the caution sounded by the High Court in the case of *Republic v Mathuso* Criminal Case No. 27 of 2008 (High Court) (unreported) in which the court had this to say on sentences for homicide

... to me, it amounts to an affront against the value of human life to treat a person who has killed a fellow human being as good as the one who has just stolen property worthy, or money amounting to a few hundred kwacha. While circumstances will differ from one case to another, I cannot comprehend a court punishing a person who has broken into a house and stolen something more than one who has actually killed a person, and where clearly that person will not return to life. I am accordingly not persuaded that courts should be thinking of sentences such as 2 or 3 years imprisonment for the offences of this type.

The State then submitted correctly that the murder convict herein, like any other convict facing a probable death sentence according to law, have the right to be sentenced to a number of years with or without labour or even life imprisonment. The sentence to be imposed on them will depend on the aggravating and mitigating factors affecting this case.

In addition to the aspects on which the defendant agreed with the State in foregoing, the defendant's submissions were principally in two parts. The first part contained common submissions prepared in respect of all surviving beneficiaries of the decisions in *Kafantayeni*, *Jacob*, and *McLemonce* cases (henceforth referred to as the "*McLemonce* beneficiaries"). The second part contains specific submissions prepared in relation to the defendant herein. This Court thinks it important to refer to these submissions.

This is the first part of the defendant's submissions. The defendant started by commenting on this Court's jurisdiction to resentence the defendant.

The defendant rightly stated that, in ordering that the *Kafantayeni* plaintiffs be resentenced, the High Court was exercising its broad power under section 46(3) of the Constitution to make any order necessary to remedy or prevent a violation of constitutional rights. Section 46 (3) provides that

Where a court referred to in subsection (2)(a) finds that rights or freedoms conferred by this Constitution have been unlawfully denied or violated, it shall have the power to make any orders that are necessary and appropriate to secure the enjoyment of those rights and freedoms and where a court finds that a threat exists to such rights or freedoms, it shall have the power to make any orders necessary and appropriate to prevent those rights and freedoms from being unlawfully denied or violated.

And in particular, the High Court held in the *Kafantayeni case* that

Pursuant to section 5 of the Constitution, we declare section 210 of the Penal Code to be invalid to the extent of the mandatory requirement of the death sentence for the offence of murder. For the removal of doubt, we state that our declaration does not outlaw the death penalty for the offence of murder, but only the mandatory requirement of the death penalty for that offence. The effect of our decision is to bring judicial discretion into sentencing for the offence of murder, so that the offender shall be liable to be sentenced to death only as the maximum punishment.

The action of the plaintiffs therefore succeeds and we set aside the death sentence imposed on each of the plaintiffs.

We make a consequential order of remedy under section 46(3) of the Constitution for each of the plaintiffs to be brought once more before the High Court for a Judge to pass such individual sentence on the individual offender as may be appropriate, having heard or received such evidence or submissions as may be presented or made to the Judge in regard to the individual offender and the circumstances of the offence.

The defendant further rightly stated that in the *Yasini case*, the Malawi Supreme Court of Appeal confirmed that this consequential order of remedy applied to all prisoners who were sentenced to death under the mandatory provisions of Section 210 of the Penal Code. Further, that *McLemonce* clarified that it is the duty of the Director of Public Prosecutions to bring before the High Court for re-sentence hearing all prisoners. The *McLemonce* beneficiaries are therefore not required to make individual applications for a resentencing hearing. The right to resentencing hearing is independent of any prisoner's right to appeal his death sentence. This Court therefore has jurisdiction to resentence the defendant.

The defendant then submitted rightly that this Court's jurisdiction to re-sentence him is its jurisdiction as a criminal trial court. The judge dealing with this case will be acting as a judge passing sentence at the conclusion of a criminal trial. He or she will be imposing an appropriate and individualized sentence and in doing so will be providing part of the remedy for the violation of the petitioner's constitutional rights under section 46(3) of the Constitution as submitted later below. The defendant will have a right of appeal against any sentence imposed.

The defendant then submitted on the suggested procedure and directions. He stated that senior judges in various jurisdictions have issued guidance on sentencing in discretionary capital cases. For instance, the guidelines for sentencing in murder cases issued by Sir Dennis Byron CJ in *Mitcham & Ors v DPP* which are as follows

- (i) If the prosecution intend to submit that the death penalty is appropriate, they must give notice no later than the day of conviction, including the grounds on which the death penalty is considered appropriate.

- (ii) If the accused is convicted and such notice is given, the judge should set a date for sentencing allowing a reasonable time for preparation.
- (iii) The judge should also direct that social welfare and psychiatric reports are prepared.
- (iv) The burden of proof at the sentencing hearing lies on the prosecution and the standard shall be proof beyond reasonable doubt.
- (v) The trial judge should give written reasons for his decision at the sentencing hearing.

See Crim. App. Nos 10-12 of 2002, Eastern Caribbean Court of Appeal. For similar procedural guidelines see: *R v Reyes* [2003] 2 LRC 688 (Belize), at [2], per Conteh CJ; Practice Note No. I of 2006: Sentencing Procedures for Persons Convicted of Murder (Bahamas), per Burton Hall CJ. The recent Ugandan sentencing guidelines do not specifically address the procedure for sentencing in discretionary capital cases (see the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013).

This Court observes that those directions contain good practice but are specific to those jurisdictions where they were made. This Court is contented that the provisions on sentencing in Malawi as contained in the Criminal Procedure and Evidence Code allow the High Court to actually receive as much information as possible on sentencing including views on behalf of the victim of the offence in capital offences among others. Section 321J of the Criminal Procedure is quite clearly very wide on that aspect and is in the following terms

- (1) Where a verdict of guilty is recorded, the High Court may, after judgment but before passing sentence, receive such information or evidence as it thinks fit, in order to inform itself as to the proper sentence to be passed.
- (2) The information or evidence that the court may receive under subsection (1) may, in addition to the evidence of the accused or the prosecution, include information or evidence by or on behalf of the victim of the offence and any relevant reports to enable the court assess the gravity of the offence.

The defendant then rightly stated that the death penalty in Malawi is an enduring remnant of the British Empire, it is very much a part of the legacy of colonialism. See W. Schabas, "Abolition of the death penalty in Africa", in *Sourcebook on the Abolition of the Death Penalty* (1997) 33. Executions under British colonial rule were not uncommon and between 1903 and 1947 one woman and 215 men were executed in Nyasaland. See S. Hynd, "Deadlier than the male? Women and the death penalty in colonial Kenya and Nyasaland", *Vienna Journal of African Studies*, vol. 12, 16. In keeping with British penal codes imposed elsewhere in the Empire, death was mandatory for murder under section 210 of the Penal Code adopted in 1930. It remained so until challenged in the *Kafantayeni Case*.

The defendant lamented that since then, it would appear that no attempt has been made by the State to give effect to the Court's order. A number of the *Mclemonce* beneficiaries have since died and many have developed physical and/or mental illness as a result of the conditions of their incarceration. Eighteen beneficiaries continue to be held on death row despite their sentences having been quashed as a result of *Kafantayeni case*.

The defendant also stated that it should be noted, however, that upon resentencing, death is a possible sentence only for the 18 convicts who remain on death row. Both the prosecution and defence are in agreement that the prisoners whose sentences were commuted to life imprisonment by the President cannot be resentenced to death. In those cases, the available sentences are life imprisonment or a term of years. This Court agrees that this is the correct position as it would indeed be unfair to sentence someone to death whose death sentence has been previously reduced to life by the exercise of constitutional powers to that effect by the State President under section 89 (2) of the Constitution which provides as follows

(2) The President may pardon convicted offenders, grant stays of execution or sentence, reduce sentences, or remit sentences:

Provided that-

(a) decisions under this subsection shall be taken in consultation with an Advisory Committee on the Granting of Pardon, the composition and formation of which shall be determined by an Act of Parliament; and

(b) judgments in cases of impeachment of the President or Vice-President shall not be liable to pardon by the President.

The defendant then made submissions on the appropriate sentence in his specific case but before doing so, he made four broad and general submissions on the sentencing principles applicable to capital cases where death is a possible sentence but is not mandatory as follows.

First, that in discretionary capital cases, the offender is entitled to a wholly individualized sentencing proceeding. The sentencing judge must consider the individual circumstances of both the offence and the offender. The discretionary sentencing procedure requires that the court shall consider any and all mitigating circumstances that might earn the petitioner the court's compassion.

Second, that certain individuals are ineligible for execution, including those who were under the age of 18 at the time of the crime, and those who have significant mental disorders, including intellectual disabilities and mental illnesses.

Third, that in any discretionary capital case, the death sentence is only appropriate if the prosecution has rebutted the presumption in favour of life and proved that the offence is one of the worst of its kind, the rarest of the rare.

Fourth, that international principles prohibit the imposition of a sentence of death where the offender has been the subject of serious previous violations of his constitutional rights.

The defendant then addressed the four submissions in detail. He pointed out that a detailed commentary on the relevant sentencing principles in discretionary capital cases, including relevant aggravating and mitigating features, can be found in Fitzgerald and Starmer, "*A Guide to Sentencing in Capital Cases*", 2007 <http://www.dealbpennypenaltyproject.org/content_pages/27>.

On the first broad submission, the defendant's first broad submission is that in discretionary capital cases the petitioner is entitled to a wholly individualized sentencing proceeding. The individual circumstances of both the offence and the offender must be presented to and considered

by the sentencing authority. The discretionary sentencing procedure requires that the court shall consider any and all mitigating circumstances that might earn the petitioner the court's compassion.

The defendant argued that individual circumstances of both the offence and the offender must be considered.

He rightly stated that the *Kafantayeni Case* clearly states that in a death penalty case, the right to a fair trial requires that offenders must be able to present evidence of mitigating circumstances relevant to the individual circumstances of either the offence or the offender. Thus, the sentencing process can only be fair if such individual circumstances of both the offence and the offender are presented to and considered by the sentencing authority.

He further correctly stated that, citing *Reyes* [2002] UKPC 11, the High Court in the *Kafantayeni Case* recognized that respect for human dignity is violated by a sentencing process that deprives the accused of any opportunity to show why such sentence should be mitigated, without any consideration of the detailed facts of the particular case or the personal history and circumstances of the offender and in cases where such a sentence might be wholly disproportionate to the offender's criminal culpability. During the sentencing process, courts must be able to take account of the fact that the crime of murder embraces a range of offences of widely varying degrees of criminal culpability and that all killings which satisfy the definition of murder are by no means equally heinous. Just as the facts of each crime differ, the personal circumstances of offenders are unique in each case.

He further correctly stated that the Malawi High Court held in *Kafantayeni Case* that the mandatory death penalty violated the right of access to justice guaranteed by the Malawi Constitution by denying a convicted person the opportunity to make an argument in mitigation of his or her sentence. The Court's reasoning makes clear that any sentence imposed without an opportunity to present all relevant mitigating factors to the court would violate section 41 of the Malawi Constitution.

The defendant then correctly argued that relevant mitigating facts extend to any and all mitigating circumstances that might earn the petitioner the court's compassion. He stated that in addition to any circumstances that may render him ineligible for execution, an offender must be able to present to the sentencing court any and all mitigating circumstances that might earn him the court's compassion. As to what mitigating evidence must be considered by a sentencing court, there is no exhaustive list of factors. Relevant mitigating factors are too unique to each individual offender to be specified in advance. Nevertheless, the practices of foreign courts and guidelines developed by international experts provide helpful examples of mitigating evidence that should be considered and weighed by the sentencing court in discretionary capital cases. Existing Malawi case law provides guidance on the broad types of mitigating factors that are relevant to sentencing in criminal cases in general and these decisions are also relevant to sentencing in discretionary capital cases. Moreover, there is an emerging body of recent Malawi case law demonstrating the practices of the Malawi courts in discretionary capital cases.

The defendant further stated that, specifically, these principles and practices demonstrate that a court should consider all potential mitigating factors presented by an offender, that the death

penalty should only be employed in rare and especially serious cases, that some circumstances will render an offender strictly ineligible for execution, and that considering all relevant mitigating factors the appropriate sentence may be a term of years.

The defendant also stated that relevant mitigating circumstances will be unique *to* each individual. He noted that the United States Supreme Court has struck down state laws that do not allow a sentencing court to consider as a mitigating factor, any aspect of the petitioner's character or record and any of the circumstances of the offence that the petitioner proffers as a basis for a sentence less than death. *Lockett v. Ohio*, 438 US 536 (1978); see also *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007) (invalidating a Texas procedure that prevented jurors from considering an offender's abused childhood as mitigating evidence).

He went on to say that mitigating circumstances will frequently include the character and record of the offender, the offender's age, physical and mental health, social and economic factors that might have influenced the offender's conduct, the circumstances of the particular offence, and the possibility for the offender's reform and social re-adaptation. In *Mulla & Another. v. State of U.P.* Criminal Appeal No. 396 of 2008, for example, the Indian Supreme Court stated that the circumstances to be heavily weighed in imposing a sentence included the offender's mental or emotional disturbance, age, likelihood of committing further acts of violence, potential for rehabilitation, sense of moral justification, duress, mental impairment, and socioeconomic status. The court also emphasized that the burden fell on the State to prove that an offender was likely to pose a future threat and could not be reformed. After reviewing these factors, the court in the *Mulla case* declined to impose the death penalty on offenders who had no criminal history and were extremely poor, even though they had been convicted of the murder of multiple innocent people.

The defendant also submitted that the United States Supreme Court has recognized childhood abuse, mental disabilities, and good conduct in prison as factors that should be considered during sentencing. In *Williams v. Taylor* 529 U.S. 362 (2000), for example, it held that an offender's constitutional right to present mitigating evidence during sentencing was violated when his defence counsel failed to present evidence that he had suffered an abusive childhood, was borderline mentally retarded and did not advance beyond sixth grade, had been commended in prison for helping to crack a prison drug ring and returning a guard's missing wallet, and was viewed by prison officials as unlikely to act violently. The defendant also alluded to the case of *Wiggins v. Smith*, 539 U.S. 510 (2003) in which an order was made granting a new sentencing hearing where defence counsel had failed to present evidence that defendant had suffered physical abuse and sexual assault.

The defendant also stated that in Uganda, as in Malawi, the courts have grappled with the need to provide resentencing hearings for prisoners who had originally been given mandatory death sentences. After the Uganda Supreme Court invalidated the mandatory death penalty in *Kigula & Ors v Attorney General Constitutional Court of Uganda*, Constitutional Petition No. 6/2003 Uganda's lower courts were directed to convene resentencing hearings for offenders who had been sentenced under the unconstitutional regime. The case of *Ugandav. Patrick* HCT-03-CR-SC-190/1996 provides another helpful example of the sort of mitigating evidence that is relevant to sentencing in a new,

discretionary regime. At the time of his resentencing, Patrick had been imprisoned for seventeen years. The court recognized that it was now empowered to receive mitigating evidence and that the *Kigula* judgment authorized it to pass *any* judgment it deemed fit. In deciding which evidence was relevant, the court cited the Fitzgerald and Starmer Sentencing Guide referred to above. The Sentencing Guide lists as possible mitigating factors the gravity of the murder, the offender's impaired mental state, provocation, lack of premeditation, past good character, difficulties in early life, remorse, capacity for reform and the absence of continuing dangerousness.

He further stated that the Uganda High Court in the *Patrick Case* followed these Sentencing Guidelines and gave special consideration to evidence presented about the offender's impaired mental state at the time of the offence, his history of alcohol addiction, the fact that he had maintained strong ties with his family throughout his long incarceration, his **good** relations with other prisoners, his remorse, and the lengthy period of time he had already served in prison. Based on these mitigating factors, the High Court found that the offender did not merit a death sentence, and it resentenced him to the seventeen years already served, along with an additional year in prison followed by a year of probation.

Additionally, that the Uganda High Court has also recognized the significance of the offender's remorse and his potential for reform as relevant mitigating factors in *Jino v Uganda* [2010] UGCA 27. In that case the Court of Appeal of Uganda imposed a sentence of 15 years' imprisonment in lieu of death on an offender in part because an opportunity for him to reform and turn into a good citizen should not be wasted.

The defendant stated that in Belize, where the mandatory death penalty was likewise struck down, the Supreme Court has similarly relied on a range of mitigating factors in resentencing hearings. In the case of *Reyes*, for example, the court considered the offender's remorse, charity and community involvement, hard work in prison and family life, along with the fact that he suffered from a depressive disorder. The judge also noted that the offender had been on death row for more than three years a fact that would itself be an extenuating consideration not to pass the death sentence.

The defendant further stated that other courts have agreed that delay in sentencing or execution and substandard prison conditions may constitute additional mitigating factors. For instances, in *Pratt v. Jamaica*, the Human Rights Committee found that the inordinately long time taken by the Jamaican appeals process – as long as seven years – violated offenders' right to be tried without undue delay, and the Committee recommended that their sentences be commuted. See Report of the HRC, UN GAOR, 44th Supp. No. 40, at 222, UN Doc.A/44/40 (1989). The Uganda Supreme Court agreed, in the *Kigula Case*, that excessive delays in execution make death sentences inappropriate. Nothing the anguish suffered by those on death row and the "horrible conditions" under which prisoners are often kept, the court held that a prisoner who had spent more than three years on death row from the time his conviction was upheld on appeal should see his sentence commuted to life imprisonment.

The defendant correctly stated that Malawi also has a growing body of jurisprudence on mitigation in discretionary sentencing proceedings in capital cases. He referred to the case of *Phiri v The Republic* MSCA Criminal Appeal No. 13 of 2009, in which the Malawi Supreme Court of Appeal vacated a death sentence and replaced it with a sentence of 15 years of imprisonment, finding that this was justified considering that the appellant was a young man of 20 years of age at the time he

committed the offence and that he did not attempt to escape after the offence. This sentence was justified notwithstanding that the facts of the offence were grave and the same appellate court found that the appellant's actions were malicious. He further referred to the *Ngulube Case*, in which the Malawi Supreme Court found mitigating factors which would have excluded the need to impose the ultimate sentence of death and instead indicated that the appropriate sentence in the circumstances was a term of years. The factors considered by the Court to be relevant were that the quarrel between the appellants and the deceased which led to the assault was clearly influenced by intoxicating drink and the appellants assaulted the deceased without use of any dangerous weapon. In the Court's considered opinion these mitigating factors made it appropriate to substitute a sentence of 20 years imprisonment with hard labour. In *Rep v Mabvuto*, Criminal

Case No 66 of 2009 (High Court) (unreported) Potani J considered that despite the shocking facts of the case which were brutal and bizarre including conduct by the defendant which would send shockwaves to all normal people, it was not appropriate to impose a death sentence because the offence is not the worst of its type and the convict is not the worst offender. Furthermore, because the defendant was a first time offender the Court held that it would also not be appropriate to impose a life sentence. The Court stated that the imposition of life imprisonment on the convict would deprive him of the chance of rehabilitation and reformation. It is the policy of the law that first offenders should be accorded the opportunity of rehabilitation and reformation. While a term of years was therefore appropriate, the Court held that the brutal and bizarre manner in which the offence was conducted made the offence particularly aggravated and therefore the appropriate sentence was 30 years imprisonment.

The defendant further stated that in Malawi, in the context of discretionary sentencing in non-capital cases, the courts have applied an extensive range of mitigating factors in favour of reducing sentences. In *Republic v Keke* (Confirmation Case No. 404 of 2010), Mwaungulu J, as he then was, explained that sentencers must develop from their own experience and from appellate courts the peculiar aggravating and mitigating circumstances generally and in specific offences. Providing a non-exhaustive list relevant to the offence of robbery, Mwaungulu J, as he then was, stated that the following factors may mitigate: first offence, age, duress; provocation; restitution of property and lesser participation in a crime. Other factors have been considered in mitigation by the courts, including the impact of the offence on the offender. In *Malakomu v Rep* [1993] 16(2) MLR 559 (HC), in the context of a dangerous driving case, Mbalame J held that the fact that the offender had "reasonably suffered, in that he has lost his job" was material to mitigation of sentence. It is also settled law that a guilty plea must be considered as mitigating evidence. In *Rep v Chinthiti and others (2)* [1997] 1 MLR 70 (HC), Nyirenda J, as he then was, stated that a plea of guilty is of paramount consideration when considering a sentence. It is also a long-standing principle of sentencing under Malawian law that intoxication may successfully be pleaded as a mitigating factor in respect of offences the commission of which require a particular *mens rea* on the part of the prisoner, for instance murder. see *Rep v Sofasi* [1994] MLR 314(HC) at 316, referencing to *DPP v Beard* [1920] AC 479. The factors set out here are non-exhaustive.

The defendant then correctly argued that it is clear from the nature of the mitigating factors considered in the jurisprudence outlined above, that any and all circumstances that might earn the petitioner the court's compassion should be considered in mitigation.

The defendant then stated that while complete psychiatric reports and social inquiry reports may not

always be available, the Court may consider a range of evidence that sheds light on the prisoner's character and background, including witness statements provided by friends and family members, by the Village Headman of the petitioner's home village, by former school teachers, by prison officers and prison chaplains, or from any other source that may assist the court in its assessment of an appropriate sentence.

On psychiatric evidence, the defendant rightly stated¹ that the relevance of psychiatric reports or other evidence relating to the offender's mental health deserves particular mention, for several reasons. First, such evidence may assist the Court in forming a view as to whether the offender has the capacity for reform. This in itself may be a significant mitigating feature. Second, mental disorder may be a significant mitigating feature at the sentencing stage, even if not raised or not raised successfully at trial. See Fitzgerald and Starmer's *Guide to Sentencing in Capital Cases* at 22. This principle is illustrated in the following cases from Uganda and the Commonwealth Caribbean, where the judiciary has imposed a new discretionary sentencing regime after the abolition of the mandatory death penalty. In *Reyes*, Conteh CJ declined to impose a sentence of death on a double murderer. This was in part because according to psychiatric evidence adduced at the resentencing stage, but not at trial, the offender had been suffering from a major depressive disorder. There was accordingly an element of diminished responsibility, even though the defence of diminished responsibility had been rejected by the jury at trial.

In *R v Fox* High Court of St Christophis and Nevis (Baptiste J), judgment of 27 September 2002 the Court again declined to impose a death sentence on a double murderer. The main reason was the Court's finding that the offender's power of self-control had been diminished by years of steroid abuse.

In *Uganda v Bwenge* High Court of Uganda, HCT-03-CR-SC-190/1996, judgment of 11 November 2009 the offender was given a mandatory sentence of death before the Constitutional Court ruled in *Kigula* that such sentence was unconstitutional. His case was remitted to the trial court for resentencing. Taking all the circumstances into account, including the offender's mental health as evidenced by a recent psychiatric report, and the fact he had already spent 17 years in prison, the judge imposed a sentence of a further two years' imprisonment.

Third, as discussed below, any significant mental disorder operates as a bar to execution.

On the second broad submission the defendant argued that the death penalty should not be imposed on offenders under 18 years of age and on individuals suffering from significant mental disorders. This Court wishes to add that the death penalty cannot be imposed on a woman who is pregnant. See section 328 Criminal Procedure and Evidence Code.

The defendant started by noting that Article 6 of the International Covenant on Civil and Political Rights and Article 37(a) of the Convention on the Rights of the Child prohibit the imposition of the death penalty on children under the age of 18. Similarly, Article 5 of the African Charter on the Rights and Welfare of the Child provides that capital punishment shall not be imposed on children (and Article 2 defines a "child" as every human being below the age of 18). The defendant submitted that this principle is so widely accepted that many consider it to have attained the status of *jus cogens*.

He further stated that under Section 26(2) of the Penal Code, it is unlawful to sentence a person under 18 years of age to death. It is clear that the principle at international law proscribing the imposition of the death sentence on persons below the age of 18 years is therefore the same at domestic law in Malawi. Further safeguards on sentencing persons under 18 years of age are contained in section 42 (2)(g) of the Constitution as follows

... if that person is a person under the age of eighteen years, to treatment consistent with the special needs of children, which shall include the right-

- (i) not to be sentenced to life imprisonment without possibility of release;
- (ii) to be imprisoned only as a last resort for the shortest period of time consistent with justice and protection of the public.

The defendant then submitted that, nevertheless, a number of the *McLemonce* beneficiaries were under the age of 18 at the time of the offence. In some cases, evidence of their youth was presented at trial; in others it is apparent from a review of prison records and other documents. In some cases, the prisoner was held for such a long time on remand that by the time his trial commenced, he was no longer a teenager. The defendant noted however that ascertaining the age of the accused in a country without a national birth registry is not a simple process. Often, the accused himself will not be aware of his age. This Court agrees however that, in all cases, efforts must be made to ascertain his age at the time of the offence, and in all cases, the accused must be given the benefit of the doubt.

The defendant then submitted that Article 24 of the ICCPR states that every child shall be registered immediately after birth. Further that this right to registration also appears in the Convention on the Rights of the Child, article 7, and the African Charter on the Rights and Welfare of the Child article 6. And that these rights are directly linked to accurate determinations of age in the juvenile justice system. He further stated that in its 10th General Comment, *Children's Rights in Juvenile Justice*, the Committee on the Rights of the Child spoke at length about the importance of accurate determinations of juvenile status in the criminal justice system. It emphasized that a young person whose age is in dispute should be given the benefit of the doubt in the context of punishment, stating that the Committee notes that if a penal disposition is linked to the age of a child, and there is conflicting, inconclusive or uncertain evidence of the child's age, he/she shall have the right to the rule of the benefit of the doubt. See U.N. Committee on the Rights of the Child, *General Comment No. 10, Children's Rights in Juvenile Justice*, ¶ 72, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007). The Malawi Government has taken steps towards realization of this right to registration at birth in view of the importance of such registration.

The defendant then submitted that individuals with significant mental disorders may not be subjected to the death penalty. Further that this is true not only for individuals who suffered from such a mental disorder at the time of the offence, but also for those who become mentally ill after their death sentence is imposed. The defendant further stated that the term "mental disorder" covers both "intellectual disabilities" (formerly known to the law as "idiocy") and mental illness ("lunacy"). It includes functional psychosis, schizophrenia, PTSD, personality disorder, depression, epilepsy, and disorders arising from alcohol and drug dependence. See further Eastman et al, *Handbook of Forensic Psychiatric Practice in Capital Cases* (2013) at pp. 18-20.

This Court wishes to point out that for an individual who is proved to suffer from mental disease or illness which at the time of the offence affected his mind making it incapable of understanding what he is doing, or knowing that he ought not to do the act or make the omission the law in Malawi is clear such that the court will enter a special finding of not guilty by reason of insanity and a reception order to a mental hospital will be made in respect of the individual for the said individual to be treated and be subject to release upon such treatment. Clearly no sentence of death or otherwise can be imposed in such cases. See *Sukali v Rep* [2008] MLR 372 (SCA).

The defendant further stated that in 1984, the United Nations Economic and Social Council adopted the "Safeguards guaranteeing protection of the rights of those facing the death penalty," which were intended to clarify the limits on the application of the death penalty set forth in article 6 of the International Covenant on Civil and Political Rights. The third Safeguard provides that the death penalty shall not be carried out "on persons who have become insane." In 1989, in a resolution regarding the implementation of the Safeguards, the Economic and Social Council urged states to eliminate the death penalty "for persons suffering from mental retardation or extremely limited stated mental competence, whether at the stage of sentence or execution." See ECOSOC Resolution 1989/64, "Implementation of the safeguards guaranteeing protection of the right of those facing the death penalty" (24 May 1989). In subsequent resolutions urging full compliance with the Safeguards, the United Nations Human Rights Commission repeatedly called upon states "[n]ot to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person."

The defendant argued that this principle is of ancient pedigree in the common law citing Blackstone, *Commentaries on the Law of England*, Book 4, Chapter 2, page 24, cited in Fitzgerald and Starmer's *Guide to Sentencing in Capital Cases*, pp 22-23. And further that more recently this principle has been restated in the jurisprudence of the United States Supreme Court. In *Ford v Wainwright* 477 US 399 (1986) the Court held that the execution of the mentally ill was wrong in principle and unconstitutional. And in *Atkins v Virginia* 536 US 304 (2002) the Court recognised that the execution of individuals with intellectual disabilities violates the constitutional prohibition of cruel and unusual punishment. The Court also acknowledged that this reflects a broad international consensus.

This Court is of the view that, although the matter at hand does not raise the issue, in an appropriate case it would be vital for courts to consider whether with regard to individuals who have developed significant mental disorder by the time of sentencing it would be cruel and unusual to impose the death penalty on such individuals or to execute the said sentence on them.

On the third broad submission the defendant argued that the death penalty be imposed only for the rarest of the rare cases. In that connection, the defendant asserted that the death sentence can be appropriate only if the prosecution has rebutted the presumption in favour of life. In doing so, the prosecution must prove to a high standard that the offence is one of the worst of its kind and that there is no hope of reforming the offender. The defendant clarified that he addressed this principle in the interests of providing a comprehensive overview of the guiding jurisprudence relating to capital sentencing, but he noted that it is of no relevance to his case as the death penalty is not one of the sentencing options in cases where the President has already commuted the death sentence to life imprisonment. In support of his third broad submission the defendant relies on the following propositions.

Firstly, that in discretionary capital sentences, there is a strong presumption in favour of life and against the imposition of the death penalty. This accords with the paramount value accorded to human life for every person, including offenders, under the section 16 of the Constitution of Malawi and in the constitutions of other common law jurisdictions. That value is equally reflected in the international agreements to which Malawi is a party, in particular article 6(1) of the International Covenant on Civil and Political Rights ("Every human being has the inherent right to life..."). There is no provision in Malawi's domestic law that seeks to repudiate the paramount value of life. The proviso in section 16 of the Constitution of Malawi, which provides for the execution of death sentences, does not detract from the exceptional value of human life and the presumption that life shall not be taken away, save in the narrowest possible circumstances in accordance with the law.

Further, that, there is broad consensus across common law and this jurisdictions on the presumption in favour of life in discretionary capital cases. See *Mitlw v State of Punjab* (1983) 2 SC R 690, at 708 (Supreme Court of India); *S v Makwanyane* [1995] ZACC 3, at [46] (Constitutional Court of South Africa); *Spence & Hughes v The Queen*, Crim. App. No. 20 of 1998. at [44] (Eastern Caribbean Court of Appeal). The strong presumption in favour of life is also reflected in the caselaw of the Privy Council, including *Reyes* and *Trimmingham v The Queen* [2009] UKPC 25.

Secondly, that it follows from the presumption in favour of life that it is for the prosecution to prove that death is the appropriate sentence. There is no burden on the defence to prove that death is not the appropriate sentence. The prosecution must prove beyond reasonable doubt the existence of any aggravating features in the case and must negative beyond reasonable doubt any mitigating features relied on by the offender. This principle has been embraced by the South African Constitutional Court, the Eastern Caribbean Court of Appeal, and the Judicial Committee of the Privy Council. See, for instance, *S v Makwanyane* [1995] ZACC 3, at [46] and *Moise v The Queen* (unreported), Crim. App. No. 8 of 2003, Eastern Caribbean Court of Appeal, at [17]. In *Mitcham & Ors in DPP v Crim. App. Nos 10- 12 of 2002*, Eastern Caribbean Court of Appeal Sir Dennis Byron CJ held, as part of his guidelines for sentencing in murder cases, that the burden of proof at the sentencing hearing lies on the prosecution and the standard of proof shall be proof beyond reasonable doubt (at [2]). This point was emphasised and endorsed by the Privy Council in *Pipersburgh v R* [2008] UKPC 11, at [32].

The defendant asserted that the burden on the prosecution to justify the death penalty to a high standard of proof is even reflected in the United States, which accounts for a significant proportion of the world's executions. In Arizona, for instance, each death sentence must rest on two findings: proof beyond reasonable doubt of at least one aggravating circumstance, as defined by statute, and a finding that there are no mitigating circumstances sufficient to call for leniency (Arizona Revised Statutes, §13-751).

The defendant noted that there will be some *cases* in which there are clear mitigating circumstances or other cogent arguments against the imposition of a capital sentence. As submitted above, such cases include those in which the offender has experienced protracted imprisonment on death row awaiting execution in pursuance of an unconstitutional mandatory death sentence. In such cases the prosecution may take the position of not seeking the death penalty at the re-sentencing hearing. The defendant noted that this was the position taken by the prosecution in *R v Reyes* [2003] 2 LRC 688, at [29] and *Horris v Attorney General of Belize* (unreported), Supreme Court of Belize, Claim No. 339 of 2006. at [12, 33].

The defendant then asserted that the articulation of the burden and standard of proof in discretionary capital cases is particularly significant where, through no fault of the offender, only limited material about the offence can be put before the resentencing judge because the case file has been lost or is incomplete. In particular, where the case file has been lost or is incomplete and the facts of the offence are unknown there should be a presumption that the unknown facts of the case are mitigating. The burden is on the prosecution to rebut this presumption in favour of mitigation. This in line with Malawian case law that allows appeals to proceed with a partially complete case file only "[w]here the missing part of the record is not substantial, immaterial and inconsequential as would not result in miscarriage of justice." Where the missing part of the record is substantial, material and consequential, however, the Supreme Court has stated that "the conviction [must] be set aside without the full appeal being heard." *Chalera & Ors. v Republic* [MSCA Civ Appeal 5 of 2012]).

Thirdly, that in discretionary sentencing for murder, the death penalty must be reserved for only the worst and most serious offences of murder. This principle is consistent with the presumption in favour of life and prevents the death penalty from being inflicted arbitrarily. It requires that the death penalty is imposed only for exceptional and the most serious instances of murder, the "worst of the worst" or the rarest of the rare" cases.

The defendant asserted that this is consistent with the position of the United Nations, as well as the practice of countries with discretionary capital sentencing including Japan, India, Egypt, and the United States. See U.N. Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, E.S.C. res. 1984/50, annex, 1984 U. N. ESCOR Supp. (No. 1) at 33, U.N. Doc. E/1984/84 (1984) and Roger Hood and Carolyn Hoyle, *The Death Penalty: A World wide Perspective* (2008) 286. The defendant gave the further example of India, where the death penalty is justified only in the rarest of the rare cases. In February 2010, the Indian Supreme Court reaffirmed this rule in *Mulla & Another v. State of U.P.* Criminal Appeal No. 396 of 2008, stating that death may only be imposed in cases of extreme culpability. The court emphasized that mitigating circumstances have to be accorded full weight and a just balance has to be struck between the aggravating and the mitigating circumstances. Accordingly, the Indian Supreme Court vacated death sentences imposed on offenders convicted of murdering five individuals.

Although shocked by their deeds, the court felt the offenders were nonetheless capable of reformation. Imposing a death sentence only in the rarest of the rare cases prevents the death sentence from being randomly assigned to some offenders, while others of like culpability are spared from death.

The defendant noted that prior to abolishing the death penalty, this principle was also followed in South Africa. See for example, per Chaskalson P in *Makwanyane* [1995] ZACC 3, at [46], where he summarized the approach in South Africa prior to abolition of the death penalty namely, that the death sentence should only be imposed in the most exceptional cases, where there is no reasonable prospect of reformation and the objects of punishment would not be properly achieved by any other sentence.

The defendant submitted that this principle is enshrined in the capital sentencing guidelines recently adopted in Uganda by Odoki CJ to the effect that the court may only pass a sentence of death in exceptional circumstances in the rarest of the rare cases where the alternative of imprisonment for life or other custodial sentence is demonstrably inadequate. See The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013, paragraph 17. For decisions of the Eastern Caribbean Court of Appeal to like effect, see: *Spence & Hughes v The Queen*, Crim. App. No. 20 of 1998, at [44]; *Wilson v The Queen*, Crim. App. No. 15 of 2002, at [16]; *Moise v The Queen*, Crim. App. No. 8 of 2003, at [18].

The defendant also noted that in *Trimmingham* at [21], the Privy Council reviewed the cases on this point and observed that the approach adopted could be distilled into two basic principles:

The first has been expressed in several different formulations, but they all *carry* the same message, that the death penalty should be imposed only in cases which on the facts of the offence are the most extreme and exceptional, 'the worst of the worst' or 'the rarest of the **rare**'. In considering whether a particular case falls into that category, the judge should of **course compare it with other murder cases and not with ordinary civilised behaviour.**

The defendant also noted that the second principle identified by the Privy Council was that

there must be no reasonable prospect of reform of the offender and that the object of punishment could not be achieved by any means other than the ultimate sentence of death.

The defendant also pointed out that the restriction of the death penalty to the most serious offences is also recognised by international human rights tribunals, notably the Inter-American Court of Human Rights (see *Restrictions to the Death Penalty*, Advisory Opinion OC-3/83, at [55]) and the UN Human Rights Committee (see *Lubuto v Zambia*, Comm. No. 390/1990, at [7.2]).

He further stated that, most importantly, these principles are already recognized in the developing case law in Malawi on sentencing in capital cases *post-Kafantayeni*. And that, as noted above in the *Mabvuto case*, Potani J. considered that despite the shocking facts of that case which were brutal and bizarre including conduct by the defendant which would send shockwaves to all normal people, it was not appropriate to impose a death sentence because the offence is not the worst of its type and the convict is not the worst offender. Further that the general principle of reserving the maximum sentence for the worst of any offence in the Penal Code was also clearly articulated by Mwaungulu J, as he then was, in *Republic v Keke* at p. 4 that

The principle here, based on fiction, is that the maximum sentence is meant for the most serious offence which, notionally, has yet to occur, if ever it will. The fiction, however, helps us to avoid, until the legislature increases the sentence, passing sentences close to the maximum each time a shockingly serious instance of the offence occurs, lest we fail to have discretion when a more serious instance of the offence occurs.

This Court agrees with the defence that the death sentence must only be imposed in appropriate cases upon careful reflection by the Judge that the offence is exceptionally extreme or is *avis* other murder offences and that the object of punishment cannot be achieved other than by imposing the death sentence.

On the fourth broad submission the defendant argued that the death penalty should not be imposed following serious violations of constitutional rights. On this one the defendant asserted that where an offender has been subjected to serious violations of his constitutional rights, it would be wrong in principle to impose a sentence of death. To do so would amount to denial of a remedy in respect of those violations. He however conceded that this principle does not apply directly to his case, since he is not himself eligible for the imposition of a death sentence. Nonetheless, he includes the following discussion in the interest of providing a comprehensive overview of the guiding jurisprudence relating to capital sentencing. Additionally, these serious violations of the petitioner's constitutional rights are very strong factors in favour of mitigation of his sentence.

The defendant noted that there is no case law in Malawi on the effect of previous constitutional violations on the choice of sentence for a person previously sentenced to an unconstitutional death sentence. But it is well established in other common law jurisdictions and in the jurisprudence of international human rights tribunals that it would be wrong in principle to execute a person who has suffered serious violations of his constitutional rights, because doing so would deny him of a remedy for the violations in question. This is true irrespective of any other circumstances of the offence or of the offender which may go towards mitigation.

The defendant argued that in the case of the prisoners given mandatory death sentences prior to

Kafantayeni, all suffered from the imposition of an unlawful sentence, namely an unconstitutional sentence of death, with no opportunity to address the court on the seriousness of the offence or to advance any other mitigation. As the Court observed in *Kafantayeni*, such sentence violated their rights to a fair trial. So the imposition of a mandatory death sentence in itself constitutes a serious violation of a prisoner's constitutional rights.

The defendant argued that this constitutional violation is aggravated by three matters. First, the prisoners' detention on death row was in pursuance of an unlawful and unconstitutional sentence. This contrasts with the position considered above in *Kigula* and *Pratt*, where the courts in question were dealing with those given a lawful sentence of death but held for too long thereafter on death row.

Second, the prisoners' complaint about their unconstitutional confinement on death row is all the more compelling because of the conditions in which they have been held. The Court is invited to take judicial notice of the very poor conditions in which prisoners on death row are held. This is also referred to in relation to the specific circumstances of the defendant set out below.

The defendant pointed out that a defendant's right to a remedy for constitutional violations is expressly underscored in section 41(3) of the Constitution which provides that every person shall have the right to an effective remedy by a court of law or tribunal for acts violating the rights and freedoms granted to him by this Constitution or any other law.

He further pointed out that in each of the *McLemonge* resentencing cases it will be submitted that there have been serious and aggravated violations of the defendants' constitutional rights and that these violations justify a significant and effective remedy. The imposition of a sentence other than death provides the only means of providing such a remedy. This is consistent with the approach adopted in *Pratt* and the other cases mentioned above.

The defendant also referred this Court to the seminal judgment of the Inter-American Court of Human Rights in *Cadogan v Barbados* Series C No. 204, judgment of 24 September 2009. In that case the Court upheld Mr Cadogan's complaint that the imposition of a mandatory sentence of death and the failure to conduct a psychiatric assessment at trial amounted to violations of his fundamental rights. The Court declined to order commutation of his sentence and remitted the case for resentencing in Barbados. But as a measure of reparation for the violation of Mr Cadogan's rights, the Court ordered that he must not be sentenced to death; see [110].

The defendant then stated that even if this Court takes the view that previous constitutional violations do not by themselves justify the imposition of a non-capital sentence, it is submitted that they amount to a powerful mitigating feature weighing very strongly against the imposition of the death penalty and in many cases will suggest that the only appropriate sentence is a term of years.

This Court agrees with the defence courts would in appropriate cases have to indeed consider the violation of human rights suffered by an offender and reflect the same in the sentence imposed as that is the only effective remedy for such violations.

Now coming to the specific facts in the present case the State rightly submitted that in the present case the offence is that of murder. It is a serious offence. Life was lost. A sentence imposed should be meaningful to reflect the sanctity of life. Additionally, that the convict used a knife which is a

dangerous weapon. The deceased was unarmed and was only 27 years. He was in youthful age and a young life was at short.

The State further pointed out that the defendant had planned to cause the death of the deceased. He had in vain chased the deceased some few weeks earlier before this offence was committed to punish him for sleeping with his wife. He had planned to cause serious harm to the deceased after that incident. And he did cause the death of the deceased the moment he met him by stabbing him at once and run away. He did not stab the deceased in the heat of passion. He had premeditated of his actions to kill the deceased.

However, the State noted mitigating factors in favour of the convict namely that the convict is a first offender. He was 23 years at the time of committing the offence and therefore a relatively a young person. The police docket indicates he was of that age.

The State is of the view that although the circumstances of the case were serious, the aggravating factors as read together with the mitigating factors do not warrant a death sentence. Though the deceased was killed in cold blood, this was not the rare of the rarest cases of murder warranting death sentence. Therefore, that a term of imprisonment as sentence will be appropriate.

The State also pointed out that the convict herein had been on remand prior to his trial for two years and has so far served over 13 years of his sentence. In the foregoing circumstances, the State finally submitted that a sentence of 25 years imprisonment with hard labour from the time of his arrest is appropriate.

On the other hand, the defendant indicated that he is grateful for this meaningful opportunity to present mitigating evidence relating to his individual circumstances and those of the offence before a court with the discretion to weigh that evidence in its entirety.

He submitted that during the pre-hearing discussions the prosecution and defence discussed the circumstances of the defendant's case and had agreed that a term of no more than 7 years would be appropriate in the circumstances. At the time of this submission, the defendant has served 15 years and 3 months, including 2 years held on remand and 1 year on death row. Therefore, should the Court agree with the prosecution and defence, the defendant would be entitled to immediate release. The defendant drew this Court's attention to the submissions outlined in the fourth broad submission above and submitted that an effective remedy for the violations of the defendant's constitutional rights under section 41(3) of the Constitution is to impose a sentence no harsher than a term of years.

The defendant then set out below various further circumstances that suggest a term of years is appropriate in his case. These include the circumstances in which the offence took place, including the lack of premeditation and the fact the defendant acted in the heat of passion after finding his wife engaged in sexual conduct with another man. They also include facts about the defendant such as his young age at the time of the offence, the fact that he is a first-time offender, his capacity for reform and other personal circumstances.

In line with arguments made by the defendant, the defendant called on this Court as a sentencing court to consider any and all mitigating circumstances relevant to the individual circumstances of the

offence. He then submitted on the facts of the offence.

The defendant stated that on 5 November 2001, he was convicted of murdering Mr. Chimwemwe Belenado Miti in a drunken fight. He claimed that it is undisputed that he killed the deceased in the midst of a quarrel after finding the deceased engaged in sexual intercourse with the defendant's wife in a bush on 22 August 1999. And further that this was the second time that the defendant had found the deceased engaging in sexual relations with his wife; the first time was two weeks earlier on 1 August 1999 when the defendant returned home to find the two engaged in sexual conduct at the kitchen table of his home.

The defendant further stated that on the morning of Sunday, 22 August 1999, he went to Kapamula village to buy some goat to roast. Returning home, he then took it to a party in the same village to sell roast beef. This was his occupation. He roasted and sold meat until sometime past 6 p.m. The defendant then left the meat with his father and went to Kapamula to collect money that had been taken on credit. On the way, he saw his wife and Bernardo engaged in sexual conduct in a bush. His wife ran away. A fight broke out between the defendant and the deceased. The defendant claimed that the foregoing facts are undisputed.

The defendant claimed further that at trial the prosecution recounted that the accused said he had stabbed the deceased because he had seen him and his wife coming out of the bush and that previously, he had chased his wife from home because he had found the deceased at his kitchen at night and assumed that they had been having sex. He asserted that the post-mortem examination report confirms that the defendant found the deceased having sexual intercourse with the defendant's wife. Further that at trial, Mrs. Chiwoko, the defendant's wife, appeared as a prosecution witness and stated that her husband found her having sexual intercourse with the deceased on a Sunday. The defendant was sentenced to suffer death. After one year, the defendant's sentence was commuted to life. He has now been in prison for 15 years and 3 months.

The facts are in material respects far from being undisputed. As far as the facts are concerned the evidence on the record is such that the deceased claims to have found his wife with the deceased coming out of the bush on 22nd August 1999 that is three weeks since the defendant last found that deceased with the defendant's wife in the defendant's kitchen engaging in sex. The defendant's wife vehemently denied the defendant's allegation that he found her with the deceased on the 22nd August 1999. And only the trial judge, who is since deceased, could have said who was more credible in these circumstances. The facts are therefore far from being undisputed. However, as earlier stated, this Court is of the view that since the jury rejected the defendant's plea of provocation they must have disbelieved the defendant's version of events on the material day. Again, it must be pointed out that the statement in the post-mortem examination report to the effect that the deceased was stabbed after being caught having sex was made by the police officer who was not at the scene of the crime and therefore should not be taken as proof of the fact stated.

The defendant submitted as follows on provocation. That it is trite law that provocation reduces the offence of murder to that of manslaughter. It is *also* trite law that, once raised, the burden falls wholly on the prosecution to prove that there was no provocation. In the Scottish case of *Drury v HM Advocate* 2001 S.L.T. 1013, [19] the High Court of Justiciary, Lord Johnston stated that it also has to be borne in mind at all times that it is for the Crown to exclude provocation rather than for the defence to establish it. This strikes me as absolutely essential to a consideration of the basic

proposition that applies in this context in cases of this type, that is to say culpable killing.

He asserted that in the United Kingdom, in the context of relationships gone awry, courts are guided by the Guidelines on Domestic Violence which clearly state that provocation of the type Mr. Chiwoko reacted to may properly reduce the charge to manslaughter. In the case of *Regina v Benjamin Thompson* [2010] EWCA Crim 748, the court on special application explained that in order to determine whether provocation exists that may reduce the charge, it is essential to examine in their proper context the events which culminated in this crime including whether the impact of the deceased's actions on the defendant in the context of personal relationships means that the deceased also bore responsibility. The defendant submitted that in the present case the provocation was grave and the deceased twice affronted Mr Chiwoko by indulging in sexual activities with his wife.

The defendant further asserted that in *Drury*, the court held that while as a matter of policy Scots law ordinarily admitted the plea of provocation only where the accused had been assaulted and there had been substantial provocation, it admitted "an exception by recognising that violence due to a sudden and overwhelming indignation caused by the discovery of sexual infidelity, was not committed with the wicked state of mind required for murder". This exception applies to all cases where the sexual activity and the lethal attack were incommensurable, and where provocation was raised it should be considered whether the accused had in fact lost his self control as a result of the provocation, and whether the ordinary man or woman would have been liable to react in the same way in the same circumstances. The court held that "the relevance of provocation is its effect of reducing the level of wickedness or evil intent below that required to establish murder". This is because "the law recognises that when an accused discovers that his or her partner, who owes a duty of sexual fidelity, has been unfaithful, the accused may be swept with sudden and overwhelming indignation which may lead to a violent reaction resulting in death." [10] The court in *Drury* went further to explain that the explanation of provocation in *Macdonald's Criminal Law* at p 94 applies in cases of sexual infidelity, "the defence of provocation is of this sort-'being agitated and excited, and alarmed by violence, I lost control over myself, and took life, when my presence of mind had left me, and without thought of what I was doing.'" [10]. In *Drury*, the appeal court reduced the charge of murder to one of manslaughter for the above reasons.

The defendant also asserted further that in the United Kingdom, the Coroners and Justice Act 2009 has brought the full ambit of the defence of loss of self-control within the bounds of statute, replacing the common law defence of provocation previously codified in section 3 of the Homicide Act 1957. Under the 2009 Act, loss of control in the circumstances Mr. Chiwoko found himself in is a partial defence to murder. This defence applies where a loss of control had a "qualifying trigger". In *Regina v Clinton* [2012] EWCA Crim 2, the English Court of Appeal held that sexual infidelity, such as that of Mr. Chiwoko's wife, is a qualifying trigger "where sexual infidelity is integral to and forms an essential part of the context" of the offence.

The defendant then submitted that this is precisely the tragic situation that he found himself in on that fateful evening in 1999. Walking along the road he saw his wife, the love of his life, engaged in an intimate sexual embrace with another man. Heartbroken and distraught, he momentarily forgot his composure and lost control, as any ordinary man or woman might if affronted

publicly with such horrendous infidelity of a sexual nature.

The defendant asserted that the judge at trial in his case was clearly of the same mind. That the judge instructed the jury that "If on August 22, the accused found the deceased with his wife, he was provoked". The judge's opinion that this provocation entailed that the case was rightfully one of manslaughter is clear in his statement to the jury: "The killing is unlawful, but it the judge's opinion, is one of manslaughter." The judge did all he could to urge the jury to return a just verdict of manslaughter. Before a lay jury, this was to no avail. The defendant submitted that this honourable Court now has a chance to take account of this fact *by* giving a sentence that is truly appropriate in all the circumstances.

The defendant stated that, furthermore, at a meeting convened by the Malawi Human Rights Commission on 11 April 2014, at which the prosecution was represented by Mr. Tione-Atate Namanja of the DPP, the State agreed that this was indeed properly a case of manslaughter. This meeting was convened with a view to assist the Court by ensuring that both parties had adequate time to consider all issues and to present these efficiently to the Court such that it may beably assisted to reach a sentence that the Court deems appropriate. The State was wholly of the mind that this case was properly one of manslaughter. No further communication has since been received from the State to suggest that additional facts **or** circumstances have come to light to suggest otherwise.

The defendant therefore submitted that it is undisputed that this case was properly a case of manslaughter and that should be reflected in the appropriate sentence. He stated however that, even if it were not a case of manslaughter, it is clear that the provocation consisting of the sexual infidelity would still heavily reduce the sentence in a charge of murder. The defendant cited the case of *R. v Georgina Sarah Anne Louise Challen* [2012] 2 Cr. App. R. (S.) 20, in which the English Court of Appeal held that it was bound to "tak[e] account of the measure of provocation" as a mitigating factor. In that case, there were extremely serious aggravating factors which made the case one "of particularly high seriousness" but on balance with the mitigating fact of provocation by sexual infidelity, the Court reduced the sentence by 4 years to 18 years.

The defendant also cited the English case of *R. v William Ernest Ileywood* [2011] EWCA Crim 224, in which the Court of Appeal was faced with a highly aggravated case in which the accused had plotted the murder of his wife. This was a planned premeditated killing in cold blood with a dangerous weapon but despite those aggravating factors, the Court of Appeal nonetheless held that the fact of provocation by sexual infidelity that had left the defendant in a state of emotional turmoil was so a serious mitigating factor that the sentence had to be rightfully reduced to just 9 years.

The defendant was quick to point out that this is not to imply in any way that the offence committed on the deceased was deserved, nor that the defendant was entitled to do what he did, but justice has to be even-handed and balanced. He went on to state that it is undisputed in this case that the defendant's wife had engaged in sexual infidelity with the deceased. That the defendant tragically lost control as any ordinary man or woman might in such circumstances. And that the above law shows, this must be considered in mitigation. In light of the circumstances of this tragedy, the defendant submitted that the fact of provocation weighs heavily in favour of a sentence that fully takes account of such mitigation. He further submitted that such sentence would appropriately be at the lower scale of those commonly meted out for murder and must rather reflect the fact, agreed by the judge at trial and by the prosecution in recent meetings, that this was properly a case of manslaughter. He therefore submitted that the

appropriate sentence in this case would be a term of not more than 7 years.

The defendant then stated the following with regard to intoxication. He stated that on the day of the incident which led to his arrest, he had been working and drinking at a local drinking establishment where he sold barbecued meat. He was intoxicated at time he came across the deceased in a bush with his wife. This was the same man whom the defendant had previously found at his house engaged in sexual relations with his wife. The defendant was in a state of despair upon seeing that this act of grave and embarrassing infidelity was happening again. His loss of control was all the more heightened by his intoxication.

The defendant stated that it is an established principle of sentencing under Malawian law that intoxication is "a mitigating factor in respect of offences the commission of which require a particular *mens rea* on the part of the prisoner, for instance murder" *Rep v Sofasi* [1994] MLR 314 (HC) at 316, referencing *DPP v Beard* [1920] AC 479). In the present case, the defendant claims that he was heavily intoxicated at the time of the offence. That his culpability for the offence is greatly reduced by his intoxication at the time of commission and he submitted that this should be duly reflected in the appropriate sentence.

The defendant then argued that there was no premeditation. He stated that the tragic incident in this case was not planned or premeditated on the part of the defendant. Rather, it was the unintended result of a spontaneous quarrel between the defendant and the deceased at a time when the defendant was shocked, outraged and deeply saddened by finding that another man was engaged in sexual intimacy with his wife.

Further, that this was a spur of the moment crime of passion. The defendant claimed that the post-mortem examination report records that the deceased died from a single stab wound. Further that this was not a crime of malicious intent but was a single tragic act of passion by the defendant in reaction to devastating circumstances at a time when he was emotionally distraught, shamed and intoxicated. That this was a far cry from what may be considered the worst of the worst cases. Rather that this was a tragic act carried out in the heat of passion in reaction to gross sexual infidelity. This Court however notes that the post-mortem examination report record two stab wounds.

The defendant asserted that in view of the foregoing circumstances, it is likely that if presented to a court today, the facts would lead the prosecution to pursue the lesser charge of manslaughter.

This Court notes once again that the defence of provocation had been properly put to the jury at trial and the jury rejected the same. A reading of the record by this Court actually does not show that at the time of the murder the defendant found his wife engaging in sexual intercourse with the deceased for the second time. As such, the view of this Court is that as far as the record is concerned a period of about three weeks had elapsed between the provocation being pleaded by the defendant and his assault and killing of the deceased. No wonder the jury rejected the plea of provocation and made a finding of murder. Consequently, the defendant must be taken to have been driven by vengeance at seeing the deceased who had escaped the first encounter with the deceased three weeks previously. So that in the final analysis the good and persuasive English law on provocation as cited by the defendant does not help his cause much in the sense that the offence herein cannot now be said to be a manslaughter. It is a murder as found by the jury. Of course this court considers that the defendant to some extent was indeed provoked by his wife's infidelity with the deceased but the defendant is more culpability, than he would otherwise have

been if it were proved that he had acted in the heat of the passion, on killing the deceased after a three week period had elapsed since the defendant had found the deceased in a compromised position with the defendant's wife. The trial judge actually noted on the record of evidence that on the day of the stabbing the provocation of the defendant cooled because the defendant indicated that he stabbed the deceased after he had been stalking the deceased. The level of provocation was therefore low at the time of the stabbing herein.

The defendant also submitted that he showed immediate remorse. He stated that he immediately regretted his actions carried out in the heat of passion and saw the error of his ways. He did not try to flee or to hide but instead, on the contrary, presented himself to the police. Intent on making amends for his mistake, he confessed to the police. At trial, Detective Constable Kamphandira (PW3) testified that the defendant surrendered himself to the police station. The defendant submitted that the appropriate sentence in view of the circumstances of the offence is a term of years commensurate with sentences commonly given individuals convicted of manslaughter. He further submitted that the facts of the offence combined with the particular circumstances of the individual offender, as set out in subsequent paragraphs, provide compelling reasons why the defendant should be given a sentence of no more than 7 years, as recommended by both the prosecution and the defence in this matter. This last aspect was not agreed to by the prosecution at the hearing.

The defendant then submitted on his individual circumstances as an offender.

On being a youthful first-time offender the defendant stated as follows. That he was a first-time offender. He stated that, as detailed above, case law prohibits the imposition of a life sentence or a long term of years on an offender who is a first-time offender. See *Mabvuto case*. Section 339 read with section 340 of the Criminal Procedure and Evidence Act directs courts dealing with first time offenders to pass suspended or other non-custodial sentences on such offenders unless there are reasons which should be clearly stated that justify the imposition of a custodial sentence.

He further stated that it is trite law that an offender's youth also weighs heavily in favour of a reduced sentence. *Rep v Chtizumila and others* [1994] MLR 288 (HC); *Phiri v The Republic*; *Rep v Sukali and Chidika* Criminal Case No. 21 of 2011). He also submitted that he was a young man of just 23 years when he committed the offence for which he was sentenced to death. And that in *Keke*, Mwaungulu J, as he then was, expounded on the principles relevant to sentencing an offender falling in the age range of 19 to 25 years. Mwaungulu J. as he then was, held at p. 6 that

One most critical consideration about the offender **is age**. For ages between 19 and 25, commission of a crime may be a result of impetuous, immaturity, youth or adventure. A severe sentence may be perceived by a young offender as reflecting a harsh society on which to avenge. Long prison sentences for young persons may actually delay social integration to enable a young life to start a new life and lead a meaningful life. For young offenders, therefore, a short, quick and sharp sentence may achieve the ends of justice and deter future offending

And that Mwaungulu J, as he then was, further points out that in relation to young offenders and first offenders, it is wrong to use them for general deterrence, which is using them as a means to deter others. Rather, the principal goals of sentencing young persons should be justice, reformation, restoration and rehabilitation. The defendant stated that youth and previous good behaviour therefore weigh heavily in favour of a lenient sentence and support the defence and prosecution's recommendation that a sentence of 7 years would be sufficient in this case.

On his capacity for reform the defendant stated as follows. He stated that, as set out above, in capital cases the sentencing court must consider whether there is reasonable prospect of reform of the offender. See *Trimmingham*. The common law position is that the circumstances of a person are to be considered as of the date of sentencing hearing, in other words, the court should consider all evidence bearing on the offender's capacity for reform, including evidence relating to his behaviour since the time of his arrest and conviction. In this case, consideration of the defendant's post-conviction conduct clearly demonstrates that he is not only capable of reform, but has already reformed.

The defendant stated that he has made every effort to improve himself and make himself useful to society. While in prison, he has attended school in order to gain the education he did not receive as a child. He is now in high school and has reached form three. He attends school every day and actively looks forward to learning. He has learnt some basic French whilst in prison and has a keen interest in Biology.

Further, that over the course of his incarceration, the defendant has been recognized by prison staff for good behavior and trustworthiness. He has been identified by prison staff as an individual who is "leading by example" and whose behaviour demonstrates he has completely rehabilitated. As a result, the Prison Chaplaincy has recommended to the government that his sentence be commuted to a term of years (Exhibit TK 1). The Affidavit of Malawi Prison Service Officer Andrew Dzinyemba confirms that the defendant's prison record indicates that the defendant has not breached the Malawi Prison Service rules and that he has conducted himself in a manner which demonstrates that he is capable of reform and has reformed.

The defendant also stated that, in prison, he is a devout Jehovah's witness. He regularly takes sermons, preaching to other inmates, further indicating his capacity for reform.

On reintegration, the defendant stated that if he is released he would not pose a danger to the community, as confirmed by the Affidavit of Officer Dzinyemba. The defendant's capacity to reintegrate and his suitability to be released can be considered in mitigation. The evidence of Officer Dzinyemba weighs in *favour* of a sentence of no more than 7 years, as agreed by the prosecution in sentencing discussions. A term of 7 years would result in the defendant's immediate release.

With regard to prison conditions the defendant had the following to say. That he has been subject to cruel and inhuman treatment under deplorable prison conditions during more than 11 years of incarceration, including seven months on death row, subjecting him to cruel, inhuman or degrading treatment or punishment in violation of the Malawi Constitution and applicable international law.

The defendant pointed out that in Malawi the High Court held in the *Masangano case*, that prisoners, even though they are lawfully deprived of liberty, are still entitled to basic or fundamental human rights. The court also held that the overcrowding in Malawi prisons violates basic human dignity and is unconstitutional. Judgment in this case was delivered on 9 November 2009 and therefore even if the State had remedied the dire prison conditions immediately, the

defendant was subject to conditions that breached his fundamental human rights for at least 10 years. The defendant submitted that despite the honourable best efforts of our prison services to improve prison conditions, there has been no significant departure from those found to prevail by the High Court in 2009, such that the prisoner has to date in fact been subjected to a breach of his fundamental rights for nearly 16 years.

The defendant further stated that, over the course of his time on remand, on death row, and in Zomba maximum security prison, he has been continually subjected to overcrowding, disease, malnutrition, and extreme hardship. These factors are particularly apposite in light of a substantial body of case law that calls for the courts to avoid imposing an unnecessarily long sentence due to prison overcrowding. He further stated that in *Rep v Kholoviko* [1996] MLR 355 at 359 (HC), Ndovi J held that the paramount consideration of overcrowding of our prisons would require avoidance of unnecessarily long sentences of imprisonment in cases where short sentences of imprisonment would be appropriate. Further that Ndovi J approvingly cites Lord Lane CJ in *R v Bibi* [1980] CLR 732 (CA) who pressed that in view of prison overcrowding, the sentencing courts must be particularly careful to examine each case to ensure, if immediate custodial sentencing is necessary, that it is as short as possible, consistent only with the duty to protect the interests of the public and punish and deter the criminal. The defendant stated that he poses no risk to the public and is reformed.

The defendant also asserted that the mental torment of his incarceration was exacerbated by his terror that he would be executed after his death sentence was imposed. At the age of 23, he was told that he would be hanged for an offence that he apparently committed while so drunk that he could not clearly recall the events of that night. He had no way of knowing with any degree of certainty whether he would be hanged or not. To make matters worse, the gallows is present in the corner of the yard where the death row prisoners are continually confined. For seven long months, each morning after waking, the defendant would see the gallows. For seven long months, each night before entering his cell he would again see the gallows not ever knowing if tomorrow they would be used on him. He stated that the fact that he had to endure this psychological torture weighs heavily in favour of immediate release.

With regard to his health, the defendant has reported that he suffers from severe illness, including malaria, heart problems, chronic headaches, depression, and severe malnourishment. Before imprisonment, he suffered a heart attack.

On breaches of his constitutional rights the defendant asked this Court to consider the breaches of his constitutional rights that he has suffered and to consider remedying these breaches by imposing a sentence that would result in his immediate release. He asserted that, as detailed above, where a defendant has suffered a breach of his constitutional rights it may be appropriate to remedy the breach by imposing a shorter sentence than would otherwise have been imposed.

The defendant in this case asserted that he has suffered serious breaches of his constitutional rights; first, by being sentenced to mandatory death in violation of the Constitution, and then by continuing to be held under deplorable conditions without being resentenced despite the High Court's order that the Director of Public Prosecutions is under a duty to bring him before the Court for a sentence re-hearing. A duty which has been neglected over the last seven years since *Kafantayeni* was decided by the High Court.

The defendant stated that he has remained incarcerated for over 13 years since that unconstitutional sentence was imposed on him, with a further year spent in prison on remand. One long year of this time was spent on death row. He submitted that these breaches of the defendant's fundamental constitutional rights must be considered in mitigation of sentence. In a constitutional democracy such as that of Malawi, the only adequate remedy for such extremely serious breaches of a citizen's constitutional rights is a reduction of sentence. This fact weighs heavily in favour of a sentence of 7 years; a recommendation agreed in advance of this hearing by the prosecution.

In conclusion the defendant stated the following. That the facts of the offence in this case are far from the most extreme or exceptional. This tragic case is nowhere near what may be considered the worst of the worst or the rarest of the rare of homicides. Rather, that in light of the circumstances of the offence a sentence, commensurate with those handed down by the courts for manslaughter would be appropriate in this case, notwithstanding that the defendant was convicted of murder. That the trial record clearly shows that this was also the opinion of the presiding judge and that he directed the jury on this fact. For guidance on minimum sentences in homicide cases, this court was invited to consider Mwaungulu J's comment in *Republic v Bagala* (2011) Confirmation Case No. 24 (HC) (PR) at p. 3 where he states that this court passes sentences as low as six years in homicide cases.

Further that, considering the heavily mitigated circumstances of the offence and the additional circumstances of the offender set out above, it would be disproportionate to impose a term of years significantly greater than the minimum available. A consideration of the individual offender as set out above demonstrates compelling reasons why the defendant should be given a sentence of no more than 7 years, as recommended by both prosecution and defence in this matter. Since he has already served over 15 years, the equivalent of a 22.5 year-sentence if he is given the appropriate credit for good behaviour, the defendant recommend his immediate release. This Court points out that the State did not agree to the sentence of seven years imprisonment at the resentencing hearing.

Whilst bearing in mind the foregoing submissions, this Court has considered the sentencing trends as represented by the decisions of the Malawi Supreme Court of Appeal as cited by both parties herein. In both the *Ulodi case* and *Ngulube case* the accused persons had no clear motive in the killing which was carried out in the course of a drunken brawl and they were sentenced to 20 years imprisonment with hard labour. That has to be contrasted to the present case which appears to be slightly grave since there was clear intention of vengeance on the part of the defendant prompted by the low level of provocation due to passage of a period of three weeks after discovery of sexual intercourse between the deceased and the defendant's wife. The defendant used a knife which is a dangerous weapon that inflicted a painful death.

This Court has also considered the mitigating factors in favour of the accused person as outlined above with regard to the circumstances of the offence including the fact that he was under a low level of provocation. This Court has also considered the circumstances of the defendant himself who is geared at getting integrated back into society. This Court has also considered the difficult conditions of the defendant's incarceration during which his rights were violated. With the time spent in prison and at his age this Court does not believe that the defendant will tend towards violence. This Court has however further considered

the aggravating fact that the defendant substantially premeditated and was driven by vengeance in committing the murder using a knife three weeks after he found the deceased in a compromised sexual position with his wife. This Court consequently sentenced the defendant to serve 25 years imprisonment with hard labour from the date of his arrest on 25th August 1999.

Made in open Court at Zomba this 18th February 2015.

M.A. Tembo
JUDGE

The Republic v. Margret Nadzi Makolija

JUDICIARY

IN THE HIGH COURT OF MALAWI PRINCIPAL REGISTRY

SENTENCE REHEARING CAUSE NO. 12 OF 2015 BETWEEN

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Malunda, Senior Assistant Chief State Advocate and Salamba, Senior State Advocate, for the State

Michongwe, Senior Assistant Chief Legal Aid Advocate and Magombo, Senior Legal Aid Advocate

Ms. Emily Chikang'anga, Court Clerk

JUDGEMENT

Introduction

Margret Nadzi Makolija (convict) was charged, in two counts, with murder contrary to section 209 of the Penal Code. Upon full trial by the High Court sitting with a jury the convict was found guilty of having caused death of her two children, namely, Lapani Makolija and Mphatso Makolija, on or about the 12th day of January, 2000, and was convicted as charged on 23rd July, 2002. The Court proceeded to sentence her to suffer death.

Legal Developments

Prior to the *locus classicus* case of **Francis Kafantayeni and others v. The Attorney General, Constitutional Case No. 12 of 2005 (unreported)** [hereinafter referred to as the “**Kafantayeni Case**”], the law provided that on a finding of a conviction for murder, a court had no other opinion but to sentence the convict to suffer the mandatory punishment of death.

In the **Kafantayeni Case**, the High Court, sitting as a Constitutional Court, held that the imposition of the death sentence on murder convicts is not mandatory. It is noteworthy that the decision does not outlaw the death penalty for the offence of murder as such, but only the mandatory requirement for the death penalty for that offence. In short, the **Kafantayeni Case** has the effect of bringing judicial discretion into sentencing for the offence of murder, so that the offender is liable to be sentenced to death only as the maximum punishment. In an illustrative and illuminating dictum, the High Court said-

“We agree with counsel that the effect of the mandatory death sentence under section 210 of the Malawi Penal Code for the crime of murder is to deny the accused as a convicted person the right to have his or her sentence reviewed by a higher Court than the Court that imposed the sentence; and we hold that this is a violation of the right to a fair trial which in our judgment extends to sentencing....”

...We affirm that issues of sentencing are legal issues for judicial determination and are therefore within the purview of section 41 (2) of the constitution; and the mandatory death sentence under section 210 of the Penal Code, by denying a person convicted of murder the right of access on the sentence to the final Court of Appeal, is in violation of section 41 (2) of the Constitution. In regard to the death penalty, which is the ultimate punishment any person can suffer for committing a crime. irrevocable as it is once carried out, we would reject notion that any restriction or limitation on the guarantee under section 41 (2) of the Constitution of the right of access to a Court of final settlement of legal issues, denying a person to be heard in mitigation of sentence by such Court, can be justified under section 44(2) of the Constitution as being reasonable or necessary in a democratic society or to be in accord with international human right standards.

Pursuant to section 5 of the Constitution, we declare section 210 of the Penal Code to be invalid to the extent of the mandatory requirement of the death sentence for the offence of murder.”

The High Court proceeded to set aside the death sentence and ordered each of the Plaintiffs to be brought once more before the High Court for a Judge to pass such individual sentences on the individual offenders as may be appropriate, having heard or received such evidence or submissions as may be presented or made to the Judge in regard to the individual offender and the circumstances of the offence.

The decision in the **Kafantayeni Case**, supra, has been repeatedly endorsed by the Supreme Court of Appeal: see **Twoboy Jacob v. Republic MSCA Criminal Appeal Number 18 of 2006 (unreported)** [hereinafter referred to as the “**Twoboy Case**”], **Winston Ngulube and Another v. Republic MSCA Criminal Appeal Number 35 of 2006 (unreported)** [hereinafter referred to as the “**Winston Ngulube Case**”] and **Twalibu Uladi v. Republic MSCA Criminal Appeal Number 5 of 2008 (unreported)**.

In the **Twoboy Case**, supra, the Supreme Court of Appeal agreed with the High Court that where a person is convicted of murder, the court still retains the discretion to impose the sentence of death or a lesser sentence depending on the availability of aggravating or mitigating factors affecting the case. The following three main principles stand out in the **Twoboy Case**, supra-

- (a) offences of murder differ, and will always differ, so greatly from each other and it is therefore unjust and wrong that they should attract the same penalty and punishment;
- (b) a matter of sentence is a legal issue for judicial examination and determination; and
- (c) the mandatory requirement of the death sentence under section 210 of the Penal Code denies an offender a right to a fair trial under section 42(2)(f) of the Constitution by prohibiting the court from judicial examination and determination of sentence.

In the above-mentioned cases, it is only the applicants/appellants who benefitted in that they were given an opportunity to have their respective cases brought back to the High Court for re-hearing of sentences. This then raised the question of the legal position of convicts that were sentenced to the mandatory death sentence prior to the **Kafantayeni Case**, supra. The answer was directly provided by the Supreme Court of Appeal in **McLemore Yasini v. Rep., MSCA Criminal Appeal No. 29 of 2005 (unreported)**-

*“The Court [in the **Kafantayeni Case**] clearly ordered that the Plaintiffs were entitled to a re-sentence hearing on the death sentence individually. The Court’s decision on this point, affected the rights of all prisoners who were sentenced to death under the mandatory provisions of section 210 of the Penal Code. The right to a re-sentence hearing therefore accrued to all such prisoners. In the present case, the Appellant was never brought before the High Court for a re-sentence hearing. This default however, did not and does not take away his right to appeal against the death sentence. We wish to observe that it is the duty of the Director of Public Prosecutions to bring before the High Court for re-sentences hearing all prisoners sentenced to death under the mandatory provision of Section 210 of the Penal Code.”*

It is within the context of the aforementioned legal developments that the case of the convict is before the High Court for re-sentencing.

Facts

In dealing with the re-sentencing of the convict, it is necessary that an outline of the facts of the case is presented.

The convict hails from Kumlola Village, T/A Nkanda, Mulanje and this is where she was at the material time in 2000. She was staying with her husband (PW1), her two sons, Mphatso and Lapari Makolija, and her mother (PW2). The convict believed that PW2 was ill-treating her and her sons and, as a result, the convict and PW2 were quarrelling most times. On 12th January, 2000, PW2 ordered the convict and her sons to leave PW2’s house. This annoyed the convict and she went to Nkando market in the afternoon and bought three packets of “*tamek*”. Come night time, the convict made two drinks using the three packets of “*tamek*”. She forced her two sons to take one drink each and she took the third drink. Thereafter, she informed PW2 what she had done. Upon hearing this, PW2 gave the convict and the two sons milk to drink but this did not help the two sons who died. The convict became unconscious and she was taken to Thuchila Health Centre for treatment. She regained consciousness and was discharged from the hospital on 19th January, 2000. She was soon thereafter arrested on murder charges for killing the two sons.

The Law on Homicide Sentencing and Mitigation Generally

Counsel for both sides were agreed on the general principles that should apply where a person has been convicted of murder. Firstly, the maximum

punishment must be reserved for the worst of offenders in the worst of cases: See **Rep. v. Anderson Mabvuto, Criminal Case No. 66 of 2009 (unreported)** and **Rep. v. Jamuson White, Criminal Case No. 74 of 2008 (unreported)**. In the latter case, the Court restated the position that the death penalty be reserved for the “rarest of rare” cases-

“The offence must have been occasioned in very decrepit and gruesome circumstances, meticulously intentioned and planned and that the convict is highly likely to offend again to justify his total removal from associating with other persons even in prison. He must be a threat to society so much so that society would without thinking twice approve of his elimination from planet earth. The motive for the killing must be extremely heinous so as to cause a deep sense of society abhorrence and condemnation that such human being does not qualify to live. I may put deliberate mass murders and serial killers in this category.”

Secondly, Courts will take into consideration the age of the convict both at the time of committing the offence and at the time of sentencing. The law generally favours relatively young or old people to protect them from being in custody for longer periods: see **Rep. v. Ng’ambi [1971-1972] ALR Mal 457**.

Thirdly, Courts will always be slow at imposing long prison terms for first offenders. The rationale being that it is important that first offenders avoid contact with hardened criminals who can negatively affect process of reform for first offenders: see **Rep. v. Chikazingwa [1984-86] 11 MLR 160**.

Fourthly, Courts will have regard to the time already spent in prison by the convict and will usually order that the sentence takes effect from the date of the convict’s arrest thus factoring in the time already spent in the prison. Courts will, however, discount this factor if the time spent was occasioned by the convict themselves, that is, where they skip bail or because of unnecessary adjournments: See **Mulera v. Rep. [1971-1972] ALR Mal 73**.

Fifthly, Courts have also to look into the personal and individual circumstances of the offender as well as the possibility of reform and social re-adaptation of the convict. Arguably, this may relate to the convict’s individual circumstances at the time of committing the offence and at the time of sentencing, that is, their “*mental or emotional disturbance*”, health, hardships, etc.: see **Rep. v. Samson Matimati, Criminal Case No. 18 of 2007 HC (unreported)**.

Sixthly, the Court may take into account the manner in which the offence was committed, that is, whether or not (a) the crime was planned, rather than impulsive,

(b) an offensive weapon was used or not, (c) the convict was labouring under intoxication at the time of committing the offence even though intoxication was not successfully pleaded in defence: See **Winston Ngulube and Another v. Rep., MSCA Criminal Appeal No. 35 of 2006 (unreported)**.

Seventhly, duress, provocation and lesser participation in the crime may be mitigating factors in certain circumstances.

Needless to say, the list of circumstances, mentioned by counsel, that are

aggravating or mitigating is not exhaustive. For example, I see no reason why other factors such as remorse, lack of clear motive, childhood deprivation and abuse, good conduct in prison, effect on the victim (see **Ayami v. Rep. [1990] 13 MLR 19 (SCA)**), likelihood of committing further acts of violence, sense of moral justification and, in appropriate cases, socioeconomic status, cannot be taken into account.

Submission by Counsel for the Convict

Counsel Michongwe urges the Court to consider a reduction of the sentence in that several mitigating factors obtain in the present case and these have been listed as the age of the convict both at the time of committing the offence and at the time of her conviction, the convict being a first offender, the convict's individual circumstances (i.e. personal hardships and her subsequent mental state), circumstances of the offence, the long time the convict has already spent in prison, violation of rights already suffered by the convict, and the capacity to reform as demonstrated by the convict whilst in prison.

With respect to the individual circumstances, Counsel Michongwe drew the Court's attention to the psychiatric evaluation report and submitted that the fact that the offence was committed at a time when the convict was in a state of clinical depression as well as psychosis should count as a mitigating circumstance. The psychiatric evaluation was conducted by Dr. Robert Okin at Zomba Prison and his conclusion is as follows-

“[I]t is my professional opinion that at the time of the crime for which she was convicted. Ms. Makolija suffered from clinical depression and psychosis that had profound effect on her ability to rationally understand the behavior of those around her as well as the consequences of her own actions. Her serious mental illness impaired her ability to make reasoned choices and to exercise good judgment.”

Counsel Michongwe prayed that the Court should take into account the 15 years that the convict has already spent in prison. He submitted that remand period should be considered alongside the fact that the convict has suffered all along various violations of her rights. Specifically, her right to have a trial within reasonable time as she was only tried almost two years after her arrest; her right to human dignity, to fair trial, and to have an effective remedy before the Court as she was from the day of her conviction deprived of an opportunity to make her submission in mitigation until the decision in the **Kafantayeni Case**.

Counsel Michongwe next turned to matters that show the reformed character of the convict. He submitted that there is ample evidence of reform on the part of the convict. Firstly, she has been able to get an elementary education during her stay in prison. Secondly, because of her good conduct she has been made an overseer of her fellow inmates, commonly called “nyapala”. Thirdly, she has learnt the skill of knitting and has been entrepreneurial in that she has been able to earn a living in prison through that skill.

Counsel Michongwe also invited the Court to note that there are several factors which go to show that the convict is unlikely to face problems to re-

integrate into society. Firstly, there is no evidence of her inclination at the very minimum to reoffend if allowed back into her society. Secondly, there is sufficient evidence that she has, and still maintains good relations with members of her family with whom she has maintained contact throughout the years. This in itself, so it was argued, is a reflection of the remarkable level of reform that the convict has attained from the years she has already suffered punishment in prison. Thirdly, the elementary education acquired as well as the professional and entrepreneurial skills acquired whilst in prison also go to show that if reintegrated into society, she is capable of re-adapting and once more becoming a productive person able to support herself and her family. Fourthly, the psychiatric assessment by Dr. Robert Okin states that at present, the convict is free from any mental illness and is of good health.

In conclusion, Counsel Michongwe submitted that the foregoing weigh heavily in favour of re-sentencing the convict to a prison term limited to a number of years that will secure her immediate release.

Submission by Counsel for the State

Counsel Malunda submitted that on the basis of **Kafantayeni Case**, supra, **Twoboy Case**, supra, and **Winston Ngulube Case**, the present legal position is that the Court will not pass a sentence of death in all cases of murder. He stated that each case has to be decided on its own peculiar facts. He further opined that where, on one hand, the offence is so gruesome and the aggravating factors far outweigh the mitigating factors the Court may, in exercising its judicial discretion, pass a death sentence. It was also his view that, in other cases, depending on the aggravating and mitigating factors affecting the particular cases, the Court may only pass a life imprisonment sentence or a term of imprisonment for a number of years and not the sentence of death. To illustrate his point, Counsel Malunda cited the cases of **Winston Ngulube Case**, supra, **Twalibu Uladi v. Rep., MSCA Criminal Appeal Number 5 of 2008 (unreported)**, **Twoboy Case** and **Rep. v. Sinosi Pasipanadya, Criminal Case Number 41 of 2008 (unreported)**.

In **Winston Ngulube Case**, supra, the Supreme Court of Appeal set aside the sentence of death sentence imposed by the High Court for murder and replaced it with one of 20 years imprisonment with hard labour (IHL) after it found that (a) the assault that led to the death of the deceased was not done using dangerous weapon, (b) the quarrel which led to the assault was clearly influenced by intoxicating drink, no clear motive on the part of the Appellants to cause the deceased's death was disclosed by evidence, and (d) there was no evidence that the Appellants were persons of previous bad character.

In **Twalibu Uladi v. Rep.**, supra, the appellant and the deceased had been drinking together. A quarrel ensued after the appellant had apparently accused the deceased of attempting to steal a window frame which was inside the appellant's house but apparently found itself outside. A fight ensued and in the course of the fight the appellant took a panga knife and used it to hack the deceased. The Supreme Court of Appeal set aside a sentence of death and

substituted it with one of 20 years IHL after it observed that that the appellant was fighting with bare hands and only resorted to the panga knife in the course of the fight.

In **Twoboy Case**, supra, the appellant killed his second wife on suspicion that she was bewitching him such that he was failing to have sexual intercourse with his first wife. He appealed against the sentence of death imposed by the High Court. The

Supreme Court of Appeal dismissed the appeal and confirmed the death sentence, noting that the facts of the case did not show that it was a matter for a lesser sentence than that imposed by the High Court.

The High Court in **Rep. v. Sinosi Pasipanadya**, supra, imposed a sentence of life imprisonment on the convict. In that case the convict cut the thumb of his 7 months old child to prevent it from sucking the thumb. The child then started crying. The child's mother quarreled with the convict for what he had done and she went to report to her mother and the village Headman about the incident. This time the convict then took the child to the river and killed it in cold blood.

Regarding the case under consideration, Counsel Malunda invited the Court to note that mitigating factors far outweigh aggravating factors. He submitted that a quite disquieting factor is that the actions of the convict were premeditated in that she had deliberately planned to kill herself and her two children. Counsel Malunda pointed out that mitigating factors included the fact that the convict (a) is a first offender, (b) was 30 years at the time of committing the offence, (c) is relatively a young adult, (d) as rocked with personal problems, and (e) had been on remand prior to her trial for two years and has so far served over 12 years of her sentence.

On the basis of his foregoing submissions, Counsel Malunda was of the view that the facts of the present matter do not warrant a death sentence but rather imprisonment for a period of not less than 20 years from the time of her arrest on each of the two counts.

Analysis and Disposition

The above exposition of the law points out that as it stands now the court will not pass a sentence of death in all cases of murder. It is common ground that not all murders are committed in the same circumstances, and all murderers are not necessarily of the same character. One may be a first offender and the offence may have been committed in circumstances that the convict deeply regrets and is very remorseful. This entails that each case has to be decided on its own peculiar facts.

Where the offence is so gruesome and where the aggravating factors far outweigh the mitigating factors the court will exercise its judicial discretion in passing a death sentence. However, the Court may be inclined in other cases

to pass a life imprisonment sentence or a term of imprisonment for a number of years depending on the aggravating and mitigating factors affecting that particular case.

The action of the convict in purchasing a poisonous substance and having it administered to her sons and herself in the form of a drink has to be condemned in the strongest terms. I am particularly disturbed with the manner in which the two innocent children lost their respective lives at the hands of the convict. It is horrifying to me to imagine a mother handing over a container of poison to her sons and watch them drink and then wait to see them slowly drift to their death.

That said, I do not entirely ignore the fact that the homicide was committed in circumstances that strongly suggest that the convict was mentally imbalanced at the material time. Evidence of “*mental or emotional disturbance*”, even if it falls short of meeting the definition of insanity, may nonetheless make an offender less culpable on a murder charge and this should be considered in mitigation of sentence. I have also taken note of the so many other mitigating factors obtaining in the present case as mentioned by both Counsel.

Having considered all the circumstances of this case, I am inclined to reduce the sentences. The sentence of death on the two counts is set aside and replaced by a sentence of twenty years IHL on the 1st and 2nd counts respectively. The sentences on the two counts will take effect from 19th January 2000, the date of her arrest and detention, and will run concurrently.

The Convict is at liberty to appeal against the sentences herein to the Supreme Court of Appeal, should she be so inclined. Learned Counsel for the convict has to explain to her the finer details of how she can go about the exercise.

Pronounced in Open Court this 4th day of March 2015 at Zomba in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE

The State v. Laston Mukiwa

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY SITTING AT ZOMBA

HOMICIDE (SENTENCE RE-HEARING) CASE NO. 21 OF 2015

CORAM: THE HON. JUSTICE MRS. A. KALEMBERA

Mr Kayira, of Counsel for the Convict

Mr Malunda, Senior Assistant Chief State Advocate, for the State

Miss Ngoma, Official Interpreter

RE-SENTENCING

Kalemhera J.

INTRODUCTION

The convict, Laston Mukiwa, was charged with the offence of murder, contrary to section 209 of the Penal Code (Cap 7:01) of the Laws of Malawi. The particulars of the offence alleged that **LASTON MUKIWA** on or about the 27th January 1998 at Mose Village in the District of Mchinji, with malice aforethought caused the death of **KAPEZAYI TCHAYANI**. After a full trial, the convict was found guilty by jury and convicted as charged, and pursuant to section 210 of the Penal Code (now amended) was sentenced to death. Prior to the amendment to the said section 210 of the Penal Code, the section imposed a mandatory death sentence to anyone convicted of murder. The court had no discretion as to what sentence to impose other than a death sentence. Presently, where a person is convicted of murder, the court has the discretion to impose a death sentence (maximum sentence) or any term of imprisonment. Hence this sentence re-hearing.

ISSUES FOR DETERMINATION

The main issue for the court's determination is what sentence to impose on the convict in the circumstances of this case.

RE-SENTENCING CONSIDERATIONS

As per the submissions of both parties, there are issues the court has to take into consideration in coming up with an appropriate sentence.

Aggravating Factors

It has strongly been submitted by the Respondent that belief in witchcraft does not amount to a mitigating factor. The court must not regard the convict's belief in witchcraft as justification for committing the offence. Rather, the court must consider the circumstances of the offence as well as of the convict. The convict hacked the deceased with an axe and dumped him in a well. It is submitted that the conduct of the convict demonstrates that there was pre-meditation, and to add to that a dangerous weapon was used. These are aggravating circumstances. However the Respondent

contends that the convict does not deserve the maximum sentence of death, but a sentence of not less than 26 years would be appropriate.

Mitigating Factors

It is submitted in mitigation of sentence that the court should consider the age of the convict at the time of commission of the offence, and now that he is 61 years of age. The court must consider that the law favors the elderly. The court must further [sic] the harsh prison conditions. Further the court should also consider that courts are always slow to impose long sentences on first offenders. The convict had led an exemplary life for 43 years until he committed this offence. The court must further consider that the convict was led by his belief in witchcraft, which was not unreasonable, to commit this offence. Further, the convict has reformed and his family and society are willing to take him back.

LAW AND ANALYSIS

In the case of **Kafantayeni and Others v The Attorney General, Constitutional Case No. 12 of 2005 (unreported)**, the Court held that the mandatory death sentence was unconstitutional and ordered that all the plaintiffs in that case be brought before court for re-sentencing. And in the case of **McLemoce Yasini v The Republic, MSCA Criminal Appeal No. 29 of 2005 (unreported)**, the court directed that all murder convicts sentenced before the **Kafantayeni** decision be brought before the High Court for re-sentencing, hence this re-sentencing re-hearing. Section 210 of the Penal Code (amendment number 1 of 2011) provides as follows:

“s.210 Any person convicted of murder shall be liable to be punished with death or with imprisonment for life.”

Due to this amendment, the mandatory death sentence is no longer applicable where one is convicted of murder. The death sentence is now the maximum sentence. Thus, it now remains in the discretion of the court, to impose a death sentence on a murder convict, depending on the circumstances of the offence, or a term of imprisonment. The court must consider, *inter alia*, the seriousness or gravity of the offence, the circumstances in which the offence was committed, as well as the circumstances of the offender. Whether the convict is a repeat or first offender should also be taken into consideration.

It is not in dispute that murder is a very serious offence, it is therefore inevitable that a person convicted, even if a death sentence is not appropriate, will be given a custodial sentence. Circumstances in which the offence was committed will determine the sentence to be imposed. In **Winston Ngulube and Michael Ngulube v R, MSCA Criminal Appeal No. 35 of 2006**, the sentence of death, for murder, was set aside and replaced with one of 20 years imprisonment with hard labor because the assault which led to death of the deceased was not done using any dangerous weapon, and the quarrel which led to the assault was influenced by intoxication, no clear motive for causing the deceased death was disclosed by the evidence, and there was no evidence that the appellants were persons of previous bad character. And in the case of **The State v Manje Silumbu, Lingison Msukwa,**

Lackson Chapewa and Lusekelo Chapewa, Criminal Case No.39 of 2009 (BC)
Mzuzu District Registry, although the offence was committed in a very gruesome manner, a sentence of 30 years imprisonment with hard labor was imposed. The use of a dangerous weapon is thus an aggravating factor.

It has further been submitted that the convict had an honest belief that the deceased, his father-in-law, had bewitched his children. It was in evidence that the convict married the deceased daughter and they had children. Five of their children died and he truly believed that the deceased was responsible for the death of those children through witchcraft. I do agree with the Respondent that this belief in witchcraft would not have amounted to a defence during trial. However, I take judicial notice that there are people, who, though it might be seen as unreasonable, truly believe in witchcraft. The convict seems to be one of such people. If he didn't have such beliefs maybe this offence wouldn't have been committed. I do not think taking into consideration his belief in witchcraft would amount to endorsing witchcraft or condoning what he did. We can't run away from the fact that in our societies we have people who have such beliefs in witchcraft, though it is wrong to use that belief to commit such a heinous offence or any offence for that matter. I would, however, consider such beliefs, though unreasonable in the mind of others, as a mitigating factor. Such beliefs would however, in the matter at hand, be overridden by the use of an axe, a dangerous weapon, in committing this offence.

It has further been submitted that the convict has been subjected to harsh prison conditions, and that he has reformed, and that his family and community are ready and willing to welcome him back. That as it may be, I remind myself that this is not a parole hearing. This is re-sentencing hearing, meaning that I must at all times keep it in mind and remind myself that what is expected of the court is to consider what would have been an appropriate sentence at the time the convict was convicted. What would have been the primary considerations at that time? Though the court cannot pretend that the circumstances of the convict might have changed, the court must not behave as if it is conducting a parole hearing and must at all times avoid turning the re-sentencing hearing into a parole hearing. If it were a parole hearing, before the court, then the court would have been obliged to consider, *inter alia*, the good behavior of the convict in custody, and the views of his family and community. These considerations would have been paramount. As to the harsh conditions in prison, it is unfortunate, but it would be even worse to let dangerous criminals loose on that account. The Respondent is in a better position to influence change in the conditions of our prisons.

CONCLUSION

The court agrees with both parties that the convict is not the worst kind of offender, and that he does not deserve the the (sic) maximum sentence of death. The sentence of the court, it has been held, should be fitting to the crime and the criminal, and fair to society -**Republic v Shanti, (BC) 8MLR 69**. The convict herein is a first offender. For 43 years he led an exemplary life until he committed this offence. He is not a threat to society as he is not a repeat offender. However, this is a serious offence and the damage he caused, taking

the deceased's life, is irreparable. Furthermore, he used a dangerous weapon, an axe, in assaulting the deceased, there was pre-meditation, and hid the deceased's body in a well. A custodial sentence is inevitable. Having considered the aggravating and mitigating factors, and having found that the aggravating factors outweigh the mitigating factors, and still bearing in mind that the convict is not the worst of offenders, I consider a sentence of 22 years imprisonment with hard labor an appropriate sentence. I consequently sentence the convict to 22 years imprisonment with hard labor. The sentence to run from the date of his arrest.

PRONOUNCED in open court this 9th day of March 2015, at Zomba District Registry.

S.A. Kalembera
JUDGE

The Republic v. Limbikani Wilson Mtambo

IN THE HIGH COURT OF MALAWI PRINCIPAL REGISTRY

HOMICIDE REHEARING CASE NO. 2 OF 2015

CORAM: HON. JUSTICE M.L. KAMWAMBE

Mr Malunda and Miss Munthali of Counsel for the State

Mr Kaira of Counsel for the Accused

Mr Manda, Official Interpreter

JUDGMENT

Kamwambe J

This is one of the cases set down for the re-hearing of sentence following the finding in **Kafantayeni and others v Attorney General** Constitutional Case No. 12 of 2005 that the imposition of the mandatory death sentence was a violation of the rights to a fair trial, right not to suffer inhuman and degrading treatment and access to justice as provided under sections 42, 19 and 41 of the Constitution respectively, and is unconstitutional. The outcome is that the High Court is enjoined to consider the convict's mitigating factors before sentence is pronounced. Of course the State gives its views of the sentence appropriate in the circumstances. The Courts are now empowered to exercise their discretion whether to met capital punishment or a lesser sentence in consonance with section 321 of the Criminal Procedure and Evidence Code which provides:

(1) Where a verdict of guilty is recorded, the High Court may, after judgment but before passing sentence, receive such information or evidence as it thinks fit, in order to inform itself as to the proper sentence to be passed.

The Court should be wary that it is sitting only to consider sentence and not to change the conviction of murder, otherwise the Supreme Court was well disposed to consider both the propriety of conviction and sentence as the convict filed an appeal in October 2002 being MSCA Criminal Appeal no. 20 of 2002. However, it was never heard for reasons not known. This re-hearing could have been avoided with the conclusive determination of the appeal.

The convict was found guilty by jury trial and was sentenced to mandatory death sentence. Even if we stuck for a long time to jury trials, unpleasant acquittals or convictions could not be ruled out because jurors would not comfortably and competently distinguish legal and factual circumstances surrounding murder and manslaughter offences. Jurors were facing the intricacies of homicide law for the first time and most of them were illiterate. The shallow understanding when counsel and the Judge explained the law was not always sufficient for the jurors to really appreciate and apply the law. Even where they came up with the right verdict, one felt that may be it was by chance. Some cases of course were too obvious that a

right verdict was reached. Now that jury trials are discouraged and a professional judge sits alone, cases of wrong verdicts on conviction should reduce. No wonder that in jury trials which resulted in imposition of death sentence a practice developed whereby the case was automatically referred to the Supreme Court for review to correct any injustice occasioned in the High Court trial. The Kafantayeni case also came at the right time so that Courts today can re-consider death sentences imposed before the said Kafantayeni case. I would suggest that the Supreme Court should treat as an automatic appeal cases of death punishment arising after the Kafantayeni case rather than waiting for a formal appeal which may never be made.

Section 210 of the Penal Code (Amendment Number 1 of 2011 of the Laws of Malawi) comes up in support, in a way, of the Kafantayeni Constitutional Case as it grants courts a choice; it reads:

“Any person convicted of murder shall be liable to be punished with death or imprisonment for life.”

This is how offences for rape, robbery and burglary are couched, and term sentences are always meted on conviction. This gives me the conviction that term sentences in murder cases should not be received with a sense of shock but the Court should ask itself if the case does not qualify for a manslaughter charge so that there are fewer murder cases attracting term sentences.

Maybe a limit of term of years as a guideline could be suggested so that below that limit the judge should find compelling factors which will reduce the murder to manslaughter. I would suggest a threshold of 20 years. Murder still stands as the most serious and heinous of offences not to be equated to rape, robbery and burglary even if their statutory sentences read the same. Maybe the death sentence in offences of rape, robbery and burglary should be reviewed since capital punishment has never been meted. We do not envisage circumstances to arise in the future for such punishment. Murder offence no doubt enjoy a special upper and highest position in the ladder of heinous offences and should be treated as such. A conviction of murder should demonstrate through its sentence that it is different from one of manslaughter despite that some manslaughter circumstances will border closer to murder.

The facts of the present case are that the convict who was then 16 years old killed his wife Asita Ali Ngozo in a forest as they were going to see a herbalist on 18th August 1997. On 22nd August 1997 the police received a report that the body of an unidentified woman had been found in the forest. Before the body was identified it was buried. The body was identified through two small pieces of cloth found at the crime scene which the deceased younger sister said that they belonged to the deceased. On 14th August 2001 Mtambo was convicted of murder by a jury and was sentenced to death. He has now spent 17 years in prison.

A grievous mistake was occasioned because the convict was a juvenile at the time he committed the offence and at the time he was arrested and his status as a juvenile should have been considered by the Court. The then Children and Young Persons Act enjoins courts to treat juveniles differently from adults and that the words 'conviction' and 'sentence' shall not be used in respect of juveniles. Mtambo did not have a fair trial in the circumstances.

The procedure followed in this sentence rehearing was to comply with section 321 J of the Criminal Procedure and Evidence Code which again states as follows:

“(1) where a verdict of guilty is recorded, the High Court may, after judgment but before sentence, receive such information or evidence as it thinks fit, in order to inform itself as proper to the proper sentence to be passed.”

The Court received affidavits from prison authorities, defendant's aunt, Napilira Kamoto, village Chief Raphael Pasikaziyo, defendant's aunt, Nasonia Kamoto, defendant's mother, Nafundani Kamoto and lastly from Zomba Prison Chaplaincy Office requesting a reduction of sentence, all affidavits in aid of Mtambo. I need not go into detail of each and every affidavit, suffice it to say that they paint a rosy picture of Mtambo who was put on death row.

The village community in Dedza is ready and willing to accept him back into the village since he had always been a good person helping in community work and also at the Catholic Church to which he belonged. He grew up with his grandmother from as tender an age as 2 and when he was about 8 he grew into a man and started to fend for himself and his grandmother. He was just dependable. Members of his family have undertaken to assist him so that he is integrated in the village and he starts life of his own.

There would be no animosity and evil plans between the relations of the deceased and Mtambo because of distance barrier. The village of Mtambo is in Dedza district where Mtambo intends to relocate while the deceased's village where he married is in Solima district well over a hundred kilometers away. This is a factor to consider if release were a preferred option.

It is important that during re-sentencing the Court considers all the circumstances of the case including the personal circumstances of the, offender, the crime committed and in what manner, and feelings of the relations and society. The facts of the case are very clear that there was no clear motive on the part of Mtambo to kill his wife with whom he lived happily and lovingly. This, plus what is stated in the preceding paragraphs form strong mitigating circumstances for Mtambo if we consider an individualized sentencing process as it ought to be.

As mentioned above Mtambo was a juvenile at the time he committed the offence. He suffered great injustice for being treated as an adult. Section 26 (2) of the Penal Code prohibits the passing of death sentence to an offender below the

age of 18 years and that such person shall be detained at the President's pleasure. This procedure was more likely inadvertently ignored by the Court. To this case, this is a paramount consideration to be made. The rights of a child shall not be trampled upon by the very courts which are expected to protect such child.

Section 42(2) (g) of the Constitution outlines the rights of a person under the age of 18, and the first right is not to be sentenced to life imprisonment without possibility of release. The fifth right, just to mention a few, is the right to be treated in a manner which takes into account his or her age and the desirability of promoting his or her reintegration into society to assume a constructive role. These Constitutional provisions were also clearly violated and therefore the sentence of death which was passed was unconstitutional. I need not go any further trying to tackle other would be relevant areas because they would not serve any useful and valuable purpose. What is stated above is enough to reach a just finding on the matter.

Persons under the age of 18 are protected by the Children and Young Persons Act and we are prompted by section 4 of the Act to put into regard the welfare of the offending juveniles. This means that when sitting as a juvenile court the mind of the court should at all times tilt towards mercy and lenience with a view to reintegrating the offending youth into society quickly and rehabilitating him into being a useful citizen. (See also **The Rep v Mayeso Sukali and Duncan Chidika** Criminal Case No. 21 of 2011). The law recognizes that persons of youthful age are prone to make youthful mistakes due to immaturity and should be given the opportunity to start again in life rather than to be condemned to suffer imprisonment punishment for a long time as an adult. In short we may say that the scale heavily weighs in favour of release and alternatively, a short period of incarceration.

Just for the wrongful use of the words 'conviction' and 'sentence' in the case of **Ignasio Chivembekezo and Masauko Kusale v The Republic** Misc Criminal Appeal No. 45 of 2006 the Court ordered the immediate release of the Applicant who was 17 at the time of the offence, having failed to observe requirements of section 4 of the Children and Young Persons Act. Section 4 reads as follows:-

“Every juvenile court in dealing with a juvenile who is brought before it, either as being in need of care or protection, or as an offender or otherwise, shall have regard to the welfare of the juvenile and shall in a proper case take steps for removing him from undesirable surroundings, and for securing that proper provision is made for his education and training.”

As stated above section 11 of the Act prohibits pronouncing a death sentence against a person under the age of 18 and in this case the offender underwent mental affliction thinking over the death sentence and almost every day looking at the gallows building where those condemned to death must

suffer death punishment. It was inhuman treatment to one of youthful age.

In view of the impressive resume of Mtambo's character despite growing up in a very poor family and the willingness of the community to embrace him and the relations readiness to assist him in all ways; and that s26 (2) of Penal Code which prohibits pronouncing a death sentence of a person under 18 and also section 42 (2) (g) (i) and (iv) of the Constitution which discourage imposition of life sentence on such a person and enjoins that the dignity of such person shall be respected, yet these provisions were starkly violated by being ignored, there is no other option for this Court but to consider releasing Mtambo who was and is unfairly and unjustly treated culminating into a sentence of life imprisonment in deplorable prison conditions.

Having served 17 years in custody Mtambo deserves an immediate unconditional release and it is hereby so ordered.

Pronounced in Open Court this 16th March of 2015 at Zomba.

M .L. Kamwambe

JUDGE

The Republic v. William Mkandawire

**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY**

SENTENCE REHEARING CAUSE NO. 20 OF 2015

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Gondwe, Senior State Advocate, for the State

Magombo, Senior Legal Aid Advocate

Ms. Emily Chimang'anga, Court Clerk

JUDGEMENT

Introduction

William Mkandawire (convict) was on 26th January 2004 convicted of murder contrary to section 209 of the Penal Code and was sentenced to death.

On 4th March 2015, following sentence re-hearing, I set aside the death sentence and sentenced the convict to a term as resulted in his immediate release. I reserved the reasons for my judgement.

Facts

In dealing with the re-sentencing of the convict, it may not be out of place to present the facts of the case in a nutshell.

On 13th June 2002, Simon Simwaka (Deceased Person) and his friend, Gerald Gondwe, went to Beta Trading Centre and on their way back home, they stopped at grocery where the convict and other people were drinking beer. The convict started

assaulting the Deceased Person for no apparent reason. The fight was stopped and the Deceased Person and his friend left for their home. The convict pursued the Deceased Person and upon catching up with him, he repeatedly assaulted the Deceased Person with a club. The Deceased Person died the following day.

The Law on Homicide Sentencing and Mitigation Generally

Counsel for both sides were agreed on the general principles that should apply where a person has been convicted of murder. Firstly, the maximum punishment must be reserved for the worst of offenders in the worst of cases: See **Rep. v. Anderson Mabvuto, Criminal Case No. 66 of 2009 (unreported)** and **Rep. v. Jamuson White, Criminal Case No. 74 of 2008 (unreported)**. In the latter case, the Court restated the position that the death penalty be reserved for the “rarest of rare” cases:

“The offence must have been occasioned in very decrepit and gruesome circumstances, meticulously intentioned and planned and that the convict is highly likely to offend again to justify his total removal from associating with other persons even in prison. He must be a threat to society so much so that society would without thinking twice approve of his elimination from planet earth. The motive for the killing must be extremely heinous; so as to cause a deep sense of society abhorrence and condemnation that such human being does not qualify to live. I may put deliberate mass murders and serial killers in this category.”

Secondly, Courts will take into consideration the age of the convict both at the time of committing the offence and at the time of sentencing. The law generally favours relatively young or old people to protect them from being in custody for longer periods: see **Rep. v. Ng'ambi [1971-1972] ALR Mal 457**.

Thirdly, Courts will always be slow at imposing long prison terms for first offenders. The rationale being that it is important that first offenders avoid contact with hardened criminals who can negatively affect process of reform for first offenders: see **Rep. v. Chikazingwa [1984-86] 11 MLR 160**.

Fourthly, Courts will have regard to the time already spent in prison by the convict and will usually order that the sentence takes effect from the date of the convict's arrest thus factoring in the time already spent in the prison. Courts will, however,

discount this factor if the time spent was occasioned by the convict themselves, that is, where they skip bail or because of unnecessary adjournments: See **Mulera v. Rep. [1971-1972] ALR Mal 73.**

Fifthly, Courts have also to take into the personal and individual circumstances of the offender as well as the possibility of reform and social re-adaptation of the convict. Arguably, this may relate to the convict's individual circumstances at the time of committing the offence and at the time of sentencing, that is, their "*mental or emotional disturbance*", health, hardships, etc: see **Rep. v. Samson Matimati, Criminal Case No. 18 of 2007 HC (unreported).**

Sixthly, the Court may take into account the manner in which the offence was committed, that is, whether or not (a) the crime was planned, rather than impulsive,

(b) an offensive weapon was used or not, (c) the convict was labouring under intoxication at the time of committing the offence even though intoxication was not successfully pleaded in defence: See **Winston Ngulube and Another v. Rep., MSCA Criminal Appeal No. 35 of 2006 (unreported).**

Seventhly, duress, provocation and lesser participation in the crime may be mitigating factors in certain circumstances.

Needless to say, the list of circumstances, mentioned by counsel, that are aggravating or mitigating is not exhaustive. For example, I see no reason why other factors such as remorse, lack of clear motive, childhood deprivation and abuse, good conduct in prison, effect on the victim (see **Ayami v. Rep. [1990] 13 MLR 19 (SCA)**), likelihood of committing further acts of violence, sense of moral justification and, in appropriate cases, socioeconomic status, cannot be taken into account.

Submission by Counsel for the Convict

Mr. Magombo submitted that several mitigating factors obtain in the present case. He mentioned, among other matters, the fact that the convict is young and a first offender, circumstances of the offence, the long time the convict has already spent in prison, and the convict's capacity for reform.

Convict being a young first offender

Mr. Magombo submitted that the convict was a first-time offender who was of young age at the time of committing the offence and in this regard be referred the Court to

ss. 339 and 340, of the Criminal Procedure and Evidence Code which, in his opinion, directs courts dealing with first time offenders to pass suspended or other non- custodial sentences on such offenders unless there are reasons which justify the imposition of a custodial sentence. To buttress his submissions, Mr. Magombo cited the cases of **Rep. v. Chizumila and others [1994] MLR 288 (HC)**, **Rep. v. Mayeso Sukali and Duncan Chidika, Criminal Case No. 21 of 2011** and **Rep. v. Keke**. In **Rep. v. Keke, HC/PR Confirmation Case No. 404 of 2010 (unreported)**, Mwaungulu J., as he then was, expounded on the principles relevant to sentencing an offender falling in the age range of 19 to 25 years:

“One most critical consideration about the offender is age. For ages between 19 and 25. commission of a crime may be a result of impetuous, immaturity, youth or adventure. A severe sentence may be perceived by a young offender as reflecting a harsh society on which to avenge. Long prison sentences for young persons may actually delay social integration to enable a young life to start a new life and lead a meaningful life. For young offenders, therefore, a short, quick and sharp sentence may achieve the ends of justice and deter future offending.”

Mr. Magombo also referred the Court to page 14 of the trial transcript where the convict's previous good behavior is documented, that is, the convict was a productive member of the community who helped with chores of his community and relatives in the village, and was not in the habit of fighting or disturbing other people.

Intoxication

Mr. Magombo submitted that intoxication is a mitigating factor in respect of offences the commission of which require a particular *mens rea* on the part of the prisoner, for instance murder and he cited **Rep v. Sofasi [1994] MLR 314** as his authority. Mr. Magombo contended that the convict was very much intoxicated at the material time. His contention is based on the testimony of PW1 who told the Court that the convict was “*drunk and still taking kadansana*”. He further submitted that the testimony of PW1 is supported by the testimony of the convict, at pages 15-16 of the Court record, that he had no memory of the incident, and that he was extremely drunk.

Time already spent in custody

Mr. Magombo prayed that the Court should take into account the 11 years that the convict has already spent in prison. He submitted that remand period should be

considered alongside the fact that the convict has suffered various violations of his rights. Specifically, his right to have a trial within reasonable time as he was only tried almost two years after his arrest; his right to human dignity, to fair trial, and to have an effective remedy before the Court as he was from the day of his conviction deprived of an opportunity to make his submission in mitigation until the decision in the **Francis Kafantayeni and others v. The Attorney General, Constitutional Case No. 12 of 2005 (unreported)**.

Capacity for reform

Mr. Magombo next turned to the convict's capacity for reform. He submitted that consideration of the convict's pre and post-conviction conduct clearly demonstrates that he is not only capable of reform but that he has already reformed. There is affidavit evidence that he has learned new skills at Zomba prison. These skills include the fact that he is currently in grade 3 of carpentry studies and he is able to satisfactorily perform carpentry work. Further, the convict has a clean prison record.

Mr. Magombo also submitted that there are several factors which go to show that the convict is unlikely to face problems to re-integrate into society. Firstly, there is no evidence of his inclination to reoffend if allowed back into his society. Secondly, there is sufficient evidence that he has, and still maintains, good relations with members of his family with whom he has maintained contact throughout the years. Thirdly, the entrepreneurial skills acquired whilst in prison also go to show that if reintegrated into society, he is capable of re-adapting and once more becoming a productive person able to support himself and his family.

Submission by Counsel for the State

Mr. Gondwe submitted that in the present case mitigating factors far outweigh aggravating factors. Mitigating factors mentioned by Mr. Gondwe included the fact that the convict is a (a) first offender, (b) young family man. With respect to aggravating factors, Mr. Gondwe asked to the Court to bear in mind three factors, namely, that an innocent life was lost, a weapon was used and the deceased person was killed without any provocation on his part. Mr. Gondwe also submitted that intoxication, either as a defence or a mitigating factor, is not tenable in the present case in that (a) the drinking of alcohol did not lead to a disease of the mind as

required by section 13(2)(b) of the Penal Code and (b) the intoxication was voluntary.

On the basis of his foregoing submissions, Mr. Gondwe was of the view that the facts of the present matter do not warrant a death sentence but rather imprisonment for a period of at least 25 years, to run from the date of the arrest of the convict.

Analysis and Disposition

On the basis of **Kafantayeni Case, Twoboy Jacob v. Republic MSCA Criminal Appeal Number 18 of 2006 (unreported)**, and **Winston Ngulube and Another v. Rep. MSCA Criminal Appeal Number 35 of 2006 (unreported)**, the legal position now is that the Court will not pass a sentence of death in all cases of murder. Each case has to be decided on its own peculiar facts. Where, on one hand, the offence is so gruesome and the aggravating factors far outweigh the mitigating factors the Court may, in exercising its judicial discretion, pass a death sentence. On the other hand, in other cases, depending on the aggravating and mitigating factors affecting the particular cases, the Court may only pass a life imprisonment sentence or a term of imprisonment for a number of years and not the sentence of death: see also **Twalibu Uladi v. Rep., MSCA Criminal Appeal Number 5 of 2008 (unreported)**, and **Rep. v. Sinosi Pasipanadya, Criminal Case Number 41 of 2008(unreported)**.

In **Winston Ngulube Case**, supra, the Supreme Court of Appeal set aside the sentence of death sentence imposed by the High Court for murder and replaced it with one of 20 years imprisonment with hard labour (IHL) after it found that (a) the assault that led to the death of the deceased was not done using dangerous weapon, (b) the quarrel which led to the assault was clearly influenced by intoxicating drink, (c) no clear motive on the part of the Appellants to cause the deceased's death was disclosed by evidence, and (d) there was no evidence that the Appellants were persons of previous bad character.

In **Twalibu Uladi v. Rep.**, supra, the appellant and the deceased had been drinking together. A quarrel ensued after the appellant had apparently accused the deceased of attempting to steal a window frame which was inside the appellant's house but apparently found itself outside. A fight ensued and in the course of the fight the appellant took a panga knife and used it to hack the deceased. The Supreme Court

of Appeal set aside a sentence of death and substituted it with one of 20 years IHL after it observed that that the appellant was :fighting with bare hands and only resorted to the panga knife in the course of the fight.

The High Court in **Rep. v. Sinosi Pasipanadya**, supra, imposed a sentence of life imprisonment on the convict. In that case the convict cut the thumb of his 7 months old child to prevent it from sucking the thumb. The child then started crying. The child's mother quarreled with the convict for what he had done and she went to report to her mother and the village Headman about the incident. This time the convict then took the child to the river and killed it in cold blood.

In the present case, I agree with the Mr. Gondwe that the fact that the convict used a dangerous weapon to repeatedly club to death the Deceased Person without any provocation on the part of the Deceased Person is an aggravating factor. I also wish to concur with both counsel that mitigating factors far outweigh the aggravating circumstances in the case under consideration. It is also significant that over and above the fact that the convict is a young man with no previous conviction who has tremendously reformed during his 11 years of incarceration such that there is a high probability of him seamlessly re-integrating into society upon his release, the circumstances in which the offence was committed strongly suggest that the convict was mentally imbalanced at the material time due to excessive intoxication. Evidence of "*mental or emotional disturbance*", even if it falls short of meeting the respective definitions of "insanity" and "intoxication", may nonetheless make an offender less culpable on a murder charge and this should be considered in mitigation of sentence.

In light of the foregoing and having considered all the circumstances of this case, I am inclined to reduce the sentence. Accordingly, the sentence of death is set aside and replaced by a sentence that would result in the immediate release of the convict, as of 4th March 2015.

Pronounced in Open Court this 23rd day of March 2015 at Blantyre in the Republic of Malawi.

Kenyatta
Nyirenda
JUDGE

The Republic v. Funsani Payenda

IN THE HIGH COURT OF MALAWI

ZOMBA DISTRICT REGISTRY

HOMICIDE (SENTENCE REHEARING) CAUSE NO 18 OF 2015

CORAM: HON. JUSTICE R.E. KAPINDU

: Mr. Malunda, Counsel for the State

: Mr. Nkosi, Counsel for the State

: Mr. Katundu, Counsel for the defendant

: Mr. Nkhwazi, Official Interpreter

: Mrs. Mboga, Court Reporter.

RULING

KAPINDU, J

1. The 11th of April 2002 was a very dark day in the Mphepo household. In the early hours of that day, just before dawn, Mrs. Leah Mphepo, wife to

His Worship Mr. David Kenneth Mphepo (retired), was murdered under very aggravated violent circumstances. She was shot dead inside her own house by members of a criminal gang of robbers. She was shot using her own family gun. The gun was grabbed away from her by one member of the gang, which he in turn used to shoot her dead at close range. She had pulled out the gun after realising that her household had been invaded by criminals. Her reaction when her house was invaded was typical of the law-abiding citizen that she was, not given or disposed to violence. She pulled her husband's licenced gun and opened fire twice inside the house. At first she shot into the air and then she shot again into the roof inside the house in order to scare the criminals away rather than aiming directly at them.

2. For all we know, the deceased would have been well within her rights if she had shot directly at them, even if it meant killing them, in order to defend herself, her family and her property. Her decision not to shoot directly at them is probably the reason some of them are alive today seeking to have their punishment for killing her, reduced. They could possibly have been lawfully killed in self-defence that night.
3. Mrs. Mphepo was killed in front of her own children on that fateful night. She was shot in the abdominal region. Immediately after being shot, she went out of the house crawling and crying in pain, crying out in agony to her children, telling them that she was dying. Dying indeed she was. It is difficult to imagine many events that can be as traumatising to a child as to see her own mother being murdered before her very eyes? The late Mrs. Mphepo managed to get to the servants' quarters where she collapsed and died. She was severely bleeding from the abdominal region.

4. The evidence of PW1 during the trial proceedings, Mary Kuthyola, the deceased's daughter then aged 17 years old, who was in the house that night and witnessed all this unfold before her very eyes, is heartrending. It must have been very traumatising for her to narrate the above facts in court, thus reliving the vivid memories of that dark April day. Her evidence was actually corroborated by the sworn evidence in court of the 4th accused person in that case, one Ernest Adamu. Mr. Adamu stated in his evidence that the deceased shot in the air, confirming the evidence of PW1. He stated that it was dark in the house. He then mentioned that one of his accomplices, a boy whose name he did not provide, silently went behind her back in the dark, grabbed the gun away from the deceased and gave the gun to one Teddy. He said it was this Teddy who shot the deceased dead. Apparently Teddy was never found.
5. On that fateful night, the family had secured the house and retired to bed. There were 7 people in the house including Mrs. Mphepo, the deceased. At around 2 am, the family was woken up by a big bang on the front door of the house. The house had just been broken into by a gang of criminals, about 15 to 20 of them. Some had Panga knives whilst others carried stones. Simultaneously, as some of the robbers and burglars entered the dwelling house, other members of the gang who had remained outside were busy pelting the windowpanes with stones, breaking them up. It was at this point that Mrs. Mphepo pulled the gun with the ultimate tragic consequences as described above.
6. At the material time, His Worship Mr. Mphepo had travelled to Mangochi for a Workshop. The shock and horror that must have stricken him upon receiving the news of the death of his dear wife, and the circumstances of her death, is difficult to imagine.

7. The late Mrs. Mphepo's life was taken away at the prime of her life – she was only 37 years of age. Such is the horrific picture that characterises the instant case. This was a living nightmare for the rest of the family.
8. As if the murder of the deceased was not bad enough, the gang proceeded to take whatever they could lay their hands on in the house and then fled. Typical heartless criminals.
9. I restate these facts in this way so that we must all be reminded that today is not just another occasion for the defendant herein, Mr. Funsani Payenda, to have his day, another day, in Court. It is also another posthumous occasion for the deceased and also for the victimised family to have this matter subjected to judicial consideration and determination. It is an occasion for all of us to reflect on the tragedy that befell the deceased and the entire Mphepo family on that night as a result of violent criminal conduct, and for this Court to make a pronouncement on the consequences of that criminal conduct. Criminal justice means as much, if not more, to the victim as it does to the suspect or the proven perpetrator – such as the convict in the instant case.
10. The accused person herein was one of the people that were arrested by the Police on suspicion of having committed the gruesome offences herein. The others were Sakondwera Eleneleyo, Charles Makaika, Felani Chidede, Ernest Adamu, Kumbukani Mateyu, Lewis Bamusi and Kennedy Musende. They were charged with the offences of Armed Robbery contrary to Section 301 of the Penal Code (Cap 7:01 of the Laws of Malawi) and Murder, contrary to Section 209 of the Penal Code. Trial was by jury. The jury convicted Sakondwera Eleneleyo, Ernest Adamu, Funsani Payenda (the convict herein) and Lewis Bamusi guilty on both

counts. They were all sentenced to 25 years Imprisonment on the armed robbery charge (apart from Ernest Adamu who was sentenced to 20 years following a guilty plea of the armed robbery charge); whilst on the murder charge, they were all sentenced to suffer death as mandatorily required by law at the time. The death sentences were later commuted by the President to life sentences.

11. It is in respect of the mandatory imposition of the death penalty on the convict herein that this matter has now come up before this Court for sentence rehearing. This follows the decision of the High Court Sitting on a Constitutional Cause under Section 9(2) of the Courts Act (Cap 3:02 of the Laws of Malawi) in **Kafantayeni & Others vs Attorney General**, Constitutional Cause No. 12 of 2005 which declared all mandatorily imposed death sentences for murder to be unconstitutional and invalid.
12. The convict herein seeks to have his sentence significantly reduced. Indeed he prays that he be given a sentence of not more than 14 years imprisonment. He anchors his argument on the ground that he was wrongly convicted of the offence of murder. He argues that the only reason for his arrest, prosecution and subsequent conviction for the offences herein was that he was found in possession of items that were stolen from the Mphepos on the fateful night.
13. The defendant states that he was a successful businessman operating a shop in Lilongwe City. He states that he surrendered himself to the Police after he heard that they were looking for him. The evidence further shows that the Police had earlier arrested his wife as bait. She was immediately released after he surrendered himself to the Police. This practice of arresting spouses, children or other close relatives as

baits in order to secure the arrest of the actual suspect is most unfortunate and a flagrant abuse of human rights. I hope this practice has since stopped in the reformed Police considering that this happened over eleven years ago.

14. Upon his arrest, the defendant explains that he told the police everything that he knew in connection with the offence that had been committed. He told them the names of the persons who sold him the stolen items. He states that he was later told they were convicted and imprisoned for the theft of the stolen items but that they were never charged with the murder of the deceased like he was. This claim went undisputed by the State. The defendant further states that none of the other suspects involved in the crime mentioned his name and none knew him until they met at Court. Again this claim went undisputed.

15. It was the defendant's further argument that considering that he was running a successful shop, he would have had no reason to go out at night in gangs carrying pangas and breaking into people's houses. Still though, these explanations notwithstanding, we must reckon with the fact that the jury convicted him for both armed robbery and murder all the same; and sentenced him to a long 25 year sentence for armed robbery and the ultimate punishment of death for murder, as mandatorily required by law then.

16. His prayer before this Court is for a sentence of not more than 14 years imprisonment. This, according to the defendant, will be in-keeping with the offence of receiving stolen property which, according to the defendant's Counsel, he ought to have been charged with and perhaps convicted of.

17. I took up this issue with the defendant's Counsel immediately. I reminded Counsel that this is not an appeal against Conviction. This Court is not here to re-open the issue or issues of liability. The defendant herein was found guilty of murder and armed robbery. He remains guilty for both crimes. He will go out of this sentencing Court still guilty of murder and armed robbery. That I must make clear. Indeed, State Counsel shared the Court's concerns, and rightly so.
18. Examining the defendant's argument above, one is left with the clear impression that he felt aggrieved by the verdict. It appears though, that there was no appeal against the conviction. I am not sure why.
19. Before I revert to the remaining defendant's main arguments in this case, I must mention something else. In his "Affidavit Evidence on Sentence Rehearing", deponed by the defendant's Counsel Mr. Katundu, Paragraph 6 thereof refers this Court to the "Expert Declaration" by Professor Babcock, Professor Schabas and Professor Christof Heyns, the United Nations Special Rapporteur on Extra-Judicial, Summary and Arbitrary Executions.
20. During hearing, I started by pointing out that I personally knew all the above-mentioned professors of international law and that I knew them to be highly distinguished and leading global experts on this matter, whose opinions, if properly laid before the Court, would most probably be of good use to the Court. However, I expressed concern over the status of either the professors themselves as participants in these proceedings or the status of the Expert Declaration that they have made. Are the professors herein participating in these proceedings as *amici curiae*? Or are they seeking to participate as expert witnesses? In that vein, is the Declaration perhaps to be treated as an expert opinion? Defence

Counsel, Mr. Katundu, had no clear answers to these questions. He hesitated and equivocated in his response. He rested on saying the Court should accord the Expert Declaration the status of a Journal Article. I enquired why the “Expert Declaration” carried a Malawi Government Coat of Arms; and specifically mentioned that it was for use in the Sentence Rehearing Process herein if it was only intended to be treated as a journal article for general scholarship purposes. Indeed, if the Declaration were to be treated as a scholarly journal article, it ought to have been properly referenced in the defendant’s submissions on resentencing rather than exhibited to the defendant’s affidavit as part of evidence, as is the case in the instant matter.

21. I find that the Expert Declaration is not rightly lodged with this Court. If the Expert Declaration were to be rightly before this Court, the Experts themselves should have been accorded formal status first. They could for instance have applied to be admitted as *amici curiae*, which they did not. As far as I am concerned, I see no reason why such an application could not have been accepted by the Court.

22. In the alternative, the defendant could perhaps have applied to have the professors admitted as expert witnesses, although I am substantial doubt whether this could technically have been the right thing to do, i.e. admitting someone, irrespective of their credentials, to specifically address this Court on points of law that can already be competently raised by defence Counsel from the Bar, and doing this in the capacity of an expert witness. I would have been more inclined to accept them as *amici curiae*. Short of the experts being admitted as *amici curiae*, what the defendant’s counsel could have done was to incorporate the arguments in the Expert Declaration as part of his submissions.

23. As it is I cannot use the Expert Declaration in these proceedings, and I so order.

24. I pause there to provide an outline of the main factors to be taken into account when sentencing convicts in capital offences. I must acknowledge and greatly appreciate the impressive research and effort put into preparing submissions on the part of both Counsels for the State and for the defendant. In particular, the submission from defence Counsel is extensively researched, with authorities from all over the world, garnered from domestic courts, regional and international tribunals; and detailing a comprehensive catalogue of factors that this Court has to take into account in these sentence rehearing proceedings. I have read through both submissions. They have been very helpful to the Court. I am particularly thankful to all Counsel in this case.

25. In my considered view, the decision of Kenyatta Nyirenda, J in the case of **Republic vs Margaret Nadzi Makolija**, Homicide (Sentence Re-Hearing) Case No. 12 of 2015, has properly summarised the important considerations that have to be taken into account when sentencing convicts in murder cases. The following considerations have been outlined:

1. The maximum punishment must be reserved for the worst offenders in the worst of cases.
2. Courts will take into consideration the age of the convict both at the time of committing the offence and at the time of sentencing. Young and old offenders are preferred to receive shorter sentences.
3. Courts will always be slow in imposing long terms for first offenders, the rationale being that it is important

that first offenders avoid contact with hardened criminals who can negatively affect process of reform for first offenders.

4. Courts will have regard to the time already spent in prison by the convict and will usually order that the sentence takes effect from the date of the convict's arrest thus factoring in time already spent in prison. Courts will however discount this factor if the time spent was occasioned by the convict themselves, that is, where they skip bail or because of unnecessary adjournments.
5. Courts also have to look into the personal and individual circumstances of the offender as well as the possibility of reform and social re-adaptation of the convict. Arguably, this may relate to the convict's individual circumstances at the time of committing the offence and at the time of sentencing, that is, their "mental or emotional disturbance", health, hardships, etc. The learned Judge also quoted the case of **Republic vs Samson Matimati**, Criminal Case No. 18 of 2007 (unreported) in support of this proposition.
6. The Court may take into account the manner in which the offence was committed, that is, whether or not (a) it was planned rather than impulsive, (b) an offensive weapon was used; (c) the convict was labouring under intoxication at the time of committing the offence even though intoxication was not successfully pleaded in defence;

7. Duress, provocation and lesser participation in the crime may be mitigating factors in certain circumstances.
 8. Remorse, lack of clear motive, childhood deprivation and abuse, good conduct in prison, effect on the victim, likelihood of committing further acts of violence, sense of moral justification, and in appropriate cases, socioeconomic status;
 9. The learned Judge concluded that this list of aggravating and mitigating circumstances is not exhaustive.
26. Addressing mitigating factors that the Court must take into account in the instant case, Counsel Katundu for the defendant, in the “Affidavit Evidence on Sentence Rehearing”, deposes that the defendant herein played a minor role in the offence, that he was not present at the scene of the crime, and that he has since reformed. Counsel has exhibited to his affidavit a Report from the Prison Chaplaincy Office dated 24 February 2010 addressed to the Officer-in-Charge of Zomba Central Prison, pleading that a number of prisoners serving life sentences, including the defendant herein, had really shown that their behaviour had changed and that they were helping others to change their behaviours as well. This, according to the Prison Chaplaincy, was demonstrative of the fact that they were leading by example. The Chaplaincy therefore pleaded that their life sentences be commuted to term imprisonments. The letter was Exhibited and marked “GMK4”.
27. Counsel also sought to rely on the statement of Ignatius Matiya, serving as Village Headman Chalera of T/A Mwambo in Zomba District, which is the defendant’s home village.

28. In his statement, Mr. Ignatius Matiya stated that the defendant was:

Generally a good boy. He did not engage in alcohol or drug abuse. As Chief, he used to respect me, that is why I still inquire about his well-being in prison from his parents.

29. Then, curiously, in the next paragraph, Mr. Matiya continued to write:

By the time of his arrest in Lilongwe, I had not been crowned as Village Headman but I did hear about his arrest although I did not know the exact reason or what happened.

30. He then stated that if released, he would happily welcome the defendant back home to the village, and would sit down with him to ensure this never happens again.

31. I must immediately mention that I took issue with the obvious inconsistencies in this statement. The maker of the Statement, Mr Ignatius Matiya (Village Headman Chalera), was not called to give oral evidence and be subjected to cross-examination. Counsel could not explain to the Court how long the defendant had lived in Lilongwe after leaving his village and whether the Village Headman herein was indeed competent to testify on the behaviour of the defendant at the time of his arrest in 2002 or conviction in 2004. Even worse was the clear contradiction in the Statement. The Village headman stated that the defendant respected him “as Chief”, and immediately thereafter also stated that he was not yet Village Headman (Chief) when the offence was committed. So when was the defendant respecting him as Chief?

32. I find the statement to be highly lacking in credibility and I ignore it.

33. Defence counsel has further provided a catalogue of other factors that he argues are mitigating factors for the defendant in this case. These are:

(a) That the convict played a minor role in the offence;

Court's observation: The court's comment on this, is that this is indeed a factor that the court must, in principle, take into account. In the instant case, I am aware that the verdict was a jury verdict. As such, reasons for the convictions were not proffered. It is not my place to fault or uphold the finding of the jury. However, having examined the evidence, I must state that there is indeed no indication as to the defendant's actual involent or participation in the crime, apart from evidence that he was found in possession of goods that were stolen from the Mphepo's home. Apart from that, unlike the other persons that were convicted together with him, his name is not mentioned by any of the other accomplices. Evidence of his direct participation is rather cloudy, but as I said, this should not suggest that I wish to indirectly pronounce him not guilty. As I mentioned earlier, he remains a murder convict. However, I agree with counsel that this is a factor that I should take into account when passing sentence.

(b) That the convict is a first offender;

Court's observation: This is a well-known mitigating factor. There was and is no evidence of the defendant's previous conviction. He is a first offender. That must count in his favour.

(c) That the convict was young at the time of the commission of the offence;

Court's observation: At the time of the commission of the crime, the defendant herein was 25 years old. He was indeed a young offender, and this is a factor that needs to be taken into account in his favour when sentencing.

(d) That the convict co-operated with the police by surrendering himself to the police;

Court's observation: The evidence indeed suggests that the defendant surrendered himself to the police, but again there is evidence that the police had taken his wife into custody as bait – a practice that is condemnable. However, given this scenario, it is not entirely clear whether indeed he surrendered himself voluntarily in order to cooperate, or he did so because his wife had been held by the police. Be that as it may, since we have a situation of doubt, I must resolve that doubt in the defendant's favour and will therefore proceed to accept that he cooperated with the police.

(e) That the prison conditions he has thus far been subjected to in prison constitute cruel, inhuman and degrading punishment

Court's observation: It is true that in **Gable Masangano vs Attorney General**, Constitutional Case 15 of 2007 (HC, PR) (unreported), it was held that conditions in our prisons amount to cruel, inhuman and degrading treatment or punishment. However, this must be balanced up with the necessity to ensure that offenders are punished in order to achieve the various purposes of punishment, i.e *rehabilitation, deterrence and retribution*; and in appropriate cases *incapacitation*. The rights and interests of the offender in prison must be balanced up with the rights and interests of the victims and society at large. When these are balanced, my finding is that the balance tilts in favour of ensuring that offenders who deserve terms of imprisonment should serve their terms whilst the State, at the same time, takes progressive steps to ensure that prison conditions are improved. I expect that an explanation is in place as to the steps that the State took and has taken in giving effect to the court's directions in the **Masangano case**, including explanation for any failures to act thereon.

Having said this, each case on this point must be determined on its peculiar facts. Thus there would be cases where, for instance, the court may take cognizance of our judicial responsibility to ensure that overcrowded prisons are decongested, and pass an appropriate

sentence aimed at contributing towards that goal, whilst at the same time ensuring that the offender is punished in order to fulfil the various internationally accepted punishment aims and purposes.

(f) That he has demonstrated capacity to reform as evidenced by the recommendation from the Prisons Chaplaincy Office;

Court's observation: I have indeed examined this and noted that such a letter from the prison Chaplaincy Office is in place. I accept the letter as part of the evidence on sentencing in this matter. However, I wish to make one general observation to the Prison Chaplaincy Office in respect of the said letter. The prison Chaplaincy wrote one general letter concerning 90 life sentence inmates in respect of whom the Chaplaincy was recommending that their terms be converted to fixed term sentences. The prison Chaplaincy painted all the 90 inmates with one brush. The Chaplain stated that all of them had improved in their behaviour and that "some of them are now Pastors, Sec. School Teachers, and Deacons, Church Elders and are indeed helping others to change their behaviour, completely leading by example." The letter is not specific as to who among these had reformed into what. So we do not know who, for instance, had become a Pastor, who was a Deacon, who was a Teacher, etc. The letter says "some of them", meaning it is not all of them.

The Prison Chaplaincy Office should be reminded that it is part of the broader justice system in this country. Each offender in this system is an individual worthy of individualised attention and treatment. The Chaplaincy Office should ensure that it makes time to produce individualised reports for each offender for whom a recommendation is being made, or if under one report, there should be specific narrative for each offender, even if brief. A blanket letter however that leaves little information for individualisation, such as the present one, is not sufficiently satisfactory.

Indeed, the reason we are separately holding sentence rehearing for each individual prisoner in these category of cases is to ensure that the sentencing is individualised. The Prison Chaplaincy Office should be able to do the same. If it is overwhelmed, the State must ensure that the office is sufficiently supported to properly discharge its duties.

(g) That he has demonstrated potential for successful reintegration into society;

Court's observation: This in part hinges on what I have already mentioned in (f) above. However, the other evidence that the defendant seeks to rely on in this regard is the one from Village Headman Chalera that I have ignored. To that extent, I make no further comment on this head.

(h) That the convict's personal circumstances are defined by hardship as he came from a poor background and could only proceed up to standard 6 before he was forced to drop out of school to support his family. That after leaving school, the convict worked as a domestic worker, managed to raise capital which he in turn used to develop a successful business that he was operating until his arrest and subsequent imprisonment and conviction.

Court's observation: This history of poverty, in particular regard being had to the nature of the poverty described; and as much as it is deplorable that this country still faces these levels of poverty; I hold the view this nature of poverty and the circumstances narrated by the defendant are not sufficiently peculiar to move this Court to conclude that they rendered the defendant so vulnerable, pliable and easily disposed to a life of crime that the normal person living in Malawi. So many people who are under similar circumstances (in fact the overwhelming majority of those in similar circumstances in my view), lead crime-free lives. I will not consider this in mitigation.

(i) That the convict is a person of good character.

Court's observation: This, again is something we have already addressed.

34. The State has responded to the mitigating factors raised by the convict. Firstly, the State agrees with the defendant's Counsel that the defendant convict does not deserve the death penalty, arguing that whilst the killing of the deceased was considerably brutal, the defendant herein cannot be described as belonging to the "rarest of the rare" categories.
35. The State also agrees that the Applicant was a young man, aged 25 at the time of commission of the offence. This, the State concedes, is a mitigating factor.
36. The State further concedes that the fact that the defendant was a first offender, and that for 25 years he had led a crime-free life, entailed that he deserves leniency when sentencing.
37. The State further states that there is no record that the defendant herein jumped bail or that he contributed in any way towards delaying the trial. This therefore also needs to be considered in his favour when meting out the sentence.
38. However, the State argues that the Court should tread carefully when determining whether the convict can possibly reform and readapt into society. Counsel for the State cited the case of **The State vs Alex Njoloma**, Homicide (Sentence Re-Hearing) Case No. 22 of 2015, where my learned brother Judge, the Honourable Justice Kalembera, observed that:

I remind myself that this is not a parole hearing. This is a resentencing hearing, meaning that I must at all times keep in mind and remind myself that what is expected of the court is to consider what would have

been an appropriate sentence at the time the convict was convicted. What would have been the primary considerations at the time? Though the court cannot pretend that the circumstances of the convict might have changed, the court must not behave as if it is conducting a parole hearing and must at all times avoid turning the re-sentencing hearing into a parole hearing. If it were a parole hearing, before the court, then the court would have been obliged to consider, inter alia, the good behaviour of the convict in custody, the views of the Prison Chaplain, the views of his family and community, as well as his health. These considerations would have been paramount.

39. The learned Judge made similar observations in The **State vs Laston Mukiwa**, Homicide (Sentence Re-Hearing) Case No. 21 of 2015. Counsel cited these decisions and emphasised that the reasoning in those decisions was proper and apposite.

40. I must mention that I highly appreciate the reasoning of my brother Judge the Hon. Justice Kalemba in the two above-cited decisions. The reasoning is indeed sound. I however seem to hold a different view.

41. I must begin by pointing out that from my jurisprudential analysis there is no domestic judicial consensus on the point taken by Kalemba J. My brother Judge Kenyatta Nyirenda J, for instance, as shown above, has held that one of the factors that may be taken into account in sentencing offenders under the set of sentence rehearings that the High Court is currently conducting, is the prisoner's "good conduct in prison." However one looks at Kenyatta Nyirenda, J's position, it seems clear to

me that he holds the view that the conduct of the defendant in prison, after the crime was already committed, is relevant for sentencing at any stage.

42. It is important to point out that Malawian Courts have stated that when sentencing, it is appropriate that the nature of the crime, the circumstances of the crime, the public interest and the individual circumstances of the crime must be taken into account.
43. As shown above, in the case of **Republic vs Margaret Nadzi Makolija**, Kenyatta Nyirenda J held that Courts also have to look into the personal and individual circumstances of the offender as well as the possibility of reform and social re-adaptation of the convict. He mentioned that this may relate to the convict's individual circumstances "**at the time of committing the offence**" and "**at the time of sentencing**", that is, his "mental or emotional disturbance, health, hardships, etc".
44. Mwaungulu, J (as he then was) has also oft-emphasised the point that one of the major factors to be taken into account when sentencing are the individual circumstances of the offender. For instance, in **Republic v Pose and another** [1997] 2 MLR 95 (HC), at 97, he stated that:

Firstly, that the sentence passed for a particular offence must compare with sentences imposed on offences more or less heinous. Secondly, the court has to look at the instance of the offence before it and decide whether it is such that deserves heavy punishment... The court has also to look at the circumstances in which the offence was committed. The sentence passed must be just to the offender. The

court must consider the personal circumstances of the offender.
The court has also to consider the effect of the crime on the
victim. The criminal law is publicly enforced to prevent crime.
Sentences must be passed with this in perspective.

45. Also see Mwaungulu, J's remarks, in similar terms, in the cases of **Republic vs Chisale** [1997] 2 MLR 228 (HC); and **Republic vs Chizumila and others** [1994] MLR 288 (HC), amongst many others.

46. In **Kafantayeni vs Attorney General**, the Court, concerning the issue of resentencing in the instant category of cases, stated that:

We make a consequential order of remedy under section 46 (3) of the Constitution for each of the plaintiffs to be brought once more before the High Court for a Judge to pass such individual sentence on the individual offender as may be appropriate, having heard or received such evidence or submissions as may be presented or made to the Judge **in regard to the individual offender and the circumstances of the offence.** (My emphasis)

47. All these authorities emphasise the centrality of taking into account the individual circumstances of the defendant when sentencing. The previous sentence having been declared constitutionally invalid, the valid sentencing is taking place now.

48. The precise issue of whether, when an initial sentence has been invalidated after a substantial passage of time since conviction, post-

conviction factors of the convict must be taken into account on resentencing, recently came up for determination before the US Federal Supreme Court in the case of **Pepper vs United States**, 131 S. Ct. 1229 (2011). The Court was unanimous, with Justice Sotomayor delivering the decision of the Court. The decision is particularly instructive. Considering the dearth of comparative jurisprudence elsewhere, passages from the **Pepper** decision are quoted *in extenso* in order to provide a clear picture of the context and texture of the decision. The learned Judge began by pointing out that:

It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.” *Koon v. United States*, 518 U. S. 81, 113 (1996). Underlying this tradition is the principle that “the punishment should fit the offender and not merely the crime.” *Williams*, 337 U. S., at 247; see also *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U. S. 51, 55 (1937) (“For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender”). Consistent with this principle, we have observed that “both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge

could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.” *Williams*, 337 U. S., at 246. In particular, we have emphasized that “[h]ighly relevant—if not essential—to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant’s life and characteristics.” *Id.*, at 247. Permitting sentencing courts to consider the widest possible breadth of information about a defendant “ensures that the punishment will suit not merely the offense but the individual defendant.” *Wasman v. United States*, 468 U. S. 559, 564 (1984).

49. The Court proceeded to hold that:

[W]e think it clear that when a defendant’s sentence has been set aside on appeal and his case remanded for resentencing, a district court may consider evidence of a defendant’s rehabilitation since his prior sentencing and that such evidence may, in appropriate cases, support a downward variance from the advisory Guidelines range.

50. The Court went on to say:

As the original sentencing judge recognized, the extensive evidence of Pepper’s rehabilitation since his initial sentencing is clearly relevant to the selection of

an appropriate sentence in this case. Most fundamentally, evidence of Pepper's conduct since his release from custody in June 2005 provides the most up-to-date picture of Pepper's "history and characteristics." §3553(a)(1); see *United States v. Bryson*, 229 F. 3d 425, 426 (CA2 2000) ("[A] court's duty is always to sentence the defendant as he stands before the court on the day of sentencing").

51. The Court then wound up its decision on this point by pointing out that:

Pepper's post-sentencing conduct also sheds light on the likelihood that he will engage in future criminal conduct, a central factor that district courts must assess when imposing sentence...Finally, Pepper's exemplary post-sentencing conduct may be taken as the most accurate indicator of "his present purposes and tendencies and significantly to suggest the period of restraint and the kind of discipline that ought to be imposed upon him." ...Accordingly, evidence of Pepper's post-sentencing rehabilitation bears directly on the District Court's overarching duty to "impose a sentence sufficient, but not greater than necessary" to serve the purposes of sentencing... In sum, the Court of Appeals' ruling prohibiting the District Court from considering any evidence of Pepper's post-sentencing rehabilitation at resentencing conflicts with longstanding principles of federal sentencing law

52. Todd Haugh, in a scholarly piece titled “Sentencing the Why of White Collar Crime”, 82 *Fordham L. Rev.* 3143 (2013-2014) states, at 3148, that:

Ultimately, this Article concludes that judges’ search for the why of...crime, which occurs primarily through the exploration of neutralizations that defendants employ, is legally and normatively justified. While there are significant potential drawbacks to these inquiries, they are outweighed by the benefits of increased individualized sentencing, the importance of which has been recently reaffirmed by the U.S. Supreme Court in *Pepper v. United States*. And, although counterintuitive, neutralization inquiries may even disrupt the future commission of white collar crime. Because when judges inquire into how defendants neutralize their criminal behavior, but then reject those neutralizations as sentencing mitigators (or treat them as aggravators), this lessens the ability of future potential offenders to use those neutralizations to free themselves from the moral bind of the law. Yet for these benefits to be realized in a fair and transparent way, judges must be better educated as to the etiology of white collar crime, understand how neutralizations are used by defendants, consider the costs and benefits of basing sentencing decisions on defendants’ neutralizations, and explain their decision-making processes.

53. He continues to state, at page 3177, that:

Pepper provides strong doctrinal support for judicial inquiry into offender neutralizations. Most fundamentally, as the *Booker-through- Pepper* line of cases explains, courts now have almost unrestrained discretion to impose a sentence. This means there is no more forced "rigidity" in sentencing.

54. Finally, at page 3179, Todd Haugh states that:

Justice Sotomayor began her analysis by recognizing the traditional right of each defendant to be sentenced as an individual. Underlying this tradition, she found, was the principle that punishment should be tailored to the offender, not just the crime. This principle, which "justice generally requires," stems directly from the Court's prior rejection of determinate sentencing schemes and is consistent with the now widely accepted view of sentencing as being "most just" when it contemplates both the offense and the offender.

55. All in all, it is my view that the reasoning in the American **Pepper** decision is particularly compelling, more so considering our own approach in Malawi which has been to emphasise the principle that sentencing that also take firmly into account the individual circumstances of the offender. **Pepper** is very instructive for comparative jurisprudential purposes because it is a decision of the highest Court of a comparable and major common law-based jurisdiction, the USA, which decision is completely on point in relation to the question we are

dealing with here. We must indeed recall that in the USA, they do have a very comprehensive parole system, and yet the Federal Supreme Court in Pepper did not consider that consideration of post-conviction circumstances by the Court on resentencing, which it highly advocated, would be akin to conducting a parole hearing.

56. This is also more so considering that probably, among the various purposes of punishment such as retribution, deterrence, incapacitation, and rehabilitation; rehabilitation is the most important.

57. Neither the Constitution of Malawi, the Penal Code nor the Criminal Procedure and Evidence Code comes out clearly on the purposes of punishment. Domestic jurisprudence on the point is unsettled and it does not seem to create a hierarchical structure, in terms of importance, of the purposes of punishment. We must therefore turn to applicable norms of public international law for guidance.

58. According to Article 10 of the *International Covenant on Civil and Political Rights*, “The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.”

59. Thus according to the ICCPR, which Courts in Malawi have held to form part of our domestic law, it is therefore clear that the prime purpose for punishment is rehabilitation of the offender.

60. The Office of the UN High Commissioner for Human Rights (OHCHR), in its book *Human Rights and Prisons: Manual on Human Rights Training for Prison Officials*, (United Nations New York And Geneva, 2005), has equally emphasized this point, stating, at page 97, that:

The main aim of the prison authorities in their treatment of prisoners should be to encourage personal reformation and social rehabilitation. The purpose of the prison regime should be to help prisoners to lead law-abiding and self-supporting lives after their release.

61. The OHCHR cites, in support of this proposition, Article 10(3) of the ICCPR and Articles 65 and 66 of the UN *Standard Minimum Rules for the Treatment of Prisoners*.
62. The point to be taken is that since one of the things that a Court does in arriving at a particular sentence is to predict the convict's capacity to, and prospects of, reform and social rehabilitation, when a sentence has been set aside after a significant passage of time as in the present case, the Court has the advantage of not simply predicting future post-conviction behavior, but examining an existing significant post-conviction behavioral record of the convict. As the Court observed in Pepper, the likelihood that the offender will engage in future criminal conduct is a central factor that courts must assess when imposing sentence.
63. Further, the idea that the Court should close its judicial eyes to any development related to the defendant, that is relevant for sentencing from the date of conviction, runs into some conceptual difficulties. During argument, I asked State Counsel whether, if a convict became terminally ill just before being sentenced, that would, or ought not to affect, sentencing. I pointedly asked whether the Court ought to close its eyes to the condition and, if it were originally minded to pass say a

harsh 50-year prison sentence with hard labour, it ought to proceed and mete it out all the same. Counsel responded that the Court would have to take into account the terminal illness as a relevant factor when sentencing. He proceeded to state, however, that that would be an exceptional case. The impression that State Counsel therefore gives is that he would pick and choose instances in which post-conviction circumstances may be considered, and those where they should not be considered. This is obviously problematic.

64. There is another way of looking at the consideration of post-conviction circumstances. One may look at the negative dimension. One may conceive of a convict who was sentenced to death in 2004 and was, at the time of committing the offence, generally of a good disposition and having a wide array of mitigating factors, that would have suited him to a much shorter sentence but for the mandatory nature of the death sentence then. If at the time of the sentence rehearing post the **Kafantayeni decision**, he has now gone rogue, becoming a very disturbing and violent character in prison who is a menace to the whole prison establishment, should the Court close its eyes to this bad development, and give a light sentence as might have been imposed in light of the circumstances as they were in 2004, that might now lead to the immediate release of such a murder convict? In my view, it would not be wise for the court to close its judicial eyes to the post-conviction record of the defendant, mete out a relatively light sentence and let such a dangerous criminal loose so soon onto the free society on the basis that the Court was tied to consider only the favourable circumstances as they obtained in 2004. The parole process, where available, would be no answer in such a scenario. It seems to me in justice, that the answer ought to be that such a prisoner should be given a much longer

sentence. This would only be possible where the Court accepts to examine post-conviction circumstances.

65. As is already apparent from Paragraph 33 above, I have therefore taken post-conviction circumstances of the defendant herein, Mr. Payenda, into account in arriving at the sentence herein. I affirm the principle articulated in **Pepper**, that the court's duty is always to sentence the defendant as he or she stands before the court on the day of sentencing. Evidence of Mr. Payenda's rehabilitation since his initial sentencing is very relevant to the selection and imposition of an appropriate sentence in this case. Evidence of Mr. Payenda's conduct in custody since his conviction in February 2004 provides the most up-to-date picture of Mr. Payenda's individualised history and characteristics relevant for sentencing.
66. Having said all this, the question now is what, then, is the appropriate sentence for the defendant herein for the murder that he committed on 11 April 2002? Having regard to all that I have said above, it is this Court's overarching duty to impose a sentence sufficient, but not greater than necessary to serve the purposes of sentencing. Prime among these purposes are reformation or rehabilitation of the offender and deterrence of the offender himself and also of would-be offenders.
67. I mentioned at the beginning how gruesome this murder was. I stressed that the murder was committed in highly aggravated circumstances. However, I have also outlined a series of mitigating factors relating to the defendant that I have found acceptable. I must in particular, whilst re-affirming all my findings on mitigation above, point out the lack of evidence of the defendant's direct participation in the crime, in contrast with the remainder of his co-convicts.

68. The maximum sentence for murder under Section 210 of the Penal Code is death or life imprisonment. I bear that in mind. I am also mindful that the death sentence should only be meted out in cases that fall in the category of “the rarest of murder cases”, or put differently, the category of the “worst of murder cases”. I take the view that we must, in this regard, be using the “category of cases” for a test, and not the fictitious individual test of the “worst offender” – who is, according to the common myth, “yet to be born” – which individual test effectively makes it illogical for the maximum penalty to ever be imposed. Parliament did not prescribe the maximum penalties in legislation for decorative purposes, or as conceptual fictions, or as mere illusory punishment signposts. Parliament means what it says and it meant what it said in Section 210 of the Penal Code. It meant for those penalties to be applied in appropriate cases and not to be theorised into non-existence.

69. In the instant case, and considering lack of evidence of the defendant’s direct participation in the actual execution of the crime; I find that the defendant herein does not fall in the category of the “worst of murderers.” He does not deserve the death penalty. Once again, the life sentence is an alternative maximum penalty which is arguably a lesser penalty. My view is that the offender who must be given a life term should be an offender who only marginally fails to reach the threshold of the category of the “worst of murderers.” Again I find that the defendant herein is outside that category. He has so many mitigating factors in his favour.

70. That being said, murder, perhaps with the exception of genocide, is the most serious offence known to our law. The punishment that this Court metes out must also reflect this fact. If we do not do that, as Chombo J

astutely observed in the case of **Republic vs Masula & others**, Criminal Case No. 65 of 2008, members of the public could start asking themselves whether "something has gone wrong with the administration of justice."

71. All in all, I am of the opinion that a sentence of 20 years imprisonment with hard labour, effective from the date of arrest, is appropriate in the instant case and I so order. This sentence is to run concurrently with the sentence that was imposed on him for armed robbery in 2004.

72. The defendant has the right to appeal against this sentence to the Supreme Court of Appeal within 30 days from the date hereof.

Made in Open Court at Zomba this 23rd Day of April 2015

RE Kapindu, PhD

JUDGE

The Republic v. Lackson Dzimbiri

JUDICIARY

IN THE HIGH COURT OF MALAWI PRINCIPAL REGISTRY

HOMICIDE (SENTENCE RE-HEARING) CAUSE NO. 4 OF 2015

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Gondwe, Senior State Advocate, for the State

Magombo, Senior Legal Aid Advocate, for the convict

Ms. Emily Chimang'anga, Court Clerk

JUDGEMENT

Introduction

The case of the Lackson Dzimbiri [hereinafter called the “Convict”) is before the High Court for re-sentencing in very unusual circumstances. There is practically no record of court proceedings in respect of the trial of the Convict. The only evidence showing that the Convict was prosecuted and convicted of the offence of murder is to be found in primarily three documents, namely, Authority for Detention of Person Sentenced to Death dated 2nd July 2002 (Authority for Detention), and Notice of Appeal against Conviction and Sentence dated 6th November 2002 (Notice of Appeal), and Prisoner’s Record. There is also an affidavit in support of a bail application dated 15th May 2002 (Bail Affidavit). In the premises, a very interesting question arises, namely, how is the Court to handle sentence re-hearing in the absence of the trial record?

Facts

Despite spirited and extensive efforts to trace the trial record, the file has yet to be found. The facts of the case, as discerned from the available documents, would appear to be as follows. The Convict hails from Mangombo Village, Traditional Authority Nkanda, Mulanje, and was aged 18 years old in May 2002. On or about 25th April 1999, the Convict's brother and another boy from the same village (the Deceased) picked a quarrel to the extent of exchanging blows and the Deceased lost his cap during the fight.

On 2nd May 1999, the Convict and the Deceased's brother purposed to go for a dance at night and on their way they met a friend of the Deceased. The Deceased's friend alleged that the Convict had taken the Deceased's cap during the fight the previous week and he asked the Convict to give back the cap. The Convict denied the allegation, stating that he was not present when the fight took place. Despite the denial, the Deceased's friend grabbed the Convict by his trousers and the same got torn. Thereupon the Convict decided to report the matter to the parents of the Deceased's friend but they were not at home.

On the Convict's way back from the home of the parents of the Deceased's friend, he met the Deceased's friend who was then together with the Deceased and both of them attacked the Convict. The Deceased's friend had a panga knife in his hand and he intended to hit the Convict with it but he missed the Convict and hit the Deceased fatally injuring him. The Deceased's friend run away and people picked the Convict to Police. Shortly thereafter, the Deceased's friend became sick and died.

A perusal of the Authority for Detention reveals that the Convict was on 2nd July 2002 convicted of murder and sentenced to suffer death. The death sentence was on 15th October 2002 commuted to one of imprisonment for life.

Issues for Determination

The main issue for the Court's determination is what is the appropriate sentence to impose on the Convict having regard to all circumstances of the case. The other issues have to do with the how sentence re-hearing has to be handled where the entire trial record is missing. It is the submission of Counsel that a considered examination of the main issue has to extend to discussion of the following questions:

- (a) whether the Court has jurisdiction to proceed with sentence re-hearings where the court record is wholly or partially lost or destroyed?

- (b) whether in a case where the entire court record has been lost or destroyed, justice requires the immediate release of the convict in question?
- (c) whether where the lost or destroyed part of the record is substantial, material or consequential, justice requires the immediate release of the convict in question?
- (d) whether in a case where only part of the record is missing, it is entirely appropriate for the Court to examine sources outside of the incomplete court record in order to assess whether the missing part of the court record is so substantial, material and consequential that proceeding would result in injustice?
- (e) whether where the Court is of the view that the missing part of the court record is not so substantial, material and consequential that proceeding would not result in injustice, the Court may proceed with sentence re- hearing and may consider such evidence in mitigation as put before the Court by the State and defence respectively?
- (f) whether any unknown facts, that is, unknown because of the missing of the Court record, must be assumed to be mitigating unless proven otherwise beyond reasonable doubt by the prosecution?
- (g) whether the death sentence can ever be appropriate in a case where the court record has been wholly or partially lost or destroyed?

Submission by Counsel for the Convict

The submissions by Counsel for the Convict can be conveniently divided into three parts.

The Court's jurisdiction to hear matters without a court record and how to proceed

Counsel for the Convict argues that it would be a breach of the rights to a fair hearing and to access to justice guaranteed by the Constitution to fail to proceed with a sentence re-hearing on the basis that the Convict's court record has been lost or destroyed. It is further argued that the Convict's entitlement to a remedy in

respect of the constitutional violations in the present case cannot be defeated because the case file has been lost, through no fault of his own. For this proposition, Counsel for the Convict relies essentially on four local cases and three foreign cases.

The first of the local cases is **Francis Kafantayeni and others v. The Attorney General, Constitutional Case No. 12 of 2005 (unreported)** [hereinafter referred to as the “**Kafantayeni Case**”]. In this case, the court records of all six of the plaintiffs had been lost or destroyed. This being the case, Counsel for the Convict contends that the High Court made the order for the Director of Public Prosecutions to bring the convicts, including the Convict herein, before the High Court for sentence re- hearings in full knowledge that their court records were not available and could not be found.

Counsel for the Convict has explained why the Court in Kafantayeni Case found it imperative to order sentence re-hearing even though the trial files were missing:

“The Court ordered sentence rehearings to take place, notwithstanding that by necessity these would have to be carried out without the benefit of the Court records, because to do otherwise would be contrary to the interests of justice; would cause further breaches of the plaintiff’s constitutional rights to a fair trial including sentencing and to access to justice; and, would mean that the Court would fail to provide an essential and effective remedy to the breaches of constitutional rights already suffered by the plaintiffs at that time. Importantly, the High Court explicitly condemned any potential limitations on the right to access a Court for discretionary sentencing as amounting to a violation of rights guaranteed by the Constitution:

‘[W]e would reject any notion that any restriction or limitation on the guarantee under section 41(2) of the Constitution of the right of access to a court of final settlement of legal issues, denying a person to be heard in mitigation of sentence by such court, can be justified under section 44(2) of the Constitution as being reasonable or necessary in a democratic society or to be in accord with international human rights standards.’”

The second local case is **McLemore Yasini v. Rep, MSCA Criminal Appeal No. 29 of 2005 (unreported)** [hereinafter referred to as the “**Yasini Case**”] which was cited for the following statements:

“The Court [in the Kafantayeni case] clearly ordered that the Plaintiffs were entitled to a re-sentence hearing on the death sentence individually. The Court’s decision on this point, affected the rights of all prisoners who were sentenced to death under the mandatory provisions of section 210 of the Penal Code. The right to a re-sentence hearings therefore accrued to all such prisoners. [...] We wish to observe that it is the duty of the Director of Public Prosecutions to bring before the High Court for re-sentence hearing all prisoners sentenced to death under the mandatory provision of Section 210 of the Penal Code.” – [Emphasis by underlining added by Counsel]

Counsel for the Convict submitted that the Supreme Court of Appeal extended the order in the **Kafantayeni Case** for the Director of Public Prosecutions to bring the plaintiffs in the **Kafantayeni Case** before the Court for sentence re-hearings to all prisoners previously sentenced to the mandatory death penalty. It was further submitted that the Malawi Supreme Court of Appeal did not intend that limitations be artificially read into its order for the prisoners to be brought before the High Court for sentence hearings.

Counsel for the Convict then turned to the case of **Mtambo & others v. The Republic, MSCA Criminal Appeal No. 1 of 2012 (unreported)** [hereinafter referred to as the “**Mtambo Case**”] wherein the Court was called upon to determine whether the appeal could proceed to be heard without the Records of Appeal being available. It seems very likely that this case was cited for the following statements by Chipeta, JA, at p. 6:

“It is clear from what has been deposed to in the material affidavits of this application that no stone had been left unturned in the search for the records of trial and sentence for all three applicants. The records have so missed for not less than 10 years in respect of each applicant. It is accordingly as clear as daylight to me that save for the fact that the applicants have not asked the High Court to judicially confess its failure to help them, chances are so remote that the trial records will be traced. The meaning of this is that if it be insisted that their appeals only proceed on production of their records of appeal, then it would be as good as saying they should not exercise their right to appeal. What would be painful about such a result is that the appeals these applicants claim they lodged resolve on a very narrow compass that might not overly depend on what their records of appeal could have contained. The appeals, I have been assured, relate to the sentences they got vis-à-vis the ages they were at during their commission of the respective murders they were convicted and sentenced for. All they want to argue before the Supreme Court is that although tried and sentenced as adults, they were minors at the time of the commission and arrest.”

The Court then proceeded to make the following conclusion:

“I certainly think that from the efforts they have demonstrated in relation to the tracing of their trial records for the purposes of having the High Court prepare their records of appeal, it would be unjust to block the applicants from presenting their appeals on the question whether they were not entitled to be treated as juveniles regardless of the ages they had attained by the time of trial and sentence. In the result, therefore, despite my procedural concerns, I grant the prayer of the applicants by permitting them to proceed with the hearing of their respective appeals by the full bench of the Supreme Court on their sentences without their records of appeal.”

Counsel for the Convict understands the **Mtambo Case** as authority for the proposition that the mere fact that the whole record is missing ought not to deprive an applicant of an opportunity to be heard on appeal. It is contended that the same

approach be followed by this Court in proceeding with the hearing of the sentence re-hearing in respect of the Convict.

The fourth and last local case is that of **Andrew Morris Chalera & others v. The Republic, MSCA Civil Appeal No. 5 of 2012 (unreported)**. In this case, the appellants were charged with and convicted of murder and were each sentenced to suffer death. They all appealed against their conviction and sentence. The record of proceedings in the court below was incomplete in that the summing up to the jury by the trial court was not part of the record. The Court was informed that all efforts had been made to trace that part of the record but to no avail. It, therefore, became a preliminary matter for the Court to determine what becomes of appeals in such circumstances. The Court addressed the point in the following manner, at p. 217:

“What we make of the scanty precedent that we have been able to scout is that a court of appeal will weigh the degree, extent and relevance of the part of the record that is missing and cannot be reconstructed. Where the missing part of the record is not substantial, immaterial and inconsequential as would not result in miscarriage of justice, the appeal shall be proceeded with and finally determined. Where the missing part of the record is not substantial, material and consequential, such that proceeding with the appeal would result in injustice, the conviction should be set aside without the full appeal being heard.”

The three foreign cases, from United States of America, dealt with issues concerning failings in good record keeping. In **People v. Jones (1981) 125 Cal.App.3d 298**, the court found that the mistaken destruction of the court reporter’s notes deprived the court of such a substantial and material part of the trial record that the court was compelled to vacate the conviction. In giving judgment in **People v. Jones (supra)**, the court stated that:

“Here, we have a case in which the defendant without any fault of his own was deprived of the right to an effective presentation of his appeal due entirely to a failure on the part of an official of the trial court to comply with the law. It would be a violation of the fundamental rights of the defendant to hold that an effective possibility of appealing the convictions was properly taken away by our system of justice. To forget that this defendant was in prison for all those years, without permitting him to urge his legitimate appeal, is insufferable. [...] Therefore, the judgment should be reversed.”

In **People v. Morales (1979) 88 Cal.App.3d 259 (Cal. Ct. App. 1979)**, the court applied a test similar to that used in the **Chalera** Case:

“The test is whether in light of all the circumstances it appears that the lost portion is ‘substantial’ in that it affects the ability of the reviewing court to conduct a meaningful review and the ability of the defendant to properly perfect his appeal. It is not every loss of any part of the reporter’s notes that requires vacating of the judgment.”

The Court may consider evidence from sources other than the court record

Counsel for the Convict contends that whether the missing part of the court record is so substantial, material and consequential, it is entirely appropriate for the Court to examine sources outside of the incomplete court record in order to determine the appropriate sentence. It is the argument of Counsel for the Convict that such an approach would ensure that a fair hearing is provided and the appropriate sentence is given in the circumstances.

It was also submitted that evidence outside the court record may be gathered from a wide range of sources and that the best possible sources may vary from case to case. It was further contended that in the majority of cases, the convict may be one of the best available sources of evidence and the recent experience of the English courts, in context of lost warrants of arrest, is instructive.

For that proposition, Counsel for the Convict relies on the analogous situation which obtains in England in the context of sentencing in criminal matters where a defendant has absconded for a number of years and the Crown Prosecution Service has been unable to locate the court file at time the warrant of arrest has been eventually executed. It was submitted that in such cases, English courts have proceeded on the basis of what the defendant himself says happened in the alleged offence, applying the same principles as apply within what are known as “*Newton hearings*”:

*“[In ‘Newton hearings’] the burden rests with the prosecution throughout and **the court shall give full consideration to the defendant’s own account of events unless proven otherwise by the prosecution beyond reasonable doubt.** The only limitation on this is that the court is not obliged to accept explanations or assertions that are “manifestly absurd” merely on account of the fact that the prosecution is unable to adduce evidence to disprove them (R v Hawkins (1985) 7 Cr App R (S) 351; R v Kerr (1980) 2 Cr App R (S) 54. This approach gives effect to the need to balance the interests of the respective parties, without diminishing the principle that the burden of proof rests always with the prosecution. A helpful summary of these principles is exhibited to defence counsel’s affidavit.*

Counsel for the Convict concluded under this part of the submissions by drawing the Court’s attention to the Bail Affidavit. It was submitted that the Bail Affidavit constituted part of the best available record.

All doubt must be resolved in favour of the accused

Counsel for the Convict submitted that the articulation of the burden and standard of proof in discretionary capital cases entails that where the case file has been lost or is incomplete and the facts of the offence are unknown there should be a

presumption in favour of the convict. It was further contended that such a presumption should, at a minimum, mean that the unknown facts of the case are mitigating. In this regard, it was argued that the burden rests on the prosecution to rebut the presumption in favour of mitigation.

On the basis of the foregoing paragraph, Counsel for the Convict submitted that:

*“for all cases where the Court record is partially or wholly missing, it is a logical impossibility that the prosecution could meet these tests beyond reasonable doubt because the missing parts of the record contain unknown facts and information which must be assumed to be mitigating. Furthermore, all prisoners coming before this honourable Court for sentence rehearings have suffered previous violations of their constitutional rights for which they are entitled to an effective remedy. From the onset, therefore, all these cases therefore have at least two very heavy mitigating factors in their favor. Individual cases may have further strong mitigators relating to any of the possible areas of mitigation laid out by Honourable Justice Nyirenda in **Republic v Margret Makolija** (Sentence Rehearing Cause No. 12 of 2015).*

On the basis of the foregoing, the cases of prisoners coming for a sentence rehearing without a complete court record therefore cannot ever be the ‘worst of the worst’. Hence, the death sentence cannot ever be appropriate in a case where the Court record has been wholly or partially lost or destroyed.”

Submission by Counsel for the State

A central element in the submissions of the State is that sentencing the Convict in the absence of the trial record would be setting a wrong precedent. It may be useful to reproduce the relevant part of the State’s Initial Written Submissions:

“All the above [sentencing] principles can be applied on a matter where facts are available.

There are no other facts that can inform this court about anything apart from age of the convict. ...

This is to say, in the present case, this court will not have proper guidance in terms of the law on sentencing and Kafantayeni resentencing process. The state is of the view that the issue raised can be adequately dealt with on appeal where evidence can be led and cross examined.

PRAYER

We have carefully considered the facts, our prayer would be to put this resentencing on hold to maintain the integrity of the Kafantayeni resentencing process and to avoid setting a precedent of sentencing a convict without important information about the offence and the offender. We submit that it would be proper if we get directions from the court or the Chief Justice.”

The State has pursued the same theme in its Supplementary Submissions. Counsel for the State submitted that the trial record is the keeper of the circumstances regarding the offence and the offender and:

*“Without the record, the court will not be able to come up with the right sentence to fit the offender and the offence. There will be no record of aggravating and mitigating factors from the circumstances surrounding the offence. As such, it will not be possible to come up with an appropriate sentence in the terms of the **Republic vs Ayami principle** [cited in earlier submission] that circumstances of the offence and offender be taken into consideration.”*

Counsel for the State contended that an appeal is the right approach to be taken by a convict where the trial record is missing, owing the sole fault of the state’s servants, and chances of reconstruction of the record are too remote, and where a retrial is not a viable option like in the present case, since *“As on appeal, the remedy to release the convict is available on different arguments than arguing on re-sentence”*. It was argued that on appeal, *“the issue will not be the resentencing in terms of the Maclemonce jurisdiction, rather the remedy that may be asked is for the convicts’ release on bail pending appeal citing the missing record as unusual and exceptional circumstances”*.

Analysis and Disposition

I have considered the formidable submissions put forward by learned Counsel. They argued with great skill and clarity on behalf of the Convict and the State respectively. I am greatly indebted to them and wish to encourage them to continue with such excellent work for the good of the profession of law.

In spite of my extensive research, I have not been able to find any decided case directly on point. Most of the cases cited by Counsel, if not all, relate to situations where the convicts were questioning both the conviction and sentence, and not just the sentence. My view is that the issues decided in those cases were much broader than what I am being called upon to decide in respect of the re-sentencing of the Convict.

To my mind, the starting point is for the Court to adopt the reasoning in the **Mtambo Case** to the effect that the mere fact that the whole trial record is missing ought not to deprive a convict an opportunity of a sentence re-hearing. This would appear to be the ultimate objective of the Guidelines on Homicide Sentence Re-Hearing. The Guidelines are a product of a Special Committee that was appointed by the Chief Justice to oversee the implementation of the principle of sentencing espoused in the **Kafantayeni Case** and the **Yasini Case**.

In order to guide the homicide sentence re-hearing, the Special Committee agreed on the following guidelines:

- “2. Cases should be notified to the Director of Public Prosecutions, Legal Aid Department and legal firms of lawyers that represented the convicts.*
- 3. Cases be set down for sentence re-hearing before the judge who tried the case unless he or she is not available.*
- 4. When the case is called the State should address the Court first. The re-hearing process should follow the normal adversarial process. The State may call witnesses or submit relevant reports in terms of section 260(2) of the Criminal Procedure and Evidence Code.*
- 5. The defence will be called upon to give its version and may, likewise, call witnesses or submit relevant reports in terms of section 260(2) of the Criminal Procedure and Evidence Code.*
- 6. The State has a right to reply.*
- 7. The Judge will, after hearing both sides, pass sentence. The burden and standard of proof remain the same.*
- 8. The convict should still be advised that he or she has the right to appeal against the sentence to the Supreme Court of Appeal.”*

S.260 of the Criminal Procedure and Evidence Code (CP&EC) provides for receipt by the court of evidence for arriving at a proper sentence:

“(1) The Court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.

(2) Evidence that the court may receive under subsection (1) may, in addition to the evidence of the accused or the prosecution, include the evidence by or on behalf of the victim of the offence and any relevant reports to enable the court assess the gravity of the offence.”

I fully agree with the Guidelines on Homicide Sentence Re-Hearing and, accordingly, endorse them. I think that the broad principles stated in the Guidelines can be extended to the situation obtaining in the present case and to any other case of homicide sentence re-hearing where the trial record is wholly or partially missing or destroyed. The point being made may be illustrated by reference to the commonplace factors taken into account in homicide sentencing and mitigation generally.

One of the factors is that the maximum punishment must be reserved for the worst of offenders in the worst of cases: See **Rep. v. Anderson Mabvuto, Criminal Case No. 66 of 2009 (unreported)**. Some of the factors that may necessitate the

imposition of such a punishment include the fact that the offence was occasioned in very decrepit and gruesome circumstances, meticulously intentioned and planned and that the motive for the killing was extremely heinous. Where the trial record is wholly or partially missing such that there is uncertainty as regards the circumstances of the commission of the offence it would be completely inappropriate to impose a death sentence. Such a position would apply with equal force where the homicide re-sentencing is based on evidence received under s. 260 of the CP&EC but such received evidence is from sources other than the trial record.

The other factor is the age of the convict both at the time of committing the offence and at the time of sentencing. In my view, I see nothing wrong in principle why resort to s. 260 of CP&EC cannot be made, where the trial record is wholly or partially missing, in so far as the issue of the age of the convict is concerned subject to the following caveat: it is trite that it is not open to any party to question the conviction within the context of sentence-rehearing.

S. 260 of CP&EC may also be conveniently resorted to in dealing with the following factors:

- (a) whether or not the convict is a first offender;
- (b) the time already spent in prison by the convict;
- (c) the manner in which the offence was committed; and
- (d) the personal and individual circumstances of the offender as well as the possibility of reform and social re-adaptation of the convict.

Needless to say, the Court will have to carefully assess pieces of evidence adduced by the State and the convict under s.260 of CP&EC before accepting them. The Court is not bound to admit statements that are obviously ridiculous merely on account of the fact that the trial record is missing and the other party has not rebutted them.

Sentence in respect of the Convict

The facts in the present case, as gleaned from the Bail Affidavit, the Authority for Detention, the Notice of Appeal, and the Prisoner's Record, show that mitigating factors outweigh aggravating ones herein.

Murder is undoubtedly a very serious offence in that it involves the taking of an innocent life. Much as the Court, in exercise of its judicial discretion, may in some cases not pass a death sentence, I can hardly fathom a murder case which would

not attract a custodial sentence: see **The State v. Laston Mukiwa, Homicide (Sentence Re-Hearing) Case No. 21 of 2015 (unreported)**.

As already mentioned herein, the law sanctions a measure of leniency in favour of young offenders. The argument of Counsel for the Convict, as I understand it, is that the Court should give full consideration to the Convict's own account of his age unless proven otherwise by the prosecution beyond reasonable doubt. In this regard, the defence has adduced three documents that allude to the age of the convict herein, that is, the Bail Affidavit ("*the applicant is a Malawian Citizen aged 18 years old*"), the Notice of Appeal ("*I am a form three student at chambe secondary school*") and the Prisoner's Physical Characteristics ("*AGE: 18 years*").

On the other hand, the position of the State is that proceeding on the basis of the available Court records (that is, Authority for Detention), the Convict was prosecuted and convicted as an adult. The point has been put by the State in its written submission thus:

"It could also be that the convict's age was not an issue in the convicting court because it was convinced that the convict's age at the time of committing the offence was a major and not a minor as some peripheral evidence may show. As a result of this, this case may be marred with speculation

This is to say, in this present case, this court will not have proper guidance in terms of the law on sentencing and Kafantayeni resentencing process. The state is of the view that the issue raised can be adequately dealt with on appeal where evidence can be led and cross examined"

In my view, the starting point has to be an acknowledgement that it is not open to any party to question the conviction within the context of homicide sentence re-hearing. The Convict was tried and sentenced as an adult. On that understanding, I am prepared to accept this much: at the time of committing the offence, the Convict was a "*very young adult*".

The other mitigating factor is that the Convict has no previous conviction, thus he is a first offender. It is also in evidence that the Convict has reformed during the period that he was in prison such that there is a high probability of him seamlessly re-integrating into society upon his release

Besides the above mitigating factors, although it is on record that the Convict enjoyed bail pending trial, the bail was for a very short period of time (from 16 May 2002 to 2 July 2002), meaning that the Convict was remanded for over three

The Republic v Lackson Dzimbiri
J.

Kenyatta Nyirenda,

years prior to his trial. He has thus been incarcerated for at least 16 years.

All in all, the justice of the matter calls for a reduction of the sentence. Accordingly, the sentence of death is set aside and replaced by a sentence that would result in the immediate release of the Convict from prison unless there is another lawful cause for him to continue to be kept there. If the Convict is dissatisfied with the sentence, he has the right to appeal against it to the Supreme Court of Appeal.

Pronounced in Open Court this 1st day of June 2015 at Zomba in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE

The Republic v. Chiliko Senti

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

HOMICIDE SENTENCE RE-HEARING NO. 25 OF 2015

CORAM: Hon Justice M L Kamwambe

Messrs Chitsime and Namanja counsel for the State

Mrs Jumbe counsel for the Convict

Mr Manda Official Interpreter

Mrs Pindani Recording Officer

JUDGEMENT

Kamwambel

This is one of the cases benefiting from the declaration in the case of **Kafantayeni and Others v Republic Constitutional Case No. 12 of 2005 (unreported)** that the mandatory death sentence was unconstitutional and therefore invalid to the extent of the mandatory requirement for death sentence under section 21O of the Penal Code, necessitating all previous such sentences to be reconsidered by a competent court. Hence, this exercise.

The case of **Twoboy v Republic MSCA Criminal Appeal Case No. 18 of 2006 (Unreported)** came on the heels of the **Kafantayeni case (supra)** in support thereof when it said:

"...offences of murder differ, and will always differ so greatly from each other and it is therefore unjust and wrong that they should attract the same punishment."

Along the same thinking Conteh CJ in **Queen v Patrick Reyes (2002)** Supreme Court of Belize said:

"The use of firearms by dangerous and aggressive criminals is an undoubted social evil and, so long as the death penalty is retained, there may well be murders by shooting which justify the ultimate penalty. But there will also be murders of quite a different character (for instance), murders arising from sudden quarrels within a family, or between neighbours, involving the use of firearms legitimately owned for no criminal or aggressive purpose in which the death penalty would be plainly excessive and disproportionate. In a crime of this kind there may well be matters relating both to the offence and the offender which ought properly to be considered before sentence is passed. To deny the offender the opportunity, before sentence is passed, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate is to treat them as no human should be treated and thus to deny his basic humanity, the core of the right which section 7 exists to protect."

Section 210 of the Penal Code (Amendment No. 1 of 2011) amended the original version and it is now in accord with the pronouncement of the **Kafantayeni case (supra)**. It now reads as follows:

"Any person convicted of murder shall be liable to be punished with death or with life imprisonment."

The convict, Chiliko Senti, who was 30 at the time of arrest was charged with murder and convicted as charged by jury which led to a mandatory death sentence being imposed.

One of the accepted principles internationally is that capital punishment should be reserved for the 'rarest of the rare' cases. Only in exceptional cases should this dire punishment be invoked and only when the State has rebutted the presumption in favour of life. The case of **Republic v Jamuson White** Criminal Case No. 7 of 2008 (unreported) described the principle of the rarest of the rare as follows:

"The offence must have been occasioned in very decrepit and gruesome circumstances, meticulously intentioned and planned and that the convict is highly likely to offend again to justify his total removal from associating with other persons even in prison. He must be a threat to society so much so that society would without thinking twice approve of his elimination from planet earth. The motive for killing must be extremely heinous so as to cause a deep sense of society abhorrence and condemnation that such human being does not qualify to live. I may put deliberate mass murderers and serial killers in this category."

The other principle relates to where a convict has been subjected to protracted confinement after pronouncement of a lawful death sentence, which violates his constitutional rights. In **Attorney General v Kigula** (2009) UGCSC 6 at p.63 the Supreme Court of Uganda held that those held on death row for more than 3 years should have their sentences commuted. It is not clear when the convict's sentence was commuted as such this court is not going to speculate.

The other principle is that the courts when sentencing in capital cases should benefit from background evidence about the offender, such as, help rendered to the convict by taking him to hospital, good character in the village community before offence was committed and also in prison, and that he was a good family man. This is pre-offence conduct of a convict. This could also include evidence of previous convictions, remorse and capacity to reform. The judge has discretion to choose which material to consider in mitigation and which to reject. As I stated in **Republic v Musimuko** Homicide Sentence Re-Hearing Case No. 24 of 2015 courts must be free to decide how much weight to give to a particular piece of the report whether social welfare report or psychiatric report or any report or statement in mitigation. There is no hard and fast rule. Since re-sentencing after many years have elapsed after sentence was initially made is a special type of sentencing, post offence good character in prison may reduce sentence on the reason of good character in prison. The State argues that the convict would be benefiting twice considering remission. But courts are expected to show some measure of *lenience in deserving cases regardless of remission of sentence by the prison* authorities. Let the courts carry out their judicial functions and the prison authorities and others theirs. Courts should not be constrained by how other authorities are going to affect the sentence imposed in future.

However, I am aware of the case of **Rep v Alex Nioloma, Sentence Re-Hearing No. 22 of 2015** where the court said:

"Sentence rehearing proceedings should not be conducted as parole hearings. In

sentencing rehearing the court is taxed to impose a sentence which could have been appropriate at the time the convict was convicted."

In agreement is the case of **Rep v Kamuloni Chiwaula Lupiya, Sentence Rehearing No.7 of 2015** which said as follows:

"...post offence circumstances should not be taken into account when conducting these sentence rehearing proceedings. These include among others good behaviour of the convict in prison, the fact that his or her relatives are ready to accept back in the society unless the views of the deceased relatives are of a similar nature."

Indeed for a good balanced decision the court ought to hear from the relatives of the deceased on acceptability of the convict in the society if released.

When we talk about capacity to reform we are not far from considering the good character of the convict in prison. The question is whether post-offence convict's character is relevant when considering sentence. In normal sentencing obviously may be not. But this is resentencing exercise in which the court ought to look at all circumstances affecting the convict. If we can consider hardships he had encountered under incarceration such as mental and emotional trauma, why can good character not be considered? You cannot as a court fail to exercise your lenience just because the prison authorities are going to consider remission on good character. You do not have to look beyond. Resentencing is a special exercise and in our case at times emanating from violations of the convict's rights and so anything that would bring mercy on the subject should count. The only thing that the court should do is to determine how much weight to attract to any given mitigating factor, such as good character, remorse, etc. I know that I have in the past said that post-offence

happenings should not affect resentencing process, but I am now qualifying it that it would depend on what weight a judge attaches to such information. In resentencing good character should act in favour of the convict.

Although post crime behaviour is not relevant to an offender's culpability it bears directly on the capacity to reform. Together with the offender's pre-crime behaviour and reputation in the community, post crime behaviour can be a useful indicator of the offender's potential for rehabilitation and reform. To that end, the sentencing court must consider the offender's behaviour after conviction as well as evidence of the offender's behaviour while awaiting and during trial e.g. **Skipper v South Carolina, 476 U.S.1(1986)**.

The Privy Council and Caribbean courts have regularly considered post-crime behaviour as mitigating evidence in the process of sentencing. After the Privy Council abolished Belize's mandatory death sentence in **Patrick Reyes case (2002) AD 2002. Para 30**, the Supreme Court of Belize determined during sentencing that the offender's attendant circumstances did not justify the imposition of a death penalty. In making this determination, the court considered that the former Superintendent at the prison where the offender was detained "gave evidence of (the offender's) quiet disposition as a model prisoner and testified also of his expression of remorse." This evidence helped impel the court to regard the defendant's crime as "quite out of character," and the offender's sentence was reduced.

The consideration of post-crime behaviour goes hand in hand with post-crime sentiment such as remorse which can be an indicator of the offender's capacity to reform rather than taking him/her as an incorrigible and dangerous character. Remorse may show that the offender is not likely to offend again.

The court has to look at the defendant's individual circumstances just before the time of committing the offence, at the time of committing the offence, and at the time of sentencing, such as mental and emotional disturbance, health and any hardships met (see **R v Samson Matimati** Criminal Case No. 18 of 2007). Further the court will also look at the manner the offence was committed, such as whether a weapon was used and its type, whether the killing was planned or impulsive, intoxication, provocation, lack of clear motive, childhood deprivation and abuse etc. The list of mitigating factors is not exhaustive. Let the court in exercising its discretion consider all and sundry and determine how much weight to attach to each of them. This should apply to pleas of family obligations and poor health of the convict. The court's discretion should not be fettered at all. However, admittedly, in many circumstances, family obligations will not carry much weight if any at all.

In **Rep v Tione Chavula** Criminal Case No.93 of 2005 Katsala J had this to say:

*"The purpose of a sentence is first of all to punish the defendant for his crime which the defendant has committed, secondly to mark the disapproval of the community for the criminal actions which the defendant has committed, and thirdly, to act as a deterrent in future to this man and to anyone else who might be minded to commit this sort of crime, **R v Hitchcock [1982] 4 Cr.Ap p.R.(S) 160, Bibi [1980]Cr. App.R.(S) 177.** This in my view means that courts must pass meaningful sentences which will not generate contempt in the eyes of the public or indeed even in the eyes of the defendant. Courts must pass sentences that must fit the crime, the defendant and also satisfy the legitimate expectations of the public."*

The above cited case calls for the balancing act of the three interests which is no mean task and it requires the court to exercise

its discretion judicially and discreetly. All relevant circumstances should be considered by the court when it will choose what will influence it in coming at its decided sentence.

The defendant's mitigating factors are outlined as follows:

1. He was a young and first time offender.
2. He was highly intoxicated at the time of the offence.
3. His health has deteriorated during imprisonment.
4. He has spent over 15 years in prison.
5. He maintains that he acted out of self-defence and that his actions were not premeditated.
6. He was acting in a 'heat of passion' due to the provocation by the men with regard to his wife's infidelity. He should be found guilty of manslaughter.
7. The death of the deceased may not have occurred had it not been for the lack of transportation to hospital. PW3 testified that it took a full day for the police to transport the injured man to hospital.
8. He has a good relationship with the deceased's family who have provided financial assistance while he has been in prison.
9. He presents absolutely no danger to society, his behaviour has been exemplary in prison where he works as a cook.
10. In February 2010, the Zomba prison Chaplaincy office identified Senti as a prisoner who was 'leading by example and whose behaviour demonstrated that he had been reformed or rehabilitated. As such, the chaplaincy asked the

Chief Commissioner of prisons to request for his sentence to be commuted to a term years. The Commissioner submitted the request which is still pending.

11. He quarrelled with friends and he has no history of violence.

Before I consider some other cases, let me caution that courts should not flinch from imposing a death sentence where it is deserving although for the past 20 years no death row convict has been executed. Since death sentence is lawful in Malawi the courts are expected to consider it in their determinations of sentence rather than entertain the myth that a death sentence convict is not yet born or shall never be born. The 'rarest of the rare' should not be construed to mean an impossibility to find one of the worst murder offenders (see **Rv Jameson White**) (supra).

In **Winston Nguluwe and Another v R MSCA** Criminal Appeal Case No. 35 Of 2006 the Supreme Court set aside the death sentence and substituted it with a 20 year imprisonment sentence on the finding that no dangerous weapon was used in the assault that led to the death of the deceased, and that the quarrel was influenced by intoxication; there was no clear motive to cause death, and there was no evidence that the convicts were bad characters in life.

In **Charles Khoviwa v R MSCA** Criminal Appeal Case No. 6 of 2007, the Supreme Court opined and held as follows:

"In the present case however, we take the view that the appellant does not deserve the court's lenience. The appellant and a cofeague assaulted and stabbed a defenceless person who was fleeing the scene of a fight to save himself from trouble. The appellant and his accomplice did not want to give the deceased a chance to live. His conduct on the material day was

inexcusable, he deserves the death sentence."

In **Wyson Thomas Kapunda Manda v The Republic** Criminal Appeal Case No. 15 of 2007 the Supreme Court of Appeal refused to reduce the death sentence imposed by the High Court on the basis that the murder was committed in cold blood.

In **Twalibu Uladi v Rep** MSCA Criminal Appeal No. 5 of 2008, the convict and the deceased had been drinking together when a quarrel erupted which led to a fight where the convict took a panga knife and hacked the deceased. The Supreme Court set aside the death sentence and substituted it with one of 20 years imprisonment more likely because there was no planning for the murder, the quarrel having arisen spontaneously without premeditation and under the influence of some liquor.

In **Republic v Wilson Musimuko** Homicide Sentence Re-hearing Case No.24 of 2015 the convict quarrelled with members of his family and when they were going to their houses the deceased was walking behind. The convict followed them a 100 metres away and he hit the deceased who was his uncle with a wood twice in the head. A sentence of 20 years imprisonment was imposed on the ground that there was no clear motive to kill his uncle and no premeditation to cause his death. The court also said there was no history of violent behaviour.

The State is of the view that the facts of murder in this case do not warrant imposition of a death sentence. Ordinarily, the onus is on the State to justify why no other sentence other than death should be meted, and when it does not support death sentence the courts should be inclined to arrive at a sentence lesser than death. Further, the State has ruled out life imprisonment and suggest a term imprisonment.

I will refrain from delving into issues of conviction since I am not sitting as an appellate court, as such, point number 6 above will be entertained to the extent of provocation being a mitigating factor, and not making a finding that manslaughter was the appropriate charge. Considering propriety of conviction would be going beyond my mandate. This also may apply to point number 5 about 'self-defence.' But I am not precluded from considering premeditation when I am looking at circumstances around the commission of the offence.

The State has come out clearly that the facts as they happened do not warrant a capital punishment. Let me readily say in agreement that that is also my view. Senti may have intended to threaten and cause harm to the group, but he did not premeditate to cause death. As much as the delay to transport the deceased to hospital was principally State negligence because members of the community cannot remove the body till the police have visited the scene, the convict cannot bear the blame for causing the death entirely. Provocation as a mitigating factor will apply because the words produced by the group could injure someone's heart. It was careless to produce such words especially to one who has had some beer and has become light in the head. Of course he quarrelled with the deceased and his friends at the first drinking place where he told them that he would cut their legs. Then he went to his house from where he took a panga knife and he followed them to the second drinking place. He found them and he chased them while swinging his weapon. The deceased got tired of running and when the convict found him he hacked off his arm. He is caught by the reading of section 212 of the Penal Code which defines 'intention in that he was set to cause grievous harm, and therefore he had the requisite intention to cause death.' But this does not mean that death was premeditated. The killing was not planned. Events happened spontaneously whereby he decided to arm himself with a dangerous weapon.

I have taken into consideration that he was a first offender at 30 years of age then when he committed the offence. He is now

46 years old. He was on remand for 2 years and 7 months before he was tried in 2001. He was convicted to suffer death on the 7th of November, 2001 and he has now served about 16 years and 11 months in prison including the time spent on remand.

Courts should seriously start to take into consideration the appalling prison conditions which are quite below the recognised international standards and that such imprisonment is a punishment on its own. This is putting a convict at double jeopardy. The case of **Gable Masangano v Republic Constitutional Case No. 15 of 2007** is a case in point. It shows how miserable in all respects prison confinement is in all respects and the picture portrayed does not bring pride to Malawi as a Nation for it does not respect the human rights of the convicts as enshrined in the Constitution of the land and in various international legal provisions. Let us not give this a blind eye for it is reality though much trivialised. I have taken it into consideration.

I have taken note of his good and exemplary behaviour in prison and that he led a non-violent life before his arrest. Where a convict's health is alleged to have deteriorated let it clearly come out that it is due to incarceration because peoples' health deteriorate even outside prison. Circumstances leading to health deterioration must be explained.

His uncontrolled anger led to the death of the deceased. A life was lost which life is protected by the Constitution of the land. A person's life ought to be treated with dignity at all times unless one's actions are justified by law to take away the other's life.

I have particularly juxtaposed this case with case of **Republic v Chioko Sentencing Rehearing Case Number 9 of 2015**, where the court set aside the death penalty and substituted it with a sentence of 25 years imprisonment. In that case the convict believed that the deceased was having an affair with his wife. When they met the convict chased the deceased but he could

not catch him. They met again after three weeks when the deceased was going to his house when the convict stabbed him. The court considered that the deceased was not with convict's wife when he was stabbed and that three weeks having elapsed since the first encounter, the convict had time to cool down hence there was premeditation. The present case is not as bad as the **Chioko case {supra}**, as such I am inclined to reduce further the convict's punishment and I order that Chiliko Senti be sentenced to 23 years of imprisonment which sentence should result in his immediate release. It is so o r d e r e d .

Pronounced in Open Court this 12th day of June, 2015 at Zomba.

M L Kamwambe

JUDGE

The Republic v. Francisco James

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

HOMICIDE SENTENCE RE-HEARING NO. 28 OF 2015

CORAM: Hon Justice M L Kamwambe

Messrs Chitsime and Namanja counsel for the State

Mrs Jumbe counsel for the Convict

Mr Manda Official Interpreter

Mrs Pindani Recording Officer

JUDGEMENT

Kamwambe.J:

On 4th November 1998 Francis James, was convicted for the murder of Anock Khwanya on the 17th June 1995. At the time of the offence the convict was 19 years old. He and his older brother Katsilikiza James engaged in a flight against the deceased. They used their fists and legs to beat the deceased even when the deceased had fallen down. Upon discovering that the deceased had died the two brothers fled from the village to their fathers' farm. On 3rd August 1995, they were arrested, but Katsilikiza James absconded before trial.

Some of the stated mitigating factors are outlined as below:

1. At 19 he was a young and first offender.
2. No weapons were used.
3. He suffers from anemia, malaria, headaches and a life threatening kidney disease. He feels lethargic and tired and lacks appetite.
4. He has stomach pains and bloody urine.
5. He has been in custody for about 19 years since arrest.
6. His act of causing death was not premeditated.
7. He made a humanitarian attempt to stop a fight between the deceased and the roast meat seller.
8. Before committing the offence he was a good and productive citizen as a farmer and he would be useful outside prison.
9. He was provoked and he only acted in self-defense.

The state has argued that post-offence circumstances should not be taken into consideration unless relevant to commission of the offence. They have cited the cases of **R v Alex Njoloma** Sentence Re-hearing No. 22 of 2015 and **R v KamuloniChiwaulalupiya** Sentence Re-hearing No. 7 of 2015. Also **R v LastonMukiwa** Sentence Re-hearing No.21 of 2015. They are of the view that the death and life sentence are not appropriate in the circumstances but a term of years imprisonment. They propose that he serves 30 years imprisonment.

I said in **Republic v Msimuko** Homicide Sentence Re-hearing No. 24 of 2015 that background evidence as well as post-offence happenings surrounding convict ought to be taken into account in mitigation as the circumstances may require as long as the court's discretion is not fettered or tied since the court is supposed

to determine how much weight to attach to each circumstance. Since this sentence re-hearing may bring circumstances which may not be found in normal sentencing process, such as long stay in prison before re-sentencing, leading to mental anguish and instability which is inhumane and cruel treatment and good character in prison, the courts ought to consider post-offence convict's situation.

The Privy Council and Caribbean courts have regularly considered post-crime behavior as mitigating evidence in the process of sentencing. After the Privy Council abolished Belize's mandatory death sentence in **Queen V Reyes (2002 AD 2002)**, the supreme court of Belize determined during resentencing that the offender's attendant circumstances did not justify the imposition of the death sentence having considered that a former superintendent at the prison where Reyes was detained gave evidence of Reyes' quiet disposition as a model prisoner and testified also of his expression of remorse. This evidence impelled the court to regard the convict's crime as 'quite out of character, and sentence was reduced. Post-offence behavior goes hand in hand with post-offence sentiment such as remorse which may be an indicator of the offender's capacity to reform and saves the offender from being characterized as a habitual and dangerous criminal. Presence of remorse may show that the act of killing was merely an unfortunate event that the offender is not likely to offend again.

The court has to look at the convict's individual circumstances before committing the offence, at the time of committing the offence and at the time of sentencing. Such as mental emotional disturbance, health, prison conditions and any hardships he may have encountered (**R v Samson Matiati** Criminal Case No. 18 of 2007). Further the court will also look into the manner the offence was committed, such as, whether a weapon was used and if so, its type, whether the killing was executed according to plan or it was impulsive, intoxication etc. the defense has included other pertinent factors such as provocation, lack of clear motive, childhood deprivation and abuse. Likelihood of

committing further acts of violence, remorse and good conduct in prison. The list of mitigating factors is not exhaustive. Let the court in exercising its discretion consider all and sundry and decide how much weight to attach to each of them. This should apply to pleas of family obligations and poor health of the convict. However, admittedly, in any circumstances family obligations may not carry much weight if any at all.

Katsala J rightly said in **Rep v TioneChavula** Criminal Case No. 93 of 2005 that:

*"The purpose of a sentence is first of all to punish the defendant who has committed, secondly, to mark the disapproval of the community for the criminal actions which the defendant has committed, and thirdly, to act as a deterrent in future to this man and anyone else who might be minded to commit this sort of crime, **R v Hitchcock (1982) 4 App.R (S) 160, R v Bibi (1980) Cr.App.R. (s) 177.** This in my view means that courts must pass meaningful sentences which will not generate contempt in the eyes of the republic or indeed in the eyes of the defendant. Courts must pass sentences that must fit the crime, the defendant and also satisfy the legitimate expectations of the public."*

The above calls for the balancing act of the three interests which is no mean task and it requires the courts to exercise their discretion judicially and discreetly by looking at case law.

In deserving cases courts should not grow cold feet to impose a death penalty although for the past 20 years no death row convict has been executed. Since death penalty is lawful in Malawi the courts are expected to consider it in their determinations of sentence according to law applicable r a t h e r

than entertain the myth that a death sentence convict is not born and shall never be born. The 'rarest of the rare' should not be constructed to mean impossibility to find one qualify as the 'worst of the worst' murder offenders.

In **Winston Ngulube and Another v Rep** MSCA Criminal Appeal No. 6 of 2006 the court set aside the death sentence and substituted it with 20 years of imprisonment on the finding that no dangerous weapon was used in the assault that led to the death of the deceased, and that the quarrel was influenced by intoxication; there was no clear motive to cause death, and there was no evidence that the convicts were bad characters in life.

In the case of **Uganda v Bwenge Patrick** HCT-3-CR SC-109/1996 (Uganda 2009) the Ugandan high court gave special consideration to the fact that he had maintained strong ties with his family throughout his long incarceration, his remorse, and the lengthy period of time he had already serve in prison. Based on these factors, the court found that the offender did not merit a death sentence, and it re-sentenced him to 17 years already served, along with an additional year in prison followed by a year of probation.

In **Jino v Uganda** [2010] UGCA 27 the court of Appeal imposed a sentence of 15 years imprisonment in lieu of death in part because 'an opportunity for him to reform and turn into good citizen should not be wasted.'

In **Rep v Christopher Gaba**, Criminal Case no. 142 of 2010 (unreported) the accused stabbed the victim to death in a dispute over a cigarette and *Mvundula J* found that a death sentence was not warranted as the defendant was a first time offender and had been provoked, even though defendant's conduct was not a proportional reaction to the provocation. The court handed down a sentence of 18 years imprisonment.

In the case of **Republic v Wilson Msimuko** Homicide Sentence Re-hearing No. 24 of 2015 death sentence was substituted with a 20 year imprisonment penalty on the reasons that there was no premeditation, the fracas was merely a family feud which ended up badly not to the expectation of other family members, no clear motive to kill his uncle, and that the convict had no history of violent behavior. He was of good behavior also in prison. Further, he is a reformed and devoutly religious person who was kind to others. Courts should also take judicial notice of the poor prison conditions in Malawi which is a punishment on its own (see **Gable Masangano v A/G** Constitutional Case No. 15 of 2007).

I would go on and on with ore examples nut suffice to say that in this case, after considering all the mitigating factors, the court makes a finding that the convict indeed does not deserve a death sentence on the grounds that we did not premeditate the assault on the deceased. The quarrel and fight initially was between the meet seller and the deceased who was drunk. The convict came on the scene to stop the fight when he was provoked by the deceased. As the deceased was going away, the convict and his brother followed him and assaulted him to death. They should not have followed him, however they attacked him with bare fists and kicks, no weapon was used. The resentencing process itself was much delayed which is inhumane and cruel. At the time of commission of the offence he was only 19 years old and in **Republic v Keke** Confirmation Case No. 404 of 2010, the court said that 'for ages between 19 and 25, commission of a crime may be a result of impetuous, immaturity, youth or adventure.' As such, a very long imprisonment term may not be preferable although youthful age will not always be a strong mitigating factor in serious offences. In **Republic v Mayeso Sukali & Duncan Chilikha** Criminal Case No. 21 of 2011 *Mwase J* said that 'it should be borne in mind that at law that is different when dealing with children. The scale weighs heavily on the side of mercy and rehabilitation and preparing them for rehabilitation in the society; and ultimately shorter period of detention.' I have taken into account his ill-health despite that I have not seen medical documents to that effect, and his past good character.

In view of the fact that he has been in custody for 19 years which is a long time, I sentence him to a sentence that will results in his immediate release.

Pronounced in Open Court this 12th of June 2015 at Chichiri, Blantyre.

M. L. Kamwambe

JUDGE

The Republic v. Gilbert Masiye

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

SITTING AT ZOMBA

SENTENCE RE-HEARING CAUSE NO. 37 OF 2015

CORAM: THE HON JUSTICE H.S.B. POTANI

Mr. Gondwe, Senior State Advocate for the State

Mr. Chithope Mwale, Senior Legal Aid Counsel for the Convict

Mr. Kanchipotu, Court Clerk

Mrs. Pindani, Court Reporter

SENTENCE

The High Court sitting at Lilongwe under Criminal Case No. 63 of 1996 convicted Gilbert Masiye of the offence murder contrary to section 209 of the Penal Code and sentenced to the mandatory death penalty as stipulated in section 210 of the Penal Code. This happened in October 1998 about some 17 years ago. The matter has found itself back before the High Court in the wake of the decision in the case of **Francis Kafentayeni and others v Attorney General** Constitutional Case No. 12 of 2005 which declared the mandatory death sentence as unconstitutional thereby giving the courts the discretion to pass a sentence commensurate with the circumstances of each given case. Subsequent to the decision in the **Kafantayeni case** on November 1, 2010, the highest court in this jurisdiction, the Malawi Supreme Court of Appeal, in **McLemonce Yasin v Republic** MSCA Criminal Appeal No. 29 of 2005 ruled

that it is the right of all those that were sentenced to the mandatory death sentence prior to the **Kafantayeni Case** to be brought to court for a fresh hearing to allow them make their mitigation and then be sentenced accordingly as the mandatory death sentence deprived them of an opportunity to make their case in mitigation, thereby violating their right to a fair trial.

In order to facilitate the sentence re-hearing process, the court invited the state and the convict to furnish it with any material they consider would assist it to arrive at an appropriate sentence. In that regard, on the part of the convict, by way of evidence, there is the affidavit of Chimwemwe Chithope Mwale, Senior Legal Aid Advocate. The court has also been presented with robust oral arguments and submissions by counsel for the state and the convict over and above their written submissions filed in readiness of the re-hearing.

It is an established sentencing principle that the sentence a court imposes should fit the offender and the offence. In order to achieve this, courts are guided by aggravating and mitigating factors obtaining in each case. In the cases of murder/homicide like the present one, Edward Fitzgerald QC and Keir Starmer QC in their work **A Guide to Sentencing in Capital Cases** spell out relevant considerations when it comes to sentencing murder convicts. The list of the considerations, which admittedly is not exhaustive, includes the type and gravity of the murder, the mental state including the degree of diminished responsibility, other partial excuses including an element of provocation and undue influence. Lack of premeditation, character, remorse, views of the victim's family and prison conditions, among others. Age of the offender is also a factor that is considered invariably in all cases when it comes to sentencing.

The pertinent facts are that the convict had some disagreement with a sex worker to whom he had made an advance payment for a sexual engagement which was never to be. Somehow the deceased got involved himself in the matter and in his bid to pacify the two he allegedly uttered some swearing words and obscenities with reference to the convict. It would appear a scuffle ensued between the convict and the deceased in the course of which the convict stabbed the deceased with a knife on the chest resulting in his eventual death.

It should be pointed out at this juncture that in the earlier case of the **State v Kamuloni Chiwaula Liphiya** Sentence Rehearing Case No 7 of 2015 this court opined that on a sentence re-hearing the factors which the court must take into account in considering what would be the appropriate sentence ought to be those obtaining at the time of the initial sentencing and not those have emerged post the initial sentence. The same position was taken by Kalembera J **Rep V Alex Njoloma** Sentence Re-hearing case No. 22 of 2015. Counsel for the convict has invited the court to reconsider its position just stated and has in that regard drawn the court's attention to the position taken by brother judges Justices Kapindu and Kenyatta Nyirenda recognizing post sentence factors as relevant on a sentence re-hearing.

This court, to begin with, pays great reverence to Justices Kapindu and Kenyatta Nyirenda and respects their view on the matter and would also wish to say that its position taken in the **Liphiya** case is not an entrenched one and therefore it can make a shift if convinced with persuasive arguments. That said counsel for the convict has to be commended for the industry he has demonstrated through his supplementary written submissions in his bid to persuade this court to make a shift. However, with due respect to counsel, he has fallen short of achieving

his desired goal. It may be necessary to point out that this court considers it necessary to draw some distinction between post offence and post sentence factors. In as far post offence factors are concerned this court has no issue at all with them as constituting relevant when it comes to sentencing even at a sentence re-hearing process. With regard to post sentence factors, this court has serious difficulties in accepting them as factors to be considered on sentence re-hearing. This is because the sentence re-hearing process is meant to address a specific scenario and serve a specific purpose and that is to afford the convict the opportunity to mitigate which he did not have at the time of the initial sentencing. Therefore in all fairness and to avoid usurpation of the sentence re-hearing process or project if one may dare say the court must aim at arriving at or coming up with the appropriate sentence as would have been passed at the time of the initial sentencing process and therefore the circumstances to be considered are largely those at the time of the offence and immediately after. As this court cautioned in the **Liphiya** case, the sentence re-hearing process or project is not an occasion dealing with pardon or parole where post sentence factors take centre stage.

As the court embarks on a consideration of the sentence to be imposed in the case at hand, perhaps the obvious should be stated that the **Kafantayeni** case did not outlaw the death sentence *per se*. What it outlawed is the mandatory imposition of the death penalty without considering other penal options. What this means therefore is that in a proper case the court can perfectly impose the death penalty if satisfied that such a sentence, on the facts of the case, is merited.

In the instant case, the state has admitted that all factors considered the death sentence was not merited as such a sentence befits worst offenders such as mass murderers, serial killers and terrorists and the convict herein does into any of these categories. The state also does not favour life imprisonment in view of the mitigating factors obtaining in the case.

In considering the sentence to be imposed, the court first and foremost notes that the convict is or was a first offender. It is the clear policy of the law as reflected in sections 339 and 340 of the Criminal Procedure and Evidence Code that first offenders should be spared from imprisonment unless there are justifiable reasons which must be stated why they should be imprisoned. In the case at hand, imprisonment is justified considering the gravity of the offence of murder as evidenced by the prescribed maximum penalty of death. There are also the following aggravating factors which justify imprisonment rather than a noncustodial sentence: Firstly the offence resulted in loss of life which will never be restored and as they say life is precious. Secondly, a knife which *in* the circumstances of the case constituted a dangerous weapon was used.

The court would however exercise considerable leniency as there are a number of mitigating factors namely that the facts tend to suggest that the convict was somehow under the influence of alcohol, and though not amounting to a defence the convict was somehow provoked by the deceased who joined a disagreement that did not concern him and insulted the convict in the process. The court would also consider the notorious inhumane conditions in our prisons as mitigating factor. It is also significant to note that the convict was of a very tender age at the time of the offence. The record in totality shows that he was aged between 18 and 19. Besides he was and is a first offender as earlier

acknowledged. It is a clear policy of the law that young and first offenders should not be subjected to unduly long periods of imprisonment.

The court has taken time to look at sentences passed in recently decided cases of a similar nature notably the **State vs Alfred Galimoto** Homicide Sentence Re- hearing Cause no. 43 of 2015 in which the facts closely resemble those in the instant case and a sentence of 22 years imprisonment was imposed. The court in the end would consider a sentence of 22 years imprisonment effective from the date of the arrest of the convict.

The convict has the right of appeal to the Malawi Supreme Court of Appeal.

Made this day of July 20, 2015, at Zomba in the Republic of Malawi.

H.S.B. POTANI
JUDGE

The Republic v. Mabvuto Elias
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
HOMICIDE CASE NO. 44 OF 2015

CORAM: **HON. JUSTICE M.L. KAMWAMBE**
Mr. D. Malunda of Counsel for the State
Mrs. Kambuwa of Counsel for the Accused
Mr. Manda, Official Interpreter
Mrs. S. Msowoya, Secretary

JUDGMENT

Kamwambe J

This is a homicide matter in which the convict was sentenced to suffer death but as a result of pronouncements in **Kafantayeni & Others v Republic** Constitutional Case No. 12 of 2005 the mandatory death sentence is to be reconsidered.

The convict was arrested on 1st January 1994 and convicted on 23rd August 1997. In 1999 death sentence was commuted to life imprisonment.

Further, in **McLemoce Yasini v The Republic** MSCA Criminal Appeal No. 29 of 2005 (unreported) the Malawi Supreme Court of Appeal ordered that the director of Public Prosecutions should not only bring back to court the applicants in the Kafantayeni case, but all murder convicts sentenced before the Kafantayeni judgment so that they are resentenced.

The death sentence imposed on the convict was obviously the ultimate and maximum sentence. It is a principle of sentencing that the maximum sentence shall be reserved for the worst offenders. This attracts the question whether the convict herein fits in the category of “the worst of the worse murder offenders.” It is by far in the negative when we consider all the circumstances of the case. The circumstances of the crime show that the convict was attacked by a group of people at night and in retaliation he used a knife with which he caused death. He always moved with the knife which he used to eat mangoes, cassava etc. It was used for just causes. It was ordinary tool to enable him carry out simple tasks which do not offend the law. His use of the knife was spontaneous and unplanned. Now that the mandatory death sentence is abolished

And jury trials not the norm, I find that the death sentence imposed was harsh, not fitting the convict and the circumstances of the crime.

Indeed one sentence for murder presupposed that all murder crimes were the same in gravity and seriousness. The *Malawi* Supreme Court came out clearly in **Twoboy v Republic** MSCA Criminal Appeal Case No. 18 of 2006 to the effect that there are different shades of murders which should attract different sentences. In short, the manner in which the offence was perpetrated does not call for a death sentence. I therefore rule out the death sentence outright. The case of **Republic v Jamuson White** Criminal Case No. 74 of 2008 (unreported) the court emphasised that the court the death penalty must be reserved for the “rarest of rare,” it said.

“The offence must have been committed in decrepit and gruesome circumstances, meticulously planned and intentioned and that the convict is highly likely to offend again to justify his total removal from associating with other persons even in prison. He must be a threat to society so much so that society would, without thinking twice approve of his elimination from planet earth. The motive for the killing must be heinous so as to cause a deep sense of society abhorrence and condemnation that such human being does not qualify to live.”

The convict in this case does not qualify for the description as above.

The second important consideration is the age of the convict at the time he committed the offence. He was a mere teenager of 17 years. It is advisable to observe that law favours the young in sentencing more especially because of their immaturity and adventurous life. They are prone to act stupidly because they are just experiencing life, and they can be more daring. The case of **Republic v Keke** Confirmation Case No. 404 of 2014 carries the same views. Heavy sentences on young persons will not yield good results as the sentence will tend to harden the inexperienced young person. It is therefore not amiss that shorter periods of imprisonment are preferred for young persons to give them opportunity to reform and be useful citizens.

However in this case we are dealing with a child offender who had not yet attained majority age of 18 years. A different legal regime applies to this group. Article 6 of the International Covenant on Civil and Political Rights and Article 37 (a) of the Convention on the Rights of the Child prohibit the imposition of death penalty on children under the age of 18. So too Article 5 of the African Charter on the Rights and Welfare of the Child. Further, under section 26(2) of the Malawi Penal Code. It is unlawful to sentence a child under 18 years of age to death. Even if he were 18 years or a bit older at the time of commission of the crime, a good measure of mercy should be exercised on the convict for his youthful age.

We have to impose sentences that are in line with section 19(3) of the Constitution which prohibits cruel, inhuman and degrading sentences. It has often times been said that in sentencing there must be a proper balancing of the interests of the convict, the victim and his family and the society. Society expectations play a major part in sentencing. The sentencing Court must ask itself how the society would respond to a given sentence.

The Court will take into account the convict's expression of remorse for what he did although a long time has elapsed since the crime. Acts of remorse need not always be immediate after the crime, after all the admitted at police and in court that he committed the offence.

In the Court's view, looking at the circumstances of this case, it would be cruel and degrading treatment to give a harder sentence than the convict deserves. He does not deserve a life sentence considering his youthful age and other factors covered.

In the case of **Republic v Mayeso Sukali and Duncan Chidika** Criminal Case No. 21 of 2011 Mwase J said that it must be borne in mind that at law that is different when dealing with children. The scale weighs heavily on the side of mercy and rehabilitation and preparing them for reintegration in the society and ultimately shorter period of detention.

In **The Republic v Francis James** Homicide sentence Rehearing No. 28 of 2015 the Court gave such a sentence that resulted in the convict's immediate release after noting that the convict was of youthful age at 19 and that he had been in custody for 19 years.

Without much ado I sentence the convict tot a sentence that will result in his immediate release.

Pronounced in Open Court this 11th day of August 2015 at Zomba District Registry.

M.L. Kamwambe
JUDGE

The Republic v. Clitus Chimwala

JUDICIARY

IN THE HIGH COURT OF MALAWI PRINCIPAL REGISTRY SENTENCE RE-HEARING CAUSE NO. 56 OF 2015

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Chitsime, Senior State Advocate, for the State

Mr. Nanthuru, of Counsel, for the Convict

Ms. Emily Chimang'anga, Court Clerk

Mrs. Pindani, Court Reporter

JUDGEMENT

Kenyatta Nyirenda, J.

Clitus Chimwala, the Convict herein, was on 7th May 1999 convicted of murder contrary to section 209 of the Penal Code by a Judge sitting with a jury and sentenced to death, which was then deemed to be the mandatory sentence for murder. On 15th July 2015, following sentence re-hearing, I set aside the death sentence and sentenced the Convict to a term as resulted in his immediate release. I will now proceed to deliver my judgement.

The original docket for the Convict's trial record has failed to be traced. However, the available facts as pieced together from sources outside the trial record appear to be as follows. The Convict was arrested on 29th December 1994 and charged alongside another man, Mark Nkoloma on one count of having caused the death of one Mrs. Mkandawire on an unknown date in the City of Zomba. The Convict was at the time of his arrest a Form 2 student at Zomba CCAP Distance Education Centre. Mr. Nkoloma died before he could be taken to Court for trial.

Before I proceed to venture into my analysis of the law pertaining to re-sentencing of homicide convicts, let me place on record my gratitude to counsel for their research and industry which was of immense assistance to the Court. However, I may not in the course of my judgement be able to recite every submission they made. This will not be out of disrespect to Counsel but it will be due to reasons of brevity.

It is trite that murder is a very serious offence: see section 210 of the Penal Code which provides for death as a maximum sentence upon conviction of the offence. However, it has been repeatedly held that the maximum punishment must be reserved for the worst of offenders in the worst of cases: See **Rep. v. Anderson Mabvuto, Criminal Case No. 66 of 2009 (unreported)** and **Rep. v. Jamuson White, Criminal Case No. 74 of 2008 (unreported)**. Both the State and the Defence are agreed that the death sentence imposed on the Convict was not merited. I fully concur with Counsel that it cannot be properly contended that the offence herein was committed in circumstances that can be described as worst instance of murder. In any case, the Convict's participation in the commission of the offence appears to have been very minimal.

It is also noteworthy that the Convict was a very young man at the time of committing the offence. The law generally favours relatively young or old people to protect them from being in custody for longer periods: see **Rep. v. Ng'ambi [1971-1972] ALR Mal 457**. Further, as submitted by both Counsel, the Convict is a first offender with no record of any previous conviction. Courts will always be slow at imposing long prison terms for first offenders: see **Rep. v. Chikazingwa [1984-86] 11 MLR 160**.

Furthermore, both Counsel drew the Court's attention to the fact that the Convict had already spent about 5 years on remand before commencement of his trial. Courts will usually order that the sentence takes effect from the date of a convict's arrest thus factoring in the time already spent in the prison: See **Mulera v. Rep. [1971- 1972] ALR Mal 73**.

There is also on record medical evidence demonstrating that the Convict suffered serious mental health disorders prior to his arrest. Such a condition constitutes a mitigating factor: see **Rep. v. Margret Nadzi Makolija, Homicide Sentence Re- hearing No. 12 of 2015 (unreported)** where the Court held that:

"Evidence of 'mental or emotional disturbance', even if it falls short of meeting the definition of insanity, may nonetheless make an offender less culpable on a murder charge and this should be considered in mitigation of sentence. I have also taken note of the so many other mitigating factors obtaining in the present case as mentioned by both Counsel."

It is also significant that the Convict has tremendously reformed during his 21 years of incarceration such that there is a high probability of him seamlessly re-integrating into society upon his release.

In light of the foregoing aggravating and mitigating circumstances, as accepted by this Court, and having considered several decisions on homicide sentencing made by both the Supreme Court of Appeal and the High Court, I am inclined to reduce the sentence. Accordingly, the sentence of death is set aside and replaced by a sentence that would result in the immediate release of the Convict, as of 15th July 2015.

Pronounced in Open Court this 18th day of August 2015 at Zomba in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE

The Republic v. James Galeta

JUDICIARY

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

HOMICIDE SENTENCE RE-HEARING CAUSE NO. 47 OF 2015

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Chitsime, Senior State Advocate, for the State

Mr. Nanthuru, of Counsel, for the Convict

Ms. Emily Chimang'anga, Court Clerk

Mrs. Pindani, Court Reporter

JUDGEMENT

Kenyatta Nyirenda, J

James Galeta (Convict) appeared before the High Court sitting at Mwanza on an indictment for murder contrary to s. 209 of the Penal Code. After a full trial, before a jury, the Convict was found guilty and, accordingly, convicted on 6th August 2003. He was mandatorily sentenced to death as was then deemed to be the case. On 9th April 2004, the death sentence was commuted to life imprisonment.

The pertinent facts can be shortly stated. On or about 20th December 1990, the Convict and two other men caused the death of Joseph Mphonde, a black market forex trader who plied his business at Mwanza Border (Deceased). The murder was committed when the Convict and his co-accused were in the course of robbing the Deceased.

The case is again before the High Court following the decision in **Francis Kafantayeni and others v. Attorney General, Constitutional Case No. 12 of 2005 (unreported)**, [hereinafter referred to as the "**Kafantayeni Case**"] which

declared the mandatory death sentence as unconstitutional, thereby giving the High Court the discretion to pass a sentence commensurate with the circumstances of each given case. The **Kafantayeni Case** also held that all convicts who had been sentenced to death were entitled to be re-heard and an appropriate sentence passed on them.

The decision in the **Kafantayeni Case**, supra, has been repeatedly endorsed by the Supreme Court of Appeal: see **Mclemence Yasini v. Rep.**, MSCA Crim. App. No. 25 of 2005 (unreported), **Twoboy Jacob v. Rep.**, MSCA Crim. App. No. 18 of 2006 (unreported), **Winston Ngulube and Another v. Rep.**, MSCA Crim. App. No. 35 of 2006 (unreported) and **Twalibu Uladi v. Rep.**, MSCA Crim. App. No. 5 of 2008 (unreported).

Counsel Chitsime and Counsel Nanthuru are agreed that mitigating factors far outweigh aggravating factors. Mitigating factors mentioned by both parties include the fact that the Convict is a first offender who is young and was aged 23 years at the time of committing the offence. The law generally favours relatively young or old people to protect them from being in custody for longer periods: see **Rep. v. Ng'ambi (1971-1972) ALR Mal 457**. It is also true that courts will always be slow at imposing long prison terms for first offenders: see **Rep. v. Chikazingwa [1984-86] 11 MLR 160**. It is also noteworthy that the Convict co-operated with authorities unlike his co-accused who fled the jurisdiction to Mozambique.

Counsel Nanthuru submitted that there are several other mitigating factors in addition to those mentioned by the State. The Defence mentioned, among other matters, (a) the long time the Convict has already spent in prison, (b) the Convict being remorseful, (c) not being a natural leader, the Convict was led astray by his co-accused, (d) lack of clarity regarding the Convict's role in the commission of the offence, (e) the "weak" mental capacity of the Convict and (f) the Convict's capacity for reform.

With respect to the Convict's mental capacity, Counsel Nanthuru submitted that the Convict greatly depended on alcohol such that there were indications of his suffering alcohol-related intellectual impairment. In support of his submission, Counsel Nanthuru drew the Court's attention to the affidavit evidence by Group Village Headman Justino Pitalasi and relatives of the Convict to the effect that the Convict, among other things, (a) was "*a vulnerable youngman...*", and (b) "*..used to drink a lot of alcohol, even from an early age, I think he was an alcoholic*".

As regards reform and re-integration, reliance was placed on affidavit evidence of Prison Officer Janjanani Katezathe, Group Village Headman Justino Pitalasi and

members of the Deceased's family and community which attest to the Convict's good conduct pre-and post his conviction.

Lastly, Counsel Nanthuru submitted that, without in any way challenging the conviction, lack of direct evidence showing the Convict's involvement in the death of the Deceased must count strongly in his favour in relation to sentence. He placed reliance on the case of **Rep. v. Funsani Payenda, Sentence Re-hearing Cause No. 18 of 2015 (unreported)**, wherein the Court stated:

"Evidence of his direct participation is rather cloudy, I as I said, this should not suggest that I wish to indirectly pronounce him not guilty. As I mentioned earlier, he remains a murder convict. However I agree with counsel that this is a fact that I should take into account when passing sentence." - Emphasis by underlining supplied by Counsel

With respect to aggravating factors, Counsel Chitsime asked the Court to bear in mind three factors, namely, that (a) murder is a serious offence in that it entails loss of an innocent life, (b) offence was committed by a group which shows that there was careful planning, leading to a meeting of minds and (c) the offence of murder was committed in the course of another offence, that is, robbery. In responding to Counsel Chitsime's submissions on aggravating factors, Counsel Nanthuru argued that the death was a tragic consequence of a robbery that spun out of control. To buttress its submission that there was lack of premeditation, the defence adduced affidavit evidence to show that the Convict did not plan to kill the Deceased:

"86. ... This is confirmed by Mr Galeta's co-accused, Ligisi Kapalepale, whom investigators in the present matter were able to locate and interview. Mr Kapalepale states that:

'James was involved in the robbery but I don't think he planned to kill the victim. I think the victim was killed in the heat of the moment'

Indeed Mr Galeta's nephew, Matthew Kanikole, recalls Mr Kapalepale sharing with the community Mr Galeta's express intention that the deceased should not be killed:

'The one who was acquitted, Lingisi Kapalepale, told people in the village that James told the group during the robbery that they should leave the victim and not kill him'.

Having laid the foundational evidence, Counsel Nanthuru asked the Court to bear in mind the importance of the distinction between "intent to injury" and "intent to kill" in so far as sentencing is concerned: This is to be found on page 27 of his Written Submission:

"It is respectfully submitted that Mr Galeta did not possess an intent to kill nor did he premeditate that death should occur. Fitzgerald and Starmer, "A Guide to Sentencing in Capital Cases", supports drawing a distinction between different levels of intents and

*states that "the lack of any long pre-meditation, or pre-planning, should always count as a strong mitigating factor (at 25). Even in very grave cases, judges have held that a death sentence would be improper where the defendant lacked an intent to kill. In **R v Vola** [2005] TOSC 31 (Tonga), for example, the defendant beat the victim to death with an iron bar but at sentencing the judge differentiated between intent to injure and intent to kill, and duly took this into consideration as mitigation. The absence of such a premeditated intention to kill is a powerful mitigating factor, which should be duly weighed into the balance upon sentencing."*

In his response, Counsel Chitsime submitted that the Defence's arguments on lack of premeditation lack factual basis in that the affidavits sought to be relied on are full of "pure hearsay evidence". I am inclined to agree with Counsel Chitsime. Mr. Kapalepale gives no reason for his belief that the Convict did not plan to kill the Deceased. In any case, Mr. Kanikole did not witness the commission of the offence.

It is trite that the maximum punishment must be reserved for the worst of offenders in the worst of cases. This principle was confirmed by the Supreme Court of Appeal in **Msanide Phiri v. Rep.**, MSCA Crim. App. No. 13 of 2009, (unreported) where the Court replaced a death sentence with a sentence of 15 years imprisonment with hard labour (IHL). It is my considered view that the offence of murder committed by the Convict does not come anywhere near circumstances that can be described as the worst case of murder: there is no evidence to show that it was committed in decrepit and gruesome manner.

In **Winston Ngulube and Another v. Rep.**, supra, the Supreme Court of Appeal set aside the sentence of death sentence imposed by the High Court for murder and replaced it with one of 20 years IHL, after it found that (a) the assault that led to the death of the deceased was not done using dangerous weapon, (b) the quarrel which led to the assault was clearly influenced by intoxicating drink, (c) no clear motive on the part of the Appellants to cause the deceased's death was disclosed by evidence, and (d) there was no evidence that the Appellants were persons of previous bad character.

In **Twalibu Uladi v. Rep.**, supra, the appellant and the deceased had been drinking together. A quarrel ensued after the appellant had apparently accused the deceased of attempting to steal a window frame which was inside the appellant's house but apparently found itself outside. A fight ensued and in the course of the fight the appellant took a panga knife and used it to hack the deceased. The Supreme Court of Appeal set aside a sentence of death and substituted it with one of 20 years IHL after it observed that that the appellant was fighting with bare hands and only resorted to the panga knife in the course of the fight.

The High Court in the **Rep. v. Meckson Chilima, Homicide Sentence Re-hearing Cause No. 20 of 2015 (unreported)** the convict beaten his friend to death with a stick with a view to steal small property from him. The convict was granted immediate release after having served about 20 years. In **Rep. v. Ernest Adam and Elenelewo Sakondwera, Homicide Sentence Re-hearing Cause No. 18A of 2015 (unreported)**, the two convicts took part in a violent burglary during which the homeowner's wife was shot dead by her own gun in front of her children. While the 1st convict received a sentence of 36 years IHL, the 2nd convict was sentenced to 25 years IHL after the Court found that he deserved leniency on the basis of his co-operation with authorities and continued remorse for the offence.

In **Msanide Phiri v. Rep.**, supra, the Court sentenced the convict to 15 years IHL having found that the convict was a young man of 20 years at the time he committed the offence of murder and he did not attempt to escape after committing the offence. This was against the aggravating factors that the convict had maliciously beaten the deceased with a metal wire before striking her with a hoe and leaving the deceased to bum in her own home, which he had set alight.

In the present case, I agree with both the State and the Defence that mitigating factors far outweigh the aggravating circumstances. It is also significant that over and above the fact that the Convict is a young man with no previous conviction who has tremendously reformed during his 16 years of incarceration such that there is a high probability of him seamlessly re-integrating into society upon his release, the circumstances in which the offence was committed strongly suggest that the Convict was mentally imbalanced at the material time due to excessive intoxication. As was rightly held in the **Rep. v. William Mkandawire, Homicide Sentence Rehearing Cause No. 20 of 2015 (unreported)**, evidence of "*mental or emotional disturbance*", even if it falls short of meeting the definition of "*intoxication*", may nonetheless make an offender less culpable on a murder charge and this should be considered in mitigation of sentence.

It is also important to bear in mind the fact that, much as the propriety of the conviction cannot be challenged in the present proceedings, it is undeniably that on the available evidence there are "many doubts" as regards his role and behavior during the commission of the offence. Likewise, unresolved is the question of who actually caused the death of the Deceased and the manner in which it was brought about. The uncertainty on these matters must, to my mind, be resolved in favour of the Convict: see **Rep. v. Clement Master, Sentence Re-hearing Cause No. 18 of 2015 (unreported)** and **Rep. v. Funsani Payenda**, supra. I am also mindful of the

fact the Convict was arrested on 30th December 1999 and had been on remand for 3 years and 7 months before his conviction on 6th August 2003.

In light of the foregoing and having considered all the circumstances of this case, I am inclined to reduce the sentence. Accordingly, the sentence of death is set aside and replaced by a sentence that would result in the immediate release of the Convict.

Pronounced in Open Court this 18th day of August 2015 at Zomba in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE

The Republic v. Richard Chipoka

JUDICIARY

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

SENTENCE RE-HEARING CAUSE NO. 39 OF 2015

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Malunda, Chief State Advocate, for the State

Mr. Chithope-Mwale, Senior Legal Aid Advocate

Ms. Emily Chimang'anga, Court Clerk

Mrs. Pindani, Court Reporter]

JUDGEMENT

Kenyatta Nyirenda, J

The case of the Richard Chipoka [hereinafter called the "Convict") is before the High Court for re-sentencing. The Convict was one of the six individuals whose respective death sentences were set aside by the High Court in **Francis Kafantayeni and others v. The Attorney General, Constitutional Case No. 12 of 2005 (unreported)**.

The original docket for the Convict's trial record has failed to be traced. However, the established brief facts of the case are that in or around January 2002, the Convict perpetrated a robbery, with a co-accused, during the course of which an individual was killed or suffered injuries from which he subsequently died. The Convict was arrested and kept on remand from around January 2002. On 23rd August 2005, he was convicted of murder contrary to section 209 of the Penal Code and was mandatory sentenced to death as was then deemed to be the case.

In **Rep. v. Margret Nadzi Makolija, Sentence Rehearing Cause No. 12 of 2015 (unreported)**, [hereinafter referred to as the "**Makolija Case**"], the Court outlined the key factors that ought to be taken into consideration in sentencing convicts in homicide cases and the factors include (a) the reservation of maximum sentences for the worst offenders in the worst of cases, (b) the age of the convict at the time of committing the offence and at the time of sentencing, (c) leniency towards first offenders, (d) time already spent in prison, (e) the possibility of reform and social re-adaptation of the convict, (f) circumstances of the offence.

There is no evidence herein to establish that the murder had been premeditated and the Convict appears to have been of good character and a reliable member of society prior to his conviction. Both the State and the Defence are agreed that the offence committed by the Convict was not the 'worst of the worst' and, as such, neither death nor life sentence would be an appropriate sentence.

The Convict also deserves leniency in that he (a) was young (around 21 years old) when he committed the offence and (b) was a first offender at the time of committing the offence and by all accounts had led a lawful life prior to the commission of this offence, and (c) had been a productive member of society prior to his conviction, as evidenced by three reports respectively tendered by the village counsellor (Tenson Gross), his mother and his ex-wife.

It is also noteworthy that there is no record that the Convict jumped bail or that he unnecessarily delayed the proceedings during his trial. He, therefore, deserves credit for the 13 years he has been in police custody, which includes the time he has been on remand.

Against the above-mentioned mitigating factors, there are at least two aggravating factors. Firstly, it is clear that the offence was committed using an offensive weapon, namely, a gun. This demonstrates a certain level of pre-meditation as the defendant and his co-accused brought the weapon to the scene. I am not persuaded by the submission by the defence that the co-accused was older and had induced or otherwise enticed the Convict into participating in the commission of the offence. The submission regarding inducement is premised on hearsay evidence contained in the statement of Tenson Gross:

"I know Richard's co-defendant Fyson Gama because he was from our neighboring village, Mumba Village. I remember that before this crime he had previous convictions for burglary in a village called Tambala Village.

Fyson was much older than Richard. If Richard was involved in the offence then I believe that it was Fyson who influenced Richard.

From what I understand, it was Fyson who shot the victim during the robbery in Namisasi. That is the belief here in the community and it also the belief in Namisasi.” - Emphasis by underlining supplied

In any case, the Convict was an adult at the time of committing the offence and was aware of the risk of participating in a robbery with a weapon.

I now turn to two key matters, that is, reform and double jeopardy, on which the State and the defence are not agreed.

Possibility for Reform

The defence adduced affidavit evidence to the effect that the Convict *'has conducted himself in a manner which demonstrates that he is capable of reform and has reformed'*. Counsel Malunda submitted that post-conviction conduct ought not to be considered. He placed reliance on the cases of the **Rep. v. Abraham Galeta and Zaima Makina, Sentence Re-hearing Cause No. 6 of 2015 (unreported)** and the **Rep. v. Clement Master, Sentence Re-hearing Cause No. 33 of 2015 (unreported)** which are for the proposition that in dealing with a sentence re-hearing, the court should consider the appropriate sentence which could have been passed at the time of the initial sentencing process and therefore the circumstances to be considered are largely those obtaining at the time of the offence and immediately thereafter.

Counsel Malunda also made reference to s. 106 of the Prison Act which provides that the Commissioner of Prison may review any punishment imposed on any prisoner and may vary or remit such punishment. In considering whether to vary or remit a prisoner's sentence, the Commissioner of Prisons has to take into account the behavior of the prisoner while serving his sentence. The Chief State Advocate submitted that taking into account the prisoner's behavior at re-sentencing is tantamount to making the prisoner benefit twice on the basis of the same factors.

Counsel Mwale submitted that 'post-offence' or 'post-conviction' circumstances are relevant to sentencing, either as mitigating or aggravating factors. To illustrate his point he gave the following two examples:

- "1. *If a person commits murder and, post offence, he remains at large for 15 years during which time he commits a further offence the state argues, and the court buys, as an aggravating factor that the person committed a further offence hence a sign of no remorse and no reformation. Why should then the opposite fact that a person has reformed, post offence, within the said 15 years not be treated as an opposite of an aggravating factor, that is, a mitigating factor?*

2. *If a person has been convicted of theft of K2,000,000.00 and by the time of sentence has since refunded the same, should or does the court turn a blind eye to this fact stating it will treat the convict as at time of conviction and proceed on the basis that there is no recovery?"*

Counsel Mwale cited a number of authorities from within and without our jurisdiction such as **Pepper v. United States**, 131 S. Ct. 1229 (2011) and **United States v. Bryson**, 229 F. 3d 425,426 (CA2 2000) but much emphasis was placed on the **Rep. v. Funsani Payenda, Sentence Rehearing Cause No. 18 of 2015 (unreported)** [hereinafter referred to as the '**Payenda Case**']. With respect to the **Payenda Case**, Counsel Mwale drew the Court's attention to three specific dicta at pages 29 and 30:

- "62. *The point to be taken is that since one of the things that a Court does in arriving at a particular sentence is to predict the convict's capacity to, and prospects of reform and social rehabilitation, when a sentence has been set aside after a significant passage of time as in the present case, the Court has the advantage of not simply predicting future post-conviction behavior, but examining an existing significant post-conviction behavioral record of the convict. As the Court observed in **Pepper**, the likelihood that the offender will engage in future criminal conduct is a central factor that courts must assess when imposing sentence.*
63. *Further, the idea that the Court should close its judicial eyes to any development related to the defendant, that is relevant for sentencing from the date of conviction, runs into some conceptual difficulties. During argument, I asked State Counsel whether, if a convict became terminally ill just before being sentenced, that would, or ought not to affect, sentencing. I pointedly asked whether the Court ought to close its eyes to the condition and, if it were originally minded to pass say a harsh 50-year prison sentence with hard labour, it ought to proceed and mete it out all the same. Counsel responded that the Court would have to take into account the terminal illness as a relevant factor when sentencing. He proceeded to state, however, that that would be an exceptional case. The impression that State Counsel therefore gives is that he would pick and choose instances in which post-conviction circumstances may be considered, and those were they should not be considered. This is obviously problematic.*
64. *There is another way of looking at the consideration of post-conviction circumstances. One may look at the negative dimension. One may conceive of a convict who was sentenced to death in 2004 and was, at the time of committing the offence, generally of a good disposition and having a wide array of mitigating factors, that would have suited him to a much shorter sentence but for the mandatory nature of the death sentence then. If at the time of the sentence rehearing post the **Kafantaveni decision**, he has now gone rogue, becoming a very disturbing and violent character in prison who is a menace to the whole prison establishment, should the Court close its eyes to this bad development, and give a light sentence as might have been imposed in light of the circumstances as they were in 2004, that might now lead to the immediate release of such a murder*

convict? In my view, it would not be wise for the court to close its judicial eyes to the post-conviction record of the defendant, mete out a relatively light sentence and let such a dangerous criminal loose so soon onto the free society on the basis that the Court was tied to consider only the favourable circumstances as they obtained in 2004. The parole process, where available, would be no answer in such a scenario. It seems to me in justice, that the answer ought to be that such a prisoner should be given a much longer sentence. This would only be possible where the Court accepts to examine post-conviction circumstances." -

Emphasis by underlining supplied by Counsel

To hammer home his contention, Counsel Mwale invited the Court to take note of the fact that the Convict is not blame for the delay in having him re-sentenced:

*"Moreover, I think it always has to be remembered that the homicide convicts undergoing rehearings are not finding themselves before the courts seeking a constitutional sentence of their own making. It is not their fault that they come before the court for sentence rehearing for instance, 15, 18 of 20 years down the line. It is because the state put in place an unconstitutional mandatory death penalty and per **Section 41 (3) of the Constitution** they are entitled to an effective for the unconstitutional mandatory death penalty that violated their right to fair trial, among others, which effective remedy can only be to consider post offence mitigating factors. Otherwise to ignore everything after their unconstitutional mandatory death penalty and sentence them only as at time of conviction would be tantamount to the court forgetting that the convict is in fact not as at time of conviction; it would further be tantamount to telling convicts they have suffered in vain and there is no effective remedy."*

To shore up his argument, Counsel Mwale quoted the following passage in **Payenda Case**:

"One of the tasks the court is faced with at the time of sentencing is to consider "capacity for reform" and "social re-adaptation". If a person is sentenced not long after committing a crime and being found guilty the court is left speculating on the prospects of reform and social re-adaptation. Now if a person is sentenced 20 years after committing a crime or being convicted how is the court supposed to approach "capacity for reform" and "re-adaptation"? Should the court still speculate, stating "we think convict may reform" when there are facts/evidence that the convict has actually already reformed?

Wouldn't it defeat logic to state one thinks a car may be speedy when in fact he has evidence that it is actually speedy? Similarly, wouldn't it defeat logic to speculate what a convict may become after 20 years imprisonment when there is actually evidence of what he has actually become after 20 years?"

It will be recalled that the **Makolija Case** holds that courts have to consider the possibility of reform when sentencing a convict. In this regard, the **Payenda Case** merely confirms, albeit in a more forceful way, the decision in the **Makolija Case**.

It is also noteworthy that the **Payenda Case** was delivered on 23rd April 2015 with the benefit of the decisions in **Rep. v. Abraham Galeta and Zaima Makina**, supra, and the **Rep. v. Clement Master**, supra. The **Payenda Case** addresses the issue of post-conviction mitigating factors in detail and with a depth of analysis far much more than the other decisions on the subject-matter. In the premises, I remain satisfied, and stand, by my decision in the **Makolija Case** that in capital offences the sentencing court must consider whether or not there is reasonable prospect of the offender of reform by looking at both pre and post-conviction conduct.

Double Jeopardy

Counsel Chitope Mwale contended that the Court should consider reducing the sentence on the basis that the Convict had available to him a plea of *autrefois convict*, or in the alternative there was an abuse of process. The contention was put thus:

- "85. There are in any event strong prima facie concerns about the conviction for murder. The fact that the defendant appears to have been tried for murder three years after the offence took place and despite what was apparently an earlier decision to try him for armed robbery rather than murder calls out for explanation and justification.
86. Richard Chipoka's conviction for murder has resulted in serious constitutional violations for two reasons. These points are separate from and additional to the unconstitutionality of his mandatory sentence of death and the unconstitutionality of being detained on death row for many years in respect of an unconstitutional sentence.
87. First, there is at least a significant risk that the defendant was convicted of murder in violation of the rule against double jeopardy, as enshrined in section 42(2)(f)(vii) of the Constitution. Under that provision, the defendant was entitled "not to be prosecuted again for a criminal act or omission of which he or she has previously been convicted or acquitted". Yet that is what appears to have occurred here. Assuming that he was indeed responsible for certain criminal acts in February 2002 that resulted in his conviction that year for armed robbery, he was prosecuted again for the same criminal act, only this time for murder, in 2005. On that analysis, the latter conviction amounted to a breach of section 42(2)(f)(vii).
88. Second, the defendant's conviction for murder amounted to an abuse of process and a breach of his broader constitutional right to a fair trial. This is a separate issue from the double jeopardy point addressed above. It is an established common law principle that no one should be punished twice for an offence arising out of the same or substantially the same set of facts. To do so would offend

against the principle that there should be no sequential trials for offences on an ascending scale of gravity.

89. *On this point the defendant relies on the reasoning of the Court of Appeal (England and Wales) in R v. Beedie [1998] QB 356, applying and explaining the House of Lords' earlier ruling in Connelly v. DPP [1964] AC 1254. In Beedie, the defendant was the landlord of a property in which a tenant died from poisoning caused by a defective gas appliance. The defendant was convicted and fined for breaching his statutory duty to ensure that the appliance was maintained and repaired. He was later prosecuted for and convicted of manslaughter, for which he was given a suspended prison sentence. The Court of Appeal ruled that the trial judge should have stayed the manslaughter proceedings as an abuse of the court's process. This was because "the manslaughter allegation was based on substantially the same facts as the earlier summary prosecutions and give rise to a prosecution for an offence of greater gravity, no new facts having occurred..." (p.366). The Court noted that any general public interest in prosecuting a person for a more serious crime is not sufficient reason to depart from this important general principle.*
90. *In the present case, it is submitted that the same reasoning applies. The defendant appears to have been prosecuted for murder, obviously a more serious allegation, despite the allegation being based on the same or substantially the same facts as the earlier prosecution for armed robbery. This, it is submitted, is a strong argument that the defendant's prosecution for murder was an abuse of the Court's process at common law. Alternatively, it is submitted that any such prosecution was unfair and accordingly violated the right to fair trial enshrined in section 42(2)(f) of the Constitution.*
91. *The prosecution say that Beedie has no bearing on the present case, because the present defendant was charged with two discrete offences, with "unique elements" (para. 4.1.7 of the State's written submissions). But so was the defendant in Beedie. He was charged with breach of a statutory duty to maintain an appliance and manslaughter, two discrete offences with unique elements. The prosecution also say that the key feature of the prosecution case on the first charge in Beedie was the victim's death, implicitly, in contrast to the present case. But in the absence of a court file, the prosecution have no basis for asserting anything about what was or was not a key feature in the defendant's first trial.*
92. *The defendant is not seeking through this submission to reverse his conviction for murder. Rather, he is inviting the Court to provide an effective remedy for previous constitutional violations..." - Emphasis by underlining supplied by Counsel*

Counsel Malunda does not agree with Counsel Mwale's assertion that the principle of double jeopardy applies to the present case. His written submissions on the matter read as follows:

- "4.1.2 In **Kafantayeni and Yasini** the court ordered the Director of Public Prosecutions to bring all affected murder convicts to the court for resentencing. A resentencing court's purview is that of imposing a substitute sentence for the unconstitutional sentence, taking into account all relevant law on sentencing in homicide cases. The conviction has already been settled and cannot be re-examined by the Court.
- 4.1.3 In the interest of ensuring that no miscarriage of justice occurred however, the State will explore the concern raised by the defence. Section 20 of the Penal Code states:
A person shall not be punished twice, either under the provisions of this Code or under any other law, for the same offence.
- 4.1.4 Section 20 of the Penal Code is clear, there is a bar on imposing multiple punishments for the same offence on an individual. In the current case however it is important to note that the defendant was charged with two separate offences i.e. armed robbery and murder. Although the two offences arose out of the same factual scenario they are two distinct offences, with different composite elements.
- 4.1.5 It is also important to differentiate the situation herein with the situation in the case of **R v Beedie** [1964] QB 356. An important feature in **Beedie** was that the death of the victim had been a key feature of the prosecution case on the first charge in the lower court. In attempting to establish the charge of failing to "conduct his undertaking as a landlord so as to ensure, so far as was reasonably practicable, Tracy Murphy's health and safety, by maintaining the fire and flue in good repair and proper working order", the prosecution relied on the victim's death to support their case.
- 4.1.6 Upon appeal it was held that it was an abuse of process to subsequently try the defendant for manslaughter, when he had effectively been tried for the same offence on a prior occasion. The Court did not overturn the narrow interpretation of the doctrine of double jeopardy as stated in the locus classicus **Connelly v DPP** [1964] AC 1254.
- 4.1.7 As the defendant in the current case was charged with two discrete offences, with unique elements the defendant did not have grounds for a plea of *autrefois*."

Before considering the submissions made by both Counsel, there is an issue that has to be examined. This has to do with whether the plea of *autrefois convict* and abuse of court process have factual basis. It would appear the claims are premised on an affidavit sworn by Christopher Materechera, a sub-inspector at Chichiri Prison, regarding the committal of the Convict at Chichiri, Blantyre and Zomba Prisons respectively. Paragraph 9 of the affidavit is relevant:

"THAT Richard Chipoka's prison file shows the following:

- a. *THAT Richard Chikopa was convicted by the SG Magistrates Court sitting in Mulanje of armed robbery (case number 61 of 2002) and sentenced to five years imprisonment with hard labour.*
- b. *THAT Richard Chipoka date of committal was 13th of May 2002 and that his date of release for his conviction was noted by prison staff as the 12th of September 2005.*
- c. *THAT before Richard's scheduled release he was convicted by the High Court of murder (case number 180 of 2005) and sentenced him to suffer death.*
- d. *THAT Richard Chipoka's death sentence was handed down on the 23rd of August 2005."*

What is the reasonable conclusion to be drawn from paragraph 9 of the affidavit? Nothing more and nothing less than that the Convict was convicted of armed robbery by the magistrate court and murder by the High Court. I have painstakingly gone through the documents filed with the Court and I have found no evidence in support of the fact the Convict was prosecuted for armed robbery and murder in respect of the same criminal act. To my mind, the evidence before the Court falls far short of sustaining a plea of *autre fois convict*. I am fortified in my view by the fact that paragraphs 85 to 90 of the submissions by Counsel Mwale are littered with suppositions, conjectures, assumptions, etc, with the common phrase being "*the defendant appears to have been prosecuted.*"

In any case, the plea of *autre fois convict* has to fail on two other grounds. Firstly, despite the contention in paragraph 89, it is inescapable from a reading of paragraphs 82 to 88 inclusive that the Convict seeks to attack the conviction. The case of **Rep. v. Lackson Dzimbiri, Sentence Re-hearing Cause No. 12 of 2015 (unreported)** is for the proposition that it is not open to any party to question the conviction within the context of homicide sentence re-hearing. In the present case, the Court only has jurisdiction over sentence and it thus proceeds on the basis that the conviction was safe and accurate. Viewed from that angle, I fail to appreciate how the plea of *autre fois convict* can be a mitigating factor without vitiating the position that the conviction of the Convict was legally well-grounded.

Secondly, the plea of *autre fois convict* is diametrically opposed to paragraph 98 of the Defence's Submission which is to the effect that the Convict was a first offender. Clearly, the Convict cannot have it both ways.

I now turn back to the central issue before this Court, that is, determining the appropriate sentence to be meted out on the Convict. My attention has been brought to sentencing trends in similar cases by way of three cases, namely,

Mabvuto Alumeta v. Rep, MSCA Criminal Appeal No. 46 of 2002 (unreported), Evance Namizinga and another v. Rep., MSCA Criminal Appeal No. 18 of 2007 (unreported) and Winston Ngulube and another v. Rep., MSCA Criminal Appeal No. 35 of 2006 (unreported).

In **Mabvuto Alumeta Case**, supra, death had been caused in the course of an armed robbery, committed by the Appellant and 2 co-accused and the Supreme Court of Appeal held that the death sentence was the appropriate sentence considering the circumstances. In **Evance Namizinga Case**, supra, the deceased, a guard at the premises of a shop that the appellants went to rob, was struck with a bottle until he was unconscious and subsequently died from the injuries. The Supreme Court of Appeal substituted a sentence of 25 years for the death penalty. In **Winston Ngulube Case**, supra, the Supreme Court of Appeal set aside the sentence of death sentence imposed by the High Court for murder and replaced it with one of 20 years imprisonment with hard labour (IHL) after it found that (a) the assault that led to the death of the deceased was not done using dangerous weapon, (b) the quarrel which led to the assault was clearly influenced by intoxicating drink, (c) no clear motive on the part of the Appellants to cause the deceased's death was disclosed by evidence, and (d) there was no evidence that the Appellants were persons of previous bad character.

In the present case, having regard to mitigating factors and aggravating factors as accepted by this Court and in light of relevant authorities decided by both the Supreme Court of Appeal and the High Court, I am inclined to reduce the sentence. Accordingly, the sentence of death is set aside and replaced by a sentence of 20 years IHL effective from his date of arrest in January 2002. The Convict has the right of appeal against this sentence to the Supreme Court of Appeal.

Pronounced in Open Court this 18th day of August 2015 at Zomba in the Republic of Malawi.

Kenyatta Nyirenda

JUDGE

The Republic v. Bisket Kunitumbu

JUDICIARY

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

SENTENCE HEARING CAUSE NO. 59 OF 2015

CORAM: THE HONOURABLE MR JUSTICE CHIRWA

Mr. Malunda, Senior State Advocate for the State.

Mr Kaira, of Counsel for the Accused

Mr H. Amos, Official Court Interpreter

RULING

The Convict herein, **Bisketi Kunitumbu**, was convicted of the offence of murder contrary to Section 209 of the Penal Code by the High Court sitting with jury at Dedza on the 11th of September, 1998. He was sentenced to suffer the mandatory death penalty.

The Court record pertaining to the Convict's case however, cannot be traced with the result that the exact facts of the case could not be established. Suffice to say, that the Convict was arrested of having caused the death of his niece, Ms Ndakathetha Phiri, on or about the 29th of June, 1992.

In determining what an appropriate sentence is for the Convict herein, this Court is mindful of the provisions of Section 321J of the Criminal Procedure & Evidence Code, that is to say:

“(1) where a verdict of guilty is recorded, the High Court may, after judgment but before passing sentence, receive such information or evidence as it thinks fit, in order to inform itself as to the proper sentence to be passed.

(2) The information or evidence that the court may receive under subsection (1) may, in addition to the evidence of the accused or the prosecution, include information or evidence by or on behalf of the victim of the offence and any relevant reports to enable the court assess the gravity of the offence.”

The foregoing provisions, no doubt, give the court discretion as to what information or evidence to accept in order for it to make an informed decision as to the appropriate sentence to be passed on a convict. It is thus not each and every information that maybe taken into consideration by the court. This Court, however, bears in mind the fact that such a discretion ought to be exercised judiciously.

In the instant case this Court has had the opportunity of perusing the written submissions of both the State Counsel and the Defence Counsel and the oral submissions made by both Counsel at the hearing of this re-sentencing. It has also had the opportunity of perusing the several Affidavits filed on behalf of the Convict herein. What had greatly persuaded this Court to order the immediate release of the Convict herein on the date of the hearing of his case is the age of the Convict. According to the available information the Convict was 47 years old at the time of his conviction and is now 70 years old. The age of 70 years is quite an advanced age and considering that the Convict is a man of previous good character this Court is constrained to find any benefit that would accrue to the State and even the community from where the Convict comes if the Convict were to continue to be detained. The fact that the convict is of an advanced age is a very strong factor mitigating in favour of the

imposition not a very long term sentence of imprisonment. As a matter of fact, it is very unlikely that such a person would re-offend. The case of **Republic v Ng'ambi**, [19 71-19 72] ALR (Mal) 457 has been cited by both Counsel as authority for the proposition that courts will favour young or old people to prevent them for being in custody for too long. This Court concurs with both Counsel.

The fact that the Convict herein had lived for 47 years without offending the law also heavily weighs in his favour when sentencing him. It is quite commendable for a citizen to live all this long without offending the law in any way.

The fact that the Convict was arrested on or about the 29th of June, 1992 and convicted on the 11th September 1998, that is to say, 6 years later, means that the Convict had suffered pre-trial detention in contravention of his Constitutional right under section 42 (2) (e) of the Constitution. The conduct of the State in failing to prosecute the Convict within a reasonable time as provided for in Section 42 (2) (f) (i) of the Constitution is a gross violation of the constitutional right of the Convict herein. This Court had also taken this factor into consideration when ordering the immediate release of the Convict herein.

This Court has also taken into account the fact that the Convict herein has remained in custody for a period of 23 years since his arrest. This is a long period for a person of previous good conduct and regard being had to the circumstances of the within offence.

In conclusion therefore, it is the order of this Court that for the reasons, aforesaid, that the Convict herein be and is entitled to his immediate release from custody unless he be held for some other just cause. It is so ordered.

Dated this 4th day of September, 2015.

CHIRWA J
JUDGE

The Republic v. Kachepa Tsogolani

JUDICIARY

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

SENTENCE RE-HEARING NO. 52 OF 2015

CORAM: THE HONOURABLE MR JUSTICE CHIRWA

Mr Malunda, Senior State Advocate for the State

Mr Kaira, of Counsel for the Accused Person

Mr H. Amosi, Official Court Interpreter

Chirwa J:

SENTENCE

The Convict herein, **Kachepa Tsogolani**, was convicted of the offence of murder contrary to Section 209 of the Penal Code by the High Court sitting with jury at Lilongwe on the 28th of November, 1998. He was sentenced to suffer the mandatory death penalty.

The Court record pertaining to the Convict's case however, cannot be traced. As a result it has been difficult for both this Court and Counsel for the parties hereto to establish the exact facts of the case. However, through the effort of both Counsel hereto some facts as are material for the present determination, seem to have been established. This Court is

quite indebted to both Counsel for their endeavours in this regard. It may be worth mentioning that the much use by this Court of one of the party's facts does not necessarily mean that the same are more accurate than the other facts.

Facts

On or about the 2nd of February, 1994, the Convict upon his return to his home village of Kalinde in T/A Mazengera, Lilongwe District, from his drinking spree found that a considerable number of trees had been cut down on a piece of land which the Convict believed to be his. A dispute erupted regarding the ownership of the said piece of land. This drew the attention of the villagers from both the Convict's village and the Deceased's (Jeviyalas Nyundo's) neighbouring village of Mdzeka. In the course of the heated quarrel between the two villagers, the Deceased picked up a club and struck the Convict's brother, Kwenda Tambaya, on the head with it, causing him to lose consciousness. The Convict and the Deceased then wrestled with each other with the result that the Convict managed to seize the club from the Deceased and in turn struck him on the head with it. The Deceased fell to the ground and died. The Convict together with several others were arrested on the same day by Nathenje Police after both groups had travelled there to report the incident and obtain police reports for them to be treated for their various injuries.

The Malawi Supreme Court of Appeal in the famous case of Francis Kafantayeni & Others v The Attorney General.

Constitutional Case No. 12 of 2005 (unreported) having, inter alia, held that (1) the mandatory death sentence upon the conviction of murder under Section 209 of the Penal Code is unconstitutional and (2) all convicts who had been sentenced to death as a mandatory sentence were entitled to be re-heard and an appropriate sentence passed on them. And, the said Court of Appeal in a subsequent judgment in the case of **Mc Lemoce Yasin v The Republic** MSCA Criminal Appeal No. 29 of 2005 (Unreported) having also ordered that the Director of Public Prosecutions should not only bring back to court the applicants in the **Kafantayeni** case, but all the murder convicts sentenced before the **Kafantayeni** Ruling so that they may be sentenced, the Convict herein, as one of such convicts, has been brought before this Court.

This Court is further indebted to both Counsel for their wellprepared written submissions in this case and also for making the same available to this Court before the date of the hearing of this matter on the 28th of August, 2015. This is also quite commendable.

The offence of murder with which the Convict herein was charged and convicted of is, no doubt, a very serious offence as evidenced by the maximum death sentence reserved therefor. This Court is however, mindful that the maximum sentences are reserved for the worst offenders - See: **Namatev Republic** 8MLR 132 per **Skinner CJ** at p. 135. And the Malawi Supreme Court of Appeal in the case of

Twalibu Uladi -vs- The Republic MSCA Criminal Appeal Case No. 5 of 2008
(Unreported) commenting on the maximum sentence of death had this to say:

"We also remind ourselves that a maximum sentence, which the penalty of death is for the offence of murder, is for use only in the worst instances of an offence."

This Court is also mindful of the principle of law that "offences of murder differ, and will always differ, so greatly from each other that --- it is wrong and unjust that they should attract the same penalty or punishment." - See: **Two-boy Jacob v The Republic** MSCA Criminal Appeal No. 18 of 2006 (unreported).

The foregoing propositions of the law, in this Court's view, call into consideration the provisions of Section 321 J of the Criminal Procedure & Evidence Code, which are as follows:

"321 J - (1) Where a verdict of guilty is recorded, the High Court may, after judgment but before sentence, receive such information or evidence as it thinks fit, in order to inform itself as to the proper sentence to be passed.

(2) The information or evidence that the court may receive under subsection (1) may, in addition to the evidence of the accused or the prosecution, include information or evidence by or on behalf of the victim of the offence and any relevant reports

to enable the court assess the gravity of the offence."

Counsel for both the State and the Convict herein have brought to the attention of this Court several factors which would operate in mitigation of the sentence to be imposed on the Convict herein. First, is the age of the Convict herein when he committed the offence, which is said to have been 26 years. This was quite a youthful age. The law generally favours young people by treating them with leniency. It does not generally favour lengthy imprisonment of the relatively young or old people - See: **Republic v Ng'ambi** [1971-9172] ALR (Mal) 457 and **Msanide Phiri v Republic** MSCA Appeal No. 13 of 2009 (Unreported). This Court will, no doubt, bear the youthful age of the Convict herein when determining an appropriate sentence for him.

The second factor is the fact that the Convict herein has no record of any previous convictions. He is a first offender. The law also recognises this as a factor mitigating sentence. See: **Winston Ngulube & Another v Republic** MSCA Criminal Case No. 35 of 2006 (Unreported) and **Republic v Chikazingwa** [1984- 1986] 11 MLR 160. Indeed for the Convict herein to have remained of good conduct for up to 26 years at a village at Nathenje in Lilongwe, is no doubt, commendable. He thus deserves the leniency of this Court in sentencing him.

The third factor is the lack of a clear motive on the part of the Convict herein to cause the death of the Deceased. As the facts show, the offence was committed in the course of a

fight which had erupted between the villagers of the Deceased and those of the Convict. It was in the course of the fight that the Convict after wrestling with the Deceased got hold of the club in the possession of the Deceased and clobbered him with it. Further, at the time the Convict committed the offence, he had just returned from a drinking spree. It would be quite safe to conclude that he was acting under the influence of intoxicating liquor. This, no doubt, is also a factor mitigating sentence. See: **Winston Ngulube & Another, (Supra)**

The fourth factor is the time already spent in custody by the Convict before his conviction. The Convict was arrested on the 2nd of February, 1994 and was only convicted on the 28th of November, 1999. He had thus stayed on remand for a period of close to 5 years 10 months. This period is normally taken into account when sentencing unless there be evidence to show that the Convict had himself contributed to the delay in the conclusion of his prosecution, say, by jumping bail. See: **Mulero v Republic**, [1971-72] ALR (Mal) 73.

It should, in the premises, be apparent that the case of the Convict herein cannot be classified as the worst instance of an offence of murder so as to deserve the imposition of a death penalty.

The attention of this Court was drawn to the position taken by **Kenyatta Nyirenda J** and **Kapindu J** when re-sentencing, which is to take into account the post-conviction conduct of the convict. With respect, this Court remains of the fortified

view, which view apparently seems also to held by **Potani J**, and **Kolembera J** and the State herein, that such a consideration would unfairly disadvantage all the other convicts within the prison cells whose sentences are not to be reheard so as allow resentencing considerations to take into account any post-conviction conduct. Put differently, the considered view of this Court is that to allow the Convict's post-conviction conduct to be considered when re-sentencing him would be discriminatory to the other convicts who are not the subject of re-sentencing but who might as well have conducted themselves properly after their convictions and sentences. For fear of being a perpetrator of any form of discrimination, this Court is thus not inclined to take into consideration when deciding an appropriate sentence for the Convict herein his post-conviction conduct as prayed for on his behalf.

The State has, in this Court's view, summed up the purpose of these proceedings very correctly in their written submissions at page 10 paragraph 31 in the following words:

“The current resentencing hearing are an opportunity for the court to effectively substitute the original unconstitutional sentences of death with sentences that would have been more appropriate bearing in mind all the circumstances existent at the time.”

The Sentence:

In arriving at an appropriate sentence for the Convict herein, this Court has also considered the views expressed by the Courts in the following cases, **Twalibu Uladi** (*supra*), **The Republic v Clement Master**, Sentence Re-hearing No. 33 of 2015 (unreported), **The Republic V Chiukepo Chavula**, Sentence Rehearing No. 11 of 2015 (Unreported) and **Winston Ngulube & Another** (*supra*). In the premises, this Court finds a sentence of 20 years imprisonment with hard labour as fitting the offence of murder herein, the Convict herein, to wit a man without a record of previous convictions and of youthful age at the time of the commission of the offence, and the circumstances of the offence, to wit, an offence committed under the influence of intoxicating liquor and without any clear motive on the part of the Convict herein.

It is therefore, the decision of this Court to set aside the sentence of death which had been imposed on the Convict herein and substitute it with a sentence of a term of 20 years imprisonment with hard labour. This sentence is to take effect from the 2nd day of February, 1994 which happens to be Convict's date of arrest. The Convict herein would thus be entitled to his immediate release unless his continued detention be for some other lawful cause.

The Convict herein is however, reminded of his Constitutional right of appeal to the Malawi Supreme Court of Appeal, if he so wishes, against this sentence.

Dated this 4th day of September, 2015.

CHIRWA J
JUDGE

The Republic v. Kingsley Karonga

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

SITTING AT ZOMBA

HOMICIDE (SENTENCE RE-HEARING) CASE NO. 60 OF 2015

DEFENDANT 1: KINGSLEY KARONGA

DEFENDANT 2: MUSTAFA BALALA

CORAM: THE HON. JUSTICE MR. S.A. KALEMBERA

Mr Chitsime, Senior State Advocate, of Counsel for the State

Mr Chirwa, Senior Legal Aid Advocate, of Counsel for the Accused

Mr Shaibu, Senior Legal Aid Advocate, of Co-Counsel for the Accused

Miss Ngoma, Official Interpreter

ORDER ON RE-SENTENCING

Kalembera J

INTRODUCTION

The convicts, Kingsley Karonga and Mustafa Balala, were arrested on 22nd day of March 1999 for causing the death of Mustafa Balala's uncle using a panga knife. They were jointly charged with murder, were tried and convicted by the High Court sitting with a jury in Zomba on 2nd day of May 2002. They were sentenced to suffer the mandatory death sentence as per section 210 of the Penal Code. Prior

to the amendment. Prior to the amendment to the said section 210 of the Penal Code, the section imposed a mandatory death sentence to anyone convicted of murder. The court had no discretion as to what sentence to impose other than a death sentence. Presently, where a person is convicted of murder, the court has the discretion to impose a death sentence (maximum sentence) or any term of imprisonment. Hence this sentence re-hearing.

At the sentence re-hearing, it became necessary to adjourn the matter in respect of Mustapha Balala. This was due to the fact that issues raised were tantamount to challenging his conviction and sentence, which would be the domain of an appellate court, in our case, the Malawi Supreme Court of Appeal. This court has since released him on bail pending his appeal and consequently the matter is referred to the Malawi Supreme Court of Appeal for its further directions.

As regards Kingsley Karonga, it became clear that it was being alleged that he was a juvenile, aged about 15 or 16 years, when he committed the offence of which he was convicted of murder and sentenced to suffer death. It therefore became necessary for further evidence to determine his age. This was in form of an additional affidavit sworn by Darlington Shaibu, Senior Legal Aid Advocate, of Co-Counsel for the convict. Hence this sentence re-hearing in respect of Kingsley Karonga, the 1st convict.

ISSUES FOR DETERMINATION

The main issues for determination are whether the 1st convict was a juvenile, and if so whether he could be convicted and sentenced to suffer death. If not a juvenile what would be an appropriate sentence in the circumstances of this case.

WAS THE 1ST CONVICT A JUVENILE

It has been deposed that the Prison Record, Exhibit "DS 1"^d indicates that 1st convict was committed to prison on 2nd May 2002. The said Prison Record indicates that the 1st convict was 20 years old at the time of committal. The said offence, of which he was convicted, was committed on 21st March 1999. Obviously, then, he was 16 or 17 years old when he committed the offence. Under section 2 of the Children and Young Persons Act (Cap 26:03) of the Laws of Malawi 'juvenile' includes a child and a young person; and a young person is

defined as 'a person who, in the absence of legal proof to the contrary, is, in the opinion of the court having cognizance of the case in relation to such person, fourteen years of age or upwards and under the age of eighteen years.'

I would, in the circumstances, find that indeed the 1st Convict was a juvenile when he committed this offence.

RE-SENTENCING/PUNISHMENT

The main objectives of punishment/sentence are as follows:

- i. To provide the public with a period of protection from the offender;
- ii. To deter the offender from future crimes;
- iii. To deter others from committing crimes;
- iv. To fit the punishment to the crime; and
- v. Retribution or vengeance.

As regards children and young persons, who find themselves in conflict with the law the basic principle is that custody must be used as a last resort.

In the first place juveniles must be tried in a Juvenile Court where punishments befitting juveniles are enforced. However there are exceptions. Section 6 of the Children and Young Persons Act (CYP[^]) provides as follows:

"Subject as hereinafter provided. No charge against a juvenile shall be heard by a court other than a juvenile court:

Provided that -

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(i) where a juvenile is charged with. an offence or offences triable only by the High Court, he shall be tried by the High Court;

(ii) a charge made jointly against a juvenile and a person who has attained the age of eighteen years shall be heard by a court of appropriate jurisdiction other than a juvenile court;

(iii) *where in the course of any proceedings before any court of appropriate jurisdiction other than a juvenile court, it appears that the person to whom the proceedings relate is a juvenile nothing in this section shall be construed as preventing the court, if it thinks fit to do so, from proceeding with the hearing and determination of such proceedings."*

However the CYPA does not preclude the court from convicting and sentencing a juvenile, only that a sentence of death shall not be pronounced on or recorded against a person under the age of eighteen years, but in lieu thereof the court shall sentence him to be detained at the pleasure of the President - section 11(1) of the CYPA. That as it may, section 11(2) of the CYPA gives the court power to sentence the juvenile in certain circumstances as follows:

"Where a juvenile is found guilty, or convicted, of murder, or manslaughter, or attempted murder, or of an offence under section 235 and 238 of the Penal Code, and the court is of opinion that none of the other methods by which the case may legally be dealt with is suitable, the court may sentence the offender to be detained for such period as may be specified in the sentence and where such a sentence has been passed the juvenile shall, during that period, notwithstanding anything in the other provisions of this Act, be liable to be detained at such place and on such conditions as the President may direct."

It therefore follows that the 1st convict, having been charged jointly with an adult, and having been charged with murder which at that time attracted a mandatory sentence of death, upon conviction, he was properly charged before the High Court as opposed to a juvenile court. It further follows, that a court can find a juvenile guilty and convict him of the offence charged if proved beyond reasonable doubt -section 11(2) of the CYPA refers. There was nothing wrong in convicting the 151 convict despite that he was a juvenile. After all the issue of the 1st convict's age might not have arisen. Unfortunately we do not have the privilege of the full record or transcript of the trial at which he was found guilty, convicted and sentenced to suffer death together with the 2nd convict.

I therefore find myself in a dilemma.

RESOLVING THE DILEMA

As I have observed herein this court does not have the benefit of the court record for the trial at which the 1st convict and the 3rd convict were found guilty and convicted. It has further been observed that a sentence of death shall not be pronounced on or recorded against a person under the age of eighteen. However it has also been observed that a juvenile convicted of murder could be sentenced to be detained for such period as may be specified in the sentence. This can only happen where the court is of the opinion that none of the other methods by which the case may legally be dealt with is suitable. The 1st convict herein has already been in custody for 16 years. His colleague, the second convict, has already been released on bail on account of his conviction being challenged or going to be challenged in the Malawi Supreme Court of Appeal on the ground that he was mentally disturbed or insane at the time he committed the offence and at the time he was tried, found guilty and convicted.

The 1st convict having already served 16 years in custody, would justice *be* achieved by ordering his further incarceration at the pleasure of the President of Malawi? Or would justice be achieved by imposing a term of imprisonment or incarceration? I am mindful that I have concluded that the 1st convict was a juvenile when he committed the offence of murder herein. The High Court, because he was jointly charged with an adult treated him as an adult and sentenced him to suffer death. Fortunately, his sentence of death was commuted to life imprisonment. It would have been a grave injustice if he had eventually been executed. The court has been granted a second chance to do justice in this matter. It would not serve any purpose to order further incarceration of the 1st convict at the pleasure of the President of Malawi. I am of the considered view that the trial court would have achieved justice in this matter if it had treated the 1st convict as a juvenile and imposed a term of imprisonment by invoking section 11(2) of the CYPA. And indeed am further of the considered view that justice would be achieved by this court imposing a term of imprisonment on the 1st convict.

RE-SENTENCING CONSIDERATIONS

I am mindful that a life was lost by the senseless acts of the 1st and 2nd convicts. I am further mindful that with the amendment to section 210 of the Penal Code (amendment no. 1 of 2011) the death sentence is no longer mandatory upon a conviction for murder. The court retains the discretion as to what sentence to impose upon conviction for murder. Several considerations must exercise the court's mind in coming up with an appropriate sentence upon a murder conviction. It can impose the maximum sentence which is death or any other term of imprisonment.

Aggravating Factors

The court must take into account the seriousness of the offence and circumstances surrounding the offence. In the matter at hand the offence of murder is a very serious offence carrying a maximum sentence of death. Furthermore, a pangani knife was used which led to the deceased's death. Thus it is the submission of the State that a sentence of 25 years would be appropriate in the circumstances.

Mitigating Factors

As it has been observed, the 1st convict was a young person when he committed this offence and precedents abound that young and old persons must be given lenient sentences -see **Rep v Chizumila and Others [1994] MLR 288**. In fact the trial court should have tried him as a juvenile. It is also not in dispute that the 1st convict was a first offender, he had led an exemplary life until the commission of this offence. The 1st convict was not the main aggressor, the main aggressor being the 1st convict whose sanity at the time of committing the offence is now in question.

LAW AND ANALYSIS

It has already been observed that section 210 of the Penal Code (amendment number 1 of 2011) provides as follows:

"s.210 -Any person convicted of murder shall be liable to be punished with death or with imprisonment for life."

It therefore remains in the discretion of the court as to what sentence to impose on a person convicted of murder. The court can impose the maximum sentence of death, or can impose a life sentence, or any other term of imprisonment. It all depends, *inter alia*, on the seriousness or gravity of the offence, the circumstances in which the offence was committed, as well as the circumstances of the offender.

Murder being a very serious offence, it is inevitable that even if the circumstances of its commission do not warrant the maximum sentence of death, a custodial sentence would be imposed. In the matter at hand, both parties agree that the circumstances of the commission of the offence do not warrant the imposition of the death penalty but a term of imprisonment. I do agree that this convict is not the worst kind of offender and therefore does not deserve the maximum sentence. What then, would be an appropriate sentence?

I am inclined to believe that the 1st convict, being a young person when he committed the offence; and being a first offender; and having not been the main aggressor in the commission of the offence, he deserves leniency from the court. He has already been in custody for 16 years, and it is in evidence that he has led an exemplary life in prison, in other words, he is reformed. There is also evidence that he will be received and accepted in his village if he were to be released. He still has the ability to be a good citizen who would contribute to the development of his community.

I am therefore of the view that to achieve justice in this matter, I must impose a sentence which would lead to the immediate release of the 1st convict. I consequently sentence him to 20 years imprisonment with hard labour, effective from the date of his arrest.

PRONOUNCED in open Court this 6th day of November 2015, Principal Registry, sitting at Zomba.

S.A. Kalembera

JUDGE

The Republic v. Edson Khwalala

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

HOMICIDE CASE NO. 70 OF 2015

Coram: Ms Munthali of counsel for the State
Mr Mwakhwawa of counsel for the Convict
Mr N. Phiri Official Interpreter
Mrs Pindani Court Reporter
Mrs Msowoya Secretary

SENTENCE

Kamwambe J

The convict, Edson Khwalala was arrested on the 15th July 1992 and convicted of the offence of murder contrary to section 209 of the Penal Code on the 11th August, 1997, for which he was sentenced to a mandatory death penalty. The sentence was commuted to life imprisonment in 1999. While serving this sentence he committed another murder offence in 2000 when he killed a fellow inmate after a quarrel in the cell at around 9.00 pm. In 2005

he was convicted to suffer death sentence. As a result of the case of **Francis Kafantayeni and others v Attorney General** Constitutional Case No. 12 of 2005 (unreported) which declared the mandatory death sentence unconstitutional this matter is before this court for re-sentencing. He has spent 23 years in custody. The right to be heard is supported by the requirements of section 321 J of the Criminal Procedure and Evidence Code which state as follows:

"(1) Where a verdict of guilty is recorded, the High Court may, after judgment but before passing sentence, receive such information or evidence as it thinks fit, in order to inform itself as to the proper sentence to be passed.

(2) The information or evidence that the court may receive under subsection (1) may, in addition to the evidence of the accused or the prosecution, include information or evidence by or on behalf of the victim of the offence and any relevant reports to enable the court to assess the gravity of the offence."

Whereas there is a court record for the first conviction there is none for the second conviction. As such, it is not known whether the sentences were to run concurrently or consecutively. The State supports the view that the sentences be made to run consecutively, and the defence supports the other way for obvious reasons. About eight years had elapsed before the convict committed the second offence of murder. David Newman in Criminal Procedure and Evidence Code in Malawi vol. 2 states that a court having convicted an accused on more than one count, must generally impose separate punishment in respect of each conviction, rather than an omnibus sentence. He further says that ordinarily, sentences will run consecutively unless more than one offence has been committed by the accused in the course of the same transaction, in which case the court should expressly order the sentences to be concurrent (see section 17 of the Criminal Procedure and Evidence Code). I should also add that where offences have been committed at two separate occasions distant in time as in this case,

consecutive sentences are appropriate. Strictly speaking according to the Criminal Procedure and Evidence Code, consecutive sentences are proper for the two murder offences committed by the convict.

I am inclined to support Nyirenda J in **Republic v Lackson Dzimhiri** Sentence Rehearing Cause No. 4 of 2015, for advising against imposition of a death sentence where a court record is missing wholly or partially but substantially, for the simple reason that extenuating circumstances are difficult to come by.

The court will take into consideration the youthful age of the convict when he committed the first murder offence. He was then about 21 years of age. Those who are young should be given opportunity to go back to society sooner than later. It is believed that one's youthful age reflects inexperience in the way of life. Immaturity then reigns and one is prone to make impromptu and impatient decisions which become regrettable later. The court is however mindful of the fact that the convict behaved weirdly by coming back to complete the fight after the first brawl, thereby stabbing the deceased. Whether he was given the knife he used or he retrieved it from his own pocket does not make much difference to his state of mind. I see it that he prepared to take revenge that's why he came back and stood at the entrance of the bar waiting for opportunity to attack the enemy. And indeed that opportunity arose and he did what he planned to do. It is, however, procedurally right that those of youthful and old age deserve some measure of mercy in sentencing.

The court has also considered whether to accept the plea of provocation in mitigation. There was no deliberate provocation as the deceased accidentally stepped on the convict's foot and the convict in a high handed manner moved to slap the deceased who fought back. If the convict had considered the circumstances properly, he would not have done what he did. It is not surprising that in his affidavit he regrets what he did long time ago.

The convict had been under death sentence initially for three years and later for ten years after the second conviction. The second death sentence was not commuted. One should not stay a long time under the weight of death sentence before it is carried out since one is always haunted by it. One becomes a living corpse. This is a ghastly experience. In the Ugandan case of **Attorney General v Kigula** [2009) UGCSC 6, at p.63 the Supreme Court of Uganda held that those held on death row for more than three years from confirmation of a capital sentence must have their sentences commuted. Also **Henfield v Attorney General of Bahamas** [1997) AC 413 is another example where the Privy Council held that a delay of over 3 1/2 years would normally render a sentence of death inhuman and unconstitutional. It was proper that the convict was not considered for sentence commutation in good time. The court will take into consideration this psychological suffering that he underwent.

The court record for the second conviction is missing as stated above. It is therefore not known what weapon and whether any weapon was used at all. Ordinarily weapons are not allowed in prison premises for use by the inmates. It shall be taken that the convict used bare hands to fight the deceased in the cell.

Also to be considered are the undeniable appalling conditions in prisons where minimum international standards are not even met by far. This is double punishment. I have deemed it necessary to feel sympathetic to convicts because their human rights relating to good prison conditions are violated almost on a daily basis. This situation should be taken seriously by the relevant authorities. To cast a blind eye to degrading prison conditions would be doing untold harm and showing disdain to the much touted Malawi Constitution. We understand that not all human rights can be fulfilled within a short time frame, but with political will, meaningful improvements should be visible as time passes. I do not think that since the findings in the case of **Gable Masangano v Attorney General & others** Constitutional Case No. 15 of 2007 one can show noticeable permanent improvements worth talking about.

There is also the principle that the death penalty is to be applied to the 'rarest of the rare' cases and is appropriate only if the State has rebutted the presumption in favour of life if the offence is one of the worst of its kind and that there is no hope of reforming the offender.

To describe the 'rarest of the rare' principle, the court in **Republic v Jamuson White** Criminal Case No. 7 of 2008 (Unreported) said:

"The offence must have been occasioned in very decrepit and gruesome circumstances, meticulously intentioned and planned and that the convict is highly likely to offend again to justify his total removal from associating with other persons even in prison. He must be a threat to society so much so that society would without thinking twice approve of his elimination from planet earth. The motive for killing must be extremely heinous so as to cause a deep sense of society abhorrence and condemnation that such human being does not qualify to live. I may put deliberate mass murderers and serial killers in this category."

Since a court may pass a death sentence only in exceptional circumstances, as in the 'rarest of rare' cases, it should be hardly difficult to apply the standard but when these rarest of the rare circumstances have come up, the courts should not hesitate to pass this rare punishment just because ordinarily the maximum punishment is unreachable.

The court has to look at the convict's individual circumstances before committing the offence, at the time of committing the offence and at the time of sentencing, such as mental and emotional disturbance, health and any hardships met see **R v Samson Matimati** Criminal Case No. 18 of 2007. Further, the court will also look into the manner the offence was committed, such as whether a weapon was used and its type, whether the killing was planned or impulsive, intoxication etc. The defence has included other pertinent factors such as provocation, and quiet attitude in prison showing that he may reform. The list of mitigating factors is not exhaustive. Let the court in exercising its discretion consider all and sundry and determine how much weight to attach to each of them. This should apply to pleas of family obligations and poor health of the convict. The court's discretion should not be fettered. However, admittedly, in many circumstances, family obligations will not carry much weight if any at all.

Katsala J rightly said in **Rep v Tione Chavula Criminal Case No. 93 of 2005** that:

"The purpose of a sentence is first of all to punish the defendant for his crime, which the defendant has committed, secondly to mark the disapproval of the community for the criminal actions which the defendant has committed, and thirdly, to act as a deterrent in future to this man and anyone else who might be minded to commit this sort of crime, R v Hitchcock [1982] 4 Cr.App.R. (S) 160, Bibi [1980] Cr.App.R. (S) 177. This in my view means that courts must pass meaningful sentences which will not generate contempt in the eyes of the public or indeed even in the eyes of the defendant. Courts must pass sentences that must fit the crime, the defendant and also satisfy the legitimate expectations of the public."

The above case calls for the balancing act of the three interests which is no mean task and it requires the court to exercise its discretion judicially and discreetly. All relevant circumstances

should be considered by the court when it will choose what will influence it in coming at its decided sentence.

It is necessary that I consider a few cases known to the legal fraternity such as the case of **Twoboy v Republic**, MSCA Criminal Appeal No. 18 Of 2006 [unreported], in which the Malawi Supreme Court of Appeal came up with a landmark finding that 'offences of murder differ, and will always differ, so greatly from each other and it is therefore unjust and wrong that they should attract the same punishment.' This puts the Malawi Supreme Court of Appeal in concord with the **Kafantayeni case (supra)** justifying why courts should exercise their discretion in determining on the appropriate level of punishment in murder convictions, which is a judicial function. In **Twoboy case (supra)**, the appellant killed his second wife on the belief that she was bewitching him such that he was failing to consummate his marriage with his first wife. The appeal was dismissed.

In **Winston Ngulube and Another v Rep** MSCA Criminal Appeal Case No. 35 of 2006 the court set aside the death sentence and substituted it with a 20 year imprisonment sentence on the finding that no dangerous weapon was used in the assault that led to the death of the deceased, and that the quarrel was influenced by intoxication; there was no clear motive to cause death, and there was no evidence that the convicts were bad characters in life.

In **Charles Khoviwa v Rep**, Criminal Appeal No. 6 of 2007, MSCA, the court opined and held as follows:

"In the present case however, we take the view that the appellant does not deserve the court's lenience. The appellant and a colleague assaulted and stabbed a defenceless person who was fleeing the scene of a fight to save himself from trouble. The appellant and his accomplice did not want to give the deceased a chance to live. His conduct on the material day was inexcusable, he deserves the death sentence."

That one is a first offender will not always warrant a short term sentence for serious offences, see, **Republic v Domingo Juwawo Confirmation Case No. 1029 of 1996.**

In the case of **Wyson Thomas Kapunda Manda v The Republic, Criminal Appeal No. 15 of 2007**, the Malawi Supreme Court of Appeal refused to reduce the death sentence imposed by the High Court on the basis that the murder was committed in cold blood.

In the case of **Twalibu Uladi v Rep MSCA Criminal Appeal Case No. 5 of 2008** the convict and the deceased had been drinking together and a quarrel erupted which led to a fight where the convict took a phanga knife and hacked the deceased. The Supreme Court of Appeal set aside the sentence of death and substituted it with one of 20 years imprisonment more likely because there was no planning for the murder. The act of committing the offence was spontaneous.

I have perused through the forensic psychiatric report which in my view seems not conclusive. The head injuries during the convict's childhood may or may not have influenced his violent disposition. It may be dangerous to assume that since he has not reoffended since 2000 then he has changed. I am not surprised that there is a suggestion that his risk of violence can be reduced with appropriate psychological interventions. There are suggestions that he used to be on cannabis, and on the other hand he denies it. In my view, he is still a risk to society.

I have read the affidavit of Mr Dzinyemba the prison officer which is to the effect that the convict is now a quiet person who most times spends time in his cell. He keeps mostly to himself. His violent nature may be hidden because none dares to provoke him for fear of perceived dire repercussions. His seclusion may be due to inmates shunning him as they know what he is capable of doing.

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The offences he committed were serious ones and two innocent lives were lost due to foolish reasons. When sentencing, the expectations of society must be tempered. Ultimately, after balancing the interests of the victim, society and the convict, the interest of justice should be achieved. The fact that he is a repeat offender will weigh much on the sentence.

In view of the above, I sentence the convict for the first offence to 25 years imprisonment and for the second one to 23 years imprisonment to run consecutively.

Pronounced in Open Court this 2nd day of February, 2016 at Zomba District Registry.

M L Kamwambe
JUDGE

The Republic v. Richard Maulidi and Julius Khanawa

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
HOMICIDE CASE NO. 65 OF 2015

Coram: **Hon. Justice M L Kamwambe**

Mr Chitsime of counsel for the State

Mr Mwakhwawa of counsel for the convicts

Mr Nicholas Phiri Official Interpreter

Mrs Pindani Court Reporter

Mrs Msowoya Secretary

JUDGMENT

Kamwambe J

The convicts were convicted of murder by the High Court sitting at Blantyre on 1st November, 2001 after being arrested on 11th February, 1996 when they were 21 and 18 years old. They have been in custody for 19 years and 9 months. They are now before this court for re-sentencing following the determination of the case of **Francis Kafantayeni & Others v The Attorney General** Constitutional Case No. 12 of 2005 which held that the mandatory death sentence was unconstitutional as the accused was not accorded opportunity to be heard, inter alia. That opportunity was now granted. This also ensures that the court's discretionary powers to determine on sentence are not ousted by the mandatory requirement.

In **Mclemence Vasi v The Republic** MSCA Criminal Appeal No. 25 of 2005, the Malawi Supreme Court of Appeal held that all persons sentenced to the mandatory death penalty are now entitled to be reheard on sentence.

The right to be heard is supported by the requirements of section 321 J of the Criminal Procedure and Evidence Code which states as follows:

“(1) Where a verdict of guilty is recorded, the High Court may, after judgment but before passing sentence, receive such information or evidence as it thinks fit, in order to inform itself as to the proper sentence to be passed.

(2) The information or evidence that the court may receive under subsection (1) may, in addition to the evidence of the accused or the prosecution, include information or evidence by or on behalf of the victim of the offence and any relevant reports to enable the court to assess the gravity of the offence.”

Let me in the outset state that this re-sentencing exercise is a special kind such that it is not covered by the Criminal Procedure and Evidence Code. However, since sentencing per se is there and is also established by practice, one school of thought advocates strict compliance with the existing practice. Hence, this school of thought discourages consideration of post-conviction good character as it would be introducing parole practice through the back door. It is said that in re-sentencing the courts should take into consideration only what would have been considered at sentencing stage. I am of the other school of thought which favours and supports the use of post-conviction good character for the sole reason that this is a special type of sentencing arising from a constitutional breach, and if there is anything for the convict to show in mitigation by way of post-crime good behaviour after so many years of incarceration, let him be given that opportunity, after all, the justice system should move towards promoting rehabilitation merged with considerations of mercy. At this stage of re-sentencing circumstances have changed and hence other considerations such as psychological and physical effects of long incarceration are considered through medical or psychological reports. From what is on the ground now, a similar exercise will hardly resurface.

The facts of the case are that the convicts were living in abject poverty. They survived with hardship. At the time of arrest they were 21 and 18 years old. Due to hunger and natural need to feed their families they planned to rob the house of an elderly woman who was rich, according to them, and lived alone. They carried out the mission on the night of the 10th to the 11th February 1996. The 1st convict entered the house to steal food while the 2nd convict remained outside as a look-out. The 1st convict came out with two bags, one of rice and the other of beans. But he had attracted the attention of the deceased Dorica Njaya whom he hit with bear hands and she fell down. They left with the loot sharing one bag each. The following day they heard that the deceased had passed away and they were subsequently arrested on the same day. On

15th October, 2002 the death sentence was commuted to life imprisonment.

The convicts have now served almost 20 years in prison, including time on remand. Counsel for the convicts is of the view that in the light of mitigating factors he has outlined, the convicts deserve a term of years' sentence and are now entitled to immediate release. The State agrees with the views of the convicts' counsel.

It is noted that the court's record is missing, as such, this could not be construed to the disadvantage of the convicts. Rather they should benefit from such a situation. In this regard, the mode of committing the crime/murder is not known, therefore, it will be assumed that no dangerous weapons were used. In **Republic v Lackson Dzimbiri** Sentence Re-hearing Cause No. 4 of 2015 Nyirenda J concluded that "where the trial record is wholly or partially missing such that there is uncertainty as regards the circumstances of the commission of the offence it would be completely inappropriate to impose a death sentence." I agree with this statement.

One of the principal considerations in mitigation is age. The courts shall favour youthful age especially between 18 and 25 years for this age group is immature in life experience and is likely to make regrettable decisions. They should be given an opportunity to live life again outside prison precinct at an earlier stage. (see **Republic v Felix Madalitso Keke** Confirmation Case No. 404 of 2010) In **Msanide Phiri v Republic** MSCA Criminal Appeal No. 13 of 2009, the Supreme Court vacated a death sentence and replaced it with a sentence of 15 years imprisonment after finding that the Appellant was a young man of 20 years at the time he committed the offence and he did not attempt to escape after the offence regardless of the fact that the Appellant's actions were malicious.

Another crucial consideration is where the offender is a first offender. Sections 339 and 340 of the Criminal Procedure and Evidence Code proscribes to the effect that unless justifiable reasons are given for the imposition of a custodial sentence, incarceration should be avoided. This again shows that the law relating to punishment favours 1st offenders. There is no record or information suggesting that the convicts were not 1st offenders. By virtue of being 1st offenders the convicts shall be considered favourably.

I have also considered the fact that the convicts were good citizens before they committed the offence of murder. Apart from that they have demonstrated good conduct while under incarceration. In his affidavit officer Kamanga stated that 'Richard Maulidi has shown remarkable tenacity and proved himself to be a valuable member of the prison community working as a peer educator, cook and nyapala' (inmates supervisor though a prisoner himself). While in prison he enrolled in school and completed Standard 8 and has gone as far as Form 3. This education will help him to settle well in the village. The Zomba Prison Chaplaincy in 2010 identified Richard as one leading by example whose behaviour demonstrated that he had reformed.

Officer Dzinyemba commented on good behaviour of second accused Julius Khanawa. He says that Julius is a peaceful and well behaved man and hardworking. He is also a nyapala a role assigned to prisoners of good behaviour. Like Richard, he was also identified in 2010 as one leading by example.

The concerned people in the village including relations of the deceased and the village headman have no problems if the convicts were released.

The court will take into consideration the fact that the convicts did not have a specific intent to kill. However, under section 212(c) of the penal Code they are still liable for murder as the crime was committed in the act of committing another felony.

This is not a case which one can say happened in the 'rarest of the rare' circumstances. It does not qualify to be said to be the 'worst of the worst' of cases. The death sentence should be reserved for exceptional circumstances which are the 'rarest of the rare' cases. For instance, no weapons were used to execute the crime and the motive to bring food to their families does not sound that abhorrent. They were driven by desperation fuelled by hunger to commit the offence but, of course, poverty per se is not a defence and it would not be a meaningful mitigating consideration.

In **Republic v Jamuson White** the court restated the position that death sentence be reserved for the 'rarest of the rare' cases:

"The offence must have been occasioned in very decrepit and gruesome circumstances meticulously intentioned and planned and that the convict is highly likely to offend again to justify his total removal from associating with other persons even in prison. He must be a threat to society so much so that society would without thinking twice approve of his elimination on planet earth. The motive for the killing must be extremely heinous so as to cause a deep sense of society abhorrence and condemnation that such human being does not qualify to live. I may put deliberate mass murderers and serial killers in this category."

In **Republic v Chiliko Senti** Sentence Rehearing Cause No.25 of 2015 I said that 'appalling prison conditions which are quite below the recognised international standards should be taken into

consideration in these sentence re-hearing proceedings; and that imprisonment in such conditions is a punishment on its own.' This came up in support of the case of **Gable Masangano v Attorney General and others** Constitutional Case no. 15 of 2007.

I have taken note of the aggravating factors that murder is nevertheless a serious offence and that the crime was committed by two persons and further that it was committed at night when the victim was defenceless and vulnerable.

In **Winston Ngulube and Michael Ngulube MSCA Criminal Appeal** Case No. 35 of 2006 the Malawi Supreme court substituted a sentence of 20 years imprisonment for death penalty because no weapon was used, the quarrel was influenced by intoxication and there was no clear motive to kill.

In **Twalibu Uladiv Republic.....** the Supreme Court substituted a sentence of 20 years imprisonment for death penalty because there was no planning for the murder. The accused and the deceased were drinking beer together when they quarrelled and accused took a panga knife and hacked the deceased. The act was spontaneous.

The convicts have been in prison for close to 20 years now. I find it compelling to give them a sentence that will lead to their immediate release in view of considerations made above.

PRONOUNCED in open Court this 2nd day of February, 2016 of Zomba District Registry.

M L Kamwambe
JUDGE

The Republic v. Geoffrey Mponda

IN THE HIGH COURT OF MALAWI

ZOMBA DISTRICT REGISTRY

HOMICIDE (SENTENCE REHEARING) CAUSE NO 68 OF 2015

CORAM: HON. JUSTICE R.E. KAPINDU

- : Mr. Mtonga, Counsel for the State
- : Mr. Nanthuru, Counsel for the defendant
- : Mr. Tepeka, Official Interpreter
- : Mrs. Chirombo, Court Reporter.

RULIN G

KAPINDU, J

1. The defendant herein was convicted by the High Court in Zomba on 15th June 2000 for the offence of murder committed in May 1995, contrary to Section 209 of the Penal Code (Cap 7:01 of the Laws of Malawi). He was accused of being responsible for the murder of Edes Daniel. According to the State, Edes Daniel was the defendant's former wife whilst according to the defence, Edes Daniel was the defendant's wife. What is clear in any event is that there was a form of a close domestic relationship between the two. Together, they had a daughter, a baby at the material time by the name of Gladys.
2. This is one of those unfortunate cases where the original file recording the proceedings during the trial of the defendants herein went missing. Neither the Court, the State nor the Legal Aid Bureau have records of the trial proceedings. The State states that after tireless efforts to find any record of the proceedings, the same could still not be found. There have been efforts to reconstruct the facts of the case and what transpired at trial; but there are clearly variances in the versions from the respective parties before this Court, as paragraph 1 above already demonstrates.
3. The State's version is that the defendant herein was a former husband of the deceased. The two had a daughter together. On the material day, the defendant paid the deceased a visit with the intention of reconciling after an earlier break-up. The State states that witnesses then heard a quarrel from the deceased's house. They heard the defendant yelling and they were soon alarmed to see the house up in flames.

4. According to the State, when the witnesses attempted to put out the fire, the convict was seen running out of the burning house and he disappeared into a nearby bush. At this stage, the blaze on the house was full blown and the witnesses found it impossible to rescue the deceased.

5. The State states that the deceased's body was found but without private parts. It is the State's case that the defendant had removed the deceased's private parts before setting the house ablaze. The defendant was arrested a few days after the incident. He was tried, convicted of murder, and sentenced to death since that sentence was at the time believed to have been mandatorily required by law. The State and the defence made no representations nor led any evidence due to the prevalent belief that the sentence of death was mandatory under the circumstances.

6. The defendant has a different version of the facts. He states that Edes Daniel was his wife and that they lived together at her home village of Linde in Machinga District. The defendant states that on the night of the 17th -18th of May 1995, he was sleeping with his wife in their home together with their seven month old daughter, Gladys. At around 1 am or 2 am, he states that he awoke only to suddenly find that the house was alight and that the room was filled with thick smoke. He states that he was unable to see and was struggling to breathe. He states that he felt for the baby Gladys whilst shouting to Edes to get out of the house. He states that he eventually found the baby and stumbled with her out of the house and was expecting Edes to follow. When Edes did not appear, he states that he tried to re-enter the house but as he was searching, the roof of the house begun to collapse around him. His clothes caught fire

and he states that he sustained severe burns on his hands, feet and elbows and that he bears these scars to this very day. He states that under the circumstances, he was forced to abandon his rescue operation. He states that as a result of the fire, he inhaled so much smoke such that he was barely conscious when he stumbled to the door. He states that what he remembers next was that later that morning he was at the Police Station and given a document to thumbprint which, according to his understanding, was to allow him to be transferred to hospital for treatment. He states that this document was later produced in court at his trial and he learnt that it was actually his Caution Statement.

7. The defendant states that he was subsequently taken to Zomba Central Hospital and he was admitted for three months before he was eventually discharged and transferred to Zomba Central Prison on remand.
8. He states that he was tried on 15 June 2000 and was convicted upon the verdict of a jury. He was sentenced to death as it was believed at the time to have been mandatory. He has therefore served over 20 years in custody.
9. I must start my analysis by addressing a very important issue that was raised by Counsel for the defendant, Mr. Nathun1. He invited the Court to order the immediate release of the defendant and order that his 20 year incarceration in the absence of a record of his trial proceedings has been unconstitutional. He invited this Court to send a very strong message to the State and the registries of Courts that record keeping is very important.

10. Fortunately for this Court, this is not the first time that these Courts have had to deal with the issue of a missing Court record. In a similar sentence rehearing matter to the present one, the case of **Republic v Dzimbiri**, [20 15] MWHC 1 similar issues were raised. In that case the State sought not to proceed with the hearing on account of the missing Court record. Kenyatta Nyirenda J responded by stating, among other things, that:

To my mind, the starting point is for the Court to adopt the reasoning in the **Mtambo Case** to the effect that the mere fact that the whole trial record is missing ought not to deprive a convict an opportunity of a sentence re-hearing.

11. In the **Mtambo case (Mtambo & others v. The Republic)**, MSCA Criminal Appeal No. 1 of 2012 (unreported), Chipeta, JA, stated that:

It is clear from what has been deposed to in the material affidavits of this application that no stone had been left unturned in the search for the records of trial and sentence for all three applicants. The records have so missed for not less than 10 years in respect of each applicant. It is accordingly as clear as daylight to me that save for the fact that the applicants have not asked the High Court to judicially confess its failure to help them, chances are so remote that the trial records will be traced. The meaning of this is that if it be insisted that their appeals only proceed on production of their records of appeal, then it would be as good as saying they should not exercise their right to appeal.

What would be painful about such a result is that the appeals these applicants claim they lodged resolve on a very narrow compass that might not overly depend on what their records of appeal could have contained. The appeals, I have been assured, relate to the sentences they got vis-a-vis the ages they were at during their commission of the respective murders they were convicted and sentenced for. All they want to argue before the Supreme Court is that although tried and sentenced as adults, they were minors at the time of the commission and arrest... I certainly think that from the efforts they have demonstrated in relation to the tracing of their trial records for the purposes of having the High Court prepare their records of appeal, it would be unjust to block the applicants from presenting their appeals on the question whether they were not entitled to be treated as juveniles regardless of the ages they had attained by the time of trial and sentence. In the result, therefore, despite my procedural concerns, I grant the prayer of the applicants by permitting them to proceed with the hearing of their respective appeals by the full bench of the Supreme Court on their sentences without their records of appeal.

- 12 The learned Judge in the Dzimbiri case also referred to the case of **Andrew Morris Chalera & others v. The Republic, MSCA Civil Appeal No. 5 of 2012 (unreported)** where the Supreme Court of Appeal addressed the point as follows

What we make of the scanty precedent that we have been able to scout is that a court of appeal will weigh the degree, extent and relevance of the part of the record that is missing and cannot be reconstructed. Where the missing part of the record is not substantial, immaterial and inconsequential as would not result in miscarriage of justice, the appeal shall be proceeded with and finally determined.

Where the missing part of the record is not substantial, material and consequential, such that proceeding with the appeal would result in injustice, the conviction should be set aside without the full appeal being heard.

13. He also referred to the decision of the California Court of Appeal in the case of **People v. Morales** (1979) 88 Cal. App. 3 d 259 (Cal. Ct. App. 1979), where the Court stated that:

The test is whether in light of all the circumstances it appears that the lost portion is 'substantial' in that it affects the ability of the reviewing court to conduct a meaningful review and the ability of the defendant to properly perfect his appeal. It is not every loss of any part of the reporter's notes that requires vacating of the judgment.

14. Further however, in the **Dzimhiri case**, Kenyatta Nyirenda J proceeded to observe that:

In spite of my extensive research, I have not been able to find any decided case directly on point. Most of the

cases cited by Counsel., if not all, relate to situations where the convicts were questioning both the conviction and sentence, and not just the sentence. My view is that the issues decided in those cases were much broader than what I am being called upon to decide in respect of the re-sentencing of the Convict.

15. The learned Judge concluded in the **Dzimhiri case** that the High Court is still within its jurisdiction to proceed with sentence rehearing even where the trial record is wholly or partially missing or destroyed; and that the Court may advert to Section 260 of the Criminal Procedure and Evidence Code (CP&EC) which provides for receipt by the court of evidence for arriving at a proper sentence. Section 260 of the CP & EC provides that:

(1) The Court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.

(2) Evidence that the court may receive under subsection (1) may, in addition to the evidence of the accused or the prosecution, include the evidence by or on behalf of the victim of the offence and any relevant reports to enable the court assess the gravity of the offence.

16. I agree with the observations of Kenyatta Nyirenda J, and for the reasons he advances, I do not consider that the whole process of sentence rehearing ought to fail simply and only because of a missing record.

17. The question remains, however, whether the continued incarceration of the defendant in the absence of the record herein is unconstitutional. In my view, the Court cannot make a sweeping comment that in all cases where there has been a missing record of the trial proceedings, the continued detention (incarceration) has been unlawful or unconstitutional. There must be some positive demonstration of how the missing record has compromised the defendant's rights that he or she would otherwise have sought to exercise. In the absence of such a demonstration, this Court would not consider it appropriate to make such a decision.

18. In the instant case however, Counsel Nathuru has demonstrated that the defendant attempted to appeal, as evidenced by his prison file, but his attempt to appeal hit a blank wall. Counsel submitted that a copy of the defendant's *pro se* appeal, dated 7 September 2000, is available on his prison file. He lamented in his submission that over 15 years later, the defendant's appeal has not been heard, and that in all probability, the lack of movement in the appeal could be attributed to the missing Court record.

19. I have carefully considered this issue. Section 42(2)(f)(viii) provides every person arrested for, or accused of, the alleged commission of an offence, the right "to have recourse by way of appeal or review to a higher court than the court of first instance." The defendant herein attempted to appeal in the year 2000 to no avail. The State did not respond to the defendant's submission on this point. In determining whether a person's right to appeal has been violated within the framework of constitutional criminal procedure law, each case must be determined on its own facts. However, I am of the view that whatever factors one may take into

consideration, 15 years or more than that, is an inordinately long time and the delay to process the defendant's appeal for such a long time is an obvious violation of the right of appeal. As I have mentioned earlier, the Court's conclusion is further bolstered by the fact that the State did not reply to dispute the defendant's claim of violation, perhaps to show that there were factors that would constitute a permissible limitation on the defendant's right to appeal under the circumstances.

20. In the premises, this Court, having found a violation of the right of appeal under Section 42(2)(f)(viii) of the Constitution, must provide an effective remedy. The Court considers that the effective remedy is to order the immediate release of the defendant.

21. Having said that, I do not consider it necessary to traverse all the other issues relating to the possible imposition of another sentence in this matter. That has been rendered otiose by my finding of violation of the constitutional right of appeal herein. I need to mention though that but for the finding of the violation of the right to appeal above, having considered all the mitigating and aggravating factors, I would still have imposed such a sentence as would have led to the immediate release of the defendant, considering that he has already spent about 21 years in custody.

Made in Open Court at Zomba this 4th Day of March 2016

RE Kapindu, PhD

JUDGE

**The Republic v. Richard Jiba James, Charles
Dick, Charles Nyalapa and Gray Zimba**

IN THE HIGH COURT OF MALAWI

ZOMBA DISTRICT REGISTRY

HOMICIDE (SENTENCE REHEARING) CAUSE NO 69 OF 2015

CORAM: HON. JUSTICE R.E. KAPINDU

- : Ms. Supply, Counsel for the State
- : Mr. Nanthuru, Counsel for the 3rd and 4th defendants
- : Mr. Chirwa, Counsel for the 1st and 2nd defendants
- : Mr. Tepeka, Official Interpreter
- : Mrs. Chirombo, Court Reporter.

RULING

KAPINDU, J

1. The defendants herein were convicted on 11 August 2000 for the offence of murder, contrary to Section 209 of the Penal Code (Cap 7:01 of the Laws of Malawi). They were accused of being responsible for the murder of one Mr. Mwase, a person they said was unknown to them at the material time. The facts below are common cause for both the State and the defendants.
2. It is similarly not in dispute that the original file recording the trial of the defendants herein went missing. Neither the Court, the State nor the Legal Aid Bureau have records of the trial proceedings. The State states that after tireless efforts to find any record of the proceedings, the same could still not be found. Both parties agree however that through efforts by the parties involved, a reconstruction of the case has been done through what the defendants themselves had to say about what transpired during the proceedings, as well as other witnesses. The State on its part states that it was able to trace the relatives of the deceased who were able to furnish the State with the facts herein.
3. Be that as it may, this Court remains of the view that whilst these facts are certainly helpful for purposes of this rehearing on sentence, they can by no means be treated as a proper replacement of the evidence that was actually adduced during trial, which it seems is lost beyond redemption.
4. According to the reconstructed facts, the deceased person was one Mr. Mwase, who was a teacher at some primary school. It was on Christmas Eve, the 24th of December, 1996. Christmas day, a day of symbolic

spiritual redemptive significance for Christians , was just a few hours away. On the fateful day, the deceased had knocked off from work and left his home which was close to the school where he was teaching, to visit his relatives, a few minutes of bicycle ride away. He got there between 1600 hrs- 1700hrs. Upon reaching the village he learnt of a funeral that had occurred in the village. He decided to cycle back to his home in order to grab blankets since as he planned to spend the night at the funeral.

5. The deceased however never made it back to the village for the funeral. On the following morning, around 6am he was found dead at a distance from the village that he was headed to. Neither his bicycle nor the beddings he had fetched were found on him as he lay dead and in a pool of blood. His body had stab wounds all over. He was taken to the mortuary by the police and relatives and was thereafter laid to rest. This account was given by the deceased's son who is the present T/ A Mwase of Kasungu, and his uncle, who is a cousin to the deceased.
6. The 1st and 2nd defendants have provided an account of what they remember about the facts of the case. They admit that on or about the 24th of December 1996, the two were walking from a drinking place in Mwalawanyenje, near Kasungu, to their homes at Chitete Trading Centre. They state that it was approximately 7 or 8pm and it was dark. The two men were acquaintances who had met after both had moved to Kasungu in search of work. The two claim that they had been drinking for a number of hours and were both extremely intoxicated.
7. According to the 1st and 2nd defendants, as they were walking, the 1st defendant was suddenly struck and knocked to the ground by a cyclist

who approached them from behind. They state that the cyclist got angry, shouted at and insulted the 1st defendant, and a quarrel quickly ensued between them. They state that the 1st defendant, in his highly intoxicated state, also lost his temper and pushed the cyclist. The result was that a fight between the two broke out, and the 2nd defendant joined in the fight to assist the 1st defendant.

8. They state that after sometime, the cyclist fell to the ground and the fight ended. They state that in their highly intoxicated state, it did not occur to them that the man might have been badly injured or that he would have been in urgent need of medical assistance.
9. They claim that on impulse, they picked up the cyclist's bicycle and continued with their journey on it. Some nine or ten days later, on 3rd January 1997, the 1st defendant was arrested by local police officers and charged with the death of the cyclist, who had succumbed to his injuries. Two of his three co-convicts, Gray Zimba (the 4th defendant) and Charles Dick (the 2nd defendant), were arrested the same day; the third, Charles Nyalapa (3rd defendant), was arrested early the following morning. Three further men were also arrested in relation to the same offence: Amon Nazombe, who allegedly died in custody after allegedly being badly beaten by police officers during interrogation, and Simeon Pinde and Andrew Mwase who were allegedly released on bail prior to trial and both of whom have since died.
10. After being held on remand for over three years and seven months, the defendants herein were tried by the High Court on 11th August 2000. All four men were convicted upon the verdict of a jury and were condemned to death. The death penalty was at the time understood to have been

mandatorily required by law for the offence of murder. The defendants remained on the death row for a little under a year prior to their sentences being commuted to life imprisonment by the State President on 13th July 2001. To date, they have served over 19 years in prison.

11. The case against the 3rd and 4th defendants appears extremely tenuous. It seems the only connection between them and the offence herein was that they were each seen at some point riding or having possession of the bicycle that was stolen from the deceased. In her address to the Court, Counsel Supply stated that even the State was of the view that the 3rd and 4th defendants were wrongly convicted by the jury, but that the State's hands were tied as this Court is only dealing with the sentencing aspect during these proceedings.
12. The Court noted with regret that the 3rd and 4th defendants were kept in detention for so long under these circumstances. The Court observed that in view of the circumstances relating to the 3rd and 4th defendants, it was clear that any sentence it was going to impose, if at all, was going to be one that would lead to the immediate release of these two defendants. In the circumstances, the Court ordered the immediate unconditional release of the 3rd and 4th defendants pending this ruling today.
13. As mentioned earlier, this is a rehearing on sentence for the offence of murder in respect of the defendants herein, following the decision of the High Court sitting on a Constitutional Cause under Section 9(2) of the Courts Act (Cap 3:02 of the Laws of Malawi) in **Kafantayeni & Others vs Attorney General**, Constitutional Cause No. 12 of 2005 which declared all mandatorily imposed death sentences for murder, such as the ones that were imposed on the four defendants herein, to be unconstitutional and invalid.

14. All the four defendants are praying for lesser term imprisonment rather than life imprisonment which they are currently serving following a Presidential commutation of their death sentences to life imprisonment on 13th July 2001.
15. I pause there to provide an outline of the main factors to be taken into account when sentencing convicts in capital offences. I must acknowledge and greatly appreciate the impressive research and effort put into preparing submissions on the part of both Counsel for the State and Counsel for the defendant. They have been very helpful to the Court. I am particularly thankful to all Counsel in this case.
16. In my considered view, the decision of Kenyatta Nyirenda, J in the case of **Republic vs Margaret Nadzi Makolija**, Homicide (Sentence Re-Hearing) Case No. 12 of 2015, has properly summarised the important considerations that have to be taken into account when sentencing convicts in murder cases. The following considerations have been outlined:
 - (a) The maximum punishment must be reserved for the worst offenders in the worst of cases.
 - (b) Courts will take into consideration the age of the convict both at the time of committing the offence and at the time of sentencing. Young and old offenders are preferred to receive shorter sentences.
 - (c) Courts will always be slow in imposing long terms for first offenders, the rationale being that it is important that first offenders avoid contact with hardened

criminals who can negatively affect process of reform for first offenders .

- (d) Courts will have regard to the time already spent in prison by the convict and will usually order that the sentence takes effect from the date of the convict's arrest thus factoring in time already spent in prison. Courts will however discount this factor if the time spent was occasioned by the convict themselves, that is, where they skip bail or because of unnecessary adjournments.
- (e) Courts also have to look into the personal and individual circumstances of the offender as well as the possibility of reform and social re-adaptation of the convict. Arguably, this may relate to the convict's individual circumstances at the time of committing the offence and at the time of sentencing, that is, their "mental or emotional disturbance", health, hardships, etc. The learned Judge also quoted the case of **Republic vs Samson Matimati**, Criminal Case No. 18 of 2007 (unreported) in support of this proposition.
- (f) The Court may take into account the manner in which the offence was committed, that is, whether or not (a) it was planned rather than impulsive, (b) an offensive weapon was used; (c) the convict was labouring under intoxication at the time of committing the offence even though intoxication was not successfully pleaded in defence;
- (g) Duress, provocation and lesser participation in the crime may be mitigating factors in certain circumstances.

- (h) Remorse, lack of clear motive, childhood deprivation and abuse, good conduct in prison, effect on the victim, likelihood of committing further acts of violence, sense of moral justification, and in appropriate cases, socioeconomic status;
- (i) The learned Judge concluded that this list of aggravating and mitigating circumstances is not exhaustive.

17. I must first address the issue of the 3rd and 4th defendants, starting with the 3rd defendant.
18. I have already observed that both the State and the defence agree that the evidence against the 3rd defendant appears to have been so tenuous that he ought not to have been convicted in the first place. Another important factor that courts take into account when sentencing in offences of this nature is the degree of involvement of the defendant in the execution of the offence. It would appear, from what the State and the defence state in respect of the 3rd defendant, that there is no evidence of the 3rd defendant's direct involvement in the execution of the crime and they seriously doubt his connection whatsoever to the commission of the crime. The State would have invited this Court to acquit the 3rd defendant if this Court had the power and the jurisdiction to do so.
19. In addition to these sobering facts laid on the Court by both the defence and the State, there is a chain of other mitigating factors including the fact that the 3rd defendant was a first offender.

20. There is another important factor however that I have to consider before I get to my ultimate decision on his sentence. Counsel Nanthuru argued that in all probability, the 3rd defendant might have been a juvenile at the time of the commission of the offence. He states that according to the evidence of her elder sister, who is about 12 years older than him, she recalls that he was born in 1980. This would suggest that he was either below the age of 16 years, just 16 years old or just over 16 years old but less than 17 years old at the time of the commission of the crime. He observes further that even if the evidence of the sister were not to be believed, the 3rd defendant's Admission Report /admission to prison) (a document dated 23 October 2000) signed by one M.Y. Manda, who was then Officer-in-Charge of Zomba Central Prison, the age of the 3rd defendant was listed as 21 years. This would still suggest he was at most 17 years old at the time of the commission of the offence. I agree with Counsel for the 3rd defendant on this point. The Admission Report herein stated that he had already appealed against the High Court's decision in Criminal Case No. 43 of 1999 (Lilongwe) to the Malawi Supreme Court of Appeal.
21. I must perhaps pause there and move on to the more glaring case of the 4th defendant. According to the 4th defendant's Admission Report (admission to prison) (a document dated 23 October 2000) signed by one M.Y. Manda, who was then Officer-in-Charge of Zomba Central Prison, the age of the 4th defendant was listed as 18 years. This would suggest that the 4th defendant was about 14 years at the time of the commission of the crime. By every imagination, the 4th defendant was a juvenile (in terms of the then Applicable Children and Young Persons Act, Cap 26:03 of the Laws of Malawi) at the time of the commission of the offence.

22. Section 42(2)(g)(i) & (ii) of the Constitution of Malawi (as it was on 11 August 2000) provided that a person who was a child should (i) "not...be sentenced to life imprisonment without possibility of release" and (ii) should "be imprisoned only as a last resort and for the shortest period of time consistent with justice and protection of the public".

23. In addition to the Constitution, Section 11 (1) of the Children and Young Persons Act provided that "Sentence of death shall not be pronounced on or recorded against a person under the age of eighteen years, but in lieu thereof the court shall sentence him to be detained during the pleasure of the President, and, if so sentenced he shall, notwithstanding anything in the other provisions of this Act, be liable to be detained in such place and under such conditions as the President may direct."

24. Even with some of the inherent flaws in these erstwhile provisions of the law that were in force at the material time, it is evident that at a minimum, it was unlawful to impose the death penalty on either the 3rd of the 4th defendants at the time. The imposition of the death sentence on persons under the age of eighteen years was unconstitutional in the first place. In addition, after discounting the imposition of the death penalty itself, the Court should have directed its mind to the fact that if it was to impose a custodial prison term, this had to be "for the shortest period of time consistent with justice and protection of the public." The fact that none of these happened, that a death sentence was imposed and later commuted to life again without the possibility of early release, shows that manifest injustice that has characterised the sentencing of the 3rd and 4th defendants.

25. The unconstitutionality and illegality of the sentences imposed in so far as the 3rd and 4th defendants were not treated as children during the trial and sentencing, is another matter that makes the injustice suffered by the 3rd and 4th defendants so grave.

26. The Admission record to prison in both of their cases shows that they appealed to the Malawi Supreme Court of Appeal. Nothing was ever heard of their appeal. I wonder who represented them at the High Court during trial, but it appears to me that whoever did represent them also did the defendants grave injustice by not immediately taking the matter up on appeal. It is important that rights of defendants should be taken seriously all the time, and more so where, as in the present case, there is, on the face of it, clear and manifest injustice and the consequences of the conviction and sentence are so deep and severe.

27. Under these circumstances, still premised on the fact that in principle the 3rd and 4th defendants remain liable for the murder of the deceased herein, I opine that the factors I have considered, and I do not consider it appropriate to consider more factors, are enough for this Court to conclude that this is that rare case where even at the time of trial, the Court would have imposed a suspended sentence of the shortest duration, with the duration only serving to acknowledge that the offence was not a misdemeanor. In the instant case I consider that an appropriate sentence for the two defendants would be a suspended sentence of 3 years imprisonment, effective from the date of their arrest, i.e 4th January 1997 for the 3rd defendant and 3rd January 1997 for the 4th defendant. What this effectively means is that I impose a sentence that leads to the immediate release of the 3rd defendant, Mr. Charles Nyalapa; and the 4th defendant, Mr. Grey Zimba.

28. I must mention before I move to the next issue, that I am deeply shocked and appalled by the injustice suffered by the 3rd and 4th defendants; and my heart bleeds for the 4th defendant in particular. He was only 14 years old at a minimum, but he was tried as an adult all the same. Although all indications are that he had nothing to do with the crime, the jury in its wisdom, decided to convict him all the same. Although he was clearly a child at the time of the commission of the offence, the Judge sentenced him to death as an adult all the same. His school education came to an abrupt halt as a result of his arrest, subsequent conviction and sentence. The opportunities for education that he has lost during the 20 years he has unjustifiably spent in prison cannot be regained. His life's trajectory was completely compromised and ruined. When we talk of instances of miscarriage of justice that occasion irreparable harm, this is a clear example. Regrettably his attempt at an appeal to the Supreme Court never saw the light of day. Now I sit in a Court of coordinate jurisdiction to the one that conducted the trial. My hands are tied. I cannot reverse the previous findings. I am only entitled to hand down another sentence. Perhaps relevant State institutions such as the Human Rights Commission may explore the question as to whether anything can be done as a further remedy for the defendants, especially the 4th ~~defendant~~

29. Moving on to the 1st and 2nd defendants; it is evident that both agree that they fought with the deceased on the night of 24 December 1996, left him lying down, and that the 2nd defendant, Charles Dick, took the deceased's bicycle. Both the 1st and 2nd defendants testified viva voce during the sentence rehearing. They appeared quite evasive on how they came in to possession of the deceased's bicycle. They sought to create the impression that they were so drunk that they could not recollect how

they got the bicycle, and yet they were able to explain in detail how the fight with the deceased started and ended. When the 2nd defendant was asked by the Court why he decided to go and sell the deceased's bicycle on the morning of the day following the fight (i.e. 25 December 1996), he claimed that he had "matsire" (a hangover) and he just wanted money to buy more beer to address the "matsire" problem. He stated that at the time, he did not know whose bicycle it was, and yet he also mentioned in the same speech, that he recalled how the fight progressed and ended on the previous night. He decided to be very selective with his memory. This Court concluded that the 2nd defendant was a very evasive and dishonest witness who exuded the demeanour of a nonchalant liar.

30. In terms of the age of the defendants, the State agrees with the defence that the defendants were young men, the 1st defendant's age has not been clearly shown but he was in his mid-20s and the 2nd defendant was aged 23 years at the time of commission of the offence. This, the State concedes, is a mitigating factor.
31. The State further concedes that the defendants were first offenders, that until the time of the commission of the crime herein they had led crime-free lives, and that this entails that they deserve leniency when sentencing.
32. However, the State argues that the Court should also consider the circumstances of the deceased's murder. Counsel Supply stated that the aggravation was compounded by the fact that the offence was committed in concert, at night and that a dangerous offensive weapon was used to commit the murder. This was further compounded by the fact that another felony, armed robbery, was committed.

33. Having said all this, the question now is what is the appropriate sentence for each of the defendants herein for the murder that they committed on 24 December 1996? Having regard to all that I have said above, it is this Court's overarching duty to impose a sentence sufficient, but not greater than necessary to serve the purposes of sentencing. Prime among these purposes are reformation or rehabilitation of the offender and deterrence of the offender himself and also of would be offenders.
34. The maximum sentence for murder under Section 210 of the Penal Code is death or life imprisonment. I bear that in mind. It must indeed be stated that murder, perhaps with the exception of genocide, is the most serious offence known to our law. The punishment that this Court metes out must reflect this fact. If we do not do that, as Chombo J astutely observed in the case of **Republic vs Masula & others**, Criminal Case No. 65 of 2008, members of the public could start asking themselves whether "something has gone wrong with the administration of jus tice."
35. I have examined some decisions passed for similar offences which were brought to my attention by the State. In **Winston Ngulube & Another vs Republic**, MSCA Crim. App. No. 35 of 2006 (unreported), the Supreme Court of Appeal imposed a sentence of 20 years imprisonment for murder after it had observed that no weapon had been used to commit the murder.
36. Tn **Twoboy Jacob vs Republic**, MSCA Crim. App. No. 1 of 2006 (unreported), which decision also affirmed **Kafantayeni & Others vs Attorney General**, the Supreme Court of Appeal also upheld the death penalty. The defendant in that case was a polygamist. He killed his 2nd wife in cold blood using a panga knife, alleging that she had bewitched

him into failure to have sexual intercourse with his first wife. In **Namizinga & Another v Republic**, MSCA Crim. App. No. 18 of 2007 however, the Supreme Court imposed a 25 years imprisonment term in circumstances where armed robbers held the guard to the ground, tied his hands and feet, put a cloth in his mouth and hit him on the bottle on the head until he was unconscious. He later died.

37. In the present case, it is evident that the defendants robbed and killed the deceased for his bicycle. They were all acting in concert. They share the culpability for killing the deceased under gruesome circumstances. See **Harry Chigalimoto vs Republic**, 1968-70 ALR Mal 324.
38. All in all, I am of the opinion that a sentence of 30 years imprisonment with hard labour, effective from the date of arrest, is appropriate for both the 1st defendant, Mr. Richard Jiba James, and the 2nd defendant Mr Charles Dick, and I so order. Both defendants have the right to appeal against their respective sentences to the Supreme Court of Appeal within 30 days from the date hereof.

Made in Open Court at Zomba this 4th Day of March 2016

RE Kapindu,
PhD
JUDGE

The Republic v. Venita Maiche

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

HOMICIDE SENTENCE RE-HEARING NUMBER 9 OF 2016

CORAM: JUSTICE M.A. TEMBO,

Malunda, Counsel for the State

Chithope-Mwale, Counsel for the Defendant

Chanonga, Official Court Interpreter

ORDER ON SENTENCE REHEARING

On 26th May 2016, this Court was scheduled to conduct a sentence rehearing in this matter with respect to the defendant. The sentence rehearing follows the fact that the mandatory death sentence to which the defendant was sentenced in 2003 was invalidated as unconstitutional in the subsequent case of *Kafantayeni and others v Attorney General* [2007]

MLR 104 (*the Kafantayeni case*) decided on 27th April 2007.

The defendant was brought before this Court by the Director of Public Prosecutions in compliance with the decision of the Supreme Court of Appeal of 1st November 2010 in *Yasini v Republic* MSCA Criminal Appeal number 29 of 2005 (unreported) (*Yasini case*) which compelled the Director of Public Prosecutions to bring before the High Court, for a sentence rehearing, all convicts who were sentenced to the unconstitutional mandatory death penalty.

This court directed that both the State and defence address it on the preliminary issue of jurisdiction raised by the State, namely, whether the High Court can proceed with a sentence rehearing in view of the fact that Venita Maiche, after the *Kafantayeni case* but before the *Yasini case*, lodged an appeal in the Supreme Court of Appeal against the mandatory sentence of death imposed on her at trial and her appeal on the mandatory death sentence was dismissed by the Supreme Court of Appeal on 5th February 2010.

At the date set for hearing on the preliminary matter herein both the State and the defence submitted their different views orally after filing skeleton arguments.

The State observed that the present matter poses some issues pertaining to jurisdiction in that the present matter has been before the Supreme Court of Appeal which dismissed the appeal on sentence.

The State indicated that it is aware that the *Yasini case* gave the jurisdiction to the High Court to rehear convicts in mitigation but that the question that obtains is whether this *Yasini* jurisdiction could be interpreted as jurisdiction granted to the High Court to vary the decision of the Supreme Court in the present matter.

The State then presented the following arguments on the preliminary matter in this case. The State submitted on the doctrine of judicial precedent and hierarchy of courts as follows. That the hierarchy of courts is a key feature of the doctrine of judicial precedent. Further that the general rule of the doctrine of precedent is that all courts are bound to follow decisions made by their superior courts. Further that, conventionally, the Supreme Court of Appeal binds all courts in Malawi, followed by the High Court which binds the lower Courts. However that, one High Court Judge cannot be bound by the decision of another High Court Judge.

The State submitted that this is not a strange doctrine. But that it is one of a jealously guarded and entrenched doctrines. It is a way of bringing sanity in the manner laws are handled to ensure uniformity in the application of laws.

The State submitted that the Supreme Court of Appeal is the only court that can overrule itself. Further, that when a decision has been made by the Supreme Court of Appeal, however wrong, if it cannot be adequately distinguished, lower courts must be bound.

The State then made the concluding observation that in the present case, there is a Supreme Court of Appeal judgment which is still standing because it has not been overruled or revisited by the Supreme Court of Appeal itself. The State submitted that it is therefore, for all purposes, a judgment that has to be respected irrespective of the fact that the parties considers it to be wrong.

The State submitted that it is bearing that in mind that brings up the question whether if we consider the Supreme Court of Appeal decision in this matter to be wrong, we can then tamper with it? Or say, by virtue of the *Yasini* decision, the Supreme Court of Appeal overruled its own future judgments? The State wondered if we should let the Supreme Court overrule or revisit its earlier decision. The State contended that the Supreme Court never intended to overrule its future judgments. It submitted that overruling a case law done is retrospectively. Further that it is weird to think that the *Yasini* decision of 2006 overruled a judgement of the Supreme Court of Appeal in 2010. This Court notes that in the present matter the issue raised by the State about the Supreme Court of Appeal by its *Yasini* decision overruling future decisions does not arise because the present matter was decided before *Yasini*. Rather this Court will deal with the issue of the import of *Yasini* on the present matter in view of the submissions by the defence.

The State then submitted that in the case of *Republic vs Chimkango* Sentence rehearing Number 36 of 2015 (High Court) (unreported) (*Chimkango*) a similar situation was before the court. Further that, as noted by the Judge in that case, this issue is one that invokes the fear of denigrating the doctrine of judicial precedent, where hierarchy is not respected or past decisions could overrule future decisions. Further that this is the same fear that is before this court. The State further

submitted that the Supreme Court should therefore be called to rectify the situation, as no other court could, let alone, the High Court.

The State also submitted that when the Supreme Court of Appeal heard the appeal herein the defendant had opportunity to plead in mitigation although she never utilized that opportunity. Further that the Supreme Court of Appeal on that occasion considered the mitigating and aggravating factors in this matter.

The State then submitted that this matter should be transferred to the Supreme Court which should revisit its own judgment rather than the High Court varying it. The State pointed out that this approach is the same one that was adopted by my brother Judge Potani in the case of *Chimkango*. This Court wishes to point out that, if this Court finds that it is bound by the Supreme Court of Appeal decision in the case of *Maiche v Republic* MSCA Criminal Appeal number 4 of 2005 (*Maiche*), it would find it impossible to remit this matter to the Supreme Court of appeal as it does not see under what authority it would do that.

On its part the defence's analysis started with a discussion of the three relevant cases to its submissions namely *Kafantayeni*, *Yasini* and *Maiche* followed by justification for a sentence rehearing in this matter.

The defence pointed out at the outset that there is only one other case in which a jurisdictional issue similar to the one in the present case was raised and addressed by the High Court namely in *Chinkango*. Defence Counsel indicated that he represented the convict in that matter and he already submitted a copy of the judgment in the *Chinkango* case to this Court. He further indicated that some of his arguments were accepted in that case and others were rejected.

Counsel for the defendant further stated that since this Court was already furnished with a copy of the *Chinkango* decision he will not entirely dwell on it but rather simply make reference to it when and where necessary but will otherwise mainly broaden the scope of his arguments.

The defence commenced its arguments by making reference to the three relevant cases to its submission.

The defence submitted that the constitutionality of the imposition of the mandatory death sentence for murder convicts under section 210 of the Penal Code was challenged in the *Kafantayeni Case*. It further submitted that on 27th April 2007 the High Court, sitting on a constitutional matter, held that the imposition of the mandatory death sentence amounted to cruel, inhuman and degrading treatment prohibited by section 19 of the Constitution and was a violation of the right to a fair trial provided for under section 42 of the Constitution and was unconstitutional. The defence correctly observed that the effect of the judgment was that the High Court has discretion to pass a sentence in accordance with the circumstances of the offender and the offence. Further that the Court ordered that the Applicants in the *Kafantayeni Case* should be brought once more before the High Court so that the Court could pass a sentence in accordance with the circumstances of the offence.

The defence quoted the relevant parts of the *Kafantayeni case* as are relevant to its submission as follows.

The ground of fair trial

First, we conclude that “trial” of a person accused of crime extends to sentencing where the person is convicted of the crime. Therefore, the principle of “fair trial” requires fairness of the trial at all stages of the trial including sentencing.

The defence stated that on this ground, the Court went on to find as follows

We agree with counsel that the effect of the mandatory death sentence under section 210 of the Malawi Penal Code for the crime of murder is to deny the accused as a convicted person the right to have his or her sentence reviewed by a higher court than the court that imposed the sentence; and we hold that this is a violation of the right to a fair trial which in our judgment extends to sentencing.

The defence further pointed out that the *Kafantayeni case* also relied on the right to access to justice as follows.

The ground of the right of access to justice

In our judgment we also consider that the right of access to justice guaranteed by section 41 of the Malawi Constitution also has application in determining the issue of constitutionality of the mandatory death penalty. Section 41, in subsection (2), states that- “Every person shall have access to any court of law or any other tribunal with jurisdiction for final settlement of legal disputes.

We affirm that issues of sentencing are legal issues for judicial determination and are therefore within the purview of section 41 (2) of the Constitution; and the mandatory death sentence under section 210 of the Penal Code, by denying a person convicted of murder the right of access on the sentence to the final court of appeal, is in violation of section 41(2) of the Constitution. In regard to death penalty, which is the ultimate punishment any person can suffer for committing a crime, irrevocable as it is once carried out, we would reject any notion that any restriction or limitation on the guarantee under section 41(2) of the Constitution of the right of access to a court of final settlement of legal issues, denying a person to be heard in mitigation of sentence by such court, can be justified under section 44(2) of the Constitution as being reasonable or necessary in a democratic society or to be in accord with international human rights standards. In the final analysis, we hold that the mandatory requirement of the death sentence for the offence of murder as provided by section 210 of the Penal Code is in violation of the constitutional guarantees of rights under section 19 (1), (2), and (3) of the Constitution on the protection of the dignity of all persons as being inviolable, the requirement to have regard to the dignity of every human being and the protection of every person against inhuman treatment or punishment; the right of an accused person to a fair trial under section 42(2)(f) of the Constitution; and the right of access to justice, in particular the right of access to the court of final settlement of legal issues under section 41(2) of the Constitution. Pursuant to section 5 of the Constitution, we declare section 210 of the Penal Code to be invalid to the extent of the mandatory requirement of the death sentence for the offence of murder. For the removal of doubt, we state that our declaration does not outlaw the death penalty for the offence of murder, but only the mandatory requirement of the death penalty for that offence. The effect of our decision is to bring judicial discretion into sentencing for the offence of murder, so that the offender shall be liable to be sentenced to death only as the maximum punishment.

The action of the plaintiffs therefore succeeds and we set aside the death sentence imposed on each of the plaintiffs.

We make a consequential order of remedy under section 46 (3) of the Constitution for each of the plaintiffs to be brought once more before the High Court for a Judge to pass such individual sentence on the individual offender as may be appropriate, having heard or received such evidence or submissions as may be presented or made to the Judge in regard to the individual offender and the circumstances of the offence.

The defence then correctly submitted that a number of crucial principles to be isolated from the *Kafantayeni case* are as follows.

- (i) It abolished the mandatory death sentence and brought about discretion in sentencing for murder convicts.
- (ii) It came up with the legal position that those who were party to the case had to be brought before the High Court (and not the Supreme Court of Appeal) for a Judge to pass sentence.
- (iii) It provided that an appropriate sentence should be one passed after hearing or receiving such evidence or submissions as may be presented to the judge in regard to the individual offender and the circumstances of the case. Put differently, it held that a person should be heard in mitigation before sentence is meted out.
- (iv) It made a finding that denying a convict the right to have the sentence imposed on him or her to be reviewed by a higher court than the one that imposed the sentence is a violation of right to fair trial.
- (v) It made a finding that “fair trial” requires fairness of the trial at all stages of the trial including sentencing.
- (vi) It made a finding that issues of sentencing are legal issues for judicial determination hence denying a person right of access on sentence to final court of appeal is a violation of right to access to any court of law for final settlement of legal disputes.

The defence further correctly submitted that beyond the above and specifically providing a remedy to the specific litigants in that case, *Kafantayeni* fell short of addressing two major issues firstly, whose duty was it to bring the litigants therein before the High Court once again and, of course, what procedure was to be followed.

The defence also noted connected questions that remained unanswered like: would each specific convict be required to make an application before the High Court to be reheard on sentence? Or, would the High Court on its own motion summon all convicts to appear before it once again? Or, were the convicts supposed to appeal to the Supreme Court of Appeal but in that appeal slot in a prayer that they be reheard on sentence in the High Court? Or indeed would some other procedure be adopted?

The defence further correctly noted that the second, and most important issue, was what would happen to all other convicts who were not part of the *Kafantayeni* but were equally sentenced to the mandatory death sentence before it was declared unconstitutional?

The defence submitted that before the above issues were resolved, and before even the specific litigants in the *Kafantayeni* had enjoyed the fruits of their litigation, it was left to each and every convict sentenced to the mandatory death penalty to try his luck as he or she deemed fit based on *Kafantayeni*.

The defence submitted that the convict herein was one of those litigants who, without specific known direction to be taken, tried her luck by exercising her right of appeal to the Supreme Court of Appeal. And further that that is what brings us to this case.

The defence submitted that confusion in matters like the instant one then is very clear if we take *Yasini* case as an example. The defence pointed out that Yasini had to ask the Supreme Court of Appeal for a sentence rehearing before the High Court not realizing that it was an automatic right.

The defence then dealt with the events in the present matter. The defence correctly submitted that Ms Maiche's appeal was registered as Supreme Court of Appeal Criminal Appeal Case No. 4 of 2005 and she appealed against the mandatory death sentence only and not her conviction. Further that Ms Maiche's appeal judgment was eventually handed down on 5th February 2010, subsequent to *Kafantayeni* but prior to the Supreme Court of Appeal's decision in *Yasini*, which affirmed *Kafantayeni* and directed that all prisoners previously subjected to the mandatory death sentence were to be brought back to the High Court by the Director of Public Prosecutions for purposes of a sentence rehearing. Ms Maiche's appeal was, therefore, heard during a gap between the repeal of the mandatory death sentence (*Kafantayeni*) and the institution of a proper remedy for cases sentenced under the prior law (*Yasini*).

The defence stated that indeed, it was not until at least four years after Ms Maiche's appeal judgment was handed down that the Supreme Court's order in

Yasini was implemented. Funding for mitigation investigations was made available for the first time in 2014, and the first of the sentence rehearing proceedings, as ordered by the Court in 2010, commenced in February 2015.

The defence stated that Ms Maiche's appeal on the mandatory death sentence was dismissed. It observed that her counsel neither presented any mitigating evidence relating to Ms Maiche's intellectual disability nor did she interview members of Ms Maiche's community to gather additional facts relating to Ms Maiche's character, background, and the facts of the offence. This was so because mitigation of sentence was of no consequence since death sentence would follow anyway.

The defence stated that the Supreme Court of Appeal was unaware that Ms Maiche is intellectually disabled grandmother whose tiny stature is the likely result of foetal alcohol spectrum disorder and malnutrition. Similarly, that the Supreme Court of Appeal was unaware that in early 2002, at the time of the offence, Ms Maiche's village, and the surrounding region, were in the grips of a devastating famine. And that the Supreme Court did not review the statement of Wongani Saikolo, Ms Maiche's grandson and the brother of the deceased, who recalled that

People in our village were driven mad by hunger. If they saw someone else eating they would leap on them to take their food People couldn't think properly, their mental capacity was so disturbed by the hunger and stress.

The defence submitted that the mitigating relevance of this testimony is made clear by the conclusions of Dr. George Woods, a neuropsychiatrist who evaluated Ms Maiche at the request of the Malawi Human Rights Commission and observed that

under the circumstances, it seem[ed] clear that she reacted impulsively and over-aggressively to a situation that called for a more moderate and reasoned response" and concluded that the "over-reaction to her grandson's wrongdoing was a consequence of her intellectual disability.

The defence submitted further that moreover, because Supreme Court of Appeal did not receive this evidence, it was unable to consider the legality of sentencing to death a person with intellectual disabilities, as provided by international law. The defence noted that in 1989, in a resolution regarding the implementation of the

Safeguards, the Economic and Social Council urged states to eliminate the death penalty “for persons suffering from mental retardation or extremely limited stated mental competence, whether at the stage of sentence or execution.” See ECOSOC Resolution 1989/64, “Implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty” (24 May 1989). Further that in subsequent resolutions urging full compliance with the Safeguards, the United Nations Human Rights Commission repeatedly called upon states “[n]ot to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person”.

The defence submitted that similarly, the Supreme Court of Appeal heard no new evidence pertaining to the “circumstances of the individual,” which in Ms Maiche’s case would also have included testimony from family and community members about her impeccable character prior to this offence, as well as her nonviolent nature.

The defence submitted that in a nutshell key things worth noting are as follows

(i) The issue of sentence was not referred to the High Court as the first court to deal with it so as to afford the convict a tier of appeal if aggrieved by a first constitutional sentence to be imposed after the unconstitutional sentence.

(ii) No evidence was adduced or received as may be called evidence of “circumstances of the individual” (including reform in prison, health, mental or emotional disturbances, hardships). The Supreme Court of Appeal was limited to facts on record only to come to its conclusion.

The defence then submitted with respect to *Yasini*. It submitted that the answer regarding the position of all other convicts who were not part of the *Kafantayeni* as well as the procedure to be utilized for all such convicts only came later in the case of *Yasini*.

The defence submitted that in *Yasini* delivered on 1st November, 2010 the Supreme Court of Appeal held that

The Court [in *Kafantayeni*] clearly ordered that the Plaintiffs were entitled to a re-sentence hearing on the death sentence individually. The Court's decision on this point, affected the rights of all prisoners who were sentenced to death under the mandatory provisions of section 210 of the Penal Code. The right to a re-sentence hearings therefore accrued to all such prisoners. This default however did not and does not take away his rights to appeal against the death sentence. We wish to observe that it is the duty of the Director of Public Prosecutions to bring before the High Court for resentence hearing all prisoners sentenced to death under the mandatory provision of Section 210 of the Penal Code.

The defence correctly submitted that a number of things are worth noting from the *Yasini* as follows

- (i) it held that "all" convicts who were sentenced to the mandatory death penalty were "all" entitled to a sentence rehearing .
- (ii) It held that the procedure to be adopted for the sentence rehearing should be that the convicts be brought again before, not the Supreme Court of Appeal, but the High Court by the Director of Public Prosecutions (DPP).

The defence submitted that the above essentially means that all convicts do not have to make an application before the High Court in order to be reheard on sentence or that they ask the Supreme Court of Appeal via an appeal to be reheard on sentence. Rather that the right accrued automatically to all convicts sentenced to death under the mandatory death penalty and the Director of Public Prosecutions is under a duty to bring each and every one of them before the High Court. Not doing so would mean the Director of Public Prosecutions would be in contempt of court and disregarding a Supreme Court of Appeal judgment. The defence further submitted that this right to a sentence rehearing requires the High Court to disregard the previous imposition of the mandatory death sentence, and to consider fresh evidence regarding the facts of the offence and the circumstances of the offender before imposing a sentence. Put differently, the sentence rehearing is to proceed as if a guilty verdict has just been pronounced and there is no sentence yet imposed. The defence stated that we turn a blind eye to the existence of the original unconstitutional mandatory death sentence and proceed on the basis that a constitutional sentence is yet to be imposed by the court.

It is the defence's position that the High Court enjoys full jurisdiction to proceed with sentence rehearing in this matter for the following reasons: sentence rehearing and an appeal are different; *Yasini* impliedly overruled the Supreme Court of Appeal decision in *Maiche*; *Maiche* sentence was invalidated by *Kafantayeni*; to decline convict a sentence rehearing would be both discriminatory and arbitrary since principles of equity and fairness require that she be given the same treatment as others who are now benefitting from *Yasini* and the High Court would be disregarding Supreme Court of Appeal judgment in *Yasini* and the Director of Public Prosecutions would be in contempt of Court. The defence expounded each ground below.

On the submission that sentence rehearing differs from an appeal the defence submitted that sentence rehearing and an appeal are two separate legal processes such that an appeal cannot displace a convict's right to a sentence rehearing.

This Court agrees with that submission. The State also agrees that an appeal and a sentence rehearing are two different processes.

The State however argued that in the unique circumstances herein where Ms Maiche had every opportunity to be heard on mitigating and aggravating factors on appeal and that therefore the appeal was the same as a sentence rehearing.

The State added that in other cases such as *Ngulube and another v Republic* [2008] MLR 413 the Supreme Court had occasion to reduce the sentence after considering the mitigating and aggravating factors on consideration of an appeal after a previous mandatory death sentence just like in the instant matter.

The defence correctly submitted that an appeal to the Supreme Court of Appeal proceeds by way of rehearing. The appeal court restricts itself to the facts/evidence already on the record and ordinarily no new evidence is adduced. The defence referred to the Supreme Court of Appeal decision in the case of *Chimanda v Maldeco Fisheries Ltd* [1993] 16 (2) MLR 493 (SCA) where the Supreme Court of Appeal stated on page 494

The appeal to this Court is by way of rehearing. We must consider the facts and the materials which were before the trial court. We must then make up our mind,

remembering the judgment appealed from and weighing and considering it. If after full consideration of the trial court judgment we come to the conclusion that it was wrong, then we must not hesitate to disagree with it. We must always remember, of course, that the trial court had the advantage of seeing and hearing witnesses. We must be slow to reject the findings of fact made by the trial court unless we are satisfied that there is insufficient evidence to support those findings, or we must be satisfied that there is cogent evidence to the contrary which has been misinterpreted or overlooked.

The defence also referred to other cases on the same point and correctly submitted that what comes out clearly is that on appeal, as a general rule, no new evidence is adduced and the appellate court relies on or restricts itself to those facts or evidence as is already on the trial court record and scrutinizes that to come up with its own conclusions.

On the other hand, the defence correctly submitted that the answer as to what sentence rehearing means or how it has been understood by courts in Malawi is found in a number of “Kafantayeni Resentencing Project” cases from the High Court. In the case of *Republic v Dzimbiri*, Sentence Rehearing Number 4 of 2015 (High Court) (unreported) Justice Kenyatta Nyirenda correctly stated that

To my mind, the starting point is for the Court to adopt the reasoning in the *Mtambo Case* to the effect that the mere fact that the whole trial record is missing ought not to deprive a convict an opportunity of a sentence re-hearing. This would appear to be the ultimate objective of the Guidelines on Homicide Sentence Re-Hearing. The Guidelines are a product of a Special Committee that was appointed by the Chief Justice to oversee the implementation of the principle of sentencing espoused in the *Kafantayeni Case* and the *Yasini Case*. In order to guide the homicide sentence re-hearing, the Special Committee agreed on the following guidelines:

“2. Cases should be notified to the Director of Public Prosecutions, Legal Aid Department and legal firms of lawyers that represented the convicts.

3. Cases be set down for sentence re-hearing before the judge who tried the case unless he or she is not available.
4. When the case is called the State should address the Court first. The re-hearing process should follow the normal adversarial process. The State may call witnesses or submit relevant reports in terms of section 260(2)7 of the Criminal Procedure and Evidence Code.
5. The defence will be called upon to give its version and may, likewise, call

witnesses or submit relevant reports in terms of section 260(2) of the Criminal Procedure and Evidence Code.

6. The State has a right to reply.

7. The Judge will, after hearing both sides, pass sentence. The burden and standard of proof remain the same.

8. The convict should still be advised that he or she has the right to appeal against the sentence to the Supreme Court of Appeal.

S.260 of the Criminal Procedure and Evidence Code (CP&EC) provides for receipt by the court of evidence for arriving at a proper sentence:

“(1) The Court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.

(2) Evidence that the court may receive under subsection (1) may, in addition to the evidence of the accused or the prosecution, include the evidence by or on behalf of the victim of the offence and any relevant reports to enable the court assess the gravity of the offence.”

I fully agree with the Guidelines on Homicide Sentence Re-Hearing and, accordingly, endorse them.

In *Republic v. Payenda* Homicide Sentence Rehearing Number 18 of 2015, (High Court)(unreported), Kapindu J correctly stated about sentence rehearing in the following words

11. It is in respect of the mandatory imposition of the death penalty on the convict herein that this matter has now come up before this Court for sentence rehearing. This follows the decision of the High Court Sitting on a Constitutional Cause under Section 9(2) of the Courts Act (Cap 3:02 of the Laws of Malawi) in *Kafantayeni & Others vs Attorney General*, Constitutional Cause No. 12 of 2005 which declared all mandatorily imposed death sentences for murder to be unconstitutional and invalid.”

47. All these authorities emphasise the centrality of taking into account the individual circumstances of the defendant when sentencing. The previous sentence having been declared constitutionally invalid, the valid sentencing is taking place now.

48. The precise issue of whether, when an initial sentence has been invalidated after a substantial passage of time since conviction, post-conviction factors of the convict must be taken into account on resentencing, recently came up for determination before the US Federal Supreme Court in the case of *Pepper vs United States*, 131 S. Ct. 1229 (2011).

In *Republic v Galeta and Makina*, Sentence Rehearing Number 06 of 2015, (High Court)(unreported) Justice Potani stated that sentence rehearing is

aimed at affording convicts a chance “to mitigate sentence” which opportunity was not present when the convicts were being sentenced to the mandatory death penalty.

The defence correctly submitted that from the above a number of things clearly come out as regards what sentence rehearing is and, of course, is not. The following are noteworthy points about sentence rehearing from the above cases:

(i) Sentence rehearing affords convicts sentenced to the mandatory death penalty a chance to adduce evidence and/or tender reports in mitigation as a matter of right. It is not necessary to apply to court to be reheard on sentence or to adduce new evidence concerning sentence. Sentence rehearing carries with it an automatic right to be heard on sentence: to adduce evidence and/or tender reports as may assist the convict get a reduced sentence. This is not possible in an appeal.

The defence correctly submitted that this in tandem with section 321J of the Criminal Procedure and Evidence Code, a provision which has been followed by High Court Judges in all sentence rehearing so far and provides that

(1) Where a verdict of guilty is recorded, the High Court may, after judgment but before passing sentence, receive such information or evidence as it thinks fit, in order to inform itself as proper to the proper sentence to be passed.

(2) The information or evidence that the court may receive under subsection (1) may, in addition to the evidence of the accused or the prosecution, include information or evidence by or on behalf of the victim of the offence and any relevant reports to enable the court assess the gravity of the offence.

(ii) A convict is to be brought before the High Court for mitigation on sentence. This in turn affords convicts a tier of appeal if aggrieved.

(iii) That since the death penalty was declared unconstitutional, it is “invalid” *ab initio* and valid sentencing can only take place via sentence rehearing.

In the end the defence correctly submits that it becomes very clear that sentence rehearing is totally different from an appeal. And further that therefore the right to an appeal cannot displace the right to a sentence rehearing.

This Court also had occasion after the hearing to consider the commentary by Dr Esther Gumboh in her paper entitled: *Republic v Chimkango: A missed opportunity to clarify the status of pre-resentencing appeals against mandatory death sentences in Malawi (2016)* where she lucidly and correctly makes the same point that a sentence rehearing is different from an appeal and other valid points that have been argued by the defence below on why a sentence rehearing should be had on account of invalidation of the mandatory death sentence.

The submission by the State that the defendant had an opportunity to have her mitigating and aggravating factors considered by the Supreme Court of Appeal on the appeal therefore does not detract from the clear and valid argument that such an appeal does not equate to a sentence rehearing. The State cannot equate an appeal to a sentence rehearing. The fact that in cases like *Ngulube* the Supreme Court of Appeal decided to reduce the mandatory death sentence to a term of years does not at all entail that the defendants in that matter were reheard on sentence at all. They were dealt with on an appeal. It is therefore not surprising that during oral argument, in response to a question from this Court, the State eventually admitted that an appeal would be deficient compared to a sentence rehearing in a case like the instant one of Ms Maiche where matters of mental health are to be considered. These are matters that cannot easily be gathered unless evidence is properly heard on a sentence rehearing as opposed to appeal where the Court was restricted to what was on the lower court record and does not include such matters as the mental health of the defendant.

Consequently, the defendant in this matter is clearly entitled to a sentence rehearing, and not an appeal, as per *Kafantayeni* which has been affirmed by the Supreme Court of Appeal on numerous occasions including in *Yasin*.

The defence then submitted that *Yasinin* overruled *Maiche* on a point of procedure. The defence contended that another way of looking at the matter is to bear in mind the obvious fact that the Supreme Court of Appeal overrules itself. That it can overrule itself either expressly or impliedly. Further that it would overrule itself expressly where it specifically states the legal position or precedent which it is overruling. It would overrule itself impliedly where it does not specifically state the legal position or precedent it is overruling but where the new legal position

taken is different from its own previous legal position. In short, that a latter legal position of the Supreme Court of Appeal on an issue overrules a former legal position of the Supreme Court of Appeal on that issue.

Coming to the present case the defence contended that it has to be noted that the Supreme Court of Appeal delivered *Maiche* first (on 5th February, 2010) and *Yasini* later (on 1st November, 2010). The defence contended further that it follows, therefore, that in as far as the general procedure applicable in dealing with all convicts who were serving mandatory death sentences before it was declared unconstitutional, to wit, that they must be brought before, not the Supreme Court of Appeal, but rather the High Court *Maiche* was overruled to such extent that it differs from the said general procedure laid down in *Kafantayeni*. On this basis the defence submits that the High Court is entitled to conduct a sentence rehearing in this matter.

The defence further contended that, moreover, the convict cannot be blamed for not having availed herself of a sentence rehearing first before the appeal. And further that it was only in November, 2010 that the Director of Public Prosecutions was placed under a direct order to bring the prisoners for sentence rehearing and only in 2015 did sentence rehearing commenced. And further that, as such, all defendants who had been sentenced to death under the mandatory regime (other than the *Kafantayeni* plaintiffs) could not possibly have availed themselves of their right to a sentence rehearing or indeed had any reasonable expectation of receiving a sentence rehearing at any point before the decision in *Yasini*.

What must be noted is that indeed the Supreme Court of Appeal stated in *Yasini* as follows with respect to *Kafantayeni*

The court clearly ordered that the plaintiffs were entitled to a re - sentence hearing on the death sentence individually. The court's decision on this point, affected the rights of all prisoners who were sentenced to death under the mandatory provisions of Section 210 of the Penal Code. The right to a re - sentence hearing therefore accrued to all such prisoners.

During oral argument the State cautioned against the contention that there was implied overruling of the *Maiche* decision by *Yasini* because the issue of those in

the situation of Maiche was never argued in *Yasini*. This Court wishes to point out that in fact *Yasini* is very clear as to the import of *Kafantayeni*. Which is that all affected convicts were to be brought before the High Court for sentence rehearing. Indeed the Supreme Court of Appeal in *Yasini* stated what should have happened in *Maiche* before the Supreme Court of Appeal. This Court would however not go as far as saying that then in *Yasini* the Supreme Court of Appeal impliedly overruled *Maiche*. All that *Yasini* posited was that in line with *Kafantayeni* all affected convicts were to be reheard on sentence. This was not done in *Maiche* and it has to be done now.

The defence submitted that the other reason for the seeking a sentence rehearing is that the mandatory death sentence was invalidated. The defence referred to what was stated by Kapindu J in *Republic v Payenda*, Sentence Rehearing Case Number 18 of 2015 (High Court) (unreported) that as a result of *Kafantayeni* all mandatorily imposed sentences became invalid and as such a valid sentence can only be imposed now after hearing the convict in mitigation.

The defence added that the simple way of explaining this is to say that once the mandatory death penalty was declared unconstitutional all mandatory death sentences became invalid and void *ab initio*. And all such convicts on mandatory sentences were restored to a position they were as at the time of pronouncing a guilty verdict. It is as if a guilty verdict had just been pronounced and sentence is yet to be passed.

The defence contended, correctly in the view of this Court, that if this were not the case then it would not be possible for the High Court to mete out a sentence lower than death, say of 20 years imprisonment, in place of the death sentence.

So that the only reason that the High Court can pass a sentence lower than that of death can only be that the original sentences were invalidated. And it is as good as saying that by the time the appeal was lodged in the Supreme Court of Appeal there was no valid sentence at all to appeal against. The defence stated that the argument that is appropriate in this Court which does not challenge the

Supreme Court of Appeal reasoning is simply to say valid sentencing in accordance with *Kafantayeni* and *Yasini* as well as section 321J of the Criminal Procedure and Evidence Code by court is yet to take place in respect of the defendant.

The defence submitted that to shorten a long story the relevant test for Ms Maiche to qualify for the *Yasini* remedy is as follows:

Is the convict one of the people who were sentenced under the provisions of mandatory death penalty? Yes.

Does *Yasini* compel the Director of Public Prosecutions to bring even her before the High Court? Of course. It's a court order and the Director of Public Prosecutions is duty bound to obey Court orders.

Has the convict undergone any valid/constitutional re-sentencing before (which allowed her to adduce evidence in mitigation)? An overwhelming "No". An appeal is not a resentencing.

Is she, therefore, entitled to a resentencing? Of course, just like all other convicts who were sentenced to the mandatory death penalty before it was declared unconstitutional per the *Yasini* and *Kafantayeni*. The defence submitted that otherwise it would be discriminating against her on the basis of having exercised her right to appeal, which legal process is different from a sentence rehearing. The defence then expanded this last point further below.

This Court agrees with the defence that the defendant in this matter is entitled to a sentence rehearing precisely because the whole process of the mandatory sentence at trial was invalidated on various constitutional grounds. That invalidated sentence could not be subject of an appeal as it was indeed void *ab initio*. The defendant must therefore be properly sentenced otherwise the invalidation of the mandatory death sentence would be meaningless and that would also be potentially unconstitutional as the defendant would be denied an effective remedy *vis a vis Kafantayeni* which has been affirmed by the Supreme Court of Appeal in numerous cases including in *Yasini*.

What this means is that the Supreme Court of Appeal decided *Maiche* per incuriam. When the Supreme Court of Appeal observed that the defendant in *Maiche* was entitled to a sentence that would take account of mitigating and aggravating factors as per *Kafantayeni* the Supreme Court of Appeal should have considered that the sentence imposed by the trial court was non-existent as it had been declared unconstitutional by *Kafantayeni*. There was therefore no room for entertaining an appeal on an invalidated and unconstitutional mandatory death sentence.

There was a new retrospective constitutional rule since *Kafantayeni* which was affirmed by the Supreme Court of Appeal in many appeal cases including *Yasini*, that the mandatory death sentence was a constitutionally invalid punishment which should not have been imposed before *Kafantayeni*. This is a fundamental point. It means that whether the sentence was final as having been imposed by the High Court or upheld by the Supreme Court of Appeal the sentence did no longer counted and the remedy was a sentence rehearing as per *Kafantayeni*.

The doctrine of judicial precedent, on which the State based the preliminary issue before this Court, cannot therefore stand in the way of a sentencing rehearing in the foregoing circumstances. That doctrine is inapplicable because the new constitutional rule in *Kafantayeni* is clearly retrospective as held by the High Court sitting in a constitutional matter and as frequently affirmed by the Supreme Court of Appeal including in *Yasin*. The new constitutional rule abolished the mandatory death sentence and provided a remedy that is also retrospective and therefore no Court has authority to leave in place the mandatory death sentence that has been held to be retrospectively constitutionally invalid.

The defence also argued that if there is no sentence rehearing in this matter then that will amount to discrimination as other convicts in a similar position have been reheard on sentence.

The defence submitted that there are three angles to this discrimination argument. Firstly, that *Yasini* clearly held all those who were sentenced to the unconstitutional mandatory death sentence have to be resentenced before the High Court. Further that to exclude a category of those people equally sentenced to the mandatory death sentence on the basis of exercise of their right to appeal would be to discriminate against them on the basis of their being proactive in filing their appeals. This result would, perversely, reward those convicts who did not or delayed filing their appeals, and penalize those who expeditiously pursued the remedies to which they were entitled.

The defence observed that the maxim, *vigilantibus et non dormientibus jura subveniunt*, that the law does not assist those who slumber on their rights would seem to achieve the opposite in this instance. And that it would actually be rewarding those who sat on their rights.

This Court entirely agrees with the defence that the end result of not rehearing the defendant in this matter is exactly that she would be discriminated against. The Courts as custodians of people's rights need to be careful to treat people in equal circumstances equally as is required under the constitutional law. *Kafantayeni* as affirmed by the Supreme Court of Appeal on numerous occasions is to the effect that all affected convicts are to be reheard on sentence. The defendant herein cannot be excluded. In the view of this Court there is no valid justification for excluding her from a sentence rehearing.

The second angle advanced by the defence is that other convicts who were sentenced to the unconstitutional mandatory death sentence and equally appealed to the Supreme Court of Appeal but had their appeals against their death penalty dismissed have been successfully resentenced by the High Court.

The defence referred to two such cases of *Republic v Galeta* Sentence Rehearing Cause No. 47 of 2015 (High Court) (unreported) and *Republic v Lemani* Sentence Rehearing Cause No. 1 of 2015 (High Court) (unreported). The defence submitted that in these two cases the Director of Public Prosecutions – in compliance with the decisions of *Kafantayeni* as applied with *Yasini* – brought the cases before the High Court for re-hearing. Further that the convicts in both cases shared Ms Maiche's procedural posture i.e. their respective appeals had been heard subsequent to *Kafantayeni* but prior to *Yasini*. And further that their sentence rehearing proceeded without any question of whether the convicts were entitled to be reheard. And both convicts were resentenced to a term of years, in Mr Galeta's case resulting in his immediate release from custody.

The defence submitted that however, in the case of *Chinkango* the State raised arguments challenging the jurisdiction of the High Court to proceed with Mr Chinkango's sentence rehearing on the basis that his appeal had been heard subsequent to *Kafantayeni*. This was despite the fact that Mr Chinkango was in the very same procedural posture as Mr Galeta and Mr Lemani, whose sentence proceedings were completed without objection.

The defence submitted further that the *Chinkango* matter came before the High Court on 25th May 2015. And that the Court's ruling was issued three months later, on 28th August 2015. The defence counsel stated that despite noting and

agreeing with the position he advanced in *Chimkango* that an appeal and sentence rehearing are different legal processes, and despite holding that the *Kafantayeni* case and *Yasini* accorded convicts a remedy of sentence rehearing and not an appeal, his the Court in *Chimkango* remitted the case to the Supreme Court for its direction and/or disposal “with the speed and urgency it deserves”.

The third angle of the discrimination and unfairness that the defence pointed out is that it is trite that most court records on the sentence rehearing sittings are partly or fully missing. That in fact, it is 57 % of the convicts in the Kafantayeni sentence rehearing Project who have their records wholly or partially missing. The defence pointed out that a number of sentence rehearsals have been conducted based on partly or fully re-constructed files. The defence then contended that it cannot rule out a scenario where some convicts who equally appealed to the Supreme Court of Appeal and had their appeals against sentence equally dismissed but had the “good misfortune” of having their court records lost so as to leave no trace they were once in the Supreme Court of Appeal would be re-heard on sentence and perhaps released at the expense of others who have had the “bad fortune” of having their files located.

The defence therefore contended that refusing Ms Maiche and the others in her position a sentence rehearing would mean that those convicts whose appeal judgments the State happened to lose would benefit, whilst those convicts whose judgments happened to be located would, through no fault of their own, be disadvantaged. Further that, not hearing these convicts would therefore violate their right of equal treatment and of access to justice. Discrimination is bound to arise by conducting a rehearing for others in the same situation whilst turning down others.

In response, the State assured this Court that in any case where the Maiche situation arises and that comes to the attention of the State the same would be brought to the Court’s attention to avert the discrimination.

The view of this Court is that a careful look at the second and third angle of the discrimination argument as raised by the defence reveals a compelling reason for supposing that in such circumstances there would be a discriminatory treatment of

people in similar circumstances. This is the more reason why all affected convicts have to be brought for sentence rehearing in line with *Kafantayeni* as affirmed numerous times by the Supreme Court of Appeal including in *Yasini*.

The defence finally submitted that if the defendant herein was not reheard on sentence then this Court would be disregarding *Yasini* and the Director of Public Prosecutions would be in contempt of Court.

The defence submitted that *Yasini* did not qualify or discriminate as regards who was entitled to be brought back before the High Court for sentencing rehearing. That it did not hold that those who exercised their rights of appeal were excluded. Further that it simply said “all” who were sentenced to the mandatory death penalty were entitled to be brought back before the High Court for a sentence rehearing.

The defence added that *Yasini* came after the Supreme Court of Appeal had handed down a number of judgments concerning appeals against the mandatory death sentence. Further that the Supreme Court of Appeal was well aware that out of all those convicts who were sentenced to the mandatory death sentence some had appealed to the Supreme Court of Appeal and that some had lighter sentences imposed on them in lieu of the mandatory death sentence and some had their appeals against the death sentence dismissed. Further that whilst fully aware of this, a panel of three learned and highly respected Justices of Appeal deemed it fit that it simply had to be “all” without excluding those who had exercised their rights of appeal. And that this decision came after Venita Maiche appeal.

The defence submits that Ms Maiche falls within the category anticipated by *Yasini*. And that “all” should be interpreted literally to mean “all”.

The defence submitted that it would be absurd that the Supreme Court of Appeal would compel the Director of Public Prosecutions to take a convict before this Court only for this Court to shut its doors to such a convict. And that it would likewise be absurd for the Court to order that the Director of Public Prosecutions bring the convict to this court yet afford the same Director of Public Prosecutions the luxury of not bringing her to this court and risk being in contempt.

This Court certainly would not deliberately wish to fail to uphold *Kafantayeni* as affirmed in *Yasini* and numerous other Supreme Court of Appeal decisions. This Court expects as much from the Director of Public Prosecutions.

In conclusion, this Court will proceed to hold a sentence rehearing particularly because of the constitutionally fundamental reason that the sentence to which the defendant was originally sentenced was invalidated on constitutional grounds and the appeal on the same was not a sentence rehearing that was ordered to follow upon the invalidation of the original mandatory death sentence as per *Kafantayeni*. For the foregoing reasons this Court does not agree with the decision in *Chimkango* that the High Court is precluded by the doctrine of precedent from conducting a sentence rehearing in matters such as the instant one.

This Court is also of the view that for the same foregoing reasons *Yasini* was per incuriam, and not binding on this Court, in so far as it refused to allow the appellant a sentence rehearing before the High Court. That part of the decision would possibly have been different had the arguments considered before this Court were put before the Supreme Court of Appeal. The Supreme Court of Appeal in *Yasini* declined a sentence rehearing to the appellant in the following terms

Be this as it may, the appellant did not raise any mitigating circumstances as would inform this court to reduce the sentence. The appellant, in fact, prayed for a re sentence hearing. We find no justification for such a hearing. The appellant was before this court and was heard; he elected not to plead in mitigation. We do not find that he is entitled to have another hearing.

However, the Supreme Court of Appeal had earlier in *Yasin* also held that all the affected defendants as per *Kafantayeni* were entitled to a sentence rehearing individually in the following terms

The court [in *Kafantayeni*] clearly ordered that the plaintiffs were entitled to a re - sentence hearing on the death sentence individually. The court's decision on this point, affected the rights of all prisoners who were sentenced to death under the mandatory provisions of Section 210 of the Penal Code. The right to a re - sentence hearing therefore accrued to all such prisoners, In the present case, the appellant was never brought before the High Court for a re - sentence hearing.

The two positions taken by the Supreme Court in *Yasin* are therefore irreconcilable in that regard. This Court is bound by this last position that affirms the new

retrospective constitutional rule in *Kafantayeni* that has been repeatedly affirmed by the Supreme Court of Appeal in similar cases.

Made in open Court at Zomba this 11th July 2016.

M.A. Tembo

JUDGE

The Republic v. Dan Saidi Zonke

JUDICIARY

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

HOMICIDE SENTENCE RE-HEARING CAUSE NO. 7 OF 2016

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Ms. Munthali, Senior State Advocate, for the State

Mr. Nanthuru, of Counsel, for the Convict

Ms. A. Mpasu, Official Interpreter

Mrs. Pindani, Recording Officer

JUDGEMENT

Kenyatta Nyirenda, J.

Introduction

The case of the Dan Saidi Zonkie (Convict) is before the High Court for re-sentencing following the decision in Francis **Kafantayeni and others v. Attorney General, Constitutional Case No. 12 of 2005 (unreported)**, [hereinafter referred to as the "**Kafantayeni Case**"] which declared the mandatory death sentence as unconstitutional, thereby giving the High Court the discretion to pass a sentence commensurate with the circumstances of each given case. The **Kafantayeni Case** also held that all convicts who had been sentenced to death were entitled to be re-heard and an appropriate sentence passed on them.

The decision in the **Kafantayeni Case**, supra, has been repeatedly endorsed by the Supreme Court of Appeal: see **Mclemence Yasini v. Rep., MSCA Crim. App. No. 25 of 2005 (unreported)**, **Twoboy Jacob v. Rep., MSCA Crim. App. No. 18 of 2006 (unreported)**, **Winston Ngulube and Another v. Rep., MSCA Crim. App. No. 35 of 2006 (unreported)** and **Twalibu Uladi v. Rep., MSCA Crim. App. No. 5 of 2008 (unreported)**.

The case of the Defence

The Defence is of the view that the trial record is incomplete and it thus seeks to introduce fresh evidence by way of affidavits. The facts, as reconstructed by the Defence, are as follows:

- "1. The convict, Dan Saidi Zonke, was tried on 13 January 2003 before the High Court sitting then at Chiradzulu, upon one count of murder. The particulars thereof were that on 25 May 2001 the convict had unlawfully caused the death of John Abisamanga.*
- 2. Mr Zonke's court record is incomplete. His record is missing at least the following documents: charge sheet, homicide backlog return sheet, warrant of commitment, police reports and copies of prosecution witness statements prepared for trial.*
- 3. As full as possible an account of the offence has been put together on the basis of the available trial record. Mr Zonke has, in addition, provided a detailed and candid affidavit setting out his account of the offence. In this affidavit, Mr Zonke confesses to having stabbed the deceased*

while he was heavily intoxicated, but maintains that he did so in response to the deceased's provocation and that he had no intention to kill. Mr Ndumanene Silungwe, a psychologist with St John of God, has examined Mr Zonke and confirmed that he suffered from alcohol dependence at the time of the offence.

4. On 25 May 2001, Mrs Willey of Ching'ombe Village, Traditional Authority Kadewere, Chiradzulu District, hosted a beer party. The beer party was attended by, amongst others, Mr Zonke, the deceased and the deceased's parents.
5. Being attracted by the "good music" he could hear playing, Mr Zonke travelled to the party by bicycle. There, he drank alcohol from "early in the morning and continued to drink there with [his] friends until well into the afternoon and evening". Mr Zonke's Village Councillor, confirms that Mr Zonke "was drunk, he drunk the whole day [sic]". The deceased had also been drinking and by the end of the party was also drunk.
6. Accounts differ as to the events which then unfolded, leading to the death of the deceased.
7. At trial, the deceased's mother, Elina Sandalamu, gave evidence as the sole eyewitness to the offence. She testified that, near the end of the party, Mr Zonke approached the deceased to question the deceased about a comment that he had recently made about Mr Zonke. According to Ms Sandalamu's testimony, she, her husband and the deceased went to leave the party but were intercepted by Mr Zonke and his elder brother, Mr Zonke, without saying a word, produced a knife from his pocket and stabbed the deceased. Mr Zonke and his brother then ran away. Ms Sandalamu testified that her husband did not witness the attack itself because he was urinating at the time. As such, there were no further eyewitnesses to corroborate her account.
8. Mr Zonke does not deny stabbing the deceased. He insists, however, that far from wordlessly attacking the deceased, his action occurred after verbal and physical provocation by the deceased. Mr Zonke testified to this effect at trial and maintains this today, 14 years later.
9. Mr Zonke states that he was leaving the party, drunkenly pushing his bicycle, when he was approached by the deceased. At least one witness corroborates this, stating that Mr Zonke "left the scene earlier".
10. The deceased then started an "aggressive" quarrel with Mr Zonke over the ownership of Mr Zonke's bicycle. One of Mr Zonke's traditional leaders, Village Councillor Jack Flyton, has describes the deceased as having been a troublemaker, who "had bad behaviour" to the extent that, "though he was murdered, people was [sic] with him".
11. The quarrel quickly escalated when the deceased "picked up a brick from a pile next to him and tried to throw it" at the convict. Drunk, the deceased missed Mr Zonke and the brick instead hit a bystander who, immediately angered, joined the dispute: "suddenly it was all three of us in a fight together".
12. The deceased continued to throw bricks and so, in fear of injury, Mr Zonke "grabbed a knife from someone else standing nearby in the group". The deceased then came neat to Mr Zonke who without pausing to reflect, stabbed him a single time. Given his heavy intoxication, Mr Zonke was not sure where on the body he stabbed the deceased. Panicked at what he had done, Mr Zonke dropped the knife and ran away.
13. Mr Zonke was arrested on 28 May 2001 after handing himself in at Chiradzulu Police Station, accompanied by his brother. He details in his affidavit that, despite explaining to the police that he was solely responsible for the offence, both he and his brother were arrested, shackled and brutally "whipped [...] on the back with plastic pipes". Under this mistreatment, Mr Zonke signed a caution statement he had not read.
14. Mr Zonke's brother was eventually granted bail and was not tried. Mr Zonke remained on

remand for one year and eight months before being tried on 14 January 2003. He was convicted upon the jury's verdict and was condemned to death, as was at that time mandatory.

15. *Mr Zonke remained on death row for one year and three months prior to his sentence being commuted to life imprisonment on 9 April 2004. To date, he was served 14 years and 10 months in prison. "- [The paragraphs underlined in red ink contain averments not contained in the Trial File]*

On the basis of the foregoing, Counsel Nanthuru submitted that there are many mitigating factors in favour of the Convict. He mentioned, among other matters, (a) the Convict being a first offender, (b) the long time the Convict has already spent in prison, that is, almost 15 years, (c) the Convict being remorseful, (d) lack of premeditation, (e) the "weak" mental capacity of the Convict as a result of intoxication, and (f) the Convict's capacity for rehabilitation and reintegration.

With respect to the Convict's mental capacity, Counsel Nanthuru submitted that the Convict greatly depended on alcohol such that there were indications of his suffering alcohol-related intellectual impairment. In support of his submission, Counsel Nanthuru drew the Court's attention to the respective affidavit evidence by Mr Ndumanene Devlin Silungwe, a Clinical Psychologist at Saint John of God Hospital Services, Mzuzu who conducted a full mental health assessment on Mr Zonke, members of the Convict's family and community. Mr Silungwe explains the impact that the Convict's reliance upon alcohol would have had upon him during the offence thus:

- "i. He would have had a reduced ability to control his actions, especially in the situation of stress under which he had been placed;*
- ii. His inhibitions would have been lowered, leaving him more liable to impulsive or risk-taking behavior;*
- iii. His thinking and decision-making abilities would have been compromised, leaving him liable to responding in a manner which he may not otherwise have done. 11*

Counsel Nanthuru also believes that the case at hand is closely analogous to the case of **Republic v. James Galeta, HC/PR Sentence Rehearing Cause No. 47 of 2015 (unreported)** where the Court heard that Mr Galeta had a history of alcohol dependence and this was accepted as a mitigating factor.

Counsel Nanthuru also submitted that the Convict was provoked and there was absence of premeditation and lack of direct intent to kill. The submission was put thus:

*"It is trite law that even where provocation does not exculpate the actions of the accused, it may be considered as mitigating evidence in considering sentencing. In **Ngozo v Republic**, [1997] 1 MLR 192 (HC) Mwaungulu J (as he then was) stated that provocation was not available as a defence in matter at hand but that "provocative acts of a victim are, however, taken as circumstance, in which the offence is committed and hence have a bearing on the sentence which a court will pass in a particular case." See also **Republic v Bagala supra**, **Republic v Felix Madalitso Keke supra**, and **Republic v Christopher Gaba**, Case No. 142 of 2010 (unreported).*

Mr Zonke insists that he was first verbally provoked by the deceased, who falsely accused Mr Zonke of having taken his bicycle, and then physically provoked when the deceased threw a brick at him. It was in the immediately ensuing fight that Mr Zonke seized a knife from a bystander. The deceased was still throwing bricks and, fearful of being hurt by him, when the deceased "came near [him]" Mr Zonke stabbed him a single time.

Mr Zonke acknowledges that this account conflicts with that reported by the deceased's mother, who testified as the sole witness at trial. Nonetheless, he respectfully urges the Court to consider the attached statement from Flyton Jack, his Village Councillor that the deceased "had bad behaviour" to such a grave extent that "though he was murdered people was [sic] angry with him". This description of the deceased is consistent with Mr Zonke's account of his behaviour on the night of the offence, when he - like Mr Zonke - had been drinking heavily."

93. *Mr Zonke did not plan to kill the deceased. He was drawn into a quarrel which the deceased instigated and then greatly raised the tempo of by throwing a brick at Mr Zonke. Mr Zonke, furthermore, had not brought a weapon to the scene of the offence, he "grabbed" the knife from a bystander in the midst of the fight with the deceased.*
94. *This, it is submitted, should weigh strongly in Mr Zonke's favour. It is law that absence of a weapon is mitigating, even where the offender goes on to pick up a weapon during the course of a fatal dispute or quarrel. In **Twalibu Uladi v Republic** (MSCA Criminal Appeal Number 5 of 2008) (unreported), the appellant and the deceased had been drinking together. A quarrel ensued after the appellant had apparently accused the deceased of attempting to steal a window frame which had been inside the appellant's house. A fight broke out and in the course of the fight the appellant took a panga knife and used it to hack the deceased. The Supreme Court of Appeal set aside a sentence of death and substituted it with one of 20 years' imprisonment after it observed that the appellant was fight with bare hands and only resorted to the panga knife in the course of the fight.*
95. *Fitzgerald and Starmer, "A Guide to Sentencing in Capital Cases", also supports drawing a distinction between different levels of intent and states that "the lack of any long pre-meditation, or pre-planning should always count as a strong premeditating factor" (at 25). Even in very grave cases, judges have held that a death sentence would be improper where the defendant lack an intent to kill. In **R v Vola** [2005] TOSC 31 (Tonga), for example, the defendant beat the victim to death with an iron bar but sentencing the judge differentiated between intent to injure and intent to kill, and duly took this into consideration as mitigation."*

Counsel Nanthuru submitted that as the main aim of punishment is to reform and rehabilitate the offender, "post-conviction" circumstances must be considered at sentencing, but the weight to be given to the circumstances remains a matter of judicial discretion. To buttress his submission, Counsel Nanthuru cited the cases of **Rep. v. Funsani Payenda, Sentence Rehearing Cause No. 18 of 2015 (unreported)** [hereinafter referred to as the 'Payenda Case'], **Pepper v. United States, 131 S. Ct. 1229 (2011)**, **Republic v. Wintala Chiwoko, Sentence**

Rehearing Cause No. 9 of 2015 (unreported), Republic v. Chiliko Senti, Sentence Rehearing Cause No. 25 of 2015 (unreported). With respect to the **Payenda Case**, Counsel Nanthuru drew the Court's attention to three specific dicta therein. The first dictum is on page 62:

"when a sentence has been set aside after a significant passage of time as in the present case, the Court has the advantage of not simply predicting future post-conviction behavior, but examining an existing significant post-conviction behavioral record of the convict"

The second dicta are on page 63:

"the idea that the Court should close its judicial eyes to any development related to the defendant, that is relevant for sentencing from the date of conviction, runs into some conceptual difficulties. During argument, I asked State Counsel whether, if a convict became terminally ill just before being sentenced, that would, or ought not to affect, sentencing. I pointedly asked whether the Court ought to close its eyes to the condition and, if it were originally minded to pass say a harsh 50-year prison sentence with hard labour, it ought to proceed and mete it out all the same. Counsel responded that the Court would have to take into account the terminal illness as a relevant factor when sentencing. He proceeded to state, however, that that would be an exceptional case. The impression that State Counsel therefore gives is that he would pick and choose instances in which post-conviction circumstances may be considered, and those where they should not be considered. This is obviously problematic. "

The third dicta are also on page 63:

"a prohibition on considering post-conviction evidence (which can of course be aggravating as well as mitigating) would lead to the disturbing scenario whereby a court would be bound to "close its eyes" to evidence that a convict had "gone rogue" and become a "very disturbing and violent character in prison who is a menace to the whole prison establishment" and as a result "unleash to the free society" such dangerous criminals, solely on the basis that the convict had been "generally of good disposition" at the time he was first sentenced."

The case of the State

The learned Senior State Advocate took objection to the facts as reconstructed by the Defence on the ground that in certain respects the reconstructed facts were clearly not in line with the testimony adduced during the trial. Firstly, she submitted that the Court record does not mention that the Convict was drunk. Secondly, she pointed out that the Convict did not admit stabbing the Deceased Person.

That said, the learned Senior State Advocate made submissions on what she believed would be an appropriate sentence for the Convict. Her submissions were as follows:

***"WHAT IS THE APPROPRIATE SENTENCE FOR THE CONVICT
HEREIN?"***

The murder convict herein has the right to be sentenced to a number of years with or without labor or even life imprisonment. The sentence to be imposed on him will depend on the aggravating and mitigating factors affecting this case.

From the facts gathered the deceased's death was due to stabbing. According to the lower court record, the PWJ and PW2 stated that the convict asked deceased about a statement he had said earlier and then followed him and stabbed him. At the trial the convict did not admit to stabbing the deceased at all nor did he ever mention being drunk. He stated that the deceased had accused him of wanting his wife. Yet on the affidavit sworn now, the convict suddenly claims he was drunk and that he stabbed the deceased, doesn't remember how many times and the fight started because the deceased accused him of pushing his bicycle. On the other hand, during the commission of the offence the convict was relatively young, he was aged 21 years old and he was a first offender.

The court will have to consider what message it will be sending to the general public should it pass a sentence that will result in the immediate release of a person convicted of murder. Will the general public still have confidence in the court to protect them? The crime took place in 2001, according to the convict's submission, the convict has been incarcerated for 15 years, the State is of the considered view that such a sentence (of resulting to immediate release) as prayed for by the defense would amount to an affront against the value and sanctity of human life as enunciated in the Mathuso case cited above since murder is a very serious offence.

*The convict might be of good behaviour now, however, the state takes the view of Justice Kalembere in the sentence re-hearing case of **The State vs Alex Njoloma**, that this is not a parole hearing matter, good behaviour and mental state are not paramount, as these are factor the fact issues. The most important factors to consider are the ones pertaining to the material time of the offence. The factors that would have been considered during the sentencing of the accused at the time. Good behaviour, willingness of the community, and depression are factors that the convicts herein could easily bring up at a parole gearing after this and as such gain twice from the same. The State reiterates that the convicts good behaviour, mental problems and their relatives' willingness to have them back should not be paramount considerations but rather the mental state of the convicts herein at the time of commission of the crime and the other aggravating and mitigating factors then.*

The State is of the view that although the circumstances of the case were serious, the aggravating factors as read together with the mitigating factors do not

warrant a death sentence but rather imprisonment for a number of years as sentence.

The convict has been convicted of murder, he used a weapon though young (21) and possibly intoxicated. The State finally submits that a sentence of not less than 25 years from the date of arrest is appropriate. "

Analysis and Determination

This would appear to be one of those ordinarily routine homicide sentence re-hearing case but for two issues. The first issue has to do with the question whether or not the court record of the Convict's trial is complete or not.

It is now generally acknowledged that where the court record is missing or incomplete, the Court may consider further evidence relevant to sentencing under section 321 J of the Criminal Procedure and Evidence Code, namely (a) whether or not the convict is a first time offender; (b) the time already spent in prison by the convict; (c) the manner in which the offence was committed; and (d) the personal and individual circumstances of the offender as well as the possibility of reform and social re-adaptation of the convict. This additional information might take the form of statements from witnesses or family members; medical, police or prison records; or a statement or affidavit from the convict himself: see **Republic v. Lackson Dzimhiri, HC/PR Sentence Rehearing Cause No. 4 of 2015 (unreported)**.

The Court file in the present case consists of the full trial record (including submissions by both the State and the Defence), summary of known facts, precis of witness statements of PW1 (Lestain Chimbalanga Mphaya), PW2 (Elina Sandalamu), PW3 (Eveleni John), PW4 (Mrs Feliya Willey), PW5 (Amdu Leman), PW6 (Emmanuel Ngomanga) and PW7 (No. A3915 D/Const. Maridi), Caution Statement, Formal Charge, Evidence of Arrest, Report of Post-mortem Examination and Medical Examination Report. Against this, charge sheet, homicide backlog return sheet, warrant of commitment, and copies of prosecution witness statements prepared for trial were not available at re-sentencing stage.

On the basis of the foregoing, it is my finding that the missing part of the court record is not so substantial or material. Accordingly, I am not persuaded by the submission by Counsel Nanthuru that, on such matters as the manner in which the offence was committed, the Court should rely on facts as reconstructed by the Defence. In this regard, Counsel Nanthuru's submissions on the provocation, absence of premeditation and lack of direct intent to kill have to be disregarded for lack factual basis. To the contrary, PW1 and PW2 testified that it is the Convict who followed the Deceased Person: "... *After covering a distance of 300 metres,*

Zonke (accused) followed them and attacked John (deceased) from behind. He pulled a knife from his pocket and stabbed ...".

The second issue has to do with the Convict's possibility for reform. The defence adduced affidavit evidence to the effect that the Convict "*has conducted himself in a manner which demonstrates that he is capable of reform and has reformed*". Counsel Munthali submitted that post-conviction conduct ought not to be considered. She placed reliance on the cases of the **Rep. v. Abraham Galeta and Zaima Makina, Sentence Re-hearing Cause No. 6 of 2015 (unreported)** and the **Rep. v. Clement Master, Sentence Re-hearing Cause No. 33 of 2015 (unreported)** which are for the proposition that in dealing with a sentence re-hearing, the court should consider the appropriate sentence which could have been passed at the time of the initial sentencing process and therefore the circumstances to be considered are largely those obtaining at the time of the offence and immediately thereafter.

It will be recalled that in the **Republic v. Margret Nadzi Makolija, Sentence Rehearing Cause No. 12 of 2015 (unreported)** [hereinafter referred to as the '**Payenda Case**'], this Court held that courts have to consider the possibility of reform when sentencing a convict. In this regard, the **Payenda Case** merely confirms, albeit in a more forceful way, the decision in the **Makolija Case**. It is also noteworthy that the **Payenda Case** was delivered on ... April 2015 with the benefit of the decisions in **Rep. v. Abraham Galeta and Zaima Makina**, supra, and the **Rep. v. Clement Master**, supra. The **Payenda Case** addresses the issue of post-conviction mitigating factors in detail and with a depth of analysis far much more than the other decisions on the subject-matter. In the premises, I remain satisfied, and stand, by my decision in the **Makolija Case** that in capital offences the sentencing court must consider whether or not there is reasonable prospect of the offender of reform by looking at both pre and post-conviction conduct.

I now turn to consider mitigating factors and aggravating factors obtaining herein. Mitigating factors mentioned by both parties include the fact that the Convict is a first offender who is young and was aged 21 years at the time of committing the offence. The law generally favours relatively young or old people to protect them from being in custody for longer periods: see **Rep. v. Ng'ambi [1971-1972] ALR Mal 457** and **Republic v. Felix Madalitso Keke, HC/PR Confirmation Case No. 404 of 2010 (unreported)**. It is also true that courts will always be slow at imposing long prison terms for first offenders: see **Rep. v. Chikazingwa [1984-86] 11 MLR 160** and **Republic v. Anderson Mavuto, HC/PR Criminal Case No. 66 of 2009 (unreported)**.

It is trite that the maximum punishment must be reserved for the worst of offenders in the worst of cases. This principle was confirmed by the Supreme Court of Appeal in **Msanide Phiri v. Rep., MSCA Crim. App. No. 13 of 2009, (unreported)** where the Court replaced a death sentence with a sentence of 15 years imprisonment with hard labour (IHL). It is my considered view that the offence of murder committed by the Convict does not come anywhere near circumstances that can be described as the worst case of murder: there is no evidence to show that it was committed in decrepit and gruesome manner.

In **Winston Ngulube and Another v. Rep.**, supra, the Supreme Court of Appeal set aside the sentence of death sentence imposed by the High Court for murder and replaced it with one of 20 years IHL after it found that (a) the assault that led to the death of the deceased was not done using dangerous weapon, (b) the quarrel which led to the assault was clearly influenced by intoxicating drink, (c) no clear motive on the part of the Appellants to cause the deceased's death was disclosed by evidence, and (d) there was no evidence that the Appellants were persons of previous bad character.

In **Twalibu Uladi v. Rep.**, supra, the appellant and the deceased had been drinking together. A quarrel ensued after the appellant had apparently accused the deceased of attempting to steal a window frame which was inside the appellant's house but apparently found itself outside. A fight ensued and in the course of the fight the appellant took a panga knife and used it to hack the deceased. The Supreme Court of Appeal set aside a sentence of death and substituted it with one of 20 years IHL after it observed that the appellant was fighting with bare hands and only resorted to the panga knife in the course of the fight.

The High Court in the **Rep. v. Meckson Chilima, Homicide Sentence Re- hearing Cause No. 20 of 2015 (unreported)** the convict beat his friend to death with a stick with a view to steal small property from him. The convict was granted immediate release after having served about 20 years. In **Rep. v. Ernest Adam and Elenelewo Sakondwera, Homicide Sentence Re-hearing Cause No. 18A of 2015 (unreported)**, the two convicts took part in a violent burglary during which the homeowner's wife was shot dead by her own gun in front of her children. While the first convict received a sentence of 36 years IHL, the second convict was sentenced to 25 years IHL after the Court found that he deserved leniency on the basis of his co-operation with authorities and continued remorse for the offence.

In **Msanide Phiri v. Rep.**, supra, the Court sentenced the convict to 15 years IHL having found that the convict was a young man of 20 years at the time he committed the offence of murder and he did not attempt to escape after committing the offence. This was against the aggravating factors that the convict had

maliciously beaten the deceased with a metal wire before striking her with a hoe and leaving the deceased to burn in her own home, which he had set alight.

In the present case, I agree with both the State and the Defence that mitigating factors far outweigh the aggravating circumstances. It is also significant that over and above the fact that the Convict is a young man with no previous conviction who has tremendously reformed during his 15 years of incarceration such that there is a high probability of him seamlessly re-integrating into society upon his release, the circumstances in which the offence was committed strongly suggest that the Convict was mentally imbalanced at the material time due to excessive intoxication. In his caution statement, the Convict narrates that he had been heavily drinking at a beer party until the beer came to an end. That the Convict had been at a beer party is confirmed by PW1 and PW2. As was rightly held in the **Rep. v. William Mkandawire, Homicide Sentence Rehearing Cause No. 20 of 2015 (unreported)**, evidence of "*mental or emotional disturbance*", even if it falls short of meeting the definition of "*intoxication*", may nonetheless make an offender less culpable on a murder charge and this should be considered in mitigation of sentence.

In light of the foregoing and having considered all the circumstances of this case, particularly the age of the Convict at the time of the commission of the offence (See **Msanide Phiri v. Rep**, supra), I am inclined to reduce the sentence. Accordingly, the sentence of death is set aside and replaced by a sentence that would result in the immediate release of the Convict.

Pronounced in Open Court this 12th day of August 2016 at Zomba in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE

The Republic v. Gift Ngwira

IN THE HIGH COURT OF MALAWI

CRIMINAL DIVISION

SENTENCE RE-HEARING CASE NO. 22 OF 2016

Coram: Hon. Justice M L Kamwambe

Waliko Nkosi of counsel for the State

Mwakhwawa of counsel for the Convict

Phiri... Official Interpreter

Mutinti... Recording Officer

JUDGMENT

Kamwambe J

This is a murder case which has come for re-sentencing on the basis of an order of the case of **Francis Kafantayeni and others v The Attorney General** Constitutional case No. 12 of 2005 to reconsider all death sentences. The mandatory death sentence under section 210 of the Penal Code was declared unconstitutional because it accorded the convict no opportunity to be heard in mitigation. The right of the convict to fair trial under section 42 (2) (f) and the right to access justice by reaching a court for final settlement of legal issues under section 41 (2) of the Constitution were thus compromised by s 210 of the Penal Code. Further, the

rights under section 19 (1), (2) and (3) which protect a person's dignity and protect a person against inhuman treatment or punishment were said to be violated. Noteworthy though, is the fact that the death sentence is maintained, however, it is now no longer mandatory.

Following on the Kafantayeni case (*supra*), the case of **Mclemoche Yasini v The Republic** MSCA Criminal Appeal No. 29 of 2005 (unreported) came in support and the court made these remarks:

"The court clearly ordered that the Plaintiffs were entitled to a re-sentence hearing on the death sentence individually. The Court's decision on this point affected the rights of all prisoners who were sentenced to death under the mandatory provisions of section 210 of the Penal Code. The right to a re-sentence hearing therefore accrued to all such prisoners. In the present case, the appellant was not brought before the High court for a re-sentence hearing. This default however, did not and does not take away his right to appeal against the death sentence. We wish to observe that it is the duty of the Director of Public Prosecutions to bring before the High Court for re-sentence hearing all prisoners sentenced to death under the mandatory provisions of section 210 of the Penal Code."

This is the process we are undertaking now.

In this case, the convict, Gift Ngwira went to Mzimba where he started work as watchman. A man was found dead at the place he was guarding. He was tried on 6 September, 2005 before the High Court sitting at Mzimba for the murder of Warren kamanga. It appears he was living with a cousin who was suspected to have taken part in the murder. When the police arrested the convict believing him to be Gift Ngwira his cousin, they refused to believe that the convict was telling the truth that he was not Gift Ngwira

but Timoti Mfuni. Since the cousin's whereabouts could not be known, he stood trial instead and was convicted by jury. Gift Ngwira remained at large.

The convict claims that he appealed ten times or over but it has never transpired till now when court is considering re-sentencing. This is a grave miscarriage of justice because he was denied his right to be heard by the upper court and to access justice. I am aware that we are not sitting as an appellate court to consider propriety of conviction. The defence has appreciated this situation as pointed out in their submissions, but insist that it be considered in mitigation. Indeed in a bid to remedy the injustice occasioned to the convict, this court shall inevitably take into account in mitigation the constitutional violations caused by the criminal justice system as pointed above. See sections 41 and 43 of the Constitution of Malawi. I am aware that the State insists that constitutional violations and the issue of mistaken identity should be handled by the Supreme Court of Malawi because now we are sitting as a sentencing court. But the Supreme Court has failed to sit for the past many years. However, this court is not precluded to consider them in mitigation. If the convict is desirous to clear his record of conviction he should go by way of appeal since the right to appeal is suggested by the Supreme Court in the case of **Mclemoce Yasini -v- The Republic (supra)**.

The lower court record is missing and probably this is why the appeal could not be made ready for hearing. In such a situation, an appellant should be informed of the impediments in the process. Silence or inactivity is not the answer. The courts are enjoined to consider the circumstances of the case inter alia, in arriving at a proper sentence. Without a court record the exercise of re-sentencing is rendered handicapped. The absence of the record should not be considered against the convict who should rather benefit out of it unless it is proved that he contributed to its missing.

Apart from the missing record, this is a case where there was no eye witness to the murder. I will keep this in my hindsight as being part of what has been stated just above.

The State also states that mitigating factors to be considered are those relating to the time of commission of the crime and before, and not post crime mitigating factors. Whether post crime good conduct in prison should be considered alongside reformation or possibility of reform and re-integration into society have been covered in **Republic -v- Chiliko Senti Sentence Re-hearing No. 25 of 2015 and lately in Republic -v- Thom Pofera Sentence Re-hearing No. 25 of 2016**. I have considered the views of my brother judges in **Republic -v- Alex Njoloma**, Sentence Rehearing Cause No. 22 of 2015 where Justice Kalembera warned not to use in court post crime good conduct as parole and **Republic -v- Chiukepo Chavula**, Sentence rehearing Case No. 11 of 2015 where Justice Chirwa said that prisoner's good behaviour cannot be a mitigating factor during resentencing. Indeed the courts have to tread cautiously on this issue. It is obvious that the prison authorities do consider one third remission of sentence. But when the court is considering sentence, it should not be influenced by the prison authority exercise of powers to grant remission. If the prison authority testified in court of the bad character of the convict in prison I would not be lenient on the convict when sentencing him because he is not a satisfactory candidate for earlier release. To the contrary, if good conduct was reported, I would consider it to his favour. In **The Republic -v- Chiliko Senti Sentence Re-hearing Cause No. 25 of 2015** made these comments by way of comparison:

*"The Privy Council and Caribbean Courts have regularly considered post-crime behaviour as mitigating evidence in the process of sentencing. After the Privy Council abolished Belize's mandatory death sentence in **Patrick Reyes case (2002) AD 2002 para 30**, the Supreme Court of Belize determined during sentencing that the offender's attendant circumstances did not justify*

the imposition of a death penalty. In making this determination, the court considered that the former Superintendent at the prison where the offender was detained 'gave evidence of the offender's quiet disposition as a model prisoner and testified also of his expression of remorse.' This evidence helped to impel the court to regard the offender's crime as 'quite out of character,' and the offender's sentence was reduced."

The court shall take into account the youthful age of 25 of the convict at the time he committed the offence since the law favours the young and the old (**Republic -v- Ng'ambi** (1971-1972) ALR Mal at 457). Further to this, he is a first offender and should benefit accordingly.

The State is of the view that the convict does not in any way deserve the maximum sentence of death but a term of years. Again as observed in the case of **Republic -v- Thom Pofera** (supra), there is no mention why the court should not impose a life sentence. Once death penalty has been excluded the State should proceed to exclude the possibility of a life sentence. See **Republic -v- Jamuson White** Criminal Case No. 74 of 2008 and **Republic -v- Samson Matimati** Criminal Case No. 18 of 2007 (both unreported). It must come out clearly that considering the principle of proportionality, life sentence would not fit the offender and therefore would be manifestly excessive.

In **Republic -v- Jamuson White** (supra) the court emphasised that the death sentence must be reserved for the "rarest of the rare" cases and it put deliberate mass killers and serial killers in this category. Looking at the circumstances of this case, the convict does not deserve the ultimate penalty. Even life sentence would be unjustifiable and manifestly excessive.

I have also considered the fact that all his period of incarceration he was kept in the condemned cells which is likely to have traumatised him and rendering him helpless. There is no evidence that his sentence was commuted to life.

The Defence has brought convincing evidence to show that Gift Ngwira is in fact Timoti Mfuni mistakenly convicted as Gift Ngwira. In the village people who knew him identified him as Tomoti Mfuni and not as Gift Ngwira who was his cousin who kept the convict. According to law, during this process of re-sentence hearing, this court has no mandate to quash the conviction and set aside sentence. This court can only determine on sentence.

Considering all the circumstances canvassed above, I am convinced that in the interest of justice the convict be given a sentence that will result in his immediate release, and I so order.

Pronounced in Open Court this 5th day of October, 2016 at Chichiri, Blantyre.

M L Kamwambe
JUDGE

The Republic v. Michael Khonje

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL DIVISION

HOMICIDE SENTENCE RE-HEARING NO. 28 OF 2016

Coram: Hon. Justice ML Kamwambe

Mr Nkosi of counsel for the State

Mr Mwakhwawa of counsel for the convict

Mr Phiri ... Official Interpreter

Mr Mutinhi...Recording Officer

SENTENCE

Kamwambe J

Court sat to re-hear sentence on the 14th July, 2016 following the order of the case of **Kafantayeni and others -v- The Attorney General** Constitutional Case No. 12 of 2005 which is supported by the case of **Mclemoce Yasini -v- The Republic** MSCA Criminal Appeal No. 29 of 2005 by making remarks as follows:

“The Court clearly ordered that the Plaintiff were entitled to a re-sentence hearing on the death sentence individually. The Court's decision on this point, affected the rights of all prisoners who were sentenced to death

under the mandatory provisions of section 210 of the Penal Code. The right to a re-sentence hearing therefore accrued to all such prisoners. In the present case, the appellant was never brought before the High Court for a re-sentence hearing. This default however did not and does not take away his right to appeal against the death sentence. We wish to observe that it is the duty of the Director of Public Prosecutions to bring before the High Court for re-sentence hearing all prisoners sentenced to death under the mandatory provisions of section 210 of the Penal Code."

The court is enjoined to consider individual circumstances of the convict, circumstances of the crime and public expectation. The court record is missing as such it is difficult to consider in circumstances surrounding the murder itself. All we will have is the word from the convict. That the record is missing is not the fault of the convict, therefore, the convict should not be put at jeopardy but would rather benefit out of it. The deceased was found dead about 14 kilometres from the home of the convict and there were no eye witnesses. On 27th September, 2005, he was sentenced to suffer death by the High Court sitting at Mzimba. The convict is still under death sentence in the condemned section of Zomba Central Prison.

The few known facts from the caution statement are that he and others agreed to rob the deceased. The convict said that the plan was to steal and not kill. However, the robbery went wrong as the deceased struggled and Mbewe who was granted bail and is now believed to be in South Africa, produced a knife and stabbed the deceased on the neck. The convict says he did not know that Mbewe carried a weapon and that he was only a spectator to Mbewe's assault of the deceased. Soon afterwards, the deceased died. The body was discovered on the 26th April, 2004 on the day the mother of the convict passed on. Immediately after his arrest the convict made a full confession to the police and gave a caution statement revealing what happened. He led the police to the crime scene and provided officers with details of accomplices. The police arrested Moses Moyo who later was granted bail and did not attend trial. The officers confirmed that they could not apprehend Mbewe and Phiri since they had vanished. The convict has now served about 12 years and 4 months in prison.

I have said it time and again that it is the duty of the State to exclude the possibility of a death sentence. Once the State says death sentence is not warranted the court's inclination is to impose a life sentence (**R -v- Samson Matimati Criminal Case No. 74 of 2008**). But again there may be arguments militating against life sentence, in such a situation, a term sentence becomes inevitable.

At the time the convict committed the offence together with older people he was 17 years old. He was the youngest in the group. He had just sat for his MSCE examinations which later he passed. He was arrested three days after the death of his mother the only parent he knew and had. He never knew his father. When his mother later married, the step-father never minded about the convict. Unfortunately, his mother died when he was still a juvenile.

The defence is of the view that Mr Khonje was convicted because the prosecutor explained to the jury that Khonje could properly be convicted of murder "*even though he didn't actually do it*". The directions that matter most are those of the judge which must be followed by the jury and not opinions of counsel when making submissions. In the absence of full record it is difficult to agree with the defence. On the other hand, this could have arose as a matter of appeal, hence, I cannot attend to it now.

Courts are guided by known factors that influence a court to arrive at a particular sentence. These are factors that either mitigate or aggravate the sentence. Some factors are controversial others are readily accepted by all practitioners and courts. This court is going to consider some of them although circumstances of the crime are uncertain.

There is no controversy that the convict was 17 at the time he committed the offence. The law favours the young and the old (**Republic -v- Ngambi (1971-1972) ALR Mal @457**). In this case the convict was not just young, but was a juvenile. So, instead of being a young offender he was a juvenile offender who should have been treated specially. It is important to draw the distinction. Again this would have been another ground of appeal if opportunity arose. It has been suggested by some courts that young offenders of serious offences should not deserve leniency. However, it is now an established practice to accord them leniency because of their immaturity and lack of experience in the ways of the world, and that at this stage the young tend to be more adventurous in life as they grow (**Rep v Keke Confirmation Case No. 404 of 2010 and Rep v Mayeso Sukali & Duncan Chidika Criminal Case No. 21 of 2011**). That the convict was a juvenile will require a bigger measure of leniency in the circumstances. I will definitely take this into account.

The other factor is that the convict is a first offender who should benefit from the court's lenience. I have read affidavits of convict's aunt and uncle to the effect that the convict lived an almost impeccable life, and that he was very obedient. It was great surprise that he was arrested for committing this crime. May be the sickness of his mother who was at the verge of death caused in him mental and emotional instability. The mother is all he had according to him. He was on the quieter side and rarely mixed with others. More likely, the older accomplices influenced him to join them on this criminal errand and that he may have not appreciated what he was entering into. I will take into consideration that he is a first offender who was going through the most troubled and turbulent life as a juvenile when his mother's death was glaring into his face.

Dr Woods' report would come in handy at this stage when he says that the convict may have started that time when the mother was sick of AIDS developing mood disorder whose symptoms are "*depression*", "*poor judgment*", "*grandiose thinking*" and "*changes in speech pattern*". This is supported by relatives of the convict who say that the convict was very depressed and not himself during this period. I am convinced that he suffered psychological disorder and the court will lean towards leniency.

Another factor is that he has already spent 12 years in custody on death row expecting the death sentence to be implemented any time. This can be traumatic. After three years of custody on death row his sentence should have been commuted to life. This is the most just thing to do to avoid injustice being perpetuated on the convict without unnecessarily staying too long a period without the death sentence being carried out. In **Attorney General -v- Kigula** Constitutional Appeal No. 3 of 2006, 55 (Uganda 2009), the Ugandan Supreme Court found that a delay of over three years 'would normally render a sentence of death inhuman and unconstitutional'. In **Henfield -v- Attorney General of Bahamas** [1997] AC 413, the Privy Council found that a delay of about three and a half years amounted to inhuman treatment. In **Republic -v- Edson Khwalala** Sentence Re-hearing No. 70 of 2015, the convict had been under death sentence for ten years in respect of the second of the two murder offences. The court said as follows:

"One should not stay a long time under the weight of death sentence before it is carried out since one is always haunted by it. One becomes a living corpse. This is a ghastly experience.

It is not proper that the convict was not considered for sentence commutation in good time. The court will take into consideration this psychological suffering that he underwent."

It is not good sense to order a juvenile or child offender to suffer death. At least, some other measures of punishment should have been employed. Legally section 11 (1) of the **Children and Young Persons Act** which was applicable then provided that:

“a sentence of death shall not be pronounced on or recorded against a person under the age of 18 years, but in lieu thereof, the court shall sentence him to be detained during the pleasure of the President, and, if so sentenced he shall, notwithstanding anything in the other provisions of this Act, be liable to be detained in such place and under such conditions as the President may direct.”

It is surprising that the convict was sentenced to suffer death when the law did not allow it.

I have always said that we cannot give the appalling conditions of our prisons a blind eye. It would be living in denial. When one is sent to prison to suffer a term of imprisonment, the poor prison conditions become another punishment. This is not good management of inmates. In **Gable Masanganio -v- Republic** Constitutional Case No. 15 of 2007, the Constitutional Court held that the chronic overcrowding in Malawi's prisons violates basic human dignity, is unconstitutional, and falls below international minimum standards. A meal a day is not uncommon, in fact, the list goes on. Since there is no compelling reason persuading me otherwise, I will naturally take this into consideration in sentencing.

This court will also consider the absence of specific intent to kill as a mitigating factor. I applied this approach in **Republic -v- Chiliko Senti** sentence Re- hearing Cause No. 25 of 2015 where I found that Senti may have intended to threaten and cause harm to the group, but he did not premeditate to cause death. On this basis I imposed a sentence of 23 years imprisonment. The same approach was followed by Justice Nyirenda in **Republic -v- Richard Maulidi and Julius Khanawa** Sentence Re- hearing No. 65 of 2015.

It is submitted that about 10 years the convict appealed against conviction but his constitutional rights of appeal and to have access to justice have since been violated (see sections 41 and 42 (2) (f) (viii) of the Constitution). It is said in **R -v- Geoffrey Mponda** Sentence Re-hearing Cause No. 68 of 2015 that where there was inordinate delay to process the appeal which led to a constitutional violation, 'the duty of the court to provide an effective remedy is to order the immediate release of the defendant'.

For once the State has come out as expected by mentioning it that a sentence of life would be too harsh considering the mitigating factors. They even suggested that a proper sentence would be one not over 15 years of imprisonment.

The factors I have considered are enough to bring me to a just and fair sentence after also considering that his level of participation in the crime of murder was not much even if it was a joint enterprise. Suffice to say I should not delve much into this, but that he was a juvenile on who a death sentence should not have been pronounced, and in the face of the constitutional violations mentioned above, *inter alia*, as such, I consider a sentence that will lead to his immediate release as a fit sentence in the circumstances, and I so order.

Pronounced in Open Court this 7th day of October, 2016 at Chichiri, Blantyre

M L Kamwambe
JUDGE

The Republic v. Stoneki Kachala

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

SENTENCE RE-HEARING NO. 30 OF 2016

Coram: Hon Justice M L Kamwambe

Mr Salamba of counsel for the State

Mr T Chirwa of counsel for the convict

Mr Amosi... Official Interpreter

Mrs Pindani... Court Reporter

SENTENCE

Kamwambe J

On 16th September, 2003 the High Court sitting at Zomba found Stoneki Kachala guilty of murder and convicted him accordingly and was sentenced to suffer a mandatory death penalty. The mandatory death penalty was declared unconstitutional by a Constitutional Court sitting at Blantyre in **Kafantayeni and others v Attorney General** Constitutional Case No. 12 of 2005 on 27th April, 2007.

The mandatory death sentence was said to be contrary to sections 19 and 42 of the Constitution for amounting to cruel, inhuman and degrading treatment and for violating the right to fair trial respectively. The court ordered that the convicts be brought before the High Court to be heard on sentence, similarly, all other death sentence convicts. The Supreme Court of Appeal in **Mclemence Yasin v The Republic** MSCA Criminal Appeal No. 25 of 2005 also in support reiterated that all persons under a mandatory death penalty be re-heard on sentence. This is the reason for these sentence re-hearing proceedings.

To call these proceedings as sentence re- hearing may be an anomaly because there was no previous hearing on sentence anyway. There was just an automatic pronouncement of the death sentence upon a finding of guilt. This sentence re- hearing gives the court an opportunity to consider the circumstances of the offender and the offence, whereby the convict exercises his right to be heard on sentence in mitigation. Likewise, the State is heard in respect of any aggravating factors and whatever may be in the interest of the convict, as an officer of the court.

Following on the Kafantayeni case (*supra*), the case of **Mclemence Yasini v The Republic** MSCA Criminal Appeal No. 29 of 2005 (unreported) made these remarks:

"The court clearly ordered that the Plaintiffs were entitled to a re-sentence hearing on the death sentence individually. The Court's decision on this point affected the rights of all prisoners who were sentenced to death under the mandatory provisions of section 210 of the Penal Code. The right to a re-sentence hearing therefore accrued to all such prisoners. In the present case the appellant was not brought before the High Court for a re-sentence hearing. This default however, did not and does not take away his right to appeal against the death sentence. We wish to observe that it is the duty of the Director of Public Prosecutions to bring before the High Court for re-sentence hearing all prisoners sentenced to death under the mandatory provisions of section 210 of the Penal Code."

One cannot fail to refer to the much heralded case of **Twoboy v Republic MSCA Criminal Appeal Case No. 18 of 2006 (Unreported)** in which the Supreme Court of Appeal said:

"...offences of murder differ, and will always differ so greatly from each other and it is therefore unjust and wrong that they should attract the same punishment."

This puts the Malawi Supreme Court in concord with the **Kafantayeni case (supra)** justifying why courts should exercise their discretion in determining the appropriate level of punishment in murder convictions, which is a judicial function which ought not be fettered.

Section 210 of the Penal Code (Amendment Number 1 of 2011) has now improved the situation by removing the mandatory requirement in murder sentencing, and provides that:

"Any person convicted of murder shall be liable to be punished with death or with life imprisonment."

The trial transcript for the convict's case is missing and all endeavours to find it have yielded no results. The court record cannot be traced. This situation cannot be used against the convict. All the same the sentencing court can hear evidence from both parties under section 321 J of the Criminal Procedure and Evidence Code. It may consider evidence from the victim and the offender and any other people whose evidence may be relevant in the issue of sentencing. It is necessary to do so, so that the court comes up with an informed decision on sentence. Herein the State interviewed the group village headman and sister to the deceased. There was no potential witness on how the crime happened. Hence there is no factual truth on what happened. Facts shall be interpreted in favour of the convict. Relatives of the deceased did not mind if the convict was released as only God knows. He has spent 13 years in prison and the State feels this is enough punishment. The State has come out unequivocally that neither death nor life sentences are appropriate for the convict. Having excluded the two serious murder sentences, a term sentence becomes inevitable.

The convict was 17 when he committed the offence and there is no controversy about this. The law favours the young and the old (**Republic -v- Ngambi (1971-1972) ALR Mal @457**). In this case the convict was not just a young adult, but was a juvenile. So, instead of being a young adult offender he was a juvenile offender who should have been treated specially. It is important to draw the distinction. Again this would have been another ground of appeal if opportunity arose. It has been suggested by some courts that young offenders of serious offences should not deserve leniency. However, it is now an established practice to accord them leniency because of their immaturity and lack of experience in the ways of the world, and that at this stage the young adult tends to be more adventurous in life as they grow (**Republic -v- Felix Madalitso Keke Confirmation Case No. 404 of 2010**). That the convict was a juvenile will require a bigger measure of leniency in the circumstances. I will definitely take this into account.

It is not good sense to order a juvenile or child offender to suffer death, at least, some other measures of punishment should have been considered. Legally, section 11 (1) of the **Children and Young Persons Act which was applicable then provided that:**

"a sentence of death shall not be pronounced on or recorded against a person under the age of 18 years, but in lieu thereof, the court shall sentence him to be detained during the pleasure of the President, and, if so sentenced he shall, notwithstanding anything in the other provisions of this Act, be liable to be detained in such place and under such conditions as the President may direct."

In The Republic -v- Limbikani Wilson Mtambo Homicide Sentence Re-hearing Case No. 2 of 2015 this court said the following remarks:

"A grievous mistake was occasioned because the convict was a juvenile at the time he committed the offence and at the time he was arrested and his status as a juvenile should have been considered by the Court. The then Children and Young Persons Act enjoins courts to treat juveniles differently from adults and that the words 'conviction' and 'sentence' shall not be used in respect of juveniles. Mtambo did not have a fair trial in the circumstances...

Section 42 (2) (g) of the Constitution outlines the rights of a person under the age of 18, and the first right is not to be sentenced to life imprisonment without possibility of release. The fifth right, just to mention a few, is the right to be treated in a manner which takes into account his or her age and the desirability of promoting his or her reintegration into society to assume a constructive role. These Constitutional provisions were also clearly violated and therefore the sentence of death which was passed was unconstitutional....

*Persons under the age of 18 were protected by the Children and Young Persons Act and we are prompted by section 4 of the Act to put into regard the welfare of the offending juveniles. This means that when sitting as a juvenile court the mind of the court should at all times tilt towards mercy and lenience with a view to reintegrating the offending youth into society quickly and rehabilitating him into being a useful citizen. (See also **The Rep. -v- Mayeso Sukali and Duncan Chidika** Criminal Case No. 21 of 2011). The law recognises that persons of youthful age are prone to make youthful mistakes due to immaturity and should be given the opportunity to start again in life rather than to be condemned to suffer imprisonment punishment for a*

long time as an adult. In short the scale weighs heavily in favour of release and alternatively, a short period of incarceration."

I do not even wish to consider any more mitigating factors having found that the offender was a young offender and it was unlawful to sentence him to suffer death and further that as young as he was, he had to undergo the dreadful trauma of thinking of death becoming a reality anytime soon. The conditions under which he is kept are obviously appalling as they have not changed since the case of **Gable Masangano -v- Republic** Constitutional Case No. 15 of 2007. All these constitute grave constitutional breaches against section 19 (3) of the Constitution which deals with rights to a convicted person.

In view of section 11 of the then Children and Young Persons Act and section 26 (2) of the Penal Code which prohibits pronouncing a death sentence against a person under the age of 18, and in view of section 42 (2) (g)(i) and (iv) of the Constitution which discourages imposition of life sentence on such a person and enjoins that the dignity of such person shall be respected, and that these provisions were starkly violated, the court is left with no other option other than to sentence Stoneki Kachala to a sentence that will result in his release immediately, and I so order.

Pronounced in open Court this 18th day of November, 2016 at Chichiri, Blantyre.

ML Kamwambe
JUDGE

The Republic v. Charles Khoviwa
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION
SENTENCE RE-HEARING CASE NO. 35 OF 2016

Coram: Hon. Justice M L Kamwambe

Dr Priminta of counsel for the State

Mr Chithope of counsel for the Convict

Mr Amosi...Official Interpreter

Mr Mutinti...Court Reporter

RULING

Kamwambe J

This matter was coming for sentence re-hearing according to the dictates of the case of **Francis Kafantayeni & Others - v- The Attorney General** Constitutional Case No. 12 of 2005. The State did not prepare submissions for the substantive issue of murder re-sentencing because sentence was already decided upon by the Malawi Supreme Court of Appeal. The State argued that when the Supreme Court did so, it was because it was exercising its discretion and not because sentence was mandatory in a matter where both the State and the defence were heard. It went on to say that the appeal was a sentence hearing and that it was the first time issue of sentence was debated in the Supreme Court of Appeal after the Kafantayeni case. It advised that this court cannot hear on sentence because that was already done by the Upper court.

The State cited the case of **The Republic - v- Venita Maiche** Homicide Sentence Re-hearing No. 9 of 2016 in which Tembo J in a similar situation proceeded to preside over the sentence re-hearing on the premise that by virtue of the Case of **Mclemonce Yasin - v- The Republic** MSCA Criminal Appeal No. 25 of 2005 (and of course the dictates of the **Kafantayeni and others - v- The Attorney General Constitutional Case No. 12 of 2007**) the High Court has jurisdiction.

The State went further to cite cases of **Twalibu Uladi -v- The Republic**, MSCA Criminal Appeal Case No. 5 of 2008 and **Wilson Ngulube and Another -v- The Republic** MSCA Criminal Appeal No. 35 of 2006, just to mention a few, where term sentences of 20 years imprisonment were mated by the Supreme Court of Appeal. The question is whether these cases will come before the High Court to fulfil the mandate of sentence re-hearing given to it by the **Kafantayeni** and **Yasin** cases.

Mr Chithope for the convict was ready with his submissions for sentence re-hearing. He pointed out that this is a third time this issue has arisen. He is of the view that sentence re-hearing and appeal are two different processes and that an appeal is not a substitute of sentence re-hearing. He argued that death sentence was mandatory before the **Kafantayeni case** as such there was no opportunity to adduce evidence in mitigation. This led the Supreme Court when considering the appeal to make a decision on sentence without any evidence in mitigation on sentence as it restricts itself to what is on record. He pointed out that the Supreme Court of Appeal judgment in this case came on 1st July, 2010 while

the Yasin case came later on 1st November, 2010, and the Yasin case applied to all convicts without qualification. If other categories of death sentence cases, such as those decided on appeal by the Supreme Court of Appeal, were not fit for re-hearing, the Supreme Court of Appeal would have said it. It was further argued that the Kafantayeni case invalidated all death sentences, and if that were not so, it would be difficult for the High Court to substitute a death sentence with a term sentence. All death sentences were void ab initio. When the appeal was lodged with the High Court, there was no appeal on death sentence since death sentence was invalidated. The Supreme Court of Appeal decided on the issue of death sentence *per incurium*. There was no death sentence. If a decision is decided *per incurium* then the High Court is not bound by it.

In reply the State asked whether the **Ngulube** and **Twalibu** cases are invalid. In fact, I also kept asking the same question. Let me commend the passionate and spirited arguments advanced by both sides. They are all very compelling and persuasive so much that my mind was at pains which approach to follow. I have considered also the case of **The State -v- Cydreck Nambazo and Maison Nampanga** Sentence Re-hearing Cause No. 74 of 2016 by Kalembera J who does not support Tembo's J reasoning. Potani J is in the same camp of Kalembera J saying that the High Court has no jurisdiction over a matter determined by the Supreme Court of Appeal. Kalembera J held that:

"This court cannot grant an order which will be tantamount to usurping the powers and jurisdiction of the Supreme Court of Appeal. The Supreme Court of Appeal having already upheld the convictions and sentences of the applicants herein, the applicants cannot then turn around and come to this court seeking bail pending appeal. Appeal to which court? I must also state that this matter having first come by way of re-sentencing, am of the considered view that the issue of re-sentencing does not arise, as the same would be tantamount to reversing the decision of the Supreme Court of Appeal which upheld the applicants' convictions and sentences.

Strictly speaking, after the **Kafantayeni** and later the **Mclemonce Yasin cases** all death sentences were invalidated and the spirit of these cases should be maintained. The **Kafantayeni** case was a constitutional case which was not tampered with by the Supreme Court of Appeal instead, the **Mclemonce Yasin** case affirmed and confirmed the **Kafantayeni case**. In the light of all the arguments advanced by both counsel, it is advisable to consider the wording of the Supreme Court in its decision so as to draw the rightful conclusions. It would be dangerous and unhelpful to speak in generality or in a vacuum. I quote part of the Supreme Court of Appeal decision:

*"We must now consider the appeal against sentence. It is true that in the case of **Twoboy Jacob -v- Republic MSCA Criminal Appeal No. 18 of 2006**, this court accepted the High court's decision that the mandatory imposition of the sentence of death in every conviction of murder, regardless of the presence of mitigating circumstances, is unconstitutional. We also agreed that the trial judge must at all times possess discretion in relation to the gravity of sentence which must be imposed, even in cases where the defendant is convicted of murder: see **Constitutional Case No. 12 of 2005 Kafantayeni and Another -v- Attorney General**. In the present case however, we take the view that the appellant does not deserve the court's lenience. The appellant and a colleague assaulted and stabbed a defenceless person who was fleeing the scene of a fight to save himself from trouble. The appellant and his accomplice did not want to give the deceased a chance to live. His conduct on the material day was inexcusable. He deserves the death sentence." (My underlining).*

My firm view is that by the Supreme Court saying that 'the applicant does not deserve the court's lenience' means that it has considered the gravity of the act of murder and have reached a deliberate and resolute decision even in the presence of mitigating circumstances in the light of the **Kafantayeni case** (supra) to which it refers. If the appeal was on sentence, it cannot be doubted that mitigating factors were advanced before the Supreme Court of Appeal. What would one be arguing about sentence if not that either the murder did not warrant a death sentence and so, term sentence is appropriate and obviously a prudent counsel will outline mitigating factors in favour of his client, the convict. The accused will have been heard through counsel in this manner. To say the convict was not heard may not be true in the face of an appeal against sentence *inter alia*. We should also take heed that section 321J of the Criminal Procedure and Evidence Code which outlines the process of collecting evidence for sentencing purposes came into existence in 2010 after the **Kafantayeni case** (supra) was decided and more likely after this case was decided on 1st day of July, 2010. Section 321J is not mandatory.

I do not think that the Supreme Court lost the spirit of the **Kafantayeni case**. It was aware that the dictates of the case were that the convict be given opportunity to be heard on sentence and that the courts do exercise sentencing discretion on murder convicts. This it did through the appeal which is an alternative route to re-sentencing. This alternative route did not have to be mentioned by the **Kafantayeni case** as the case did not envisage then that there would be cases which would go by way of appeal, and in any case, those cases on appeal to the Supreme Court of Appeal would undergo the process of reconsidering the same issue of sentence. At this stage the convict would have the opportunity to speak all on sentence. This is exactly what happened in the **Twalibu and Ngulube** cases (supra), just to mention a few, where sentence on murder conviction were reduced to 20 years imprisonment. There is no justification that just because the Supreme Court of Appeal has upheld the death sentence then a resentencing process must be undertaken. Upon fully looking into the circumstances of a case record on appeal and mitigating factors introduced by counsel for the appellant, the Supreme Court of Appeal is entitled to uphold the death sentence or reduce the sentence to a term of years or life as the case may be. It was rightly said in **Twoboy** case (supra) by the Malawi Supreme Court of Appeals that:

"... Offences of murder convictions differ, and will always differ so greatly from each other and it is therefore unjust and wrong that they should attract the same punishment."

It is not that one size fits all, hence the term sentences for murder convictions are given.

Maybe the real issue is that there was nothing for the Supreme Court of Appeal to uphold as there was no existing valid sentence of death since it was invalidated. Admittedly, this is a matter of technicality. When the Supreme Court of Appeal says it upholds the sentence, it really means that the invalid sentence of death is validated by the appeal. However, in this appeal case, the Supreme Court did not in any way use the words that it upheld the High Court death sentence which was invalidated by the **Kafantayeni case**. Instead it said that the applicant does not deserve the court's leniency and that he deserved the death sentence. The Supreme Court of Appeal chose its words very carefully. However, the appeal may be said not tenable because there was no sentence to appeal against. In other words, the Supreme Court of Appeal did not have jurisdiction to attend to appeal matters of cases covered by the **Kafantayeni case**. This sounds very tricky and convincing. Should the convict therefore have appealed only against conviction, and after the SCA has determined on conviction, send the case down to the High Court to consider sentence in line with the order in **Kafantayeni case**? This would certainly be cumbersome. But as I said earlier, the order in **Kafantayeni case** did not envisage that a scenario of an appeal to the Supreme Court of Appeal would arise after the **Kafantayeni case**, otherwise it would have gone further to give advice on the same. It was not the intention of the **Kafantayeni case** to limit the appellate powers of the SCA or to affect the normal dealings by the SCA of appeal matters of whatever source. The **Kafantayeni case** did not say explicitly that one could not appeal to the SCA. It merely said death sentences are unconstitutional, therefore, where there is no appeal, a normal sentence re-hearing was mandatory, and where there was an appeal, the SCA was rightly placed to deal also with sentence in the light of the **Kafantayeni case**. This would mean that the spirit of the **Kafantayeni case** would still be fulfilled through the High Court and through the SCA if the appeal precedes the sentence re-hearing.

The convict argues that the **Mclemonce Yasini case** ordered that all convicts sentenced to the mandatory death sentence were to be brought back to the High Court for sentencing. The appeal decision taken on Mr Khoviwa's sentence by the MSCA at that time was invalidated by Mclemonce, and thus cannot therefore stand in the way of a sentencing re-hearing in the foregoing circumstances' (**Republic -v- Maiche** Sentencing Re-hearing No. 21 of 2016). Let us look at what the MSCA said in Mclemonce case as cited by Potani J in **Republic - v- Jackson Chinkango** Sentence Re-hearing No. 36 of 2015:

"The Court [in the Kafantayeni case] clearly ordered that the Plaintiffs were entitled to a resentence hearing on the death sentence individually. The court's decision on this point, affected the rights of all prisoners who were sentenced to the death sentence under the mandatory provisions of section 210 of the Penal Code. The right to a resentence hearing therefore accrued

to all such prisoners. This default does not take away his rights to appeal against the death sentence." (My underlining)

Here we see the MSCA trying to fill gaps in the **Kafantayeni case** by clarifying that the right to appeal on sentence is nevertheless still there. This is why earlier on I said that the appeal process is an alternative option to fulfilling the dictates of the **Kafantayeni case**. This supports my view that the **Kafantayeni case** did look beyond subsisting cases that carried the death sentence in that others may choose to appeal rather than go by way of sentence re-hearing.

With the remarks made above, my view is that where there is a determination on appeal by the SCA on sentence as the case herein, the matter should not come back to the high Court for sentence re-hearing whether the sentence of death penalty is maintained or reduced to term years. The decision on sentence by the Supreme Court of Appeal is final.

Pronounced in Open Court this day of 5th January, 2017 at Chichiri,
Blantyre.

ML Kamwambe
JUDGE

The State v. Stenala Nashele, Edwin Uladi and Mkoma Kaputeni

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL DIVISION

HOMICIDE (SENTENCE RE-HEARING) CAUSE NO. 36 OF 2016

CORAM: THE HON. JUSTICE MR. S.A. KALEMBERA

Mr Salamba, of Counsel for the State

Miss Kambuwa, of Counsel for the Convicts

Mrs Mithi, Official Interpreter

Mrs Mnthunzi, Court Reporter

ORDER ON SENTENCE RE-HEARING

Kalembera J

The convicts, Stenala Nashele, Edwin Uladi and Mkoma Kaputeni were charged with the offence of murder contrary to section 209 of the Penal Code, under Criminal Case No. 179 of 2005 before the High Court sitting at Liwonde. The particulars of the charge averred that Stenala Nashele, Edwin Uladi and Mkoma

Kaputeni on the 9th of November 2003, at Bakili Village, T/A Malomba, Machinga District, with malice aforethought caused the death of Ellias Nandolo. They were found guilty and convicted. Consequently, they were sentenced to suffer death pursuant to section 210 of the Penal Code, which was mandatory. The said section 210 of the Penal Code has since been amended, such that where a person is convicted of murder, the court has the discretion to impose a death sentence (maximum sentence) or any term of imprisonment. This was as a result of some developments in judicial pronouncements.

In the case of **Kafantayeni and Others v The Attorney General, Constitutional Case No. 12 of 2005 (unreported)**, the Court held that the mandatory death sentence was unconstitutional and ordered that all the plaintiffs in that case be brought before court for re-sentencing. And in the case of **McLemoce Yasini v The Republic, MSCA Criminal Appeal No. 29 of 2005 (unreported)**, the court directed that all murder convicts sentenced before the **Kafantayeni** decision be brought before the High Court for re-sentencing, hence this sentencing re-hearing.

Before I proceed with re-sentencing, there is a matter which I believe I must address first. In the matter at hand, it has been submitted on behalf of the convicts that *'they have never received a response to their attempts to appeal their convictions ...'* whereas the State has submitted that *'In 2007, the convicts being dissatisfied with the judgment of the High Court sitting at Liwonde in Criminal Case No. 179 of 2005 lodged an appeal against the convictions and sentences meted out by the said court through the Legal Aid Department. There are no further records showing whether the appeal was heard ...'* It is unfortunate that this court is left in doubt as to whether the appeal was heard and determined or not. If it had been proved that an appeal was heard and determined by the Supreme Court of Appeal, this court, following the decision in the case of **The State v Cydreck Nambazo and Maison Nampanga, Sentence Re-hearing Cause No. 74 of 2016**, would have thrown away this application for want of jurisdiction. See also **The Rep v Charles Khoviwa, Sentence Re-Hearing Case No. 35 of 2016**. However, in the matter at hand, with no evidence to the contrary the doubt I have must be resolved to the benefit of the convicts. Thus, I will proceed with the re- sentencing.

Both parties agree that the convicts herein are not the worst of offenders, and that they do not deserve the maximum sentence of death but rather a term of imprisonment. I am mindful though that the aggravating factors are that a life was needlessly lost, and that the offence was committed by a group and that the deceased was assaulted to death with sticks, his legs tied up, his eyes removed, wrapped in a plastic bag and dumped in a pit latrine. This was therefore a gruesome murder. On the other hand there are mitigating factors. The convicts are first offenders, they truly believed that the deceased was practicing witchcraft on them and that he was the cause of the death of Ellias Uladi, their relation. I am mindful that there are people who truly believe in witchcraft.

In the case of **The State v Laston Mukiwa, Homicide (Sentence Re-Hearing) Case No. 21 of 2015** this court had this to say:

"However, I take judicial notice that there are people, who, though it might been seen as unreasonable, truly believe in witchcraft. The convict seems to be one of such people. If he didn't have such beliefs maybe this offence wouldn't have been committed. I do not think taking into consideration his belief in witchcraft would amount to endorsing witchcraft or condoning what he did. We can't run away from the fact that in our societies we have people who have such beliefs in witchcraft, though it is wrong to use that belief to commit such a heinous offence or any offence for that matter. I would, however, consider such beliefs, though unreasonable in the mind of others, as a mitigating factor. Such beliefs would however, in the matter at hand, be overridden by the use of an axe, a dangerous weapon, in committing this offence."

In the matter at hand, having considered all the aggravating and mitigating circumstances, I do agree with both parties that the convicts do not deserve the maximum sentence of death, but rather a term of imprisonment. The circumstances of the convicts are such that the sentence of the court, as it has been held, should be fitting to the crime and the criminal, and fair to society - **Republic v Shauti, (HC) 8MLR 69**. The convicts, as already observed, are first offenders, meaning that until the commission of this offence, they had led exemplary lives.

All in all, having considered the aggravating and mitigating factors, I consider a sentence of 22 years imprisonment appropriate in the circumstances of this case .

Consequently I sentence each convict to 22 years imprisonment with hard labour. The convicts have the right to appeal against the sentence.

PRONOUNCED in open court this 30th day of January 2017, at Zomba District Registry.

S.A. Kalembera
JUDGE

The Republic v. Jack Makasu and Daniel Teputepu

Sentence Re-hearing No. 7 of 2017

Coram: Hon. Justice M L Kamwambe

Salamba of counsel for the State

Chirwa of counsel for the Convict

Amos..... Official Interpreter

SENTENCE

Kamwambe J

The Jack Makasu and Daniel Teputepu were convicted of murder and sentenced to suffer the mandatory death penalty by the High Court sitting at Zomba on the 25th day of September, 2005. The case of **Francis Kafantayeni and others -v- The Attorney General** Constitutional Case No. 12 of 2005 (unreported) ordered that all convicts suffering a mandatory death sentence be re-heard on their sentences since the respective death sentences were declared unconstitutional. This is the exercise being undertaken now 9 years after the **Kafantayeni case** gave the order.

The facts of the case are not available because the High Court record is missing and cannot be retrieved. This makes it difficult to consider what really happened at the time of commission of the crime. We will do with this limitation. All we know is that the convicts together with Makina Pondani who was acquitted, now deceased, were involved in a night robbery which resulted into the death of Stewart Likagwa in 2001.

The particulars of the offenders are that the 1st convicted Jack Makasu, is a family man with one child. He worked as a mechanic in Blantyre from where he was able to send money back to his village to support his wife and son, Justin.

He has been on death row for over 11 years. He was arrested in December, 2001. At the time of the alleged offence the 1st convict was 27 years.

The 2nd convict Daniel Teputepu was arrested on 5th May, 2003 and thereafter he spent 11 years on death row. He was 28 years old at the time of the alleged offence.

The State has come out openly that the convicts do not deserve a death sentence or life imprisonment. This excludes the imposition of death penalty. It is difficult for me to consider life imprisonment in the absence of a court record, as such, in the circumstances it is proper to consider term sentences.

Maximum sentences must be reserved for the worst of offenders in the worst of cases. In **Republic -v- Jamuson White** Criminal Case No. 74 of 2008 (unreported) the court emphasised that the death sentence must be reserved for the 'rarest of rare' cases.

The convicts being 27 and 28 respectively at the commission of the crime cannot be said to be young persons who are immature in the ways of life. They were big enough to appreciate what they were doing and the consequences thereof. In my view they are past the age when one may be considered for a lenient sentence due to young age.

Since there is no record that Teputepu was a repeat offender I will take him as a first offender. Jack Makasu has put it in his own affidavit that he was arrested initially and convicted of burglary. This will militate against him. The law favours the young and the old.

Often times the court has considered the appalling prison conditions in Malawi which are declared to be below acceptable international standards, hence this has passed as a general mitigating factor (see **R -v- Chiliko Senti**.....) Apart from one being secluded from society, to experience and live life in prison is surely a punishment on its own.

Courts should be able to consider good behaviour in prison at resentencing stage regardless of the fact that the prison authorities shall at the right time consider remission period. Good conduct in prison coupled with diligence and capability to take up responsibilities are strong indicators that the convict has reformed or is capable of reform and that he would integrate in the community successfully and be a worthy citizen.

In **R -v-**

Murder is a serious offence and that should be demonstrated by a corresponding sentence. However, due to the missing file the circumstances of the crime are not known. This should not necessarily disadvantage the convicts. Counsel for the State wants a stiffer punishment all the same because this murder was committed in the course of committing a robbery, unlike a death after a beer squabble. In the present case there was premeditation and proper planning. A group of offenders was involved which is an aggravating factor. Counsel asks the court not to show lenience even though the convicts may be first offenders.

The court will take into consideration the long stay on death row since 2005 which was really torturous experience. This is termed as "suffering from death row phenomenon". This describes the anxiety, dread, fear and psychological anguish that may accompany long-term incarceration on death row. Further, the convicts were not referred to sentence re-hearing according to the dictates of the Kafantayeni case in good time. They allowed about 9 years to pass by, which is a constitutional breach. This was unfair treatment of the convicts. Relations of the deceased advise that they should not be released soon.

The State is of the view that the 2nd convict mental suffering is not reason enough justifying early release but justifies his retention in prison since convict is near the Zomba mental hospital.

In **R -v- Samuel Nzunga & others** Sentence Re-hearing No 37 of 2016 the three convicts committed murder in the course of a robbery. They had been in incarceration for 18 years and the court sentenced them to a sentence that resulted to their immediate release due to the fact that they did not actively participate in the murder.

In **The Republic -v- Richard Nyirenda** Sentence Re-hearing Cause No. 31 of 2016 the convict and six others committed a murder in the course of a robbery/theft. They went to steal tobacco when they met the guard of KFCTA whom they killed. The convict had been in incarceration for just over 16 years and he was given a sentence that resulted in his immediate release. The court considered his little participation in the murder.

In our present case the circumstances of the case are not known. The convicts have been in custody for 11 years under death row. In view of the above I sentence the 1st convict to 27 years imprisonment as a repeat offender and the 2nd convict to 24 years imprisonment.

Pronounced in Open Court this 16th February, 2017 at Chichiri, Blantyre.

M L Kamwambe

JUDGE

The Republic v. Patson Mtepa

SENTENCE RE-HEARING CASE NO. 9 OF 2017

Coram: Hon. Justice M L Kamwambe

Dr Priminta of counsel for the State

Mr Sanyila of counsel for the Convict

Mr Amos....Official Interpreter

Mr Mutinti.....Court Reporter

SENTENCE

Kamwambe J

The convict, Patson Mtepa, of Mkwela village, TA Malemia, Zomba district with another, a Zambian national known as Robson Taitus Aifa caused the death of Stephano Banda who owned a shop in Zomba in January 2001 in the course of committing a robbery with a gun at deceased's shop. He was tried and was convicted of murder on 7th August, 2003 contrary to s 209 of the Penal Code, which led into a mandatory death sentence being meted by the High Court. The mandatory death sentence was pronounced to be contrary to sections 19 and 42 of the Constitution for amounting to cruel, inhuman and degrading treatment and for violating the right to fair trial respectively and also for usurping the powers of the court to determine on the appropriate sentence (see **Francis Kafantayeni** Constitutional Case No. 12 of 2005). The court ordered that the convicts be brought before the High Court to be heard on sentence, similarly, all other death sentence convicts. The Supreme Court of Appeal in **Mclemence Yasin v The Republic** MSCA Criminal Appeal No. 25 of 2005 also in support reiterated that all persons under a mandatory death penalty be re-heard on sentence. This is the reason for these sentence re- hearing proceedings.

To call these proceedings as sentence re-hearing may be an anomaly because there was no previous hearing on sentence anyway. There was just an automatic pronouncement of the death sentence upon a finding of guilt. This sentence re-hearing gives the court an opportunity to consider the circumstances of the offender and the offence whereby the convict exercises his right to be heard on sentence in mitigation. Likewise, the State is heard in respect of any aggravating factors. In **Edson Khowalala** Homicide Case No. 20 of 2015 the trial judge said that courts should look at the manner the offence was committed. This necessitates that all circumstances surrounding the crime should be considered for the court of law to reach an appropriate sentence.

The court record is missing, as a result, it is difficult to meaningfully consider the circumstances surrounding the crime in mitigation and aggravation of the sentence. Such situation should work to the advantage of the convict in that imposition of a death sentence is excluded and so too life imprisonment. Where the record is missing it would be difficult for the State to justify the imposition of a death sentence, let alone, life. The State too has submitted that it does not support death sentence in the circumstances. However, the State has requested the court to impose a stiff sentence befitting one who kills another with a gun while carrying out a robbery, and life sentence not to be excluded. The State is of the view that a sentence of not less than 30 years is appropriate for the convict. A number of cases were cited to support the proposition.

The defence is of the view that a term sentence of not more than 14 years imprisonment is fitting as sufficient punishment because of the mental state of the convict who is said to have been suffering from mental illness since he was young, as the mental record by Dr Richard Dudley shows, and that the missing record makes it difficult to determine the level of participation of the convict in the murder. He has been in custody for 14 years and this seems to be sufficient punishment to the convict, the defence says.

The missing of the record cannot be considered against the convict because he is not responsible for its missing. This is the reason that death sentence is put aside in favour of a term sentence. However, a reasonable term sentence ought to be meted to avoid outrageous sentences which would be a mockery to justice. I agree with Nyirenda J that 'where the trial record is wholly missing or partially missing such that there is uncertainty as regards the circumstances of the offence, it would be completely inappropriate to impose a death

sentence'. A court of law at this stage must harbour behind its mind that the convict is coming from a death sentence and as such ridiculous sentences that are too low should be avoided in the absence of a court record. This is the approach I took in **R -v- Makasu and Teputepu** Sentence Re-hearing No. 7 of 2017. It is enough that at least the convict has hope that one day he will see the outside of prison as a free person if natural death does not claim his life earlier. Nevertheless, I would be slow to impose a life sentence.

One compelling mitigating factor is that the convict was of young age at 21. Often times it has been said that the law favours the young and the old. At this age the convict was really immature in the ways of the world. Of course he committed a heinous offence, but we should admit that he was bound to make rash and careless mistakes as he makes decisions about his life. He is at a stage of experimenting life as he grows. He deserves a good measure of leniency to be exercised.

I am always persuaded to consider the long wait the convicts in this re-sentencing exercise have endured since pronouncement of the case of **Kafantayeni and others -v- The Attorney General** Constitutional Case No. 12 of 2005 in 2007 as a mitigating factor. The delay is unreasonable and has never been explained. This long delay is unconstitutional in itself. It amounts to unfair trial guaranteed by section 42 (2) (f) (vii).

In **Republic -v- Chiliko Senti** Sentence Re-hearing No. 25 of 2015 the court said that *"appalling prison conditions which are quite below the recognised international standard should be taken into consideration in these sentence re-hearing proceedings"* and that indeed, *"such is a punishment on its own"*.

Ndovi J, in **Republic -v- Kholoviko** [1996] MLR 355 at 359(HC) held that *"the paramount consideration of overcrowding of our prisons would require avoidance of unnecessarily long sentences of imprisonment in cases where short sentences of imprisonment would be appropriate."*

In the absence of trial record I do not think that it is safe to discuss the issue of mental illness or insanity now as a mitigating factor. It is the practice in this court that before one takes plea his mental state as to suitability to take plea is considered. I should take judicial notice that he passed as a fit person to take plea, otherwise criminal proceedings against him could not have proceeded. After all, he was in good hands as he was represented. There is no evidence of unfair trial. On the other hand, if the plea for mental illness is to stand, he is therefore not fit to be released into society as he would be a danger to people

unless he is adequately treated and certified by a competent doctor to be a safe person to live in ordinary communities.

It is submitted that he is a repeat offender who was initially convicted of robbery and sentenced to 48 months imprisonment. He escaped from lawful custody and while at large, he committed this murder in the course of carrying out a robbery. This militates against him.

We cannot even begin to talk about the level of participation in the crime as the record is missing. That the level of participation is not known should not entitle the convict to leniency. It is safer to ignore it completely. In the case of **The Republic -v- Samuel Nzunga and Others** Sentence Re-hearing Cause No. 37 of 2016 there was evidence or submissions to the extent that the convicts did not actively participate in the breaking into the house and killing the deceased in a robbery, but the principal offender who was at large. In this case the convict has not even stated the small part that he played.

It should be observed that the convict had a troubled life as a youngster. His father was an alcoholic who cared little for his family. Often he quarrelled with his wife. When the convict was about 12 years old, his parents divorced. His mother was incapable of tending for the family. I am very sure that he grew without parental care and guidance. No one entered into the shoes of the father when he left. It explains why he started criminal life at an early stage.

Here is a child becoming a man before his time because life was tough for him and the family.

That they carried a lethal weapon (a gun) to go and rob from a shop is an aggravating feature. It is unlike where one goes to steal but without such a lethal weapon. To carry such a weapon means disrespect and disregard of the sanctity of human life in case the weapon is used. They had fore knowledge of what they would do if they met resistance.

The statement by Prison Officer Dzinyemba gives me mixed feelings. It goes like this:

"He arrived in prison very agitated and was struggling a great deal, but he seems to have adapted over the years and is better behaved. He still struggles with life in prison, but he has become calmer and less volatile. I think he will always struggle while incarcerated, but he continues to improve."

I am not sure that the convict is capable of reform and social re-adaptation. We have to take care in releasing such an individual into society as his state of

mind cannot be read properly. There is a risk that he may relapse into criminal life again if released early. The report of Dr Dudley is not conclusive either. It merely assumes that once out of prison the stress would reduce and he would get better with treatment outside prison. Of course he wants him out.

Some cases to compare with are brought hereunder.

In **Mabvuto -v- The Republic** MSCA Criminal Appeal No. 46 of 2002, the Supreme Court imposed a death sentence where death had been caused in the course of a robbery.

In **Winstone Ngulube and Another -v- The Republic** MSCA Criminal Appeal No. 35 of 2006 the Supreme Court set aside the death sentence imposed by the High Court for murder and replaced it with one of 20 years IHL after it found that the assault that led to the death of the deceased was not done using any dangerous weapon, the quarrel was influenced by intoxication and there was no clear motive by the Appellants to cause the deceased's death.

In the case of **Evance Namizinga and Another -v- The Republic** MSCA Criminal Appeal No. 18 of 2007 (unreported), robbers attacked a guard who died from injuries sustained by being hit with a bottle. The convicts attracted a sentence of 25 years imprisonment. The bottle was not as lethal and dangerous weapon as a gun.

In **Twalibu Uladi -v-The Republic** MSCA Criminal Appeal Case No. 5 of 2008 the appellant and the deceased had been drinking together. A quarrel ensued as the appellant accused the deceased of attempting to steal a window frame which was inside the appellant's house but apparently found itself outside. In the course of a fight the appellant took a panga knife and hacked the deceased. A sentence of death was substituted by one of 20 years imprisonment after the court observed that the appellant was fighting with bare hands and only resorted to the panga knife in the course of the fight.

In the case of **The Republic -v- Jack Makasu and Daniel Teputepu** (supra) which is almost on all fours with this case, the record was missing and the murder was done in the course of a robbery, and the court sentenced them to 27 and 24 years respectively. Of course the convicts were 28 and 27 years old respectively at the time of committing the crime.

In the case of **The Republic -v- Richard Nyirenda** Sentence Re-hearing Cause No. 31 of 2016 I ordered a sentence that would result in the immediate release

of the convict who had been in incarceration for 18 years for a crime of a similar nature because it translated to 27 years imprisonment yet he did not fully participate in the murder.

In view of the analysis above I have experienced anxious moments as to the appropriate sentence to be meted. I have considered age and deprived life that the convict led whilst growing up in a broken marriage alongside the unnecessarily long period of delay before re-sentencing exercise took place, rendering it unconstitutional, and the poor prison conditions versus/weighed against a murder caused during a robbery by using a gun which is much lethal, two people taking part in the murder. If at the time of the crime the convict was much older, a sentence over 30 years would have been appropriate. I am convinced that a sentence of 25 years imprisonment is in order and I so sentence him. I refrain from making any reception order in the meanwhile.

Pronounced in Open Court this 8th day of March, 2017 at Zomba District Registry.

M L Kamwambe

JUDGE

The Republic v. Godfrey Thawe

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY (SITTING AT ZOMBA)

CRIMINAL DIVISION

SENTENCE RE-HEARING CAUSE NO. 28 OF 2017

CORAM: THE HON. JUSTICE MR S.A. KALEMBERA

Mr Malunda, Senior Assistant Chief State Advocate, of Counsel for the State

Miss Chigoneka, of Counsel for the Convict

Mrs Mithi, Official Interpreter

Mr Mutinti, Court Reporter

ORDER ON RE-SENTENCING

Kalemhera J

The convict, Godfrey Thawe, was charged with the offence of murder contrary to section 209 of the Penal Code. The particulars of the offence were that Godfrey Thawe on the 25th day of February 2003 at Gezamnjowe Village, T/A Mtwalo in Mzimba District, with malice aforethought, caused the death of his wife Annie Munthali. After a full trial the convict was found guilty and convicted as charged.

He was sentenced to suffer the mandatory death penalty per section 210 of the Penal Code (prior to its amendment). Prior to the amendment to the said section 210 of the Penal Code, the section imposed a mandatory death sentence to anyone convicted of murder. The court had no discretion as to what sentence to impose other than a death sentence. Presently, where a person is convicted of murder, the court has the discretion to impose a death sentence (maximum sentence) or any term of imprisonment.

In the case of **Kafantayeni and Others v The Attorney General, Constitutional Case No. 12 of 2005 (unreported)**, the Court held that the mandatory death sentence was unconstitutional and ordered that all the plaintiffs in that case be brought before court for re-sentencing. And in the case of **McLemoce Yasini v The Republic, MSCA Criminal Appeal No. 29 of 2005 (unreported)**, the court directed that all murder convicts sentenced before the **Kafantayeni** decision be brought before the High Court for re-sentencing, hence this re-sentencing re- hearing.

The main issue for the court's determination is what sentence to impose on the convict in the circumstances of this case.

Both parties have submitted on what they respectively consider as aggravating and mitigating factors in this case. It has been submitted by counsel for the State that the circumstances of the offence are so aggravating. That the convict murdered his wife and the reasons for so doing are very sickening. It was a ritual killing in that he collected or harvested her blood, hence there was no blood stains at the scene. The other reason was that the convict wanted to marry his girlfriend, Susan Dausi. The deceased was killed using a sharp object which was used to cut her throat. The offence was committed in very heinous circumstances; the convict had to lie to the deceased that her aunt was ill at Jenda to allow him prepare for her murder and harvesting of her blood; and the offence was heavily pre-meditated. Thus, the State submits that a life sentence would be appropriate in the circumstances.

On the other hand it has been submitted as mitigating factors the fact that the convict was an alcoholic. That according to Dr Dudley he suffers from mental illness and although it is only speculative as to his mental state at the commission of the offence, it is submitted that the court should consider the mental state of the

convict. The circumstances of the offence is indicative of the convict's mental state. And it shows that he needs treatment. The history of mental illness in the family must be considered. Further that the court should consider that the evidence relied upon emanates from the convict's caution statement which was recorded or obtained after the convict had been in custody for eleven days and after being tortured. The convict, at trial, denounced the caution statement. Hence it's submitted that the commission of the offence remains uncertain. The convict is a first offender and was 33 years old when he committed the offence. Hence its argued and submitted that a life sentence is inappropriate in the circumstances of this case and that a sentence leading to his immediate release would be appropriate.

Section 210 of the Penal Code (amendment number 1 of 2011) provides as follows:

"s.210 -Any person convicted of murder shall be liable to be punished with death or with imprisonment for life."

It therefore remains in the discretion of the court as to what sentence to impose on a person convicted of murder. The court can impose the maximum sentence of death, or can impose a life sentence, or any other term of imprisonment. It all depends, *inter alia*, on the seriousness or gravity of the offence, the circumstances in which the offence was committed, as well as the circumstances of the offender. Murder being a very serious offence, it is inevitable that even if the circumstances of its commission do not warrant the maximum sentence of death, a custodial sentence would be imposed. In the matter at hand, both parties in a way agree that the circumstances of the commission of the offence do not warrant the imposition of the death penalty but a term of imprisonment. I have noted though, that counsel for the convict asking the court to take into consideration the mental condition of the convict. In essence, it's submitted that the convict suffers from mental illness and that the court must take that into consideration.

Both parties agree that Dr Dudley's report is merely speculative as regards whether the convict was laboring under mental incapacity when he committed the offence or not. This court will therefore not belabour the point further, after all the convict was convicted of the offence as charged. That shows that either the defence of insanity was not raised, or if it was raised did not meet the required standard, that is, it was not established on a balance of probabilities, that the accused person, at

the time of the act did not or was incapable of understanding what he was doing; or of knowing that he ought not do the act. If it had been established, he could have been acquitted. Thus, this court is called upon to consider the current mental condition of the convict at this re-sentencing stage. It has been held that '*the mental illness of an offender will often be considered as a mitigating factor in sentencing even though it is not of the sort that would establish a verdict of not criminally responsible on account of mental disorder at the time of the commission of the offence*' -see **R v Gladue (1999), 1999 Can LII 679 (SCC), 133 C.C.C. (3d) 385 (SCC) at p. 408**; see also **Republic v Margaret Nadzi Makolija, Sentence Re-hearing Cause No. 12 of 2015**.

I therefore concede that the mental condition of the convict can be considered as a

mitigating factor during this re-sentencing phase. I have thus considered the report by Dr Dudley as regards the mental instability of the convict; and the fact that a conducive environment would enable the convict to function as well as he has been functioning in prison. That said, am mindful of the horrific nature of the commission of the offence. It is further not guaranteed that if released the convict will find a conducive environment as envisaged by Dr Dudley. Thus the convict might end up being a danger to the public. I have further considered the prayer by the State that a life sentence be imposed on the convict. I have also considered different case authorities cited by the parties as regards appropriate sentences to be imposed. Thus, I have come to the conclusion that a sentence of life imprisonment would not be appropriate in this case.

Having considered the aggravating and mitigating factors in this matter, a term of years of imprisonment would be appropriate in this case. Borrowing a leaf from the case of **Republic v Joyce John, Criminal Case No. 20 of 2009** where a mother murdered her child through deliberate poisoning, and was sentenced to 30 years imprisonment with hard labour, I am of the view that despite the mitigating factors, the seriousness of the offence and the conduct of the convict in committing the offence far outweigh, the said mitigating factors. The convict acted like a monster and not a loving husband. He therefore deserves a stiffer punishment. Having considered the circumstances of the offence as well as the circumstances of the convict, I am satisfied that a sentence of 30 years imprisonment is appropriate. I consequently sentence the convict to 30 years imprisonment with hard labour. The sentence to run from date of arrest. The convict retains the right to appeal against this sentence.

PRONOUNCED in open court this 10th day of March 2017, at the Zomba District Registry, Zomba.

S.A. Kalembera

JUDGE

The Republic v. Peter Kusaina and Amosi Augustine Shama

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL DIVISION

SENTENCE RE-HEARING NO. 04 OF 2017

Coram: Hon. Justice M L Kamwambe

Mr Chisanga of counsel for the State

Dr Nkhata of counsel for the Convict

Mr Amos...Official Interpreter

Mrs Pindani ...Recording Officer

SENTENCE

Kamwambe J

The two convicts herein, Peter Kusaina and Amosi Augustine Shama were convicted of the murder of Mrs Ruth Manere Nkhoma in a robbery on 25th April, 2003 when they were armed with dangerous weapons including two AK47 rifles at Mangochi at a grocery owned by the deceased. They were in the company of two others who are at large. The convicts pleaded guilty to both charges of robbery and murder. They were convicted on 6th February, 2004 and spent 11 months on death row before the death sentence was commuted to life imprisonment on 13th January, 2005.

The facts of the case are that the convicts and others came late at night to the grocery pretending to be looking for aspirin for a sick child. The deceased and her husband refused to help them presumably because it was late at night.

One accomplice, acting in a joint enterprise, fired the AK 47 rifle and forced entry into the house demanding money from the couple. The deceased emerged from under the bed and gave them MK13, 000.00 but the criminals demanded more money. They were told that there was no more money but the criminals continued shooting in the house. One bullet hit the deceased on the shoulder and two on the left hip. She fell down and died. The convicts and other accomplices ran away with other items. Post-mortem examination revealed that death was due to haemorrhagic shock because of gun shot wounds.

The convicts were arrested when they were found with some of the stolen items. The rifles were also recovered from the convicts. Photographs were shown to court revealing where the weapons were hidden and the photos were exhibited. They admitted as correct the facts as read by the prosecution together with the caution statements recorded from them and read out to the court. They were sentenced to suffer death.

Pursuant to the directive from the case of Francis Kafantaveni -v- Attorney General Constitutional Case No. 12 of 2005 in 2007, all death sentences were declared unconstitutional and subject to re-sentencing. It is this exercise which has brought us here culminating into the sentences below. Today section 210 of the Penal Code (Amendment Number 1 of 2011) Laws of Malawi provides for a non-mandatory death sentence. This is a necessary and timely improvement in the law so that the Penal Code complies with the Constitutional order.

The State has come out clearly that death sentence is not an appropriate punishment. I agree with the State which however leaves room for considering life sentence. In normal circumstances the death sentence can appropriately be applied where the case is the worst of the worse and in the rarest of the rare circumstances. Murder being one of those crimes on top of the ladder of grave and heinous crimes cannot qualify to be considered under sections 139 and 140 of the Criminal Procedure and Evidence Code for a suspended sentence as first offenders. A custodial punishment is well fitting for this crime. It would defeat good reason and public expectation to release a murder convict under the pretext of a suspended sentence unless there were very special reasons which I fail to think of now. However, as first offenders, some measure of lenience will be exercised on both. It must nevertheless be born in our minds that the death was caused in very decrepit circumstances especially that they were not provoked. An innocent life was lost due to greed for money, and the money was not theirs after all.

It is universally accepted that the law favours the relatively young and old

(R-v- Ghambi (1971-1972) ALR Mal 457. The first convict, Kusaina, was 32 and Shama, the second convict was 23 years old at the commission of the crime. Only Shama would gain lenience from his youthful age as practice shows that youths fall in the brackets between 18 and 25 years. The rationale for protecting the young from a harsh sentence is that the young may commit an offence out of impetuosity, immaturity or ill-conceived thirst for adventure (**R-v-Keke** Confirmation Case No. 144 of 2010). The young are still immature in the ways of life and the law is well placed to mitigate on sentence for such group. They make rash and careless mistakes in their

decision as they grow. Since sentences are supposed to be individuated this mitigating factor will necessitate differentiation in sentences between the two convicts. A sentence must fit the individual or offender and the circumstances of the crime as well as meet public expectation.

A plea of guilty qualifies one to about 1/3 reduction of sentence but in this case the plea of guilty seems to have been made as the convicts had no option but to plead guilty. The guilty plea was the only obvious thing for them to do because it would have been foolhardy for them to plead otherwise in the face of overwhelming and incriminating evidence as the facts show. This guilty plea was not an effective and genuine one intended to aid the court not enter into unnecessary hearing. I would thus not place much weight on this factor in mitigation.

The convicts have been in custody for 8 years since the pronouncement in **Kafantaveni -v- Attorney General** {supra} that death sentence is unconstitutional. Such is long period of waiting for justice to take its course and no doubt is unreasonable and unconstitutional in itself as the convicts are entitled by section 42 (2) (f) (viii) of the Constitution to a speedy trial. This militates against the death sentence as alluded to above. Such delays have never been explained and justified (see **R-v- Patson Mtepa** sentenced Re-hearing Case No. 9 of 2017).

In **Republic-v- Chiliko Senti** Sentence Re-hearing No. 25 of 2015 the court said that "*appalling prison conditions which are quite below the recognised international standard should be taken into consideration in these sentence re hearing proceedings*" and that indeed, "*such is a punishment on its own*".

Ndovi J, in **Republic -v- Kholoviko** [1996] MLR 355 at 359 (HC) held that "*the paramount consideration of overcrowding of our prisons would require avoidance of unnecessarily long sentences of imprisonment in cases where short sentences of imprisonment would be appropriate.*"

The most crucial purpose of punishment is to reform and rehabilitate a prisoner and not to be vindictive. It is not as it were blood for blood. A civilised nation must impose sentences that give the opportunity to offenders to entertain hope that one day they will enjoy life outside prison, unless likelihood of reform and rehabilitation are remote expectations. The court must consider the appropriate sentence as one appears in court on the day of sentencing. I believe this is the nature of these sentence re-hearings. This is why we even consider long delay in sentencing as a relevant factor in mitigation because that is fact suffered by the prisoner. The court cannot sentence one normally as if other events have not taken place. It would be unfair on the part of the prisoner. Likewise, it follows that he should take advantage of any indicators or information that he is good candidate of reform. In short, post- conviction good behaviour is a relevant mitigating factor.

Mr Jalome Chongo of Zomba Central Prison has provided information that Kusaina is well mannered and his behaviour is commendable. He is a devout catholic and attends services every Sunday. He teaches the Catholic faith to others. He has been rewarded with a position of a 'nyapala' which is a position of responsibility as he oversees over other prisoners. He has learnt plumbing and has done repairs (see **Republic -v- Limbikani Wilson Mtambo** Sentence re-hearing No. 2 of 2015).

It has become common to say that one was not armed with a gun and that somebody else fired and caused death. I have considered sections 21 and 22 of the Penal Code and observe that in an unlawful joint enterprise, the one who fires and kills does so on behalf of all others because the others had knowledge of the lethal weapon carried by the group and therefore they approved its use when necessary to fulfill their common intention. I find it difficult to think that the convicts participated less just because they did not handle and use the guns. This is the spirit of section 22 of the said Act. Even if one may be recruited last, he adopts and owns the unlawful venture just like anybody else. It is possible that the level of participation in the crime by one who is recruited last is physically more than the so called mastermind.

Ass. Supt. Constantine Kapala of Zomba Central Prison on affidavit has said that Shama is well behaved and has no issues with fellow prisoners. He is also a devout Catholic and a 'nyapala' just like Kusaina. His skin disease condition is improving but has had pneumonia. He also suffers from poor eye-sight.

I make one observation that in cases where the Supreme Court of Malawi meted a death sentence after the Kafantayeni case, it was on appeal and there was no long delay in passing sentence as is the case here, hence, death sentence was appropriate. In Mabvuto -v- The Republic MSCA Criminal Appeal No. 46 of 2002, the Supreme Court imposed a death sentence where death had been caused in the course of a robbery. Also in Charles Khoviwa -v- Republic MSCA Criminal Appeal Case No. 6 of 2007 the Supreme Court held as follows:

"In the present case however, we take the view that the court does not deserve the court's lenience. The appellant and a colleague assaulted and stabbed a defenceless person who was fleeing the scene of a fight to save himself from trouble. The appellant and his accomplice did not want to give the deceased a chance to live His conduct on the material day was inexcusable, he deserves the death sentence."

Below I bring out some more comparative cases.

In **Republic -v- Ganizani Thomasi** Criminal Case No. 366 of 2010 (unreported) Justice Chirwa imposed a sentence of life imprisonment on the convict who was a first offender because he had been greatly influenced by a ready guilty plea at the earliest opportunity.

In **Winstone Ngulube and Another -v- The Republic** MSCA Criminal Appeal No. 35 of 2006 the Supreme Court set aside the death sentence imposed by the High Court for murder and replaced it with one of 20 years IHL after it found that the assault that led to the death of the deceased was not done using any dangerous weapon, the quarrel was influenced by intoxication and there was no clear motive by the Appellants to cause the deceased's death.

In the case of **Evance Namizinga and Another -v- The Republic** MSCA Criminal Appeal No. 18 of 2007 (unreported), robbers attacked a guard who died from injuries sustained by being hit with a bottle. The convicts attracted a sentence of 25 years imprisonment. The bottle was not as lethal and dangerous weapon as a gun.

In **Twalibu Uladi -v- The Republic** MSCA Criminal Appeal Case No. 5 of 2008 the appellant and the deceased had been drinking together. A quarrel ensued as the appellant accused the deceased of attempting to steal a window frame which was inside the appellant's house but apparently found itself outside. In the course of a fight the appellant took a panga knife and hacked the deceased. A sentence of death was substituted by one of 20 years imprisonment after the court observed that the appellant was fighting with bare hands and only resorted to the panga knife in the course of the fight.

In the case of **The Republic-v-Jack Makasu and Daniel Teputepu** (supra) which is almost on all fours with this case, the record was missing and the murder was done in the course of a robbery, and the court sentenced them to 27 and 24 years respectively. Of course the convicts were 28 and 27 years old respectively at the time of committing the crime.

In the case of **The Republic v- Richard Nyirenda** Sentence Re-hearing Cause No. 31 of 2016 I ordered a sentence that would result in the immediate release of the convict who had been in incarceration for 18 years for a crime of

a similar nature because it translated to 27 years imprisonment yet he did not fully participate in the murder.

In **R-V-Yale Maonga** Sentence Re-hearing Case No. 29 of 2015 the convict who was 20 years old, together with other men plotted to rob the deceased and his friend of a small amount of money just enough for transport from Liwonde to Blantyre. They were armed with a hammer and knives. The deceased and his friend were passing by unarmed and drunk when the convict and friends ambushed them and assaulted them seriously resulting in loss of life. Friend to the deceased was stripped of his clothes and badly injured. The court imposed a sentence of 42 years imprisonment.

Courts are enjoined to consider the circumstances in which the death occurred. I see that the convicts and others displayed very wanton behaviour in total disregard of human life. Death sentence was appropriate to them. However sentence was commuted to life. The State is of the view that life sentence is sufficient punishment in the circumstances. The defence thinks that a sentence that should translate in their immediate release is commendable. I have considered all the factors covered above. The victim lost her life needlessly in very gruesome circumstances. There is hardly any excuse for that terroristic behaviour in a cowboy fashion. Those of youthful age should not go that far as to play with other peoples' lives as if life is like useless leaves falling off a tree. I agree with the State that life imprisonment is befitting the convicts, but for the mitigating circumstances. I am compelled to mete reduced but severe sentences, and I put away Kusaina to 31 years, and Shama to 35 years imprisonment.

Pronounced in Open Court this 14th day of March, 2017 at Zomba, Blantyre.

M L Kamwambe
JUDGE

The Republic v. Abraham Phonya
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY (SITTING AT ZOMBA)
CRIMINAL DIVISION
SENTENCE RE-HEARING CAUSE NO. 02 OF 2017

CORAM: THE HON. JUSTICE MR. S.A. KALEMBERA

Mr Malunda, Senior Assistant Chief State Advocate, of Counsel for
The State

Mr Sanyila, of Counsel for the State

Mrs Mithi, Official Interpreter

Mr Mutinti, Court Reporter

ORDER ON RE-SENTENCING

Kalemhera J

The convict, Abraham Phonya, was charged with the offence of murder contrary to section 209 of the Penal Code. The particulars of the offence alleged that the convict and others on or about the 23rd day of December 1995 in Lilongwe District, with malice aforethought, caused the death of Mr Panji. After a jury trial, the convict was found guilty as charged. He was sentenced to suffer the mandatory death penalty per section 210 of the Penal Code (prior to its amendment). Prior to the amendment to the said section 210 of the Penal Code, the section imposed a mandatory death sentence to anyone convicted of murder. The court had no discretion as to what sentence to impose other than a death sentence. Presently, where a person is convicted of murder, the court has the discretion to impose a death sentence (maximum sentence) or any term of imprisonment. In the case of **Kafantayeni and Others v The Attorney General, Constitutional Case No. 12 of 2005 (unreported)**, the Court held that the mandatory death sentence was unconstitutional and ordered that all the plaintiffs in that case be brought before court for re-sentencing. And in the case of **McLemoce Yasini v The Republic, MSCA Criminal Appeal No. 29 of 2005 (unreported)**, the court directed that all murder convicts sentenced before the **Kafantayeni** decision be brought before the High Court for re-sentencing, hence this re-sentencing re-hearing.

The main issue for the court's determination is what sentence to impose on the convict in the circumstances of this case.

Despite cross-examining the convict, the State is handicapped in that the court record is missing, and the convict was not helpful in his responses. And the matter was adjourned a few times at the instance of the State to enable the State gather information as to what actually happened, but all in vain. However, the State has submitted as aggravating factors the fact that the offence of murder was committed by a group and in the course of committing a robbery. The robbers stole the vehicle Mr Panji (deceased) was using. The State does concede that at 52 years of age, the convict is now advanced in age and that must work to his advantage. Further that it's not clear whether a weapon was used, thus the State pray for a sentence of 30 years imprisonment with hard labour.

In mitigation, it has been submitted by counsel for the convict, that the convict was a first offender, that the participation of the convict in the commission of the offence was minimal as he was involved when the offence had already been committed. The case record is missing and it would therefore be inappropriate to impose a death sentence. The convict has been rehabilitated, and he has already served 20 years imprisonment. His appeal filed in 2004 has never been heard. In prison he has suffered from TB and he is now in poor health. Thus, it is submitted that the convict must be sentenced to a term of imprisonment which leads to his immediate release.

I am mindful that a life was lost by the senseless acts of the convict and his accomplices. I am further mindful that with the amendment to section 210 of the Penal Code (amendment no. I of 2011), referred to herein before, the death sentence is no longer mandatory upon a conviction for murder. The court retains the discretion as to what sentence to impose upon conviction for murder. Several considerations must exercise the court's mind in coming up with an appropriate sentence upon a murder conviction. It can impose the maximum sentence which is death or any other term of imprisonment. The court must take into consideration the mitigating and aggravating factors which have been raised herein. However, I am further mindful that murder is a very serious offence attracting a maximum sentence of death. Death sentence must be reserved for the worst kind of offenders. In the matter at hand, I do agree with both parties that the convict is not the worst kind of offender.

It is not in dispute that murder is a very serious offence, it is therefore inevitable that a person convicted, even if a death sentence is not appropriate, will be given a custodial sentence. Circumstances in which the offence was committed will determine the sentence to be imposed. In **Winston Ngulube and Michael Ngulube v R, MSCA Criminal Appeal No. 35 of 2006**, the sentence of death, for murder, was set aside and replaced with one of 20 years imprisonment with hard labor because the assault which led to death of the deceased was not done using any dangerous weapon, and the quarrel which led to the assault was influenced by intoxication, no clear motive for causing the deceased death was disclosed by the evidence, and there was no evidence that the appellants were persons of previous bad character. And in the case of **The State v Mnjc Silumbu, Lingison Msukwa, Lackson Chapewa and Lusekelo Chapewa, Criminal Case No. 39 of 2009 (HC) Mzuzu District Registry**, although the offence was committed in a very gruesome manner, a sentence of 30 years imprisonment with hard labor was imposed. The use of a dangerous weapon is thus an aggravating factor.

In the matter at hand, as has been conceded by the State, it is not clear whether a dangerous weapon was used or not. That doubt has to be resolved in favour of the convict. What comes out clearly is that the offence of murder was committed in the course of committing another serious offence of robbery, and that it was committed by a group of people. This is an aggravating fact. Clearly there was pre-meditation, planning and execution of the plan, leading to the commission of the robbery as well as murder. Having considered the aggravating and mitigating factors and having further considered the circumstances of the offender as well as the circumstances of the commission of the offence, I consider a sentence of 27 years imprisonment with hard labour appropriate and sufficient in the circumstances of this case. I consequently sentence the convict to 27 years imprisonment with hard labour. The sentence to run from the date of arrest. The convict retains the right to appeal against this sentence.

PRONOUNCED in open court this 14th day of March 2017, at Zomba District Registry, Zomba.

S.A. Kalembra
JUDGE