



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

SITTING AT ZOMBA

HOMICIDE (SENTENCE RE-HEARING) CAUSE NO.23 OF 2016

THE REPUBLIC

-v-

WISEMAN KWANUNKUTI PHIRI

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

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

Mr Ndende, of Counsel for the Convict

Miss Chimang'anga, Official Interpreter

Mrs Pindani, Chief Court Reporter

ORDER ON RE-SENTENCING

Kalembera J

INTRODUCTION

The convict, Wiseman Kwanunkuti Phiri, was on 17th August, 2000, before the High Court, with a jury, sitting at Lilongwe, charged with two counts of murder contrary to section 209 of the Penal Code. These murders were committed in the course of a robbery. He was found guilty on both counts and convicted. Consequently, he was 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.

ISSUES FOR DETERMINATION

The main issue for determination is what sentence ought to be imposed on the convict considering the present developments in the law.

RE-SENTENCING CONSIDERATIONS

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.

In order to achieve these objectives the court has to consider both aggravating and mitigating factors. Both parties have submitted factors for the court to consider in arriving at an appropriate sentence to be imposed in this case. The convict has further submitted that the court must also take into considerations circumstances of the convict in prison or post-conviction. On the other hand the State is of the view that such considerations should not be taken into consideration.

In the case of **The State v Alex Njoloma, Homicide (Sentence Re-hearing) Case No. 22 of 2015** this court had this to say:

*“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, the views of the Prison Chaplain, the views of his family and community, as well as his health. These considerations would have been paramount.”*

Counsel for the convict has strongly submitted that the court must consider circumstances of the convict post his conviction and sentencing. I do sympathize with the convict. However, I still feel that the solution to this dilemma is to impress upon the Attorney General to speed up the passing of the new Prison Bill, which must include a parole regime. That would ease the confusion of having the court play the role which ought to be played by a parole board. The court must always be mindful of the fact that, we are conducting re-sentencing because at the time of the original sentencing it was just mandatory to sentence murder convicts to death. If the law was as it is now what would have been an appropriate sentence to impose on the convict? That is what the court is being asked to address now. Hence the court must consider the circumstances of the convict at that time.

Aggravating Circumstances

It has been submitted that the court must consider as aggravating the fact that this is a very serious offence, more so that two people lost their lives in the course of the robbery committed by the convict and others. Further, that the court must consider that the convict and his accomplices had dangerous weapons, that is, guns which were used in the commission of the crime.

Mitigating Circumstances

It has been submitted that the court must take into consideration the fact that convict participated in the commission of the offence under duress, to wit, at gun

point. Hence, the court must further consider that there was no pre-meditation, as the convict was only hired to drive the robbers/murderers. The court must further consider that he was a young man when he committed this offence. He is now 48 years old. Furthermore, the court must consider that he cooperated with the authorities in that he personally reported the offence to the police and handed himself when required to appear at the police.

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. It has been heard that the maximum sentence must be reserved for the worst offender. 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 have considered the mitigating and aggravating factors raised by either party in this matter. I have further considered the circumstances of the offence and the convict, as well as the fact that two lives were lost, and the serious nature of the offence. I have further considered that the convict was a first offender and he likely acted under duress. I have further considered that the punishment must fit the crime and the convict, be fair to society, and be blended with a measure of mercy – see **Rep v Shauti, Confirmation Case No. 175 of 1975**. I have considered that the maximum sentence must be reserved for the worst offenders. I do agree with submissions from both parties that the convict herein is not the worst offender, and

that he does not deserve the maximum sentence but a term of imprisonment as the court determines.

CONCLUSION

All in all, irreparable damage was caused in that two lives were needlessly lost. However, I have seriously considered that the convict was not the main perpetrator and that he was an unwilling participant. In the circumstances, I consider a term of 22 years imprisonment with hard labor as 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. The convict still retains the right to appeal against this sentence.

PRONOUNCED in open Court this 8th day of August 2016, at the Principal Registry, sitting at Zomba.



S.A. Kalembera

JUDGE