

Sentence Re-hearing No. 7 of 2017



THE REPUBLIC

-v-

JACK MAKASU

AND

DANIEL TEPUTEPU

Coram: Hon. Justice M L Kamwambe

Salamba of counsel for the State

Chirwa of counsel for the Convict

Amos..... Official Interpreter

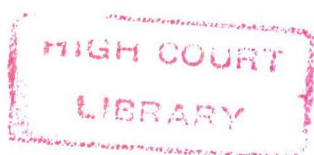
SENTENCE

Kamwambe J

Jack Makasu and Daniel Teputepu were convicted of murder and sentenced to suffer the mandatory death penalty by the High Court sitting at Zomba on the 25th day of September, 2005. The case of **Francis Kafantayeni and others –v- The Attorney General** Constitutional Case No. 12 of 2005 (unreported) ordered that all convicts suffering a mandatory death sentence be re-heard on their sentences since the respective death sentences were declared unconstitutional. This is the exercise being undertaken now 9 years after the **Kafantayeni case** gave the order.

The facts of the case are not available because the High Court record is missing and cannot be retrieved. This makes it difficult to consider what really happened at the time of commission of the crime. We will do with this limitation. All we know is that the convicts together with Makina Pondani who was acquitted, now deceased, were involved in a night robbery which resulted into the death of Stewart Likagwa in 2001.

The particulars of the offenders are that the 1st convict Jack Makasu, is a family man with one child. He worked as a mechanic in Blantyre from where he was able to send money back to his village to support his wife and son, Justin. He



has been on death row for over 11 years. He was arrested in December, 2001. At the time of the alleged offence the 1st convict was 27 years old.

The 2nd convict Daniel Teputepu was arrested on 6th May, 2003 and thereafter he spent 11 years on death row. He was 28 years old at the time of the alleged offence.

The State has come out openly that the convicts do not deserve a death sentence or life imprisonment. This excludes the imposition of death penalty. It is difficult for me to consider life imprisonment in the absence of a court record, as such, in the circumstances it is proper to consider term sentences. Maximum sentences must be reserved for the worst of offenders in the worst of cases. In **Republic –v- Jamuson White** Criminal Case No. 74 of 2008 (unreported) the court emphasised that the death sentence must be reserved for the ‘rarest of rare’ cases.

The convicts being 27 and 28 respectively at the commission of the crime cannot be said to be young persons who are immature in the ways of life. They were big enough to appreciate what they were doing and the consequences thereof. In my view they are past the age when one may be considered for a lenient sentence due to young age.

Since there is no record that Teputepu was a repeat offender I will take him as a first offender. Jack Makasu has put it in his own affidavit that he was arrested initially and convicted of burglary. This will militate against him. The law favours the young and the old.

Often times the court has considered the appalling prison conditions in Malawi which are declared to be below acceptable international standards, hence this has passed as a general mitigating factor (see **R –v- Chiliko Senti** Sentence Re-hearing No. 25 of 2015. Apart from one being secluded from society, to experience and live life in prison in Malawi is surely a punishment on its own.

Courts should be able to consider good behaviour in prison at resentencing stage regardless of the fact that the prison authorities shall at the right time consider remission period. Good conduct in prison coupled with diligence and capability to take up responsibilities are strong indicators that the convict has reformed or is capable of reform and that he would integrate in the community successfully and be a worthy citizen.

Murder is a serious offence and that should be demonstrated by a corresponding sentence. However, due to the missing file the circumstances of the crime are not known. This should not necessarily disadvantage the convicts. Counsel for the State wants a stiffer punishment all the same because this murder was committed in the course of committing a robbery, unlike a death after a beer squabble. In the present case there was premeditation and proper planning. A group of offenders was involved which is an aggravating factor. Counsel asks the court not to show lenience even though the convicts may be first offenders.

The court will take into consideration the long stay on death row since 2005 which was really torturous experience. This is termed as “suffering from death row phenomenon”. This describes the anxiety, dread, fear and psychological anguish that may accompany long-term incarceration on death row. Further, the convicts were not referred to sentence re-hearing according to the dictates of the Kafantayeni case in good time. They allowed about 9 years to pass by, which is a constitutional breach. This was unfair treatment of the convicts. Relations of the deceased advise that they should not be released soon.

The State is of the view that the 2nd convict mental suffering is not reason enough justifying early release but justifies his retention in prison since convict is near the Zomba mental hospital.

In **R –v- Samuel Nzunga & others** Sentence Re-hearing No 37 of 2016 the three convicts committed murder in the course of a robbery. They had been in incarceration for 18 years and the court sentenced them to a sentence that resulted to their immediate release due to the fact that they did not actively participate in the murder.

In **The Republic –v- Richard Nyirenda** Sentence Re-hearing Cause No.31 of 2016 the convict and six others committed a murder in the course of a robbery/theft. They went to steal tobacco when they met the guard of Kasungu Flue Cured Tobacco Authority whom they killed. The convict had been in incarceration for just over 16 years and he was given a sentence that resulted in his immediate release. The court considered his little participation in the murder.

In our present case the circumstances of the case are not known. The convicts have been in custody for 11 years under death row. In view of the above I

sentence the 1st convict to 27 years imprisonment as a repeat offender and the 2nd convict to 24 years imprisonment.

Pronounced in Open Court this 1st March, 2017 at Zomba.

A handwritten signature in blue ink, appearing to read 'M L Kamwambe', written in a cursive style.

M L Kamwambe

JUDGE