IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRMINAL DIVISION
HOMICIDE SENTENCE RE- HEARING N0.28 OF 2016

THE REPUBLIC

- V

MICHAEL KHONJE

Coram: Hon. Justice M L Kamwambe

Mr Nkosi of counsel for the State

Mr Mwakhwawa of counsel for the convict

Mr Phiri ...Official Interpreter
Mr Mutinthi...Recording Officer

SENTENCE

Kamwambe J

Court sat to re-hear sentence on the 14th July, 2016 following the order of the case of **Kafantayeni and others -v- The Attorney General** Constitutional Case No. 12 of 2005 which is supported by the case of **Mclemoce Yasini -v - The Republic MSCA** Criminal Appeal No. 29 of 2005 by making remarks as follows:

> *"The Court clearly ordered that the Plaintiff were entitled to a resentence 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 pro visions 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 *never 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."

The court is enjoined to consider individual circumstances of the convict, circumstances of the crime and public expectation. The court record is missing as such it is difficult to consider in circumstances surrounding the murder itself. All we will have is the word from the convict. That the record is missing is not the fault of the convict, therefore, the convict should not be put at jeopardy but would rather benefit out of it. The deceased was found dead about 14 kilometres from the home of the convict and there were no eye witnesses. On 27th September, 2005, he was sentenced to suffer death by the High Court sitting at Mzimba. The convict is still under death sentence in the condemned section of Zomba Central Prison.

The few known facts from the caution statement are that he and others agreed to rob the deceased. The convict said that the plan was to steal and not kill. However, the robbery went wrong as the deceased struggle d and Mbewe who was granted bail and is now believed to be in South Africa, produced a knife and stabbed the deceased on the neck. The convict says he did not know that Mbewe carried a weapon and that he was only a spectator to Mbewe's assault of the deceased. Soon afterwards, the deceased died. The body was discovered on the 26th April, 2004 on the day the mother of the convict passed on. Immediately after his arrest the convict made a full confession to the police and gave a caution statement revealing what happened. He led the police to

the crime scene and provided officers with details of accomplices. The police arrested Moses Moyo who later was granted bail and did not attend trial. The officers confirmed that they could not apprehend Mbewe and Phiri since they had vanished. The convict has now served about 12 years and 4 months in prison.

I have said it time and again that it is the duty of the State to exclude the possibility of a death sentence. Once the State says death sentence is not warranted the court's inclination is to impose a life sentence **(R -v- Samson Matimati Criminal Case No. 74 of 2008).** But again there may be arguments militating against life sentence, in such a situation, a term sentence becomes inevitable.

At the time the convict committed the offence together with older people he was 17 years old. He was the youngest in the group. He had just sat for his MSCE examinations which later he passed. He was arrested three days after the death of his mother the only parent he knew and had. He never knew his father. When his mother later married, the step-father never minded about the convict. Unfortunately, his mother died when he was still a juvenile.

The defence is of the view that Mr Khonje was convicted because the prosecutor explained to the jury that Khonje could properly be convicted of murder *"even though he didn't actually* do *it" .* The directions that matter most are those of the judge which must be followed by the jury and not opinions of counsel when making submissions. In the absence of full record it is difficult to agree with the defence. On the other hand, this could have arose as a matter of appeal, hence, I cannot attend to it now.

Courts are guided by known factors that influence a court to arrive at a particular sentence. These are factors that either mitigate or aggravate the sentence. Some factors are controversial others are readily accepted by all practitioners and courts. This

court is going to consider some of them although circumstances of the crime are uncertain.

There is no controversy that the convict was 1 7 at the time he committed the offence. The law favours the young and the old **(Republic -v- Ngambi (1971 - 1972} ALR Mal @457).** In this case the convict was not just young, but was a juvenile. So, instead of being a young offender he was a juvenile offender who should have been treated specially. It is important to draw the distinction. Again this would have been another ground of appeal if opportunity arose. It has been suggested by some courts that young offenders of serious offences should not deserve leniency. However, it is now an established practice to accord them leniency because of their immaturity and lack of experience in the ways of the world, and that at this stage the young tend to be more adventurous in life as they grow **(Rep v Keke Confirmation Case No. 404 of 2010 and Rep v Mayeso Su kali & Duncan Chidika Criminal Case No. 2 1 of 2011).** That the convict was a juvenile will require a bigger measure of leniency in the circumstances. I will definitely take this into account.

The other factor is that the convict is a first offender who should benefit from the court's lenience. I have read affidavits of convicts aunt and uncle to the effect that the convict lived an almost impeccable life, and that he was very obedient. It was great surprise that he was arrested for committing this crime. May be the sickness of his mother who was at the verge of death caused in him mental and emotional instability. The mother is all he had according to him. He was on the quieter side and rarely mixed with others. More likely, the older accomplices influenced him to join them on this criminal errand and that he may have not appreciated what he was entering into. I will take into consideration that he is a first offender who was going through the most troubled and turbulent life as a juvenile when his mother's death was glaring into his face.

Dr Woods ' report would come in handy at this stage when he says that the convict may have started that time when the mother was sick of AIDS developing mood disorder whose symptoms are *"depression", "poor judgment" , "grandiose thinking" and "changes in speech pattern" .* This is supported by relatives of the convict who say that the convict was very depressed and not himself during this period. I am convinced that he suffered psychological disorder and the court will lean towards leniency.

Another factor is that he has already spent 12 years in custody on death row expecting the death sentence to be implemented any time. This can be traumatic. After three years of custody on death row his sentence should have been commuted to life. This is the most just thing to do to avoid injustice being perpetuated on the convict without unnecessarily staying too long a period without the death sentence being carried out. In **Attorney General** - v **Kigula** Constitutional Appeal No. 3 of 2006, 55 (Uganda 2009), the Ugandan Supreme Court found that a delay of over three years 'would normally render a sentence of death inhuman and unconstitutional. In **Henfield** - v- **Attorney General of Bahamas** [1997] AC 413, the Privy Council found that a delay of about three and a half years amounted to inhuman treatment. In **Republic** - v **Edson Khwalala** Sentence Re-hearing No. 70 of 20 15, the convict had been under death sentence for ten years in respect of the second of the two murder offences. The court said as follows:

> *"One should not stay* a *long time under the weight of death sentence before it is carried out since one is always haunted by it. One* becomes a *living corpse. This is* a *ghastly experience*
>
> *It is not proper that the convict* was *not considered for sentence commutation in* good *time. The court will take into consideration this psychological suffering that he underwent."*

It is not good sense to order a juvenile or child offender to suffer death. At least, some other measures of punishment should have been employed. Legally, section 11(1) of the **Children and Young Persons Act** which was applicable then provided that:

> "a *sentence of death shall not be pronounced on or recorded against* a *person under the* age *of 18 years, but in lieu thereof, the court shall sentence him to be detained during the pleasure of the President, and, if* so *sentenced he shall, notwithstanding anything in the other provisions of this Act, be liable to be detained in such place and under such conditions* as *the President may direct."*

It is surprising that the convict was sentenced to suffer death when the law did not allow it.

I have always said that we cannot give the appalling conditions of our prisons a blind eye. It would be living in denial. When one is sent to prison to suffer a term of imprisonment, the poor prison conditions become another punishment. This is not good management of inmates. In **Gable Masanganio** -v- **Republic** Constitutional Case No. 15 of 2007, the Constitutional Court held that the chronic overcrowding in Malawi's prisons violates basic human dignity, is unconstitutional, and falls below international minimum standards. A meal a day is not uncommon, in fact, the list goes on. Since there is no compelling reason persuading me otherwise, I will naturally take this into consideration in sentencing.

This court will also consider the absence of specific intent to kill as a mitigating factor. I applied this approach in **Republic** - v **Chiliko Senti** sentence Re- hearing Cause No. 25 of 2015 where I found that Senti may have intended to threaten and cause harm to the group, but he did not premeditate to cause death.' On this basis I imposed a sentence of 23 years imprisonment. The same

approach was followed by Justice Nyirenda in **Republic** -v - **Richard Maulidi a nd Julius Khanawa** Sentence Re-hearing No. 65 of 2015.

It is submitted that about 10 years the convict appealed against conviction but his constitutional rights of appeal and to have access to jus tice have since been violated (see sections 41 and 42 (2) (f) (viii) of the Constitution) . It is said in **R - v - Geofr ey Mponda** Sentence Re-hearing Cause No. 68 of 2015 that where there was inordinate delay to process the appeal which led to a constitutional violation, ' the duty of the court to provide an effective remedy is to order the immediate release of the defendant'.

For once the State has come out as expected by mentioning it that a sentence of life would be too harsh considering the mitigating factors. They even suggested that a proper sentence would be one not over 15 years of imprisonment.

The factors I have considered are enough to bring me to a just and fair sentence after also considering that his level of participation in the crime of murder was not much even if it was a joint enterprise. Suffice to say I should not delve much into this, but that he was a juvenile on who a death sentence should not have been pronounced, and in the face of the constitutional violations mentioned above, *inter alia,* as such, I consider a sentence that will lead to his immediate release as a fit sentence in the circumstances, and I so order.

Pronounced in Open Court this 7th day of October, 2016 at Chichiri, Blantyre

M L Kamwambe
JUDGE