



**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY (SITTING IN ZOMBA)
SENTENCE RE-HEARING CAUSE NO. 10 OF 2016**

THE REPUBLIC

V

STEVEN JERE, ALIJENTI NGULUBE AND VINCENT NGULUBE

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

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

Mr Ndende, of Counsel for the Convicts

Miss Chimang'anga, Official Interpreter

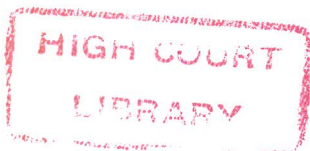
Mr Mutiuti, Court Reporter

ORDER ON RE-SENTENCING

Kalembera J

INTRODUCTION

The convicts, Steven Jere, Alijenti Ngulube, Vincent Ngulube and six others were jointly 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 YONA NGULUBE, BLACKSON NGULUBE, MICHAEL NGULUBE, DIGA NGULUBE, MATEYU GRAVE NGULUBE, OSMAN NGULUBE, VINCENT NGULUBE, STEVEN JERE and ALIJENTI NGULUBE on or about the 16th day of November, 2002 at Magudubula Village, in the District of Mzimba with malice



aforethought caused the death of PATSON NGULUBE. After a full trial by jury before the High Court sitting in Mzimba, Blackson Ngulube and Mateyu Grave Ngulube were acquitted; Yona Ngulube, Michael Ngulube, Diga Ngulube and Osman Ngulube were convicted of manslaughter, whereas the three convicts herein were found guilty and convicted of murder. And pursuant to section 210 of the Penal Code (now amended) were sentenced to death. Prior to the amendment to the said section 210 of the Penal Code, the section imposed a mandatory death sentence on 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.

ISSUES FOR DETERMINATION

The main issue for determination is mainly what sentence to impose on the convicts in the circumstances of this case.

CONSIDERATIONS ON RE-SENTENCING

I am mindful of the mitigating and aggravating factors which have been submitted from both parties. I am further mindful that at re-sentencing, the court is actually putting itself back in time, that is, the time the convicts were convicted, and what the court should have considered at that time if there was no mandatory death sentence for murder.

Aggravating Factors

It has been submitted by the State that a life was lost and this loss is irreparable. And that the deceased was a responsible person, a husband, a father and that a

number of people and his children depended on him. Further the State submits that the matter was committed in the course of compelling the deceased to submit to an alleged witchcraft practice which is a prohibited conduct under the Witchcraft Act. The State further submits that the fact that a more than 9 people were involved in the attack is itself an aggravating factor. It was unprovoked conduct and that a weapon was used.

Mitigating Factors

Counsel for the convicts has submitted that the convicts were only carrying out orders of Sub Traditional Authority (STA) which all members of the village, except the deceased, adhered to. Therefore they were only enforcing the orders of the STA. As to the use of the weapon the convicts were un armed when they confronted the deceased. It has further been submitted that maximum sentence ought to be reserved for the worst offenders and that the convicts are not the worst of offenders. Their ages at the time ought to be considered as well, Steven Jere was only 18 years old. They were all first offenders, and they have already spent 14 years in prison. Their good conduct in prison has also been highlighted and the fact that their community is ready and willing to accept them back. Furthermore, that the convicts have always been remorseful.

LAW AND ANALYSIS

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 these convicts are not the worst kind of offenders and therefore do not deserve the maximum sentence. What then, would be an appropriate sentence?

In the matter at hand, I have considered the aggravating and mitigating factors as submitted by the parties. I have further observed that both parties agree that the convicts are not the worst of offenders and that they do not deserve the maximum sentence. It has also not escaped my attention that this offence was committed as a result of beliefs in witchcraft. In the case of **The State v Laston Mukiwa, Homicide (Sentence Re-hearing) Cause No. 21 of 2015** this court stated its views on beliefs in witchcraft as follows:

“ 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 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. ”


I have therefore taken into consideration that the convicts truly believed in witchcraft. However, they acted in a group, and a weapon was used.

CONCLUSION

All in all I do agree with both parties that these convicts are not the worst of offenders. They do not deserve the maximum sentence. The sentence of the court, 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 herein are first offenders. They led an exemplary life up until they committed this offence. They cannot be said that they are a threat to society as they are not repeat offenders. However, this is a serious offence and the damage they caused, by taking the deceased's life, is

irreparable. Furthermore, they acted in a group and used a weapon in assaulting the deceased. 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 convicts are not the worst of offenders, I consider a sentence of 20 years imprisonment with had labor an appropriate sentence. I consequently sentence the convicts to 20 years imprisonment with had labor. The sentence to run from the date of their arrests.

PRONOUNCED in open Court this 29th day of September 2016, at the Zomba District Registry.



S.A. Kalembera

JUDGE