IN THE HIGH COURT OF MALAWI
CRIMINAL DIVISION
SENTENCE RE-HEARING CASE NO. 22 OF 2016

BETWEEN

THE REPUBLIC

-V-

GIFT NGWIRA

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 s210 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 **McLemoce 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 6th 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-healing No. 25 of 2015 and lately in Republic –v- Thom Pofera Sentence Re-healing 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