IN THE HIGH COURT OF MALAWI

ZOMBA DISTRICT REGISTRY

HOMICIDE (SENTENCE REHEARING) CAUSE NO 18 OF 2015

THE REPUBLIC

-VERSUS-

FUNSANI PAYENDA

CORAM: HON. JUSTICE PROF. RE 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 – as indeed she was. What can be more traumatising to a child than 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, silently went behind her back in the dark, grabbed the gun away from the deceased and gave the gun to Teddy. He said it was 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 windows panes with stones, breaking them up. It was at this point that Mrs. Mphepo pulled the gun as described above.

6. As if the murder of the deceased was not enough, the gang proceeded to take whatever they could lay their hands on in the house and then fled.

7. 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.

8. 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.

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 in Court. It is also another posthumous occasion for the deceased, an occasion for all of us to reflect on the tragedy that befell the deceased and her family on that night as a result of violent criminal conduct, and for this Court to make a pronouncement on the consequences of that crime. 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, apart from Ernest Adamu who was only found guilty of murder. They were all sentenced to 25 years Imprisonment on 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 that was imposed 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 footing that he was wrongly convicted of the offence of murder herein, and that he ought not to have been convicted in the first place. He argues that the only reason for his arrest, prosecution and subsequent conviction for the offences herein was his being found in possession of items that were stolen from the Mphepos on the fateful night.

13. The defendant states that he was a successful business man operating a shop in Lilongwe City. He states that he surrendered himself to the Police after he heard they were looking for him. The evidence further shows that the Police had earlier arrested his wife as a 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 are most unfortunate and a flagrant abuse of human rights. I hope this practice has since stopped in the reformed Police since this happened many years ago.

14. Upon his arrest, the defendant explains that he told the police everything. 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 they were never charged with the murder of the deceased. 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. Well the jury convicted him for both armed robbery and murder, and sentenced him to a long 25 year sentence for armed robbery and a mandatory death sentence for murder.

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 distinguished and leading global experts on this matter, whose opinions, if properly laid before the Court, would without doubt be of great 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 *amici curiae*? Or are they expert witnesses? Is the Declaration to be treated as an expert opinion? Defence Counsel, Mr. Katundu, had no clear answers. 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 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 not sure 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, 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 planed rather than impulsive, (b) an offensive weapon was used; (c) the convict was labouring under intoxication at the time of committing the offence eve 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. He 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 involvent 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 a 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**, 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 if 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 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 that they rendered the defendant so vulnerable as to be easily disposed to a life of crime. So many under similar circumstances, in fact the overwhelming majority of those in similar circumstances, 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. It cites 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.

40. There is no judicial consensus on the point taken by my brother Judge, Kalembera 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.

41. I take the firm view that post-conviction factors must be taken into account. My starting point is 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.

42. 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".

43. 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.

44. Also see his 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.

45. 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)

46. 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.

47. 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).

48. 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.

49. 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").

50. 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

51. 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.

52. 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.

53. 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.

54. 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.

55. Indeed this is more so considering probably, among the various purposes of punishment such as retribution, deterrence, incapacitation, and rehabilitation, rehabilitation is the most important.

56. Neither the Constitution, 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 picture of the purposes of punishment. We must turn to International law for guidance.

57. 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."

58. 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.

59. 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.

60. 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.*

61. 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 clearly has the advantage of not simply predicting future post-conviction behavior, but examining the extant 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.

62. 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.

63. 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 2004, that might now lead to the immediate release of such a murder convict? In my view, it would be even worse to let such a dangerous criminal loose on that account, and unleash him to the free society. 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 that would, among other things, give him enough time to rehabilitate before his release. This however would only be possible where the Court accepts to examine post-conviction circumstances.

64. 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.

65. 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 ia 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.

66. 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.

67. 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.

68. 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.

69. 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."

70. 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.

71. 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