**IN THE HIGH COURT OF M ALAWI**

**PRINCIPAL REGISTRY**

**SENTENCE RE-HEARING NO. 11 OF 2016**

**THE REPUBLIC**

**V**

**ALIDI THOMAS AKIMU**

**Coram:** **Hon Justice M L Kamwambe**
Mr Malunda of counsel for the State
Mr Chithope of counsel for the Accused
Mr Nicholas Phiri...Official Interpreter
Mrs Pindani...Court Reporter

## JUDGMENT

***Kamwambe J***

This matter is before this court for sentence re- rehearing according to the dictates of the case of **Kafantayeni and others v Attorney General** Constitutional Case No. 12 of 2005. After challenging the constitutionality of the death sentence, it was held by the Constitutional Court on 27th April, 2007 that the imposition of the mandatory death sentence was cruel and inhuman under section 19 of the Constitution and that it violated the right to fair trial as secured by section 42 of the Constitution. The court ordered that all cases under death sentence be re-sentenced before the High Court.

The convict was tried on 5th March, 2002 before the High Court sitting at Mchinji for the murder of Phillip Kapinga on 14th March

2000. The convict was 20 years old then. The death sentence was commuted to life imprisonment on 15th October, 2002. He was a head boy at Pinda Primary school and he was responsible for enforcing the school's assembly rules which led to a disagreement with Malichi Tobias Banda, the brother of the deceased. Later that day Malichi Banda informed his elder brothers, the deceased and Martin Phiri, of the argument. On the following day on the 14th March, 2000 the convict was walking home from school when he was confronted by the deceased who was then around 23 years old. The convict explained to the deceased to let him drop off his books and have lunch. At this point the convict believed the matter to be settled.

Re-sentencing is not an appeal as the exercise is taking place in the same court. Often times I have said that re-sentencing process is a special procedure of sentencing which shall rarely happen in the future. Because of its unique nature you are now considering all evidence to give the convict good opportunity to be heard which was denied him at first. Post crime conviction will be considered to determine on possibility of reform and re-adaptation or re-integration. Since re-sentencing is taking place many years after conviction, it is, in my view, necessary to have an open mind and allow the convict to state the path of his reformation and acceptability in society. It is by no means discrimination because the other convicts have nothing to offer by way of post- conviction evidence as they were heard. For the sake of clarity, in cases being heard now after a homicide took place, say, five or seven years ago, if convicts have anything to show on sentencing as good reformative conduct for the many past years spent in prison, they should not be denied the opportunity even when they were remandees. I am aware of the direction taken by the case of the **Republic v Alex Njoloma**, Sentence–rehearing Case No. 22 of 2015 that post- conviction conduct should not be considered as if it were a parole hearing. This is not introducing parole hearing from the back door as this process is before a judge and not some other body. A judge should not be limited in

considerations to make. The approach should be to leave the matter for mitigation before court to attach to it the weight it deserves. Where a convict has committed another offence in prison, the court will have no reason to exercise lenience on him. That he has offended again may be an indication that he is hardly reformable and as such affect adversely consideration of lenience at re-sentencing stage.

I take sides with the defence that it cannot be the case that consideration of post-conviction factors would unfairly disadvantage other convicts on other sentences other than for murder offence, since such other offenders/convicts were given opportunity to be heard on sentence since their sentences were not mandatory.

I take it that the convict was a first and young offender at 20 then, and that those who commit offences when young and immature and inexperienced in life deserve some measure of lenience (**R v Ngambi (1971-72) ALR Mal at 457**).

The convict is said to have been a person of good character before the commission of this crime and the Assistant village headman says that there would be no problem to integrate him in the community. Often the convict acted as courier boy for the Village Headman to carry messages. Antecedent character before commission of the crime shall be taken into consideration.

The convict had not shown that he had clean hands. He took leave of the deceased and his brother only to come back putting on a pair of trousers with a knife in his pocket which he used to stab the deceased on the chest. There was some form of planning and readiness. He had put himself in a challenging mood. It was childish for him to do what he did. He had the opportunity to avoid the

enemies. But he braced for any eventuality. And indeed, his action was a direct consequence of his preparedness.

For the convict to be given the position of head boy means that trust was reposed in him. He was supposed to instil discipline in other students. He must have been a reliable student.

In **Mapopa Nyirenda v Republic (2011) MWHC 4,** the court held 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.

Obviously the convict was expecting trouble or attack and he was outnumbered. We cannot assume that there was an alternative route for him to take. The absence of trial record makes it impossible to fill existing gaps. As such, on the evidence available, the court will tilt towards exercising lenience on the convict who was quite young at the time of committing the crime. He deserves to be given an earlier opportunity to live life outside prison. His character before and after the crime and conviction is worth considering.

I have considered some cases such as the **Republic v Alfred Galimoto Sentence- Re-hearing Cause No. 43 of 2015** (unreported) in which the convict during the course of a brawl, fatally stabbed the deceased using a knife which the deceased had drawn and used to stab the convict on the arm. The convict received a sentence of 22 years imprisonment, resulting in his immediate release. Obviously in this case self- defence as a mitigating factor may have played a big role to reduce sentence.

In **Republic v Keyaford Malata Sentence Re-hearing Cause No.32 of 2015** (unreported) the convict had similarly killed the deceased using a panga knife. He was sentenced to 25 years imprisonment after the court's finding that the offence was premeditated since the convict had to go home to fetch the knife.

In **Republic v Mavuto Elias Sentence Re-hearing Cause No. 44 of 2015**(unreported) the convict was attacked by a group of people on his way home. In retaliation, he fatally used his pocket knife to defend himself. Having already served 21 years, the court gave him a sentence that resulted in his immediate release. Again here is a person who was overwhelmed and used the knife more likely in self-defence.

Death sentence should be imposed in the worst of the worst of cases and this one is not such. The cases cited by the defence above did happen in circumstances almost like the present case. Here, the convict foresaw the attack or provocative acts and so he pre equipped himself with a knife in his pocket which he used to stab the deceased. He knew or must have known what harm the knife was capable of doing. He should own the consequences.

In view of the above, this court metes a sentence of 22 years imprisonment from the date of arrest.

**Pronounced** in open court this 4th April, 2016 at Zomba High Court.

M L Kamwambe
**JUDGE**