REPUBLIC OF MALAWI
MALAWI JUDICIARY
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CRIMINAL CASE NO. 68 OF 2014

THE REPUBLIC

v

LEONARD KARONGA

CORAM : MWALE, J.

: The Hon. Director of Public Prosecutions, Mrs Mary Kachale, Counsel for the State
: Theu, Counsel for the Defendant
: Kaferaanthu, Court Interpreter
: Jere, Court Recorder

Mwale, J

SENTENCE

A. FACTS

1. Leonard Karonga, hereinafter "the convict", was found guilty on his own plea on 27th August 2015 for events that occurred between 1 April and 30 June 2013, in the City of Lilongwe. The guilty plea was in relation to three counts within the category of embezzlement offences involving Government funds that have notoriously come to be known as "cash-gate" offences. All the three counts involved fraudulently obtained cheques drawn on the Reserve Bank of Malawi that were either laundered through the acquisition of valuable assets or paid to bogus contractors for goods and services allegedly supplied.

2. There are a number of striking features about this case. First and most glaring, is the sheer magnitude of the figures involved in the offences. In the first count, Conspiracy to Defraud, contrary to section 323 of the Penal Code, a sum to the total value of not less than MWK1 billion was paid to bogus suppliers of goods and services. In the second count, Facilitating Money Laundering, contrary to section 35(1)(d) of the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act, involves a sum of MWK520,000,000, used in the acquisition of six Marco Polo Torino buses. In the last count, Money Laundering, contrary to section 35(1)(c) of the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act, involving a sum of **3 billion, two hundred and fifty-two million, two thousand and twenty-five Malawi Kwacha (MWK3,252,002,025.00)**.

3. Equally remarkable is the fact that this is the first high profile case in which a cooperating defendant has appeared for sentence after executing a Witness Assistance Agreement and given evidence in accordance with it. The convict not only pleaded guilty to the offences with which he was charged, but he has also rendered substantial cooperation to agencies of the State prior to his sentencing.

B. BACKGROUND

4. An additional striking aspect about this case is the length of time it has taken from the time the convict first appeared in court, to the final disposition of the matter. Whilst the process may appear inordinately lengthy, it was justified and could not have been avoided. From the conviction in August 2015, a number of issues arose that prevented the Court from immediately proceeding to sentence the convict. Briefly, after the State filed its Submissions on Sentence in October 2015, the Defence responded by not only filing a Mitigation Statement, they subsequently filed a Witness Statement (in Support of Mitigation Statement) in November 2015. The State took issue with the facts set out in the Witness Statement and filed a Skeletal Response to Mitigation Statement in February 2016, followed by a Written Objection of Aspects of the Defence Facts in Mitigation. In the court appearances that interspaced these pleadings, the issue that occupied the parties was that although the convict had pleaded guilty and originally accepted the State's narration of the facts, the version of the facts set out in subsequent Defence pleadings departed in material respects from that of the State.

5. This significance of this difference is that the Defence version of the facts, if accepted, would have led to a more lenient sentence than a sentence imposed on the basis of the facts as narrated by the State. This being the case, I ordered the parties to proceed by way of a "Newton Hearing", so that evidence could be tendered to support the different views and the convict could enjoy any benefit that could be derived from his version of the facts that emerged from such a hearing. The Newton Hearing procedure being relatively unused in our jurisprudence, gave the parties some degree of consternation. In consequence, I had to issue detailed directions on procedure and this in itself required numerous adjournments for the parties to comply.

6. However, before the parties could fully comply with Court directions on procedure, yet another issue arose. In April 2016, the Honourable Director of Public Prosecutions applied for an order to compel the Anti-Corruption Bureau to hand over to her office, documents seized from the convict's house upon arrest. The reason for the application was that some of the issues raised by the Defence in mitigation could be proved if these documents were produced in evidence. The order was duly granted, and the Anti-Corruption Bureau complied in July 2016.

7. Between August 2016 and December 2016 several court appearances followed as the Prosecution and the Defence went through preparatory processes which would have ended with the parties cross-examining each other's witnesses. Conversely, in keeping with the twists and turns that have characterised this case, when the parties next appeared in January 2017, they requested an adjournment as they were in the course of discussions which if fruitful, would resolve the dispute without recourse to a Newton Hearing. At the next hearing in March 2017, the Prosecution and the Defence submitted in agreement that a compromise had been reached. The time taken in discussion proved fruitful. All the creases and crinkles that had plagued the determination of what the actual facts in this case were had been ironed out during the time the parties had to discuss the issues. As such, it was no longer necessary for the parties to proceed by way of Newton Hearing.

8. According to the Director of Public Prosecutions, the numerous hearings, adjournments and the orders and directions of the Court prior to this point, had not been a waste of time. In fact, as she submitted, procedural guidance had been provided in what was, at

this point, unchartered territory at the level of the offences before the Court. While the Newton Hearing did not proceed in this case, the guidance provided would be useful in the future conduct of similar cases. Although both parties hailed the usefulness of the material that had emerged during the previous hear and subsequently filed in the course of their preparations for the Newton Hearing, it was now their position that whilst the Court could note its existence for the purposes (and the circumstances in) which it was filed and the contribution it made to resolving the conflicts, the Court was now to disregard its substance.

9. It was only after that joint submission in April 2017 that the parties were finally ordered to file pre-sentencing submissions indicating the agreed facts on which sentence would be decided. Both the Prosecution and the Defence filed their individual Amended Submissions in June 2017. The parties also jointly filed Submissions and appeared to make oral submissions in June 2017.

10. The long period of time it has taken between June 2017 and now, March 2018 when the Sentence is being passed has been due to my leaving the jurisdiction in July 2017 on study leave. Whilst I had endeavoured to finalize my judgment on sentence much earlier, technical difficulties and the exigencies of my situation impeded all my efforts. I can only apologize on record for the delay.

C. THE EFFECT OF THE "PLEA BARGAIN"

11. Another significant novelty manifests itself in this case. The convict has after his guilty plea, through a process of negotiations with the Prosecution earned himself the singular distinction of being described as a "cooperating defendant". According to the State's Submissions:

> This is the first case in which a cooperating defendant has appeared for sentence after executing a Witness Assistance Agreement and giving evidence in accordance with it, in a high-profile case, which saw him being cross-examined by numerous defence counsel. The State acknowledges his fortitude in delivering his side of the agreement, in the face of pressure from third parties in a very stressful situation. The precedent which it will set is hoped to encourage others to break ranks and disclose criminality of themselves and others, in the fair expectation that their contribution to confronting the forces of organised crime will be reflected in their own sentences. Disruption and dismantling of organised crime groups depends upon participants seeking redemption and leniency in coming forward, at personal risk, to assist the law

> enforcement and prosecution agencies in their task. In this to date unique case, the States hopes to have objectively assisted the Court in its difficult role of meting out the right sentence for the Defendant and the public of Malawi.[1]

The State goes on to say as the convict is,

> Malawi's second formally engaged Assisting Offender (or Co-operating Defendant) but the first who has given evidence for the State in a criminal trial before being sentenced. Therefore, his sentencing raises novel issues in Malawi sentencing jurisprudence.

Thus, according to the State, the information provided by the convict has gone beyond what was known by the State and even further incriminates the convict himself.

12. In sum, what the State is seeking is guidance on "plea bargaining" so as to provide a future framework for the operation of negotiations with "cooperating defendants." The issue of "plea-bargaining" is one that has been constantly highlighted in the State's submissions, both oral and written. In the aftermath of cash-gate which has heightened public interest in the conduct of the judiciary and the prosecutorial organs of the State in these serious fraud cases, it is very important for the purposes of transparency that the reasons for seeking or imposing a sentence that is lower than usual are clearly set out. The State has in this case sought a lower sentence than would otherwise be appropriate in cases of this nature, in view of the convict's cooperation. The State is, I presume, honouring its part in a "bargain" in which the convict pleaded guilty and provided information on the basis that some concessions would be made by the State to his benefit. The State now beseeches the Court to acquiesce to the bargain. A task, I might add, that is not as straightforward as it appears.

13. One of the difficulties of this task arises from the lack of set standards on plea-bargaining in both statutory law and the common law. Although bargains between the prosecution and the defence are common in Malawi, especially in homicide cases, these bargains, entirely informal, always occur outside the formal court process. The process is never brought to the attention of the court and therefore there is no official record of existence and their impact on our jurisprudence. The Criminal Procedure and Evidence Code by virtue of the 2010 amendments makes reference to plea-bargaining however it

[1] Page 2 of the States Amended Submissions on sentence

neither defines nor regulates the practice. Rather, the Criminal Procedure and Evidence Code has in section 252A given the Chief Justice authority to make rules governing the practice of plea bargaining.

14. Ordinarily, when legislation is entirely silent about a subject matter, the only danger a judge who endeavors to add clarity and fill in the gaps is faced with is that he could be arrogating to himself or herself the powers that Parliament (or a delegated authority) should perform. There are however more arguments in favour of judicial intervention in instances where there is a gap in legislation than there are in instances where the legislature is aware of the gap and has expressly given the power to fill in that gap to a particular office. Attempting to fill in the gap by anybody other than the named authorized power must certainly be unconscionable. I have every confidence that the office of the Chief Justice will look into the issue with due expediency so that a proper legislative framework for the conduct or the operations of plea bargaining is developed.

15. Notwithstanding the absence of a regulatory framework, some kind of a plea-bargaining arrangement has been reached in this case and I have been made aware of it. The dictates of transparency in the delivery of justice oblige me to address the implications of this arrangement on the final outcome of this matter. My role is in this respect is not only to scrutinize those aspects of the bargain which intersect with my powers of decision-making but also to address any issues critical to the dispensation of justice in this matter.

16. A review of the position of various jurisdictions is necessary at this point to assist in gaining an understanding what factors stand out in their respective systems on the impact of the agreement to the judicial decision-making process. The level and the stage at which different courts are involved in such processes also provides important insights. The different practices also give some indication of how any potential

incursions into the rights of the accused from undue influence or pressure in his or her plea are to be avoided.

17. Therefore, beginning with a jurisdiction famous for plea bargaining, the United States of America, what emerges is that aetiology of such agreements is important to understanding the practice there which makes adapting the practices there very difficult. Plea bargaining in the US is based on its court structure and the discretion and powers that prosecutors possess on sentencing recommendations. Plea-bargaining arrangements in the US have been recognized since 1970[2] and are conducted under the watchful eye of the courts. If the terms of the bargain are unfair to any party and would prejudice the rights of the accused person to a fair trial, the bargain is not legally binding[3]. The practice of state courts and even state legislation encourages judges to play a role in safeguarding the rights of the accused. Consequently, all plea bargains must be approved by a judge to be considered legally binding.

18. The United States Supreme Court has gone further in two landmark decisions, ***Missouri v Frye***, 132 S. Ct 1399 (2012) and ***Lafler v Cooper***, 132 S. Ct.1376 (2012) to pronounce firmly on the rights of the accused to a fair trial during the plea-bargaining process. As a result of these two cases, the right of an accused person to a fair trial with reference to the right to adequate assistance of counsel can no longer be defined or enforced without taking into account the central role plea-bargaining plays in securing convictions and determining sentences.

19. Canada also has a plea-bargaining arrangement that is performed under the court's scrutiny. The negotiations within this arrangement, called a "resolution discussion", are overseen by a pre-trial judge. The pre-trial discussions are mandatory and use structured forms, procedures and practice memoranda issued by the courts. With regard to the position on sentence, both the prosecution and the defence present a joint position to the court. The jointly agreed sentence can only be rejected by the court "*if*

[2] United States Supreme Court declared plea bargaining as a constitutional way of disposing of a criminal matter in the case of ***Brady v. United States***, 397 U.S. 742 (1970).

[3] The United States Supreme Court decided in ***Santobello v. New York***, 404 U.S. 257 (1971), 261 that the defendant's sentence should be vacated because the plea agreement had been violated. More specifically, the U.S. Supreme Court established that, in order for a plea bargain to be legally valid, both the prosecutor and the defendant must honor the terms of the agreement.

it is satisfied that the proposed sentence is disproportionately lenient", or in the words of the court in ***R v Dorsey***, (1999) 12 OAC 3d342 Can.Ont.CA, "*would bring the administration of justice into disrepute.*"

20. Drawing from a different jurisdiction, Australia, plea-bargaining is not a process in which the court has any formal role.[4] The plea-bargaining process is neither recognized nor controlled by legislation. This is because the prosecution in Australia, just like in the United States, has very wide discretionary powers which allows them to decide the charges and the manner in which they bring them. The prosecution in Australia used to be able to submit to the court not only suggestions as to the type of sentence, but also the appropriate quantum. Since the decision of the High Court of Australia in ***Barbaro v The Queen***, (2014) 253 CLR 5d,76 (Austl.), the practice has been prohibited, the highest court in the land having made it clear in that case that, "*it is for the judge alone to decide on sentence*". So, unlike in the United States where the prosecution also has wide discretionary powers, the plea bargain does not bind the courts which guard judicial discretion so jealously that they will not even allow the prosecution to make a suggestion as to sentence. The difference between the American position and the Australian position is therefore due to the fact that the courts in Australia have no powers of oversight on the plea-bargaining process and this is important to note in our own circumstances.

21. The last jurisdiction I shall consider is England and Wales which offers a different model from what has been discussed above and is one which we may borrow a lot from for the purposes of the case at hand. Like in Malawi, there is no process for formal plea negotiations in England and Wales.[5] The prosecution, within its prosecutorial prerogative or discretion, selects the offence and discussions with defence counsel ensue. Any bargain that is struck between the prosecution and the defence carries with

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[4] Carol A. Brook, Bruno Fiannaca, David Harvey, Paul Marcus, Jenny McEwan, and Renee Pomerance, A Comparative Look at Plea Bargaining in Australia, Canada, England, New Zealand, and the United States, 57 Wm. & Mary L. Rev. 1147 (2016), h p://scholarship.law.wm.edu/wmlr/vol57/iss4/4

[5] As above.

it no degree of certainty as to what sentence will be finally imposed because offences in England, like in Malawi, do not carry fixed sentence and sentencing is entirely at the discretion of the courts. There is also the added uncertainty caused by the fact that some courts disallow a plea of guilty where they feel that the alleged facts do not support a guilty plea. Whatever plea-bargaining is done, it is not done under the watchful eye of the court, neither is it regulated by statute hence judicial discretion reigns supreme. In such cases judicial oversight only operates after the agreement and the court has power to reject a guilty plea if such a plea violates the rights of an accused person to a fair trial. As an additional safeguard on the rights of the defendant, judicial involvement in the bargain is expressly prohibited. The reason for this prohibition is that to allow judicial participation "*could be taken to be undue pressure on the accused, thus depriving him of that complete freedom of choice which is essential*". [6]

(a) Binding Nature of the Plea Bargain

22. What is clear from all these jurisdictions is that typically, in a "plea-bargaining" arrangement, the parties may negotiate the charge(s) on which prosecution will proceed (if prosecution proceeds at all); any concessions that may be made by the prosecution in relation to sentence; and what set of facts the prosecution will proceed on for sentencing. In considering whether I am bound to concede to the State's arguments in the plea-bargain before me, the answer, in view of the findings I have documented above, is no. What comes out of the systems prevailing in North America is that the courts oversee the process which is designed to protect the rights of the accused to a fair trial. It is also clear that there must be some degree of court involvement in the negotiation process before any agreement reached under it can be considered binding upon a judge at sentencing. Such oversight therefore displaces judicial discretion and it is the tenets of the agreement rather than the discretion of the judge that determines

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[6] Judicial involvement in plea bargaining is actually expressly forbidden in the United Kingdom. As former Lord Chief Justice, Lord Parker stated in the case of R v Turner, [1970] 2 All E.R. at 285: "*The judge should ... never indicate the sentence which he is minded to impose. A statement that, on a plea of guilty, he would impose one sentence but that, on a conviction following a plea of not guilty, he would impose a severer sentence is one which should never be made.*"

the nature and quantum of sentence. Thus, for systems like those in Australia and England and Wales in which informal plea bargains are struck outside a court-led process, judicial discretion reigns supreme.

23. However, the fact that judicial discretion reigns supreme should not prevent the prosecution or any party for that matter from making a suggestion as to sentence. Counsel for the Defence has argued, citing older Malawian precedent, that it is inappropriate for the prosecution to suggest a sentence.[7] As discussed above, this is actually the position in Australia. In developing our own practice on plea-bargaining under the current limited legal framework, I neither advocate following the Australian position, nor the Malawian precedents cited above. This is not only because the Malawian decisions were made outside the context of plea-bargaining, but for the reason that judicial discretion must be exercised judiciously and this by necessity includes taking into account any submission that will assist the judge to arrive at an appropriate sentence. This position is shared by Singini J, as he was then, who stated in the case of ***Farook Patel v The Republic***, Criminal Appeal No. 81 of 2007 (HC, LL), as follows:

> I would add that sentencing is principally the province of judicial discretion, but there are many factors open to consider in arriving at an appropriate sentence to impose in any particular case.

Suggestions by the prosecution and even the defence with regard to the nature and quantum of sentence must be treated as such and are therefore among the many factors open to the judge. Such suggestions are also vital in an informal plea-bargaining climate such as our own since making them is the only way the State can honour its part in an agreement made on the condition that the State will not pursue a sentence at the higher end in terms of quantum or one of a severe nature.

24. I reiterate that the effect of the State's submissions in the case is not in any way to override judicial discretion. Like in England and Wales, the parties in a plea-bargaining agreement in Malawi as the situation stands, have to contend with the fact that there is

[7] ***Tarmahomed v The Republic***, 3 ALR Mal. 386 (H.C.) prohibits the practice of a prosecutor asking for a special sentence as it is a matter for the court to decide and the case of ***The Republic v Susa***, 1 ALR Mal. 670 (H.C.) in which the court held that a prosecutor should not express opinion on sentence

no uncertainty to the bargain. The parties are free to give and make concessions within limits of fairness and with respect to the rights of the defendant, but it is only in analyzing those factors that are relevant for sentencing that an appropriate sentence can be arrived at. The existence of an agreement means that there are more issues that the prosecution and the defence are in agreement over and this takes away the need for the Court to have to decide on issues that would have otherwise required proof. Consequently, convicts who enter into a plea-bargaining have more to gain in entering into such an agreement even if there can be no certainty of the final outcome.

(b) Safe Guarding the Rights of a Defendant in a Plea Bargain

25. The ultimate goal of a plea bargain is to secure a guilty plea this in itself makes the defendant vulnerable to manipulation and perhaps even exploitation. A critical issue in the administration of justice therefore arises from the danger posed to the defendant as great care must be taken to ensure that the prosecution does not misuse its power to offer a concession merely to induce a guilty plea. It is central to the final outcome of this case that whatever bargain was reached, such bargain was fair and ethical. It is clear from the practice in North America that the courts will go to great lengths to secure the rights of the defendant to a fair trial and will invalidate the bargain if the rights of the defendant are violated in the process. Securing the rights of the defendant is easier in these jurisdictions because the courts are involved the process.

26. Currently, the Malawi position is more akin to that in England and Wales where there is no judicial involvement in the process and there is little in the legislation to guide the process, prosecutorial self-regulation plays a very important role in safeguarding the rights of the defendant. The level of judicial involvement and the effect of the bargain on the ultimate sentence are matters that can only be cured once the Chief Justice exercises his powers and plea-bargaining rules are promulgated. Therefore, operating under the current state of affairs,, just as the Attorney General has done in England and Wales for cases of serious fraud[8], the Director of Public Prosecutions in Malawi has in

[8] Attorney General's Guidelines on Plea Discussions in cases of Serious or Complex Fraud. Attorney General's guidelines for prosecutors on plea discussions and presenting a plea agreement to the court in serious fraud cases. Published 29 November 2012. Available at https://www.gov.uk/guidance/plea-discussions-in-cases-of-serious-or-complex-fraud--8 Accessed on 17 July 2017.

the aftermath of the notorious "cash-gate" frauds found it necessary to put in place, "*Guidelines Issued by The Director of Public Prosecutions Plea Discussions in Cases of Serious or Complex Fraud and The Prosecutor's Role in Sentencing Effective From 1 May 2015*" (hereinafter referred to as the "*DPPs Guidelines*"). Rule 4 of these Guidelines requires the prosecution to reflect the seriousness and extent of the offending so that the court, the public and the victims of crime can have confidence in the process. It is thus obligatory for the prosecution to "*evaluate the impact of any proposed plea or basis of plea on the community and the victim and on the prospects of successfully prosecuting any other person implicated in the offending*". Further under rule 5, the prosecution can only accept "*a defendant's plea if sure that the court is able, on an appropriate charge, to pass a sentence corresponding to the gravity of the offending and any aggravating features.*"

27. Therefore, in as far as ensuring transparency in an arrangement that guides prosecutorial practice in a manner that is fair and ethical, the fundamentals of a framework are already in place. The primary purpose of the *DPP's Guidelines,* which have the status of subsidiary legislation is to assure the courts that the prosecution has carefully analysed the approach that the court would take in sentencing the convict and has negotiated the guilty plea in return for a sentence that is fair in all the circumstances based on the cooperation of the convict. Therefore in deciding on an appropriate sentence when evaluating all the relevant factors in a case, the court must first confirm that the State has at all times acted in a fair and transparent manner and that the rights of the convict to a fair trial have in no way been compromised and finally, that the submissions on sentence by the State adequately take into account all the relevant factors of the current offences. I would therefore urge the State in future cases in which a plea-bargaining arrangement is made to make detailed submission to the court on the process of the plea bargain so that there is no room for any doubt that the *Guidelines* were fully complied with in the plea-bargaining process, and the defendant's rights were in no way violated.

28. I would also urge defendants to not enter into any bargains unless they are sure that they have fully understood what is expected of the prosecution and that their plea is made on the basis of this understanding. It will for this reason be easier for the courts to find that the defendant has fully understood the process if he or she is represented by counsel and has been appropriately advised. This should be made clear both by the defendant himself or herself and in the submissions of his or her counsel (if the defendant is represented) . Where the defendant is not represented, the court will have to take extra care to determine this.

29. In the absence of submissions on the plea-bargaining process, in order to fully ensure that that convict's right to a fair trial has not been prejudiced I must inquire into whether the convict was pressurized into making a guilty plea. As I have presided over the matter involving the convict right from the time he was jointly charged with ***Angella Katengeza*** in Criminal Case No. 26 of 2013, which case has now been seen through to conviction and sentence, I can safely say the guilty plea in this case is supported by the facts put forward by the prosecution right from the beginning of the case. Counsel for the Defendant has perfectly articulated that the convict has at all times in the multiple charges he has faced in various courts since 2014 (before the prosecution proffered the consolidated charges for which he has been convicted of) faced a number of serious fraud charges involving theft, money laundering, wrongful procurement etc. all of the same progenitor and thus based on very similar facts. When the current lesser and consolidated charges were read out and explained to the convict in the case at hand, he clearly and unequivocally admitted to them in a manner that is clearly supported by his Amended Mitigation Statement and all the statements that have been previously filed by the Defence.

30. Further, the convict has at all times been ably represented by the same legal counsel, Counsel Theu, who has consistently demonstrated his efforts in ensuring that his client's rights were respected and that his client was not pressured to accept a bargain that was not in his interests. The length of time it took before the State and the Defence agreed on the current set of facts stands testimony of his Counsel's vigilance and diligence. I am therefore satisfied that the convict's right to a fair trial was in no way compromised in the "Witness Assistance Agreement" agreed between the parties. I

must therefore now proceed to consider the factors for sentencing against the backdrop that the convict is a cooperating defendant, as advocated by the State.

D. AGGRAVATING FACTORS OF THE OFFENCES

31. The State has in its submissions considered all the aspects of the offence objectively and to suggest a suitable range of sentence in view not only of the aggravating and mitigating features of the offence but also the assistance that the convict has provided. In coming up with the suitable range of sentence, the State has had recourse to sentencing guidelines used by the courts in England and Wales wherein the courts must take into account the harm associated with the underlying offence to determine whether it warrants upward adjustment of the starting point for sentencing within the range or in appropriate cases, outside the range. Details on how the guidelines operate are available in those cases. Briefly, depending on the level of the role the defendant played, for example, whether the defendant played a leading role in a group activity, he or she could be classified in the category of "High Culpability". If the role is lesser, the defendant is classified in lower levels of culpability such as "Medium Culpability" and "Lower Culpability" with the sentence range diminishing as the level of culpability is reduced. Despite what the defence have argued, these sentencing guidelines were argued before and approved by the Court in the case of the **Republic v Oswald Fywell Gideon Lutepo**, Criminal Case No. 2 of 2014, (HC) (Unreported) (the ***Lutepo*** case) and have been applied by this Court in the case of the **Republic v Angella Katengeza**, Criminal Case No. 26 of 2013, (HC) (Unreported) (the ***Katengeza*** case). Professor Kapindu J. was very clear in paragraph 62 of his judgment on sentence in the ***Lutepo*** case that:

> I find this three-tier analysis useful for purposes of sentencing in cases of this nature.

Citing comparative approaches for guidance in practice does not require proof. It is up to the Court to decide whether the practice cited, the citations provided for which can easily be checked from official sources of the jurisdiction in question, would be suitable in the case at hand. As Prof Kapindu J. has already found this practice helpful and indeed this Court has also used this practice in the cases of ***Katengeza*** and ***Savala***, the defence should no longer be arguing against the practice as a foreign one, as it is one which has now received affirmation in our own courts.

32. Top on the list of aggravating factors for all these counts is the amount of money involved in the offences. In my calculations the total amount of money that was embezzled from Government funds in all three counts is no less than **four billion, seven hundred and seventy-two million, two thousand and twenty-five Malawi Kwacha (MK4,772,002,025)**. In submissions by both parties, only the money that is the subject of the third count is taken into account and the convict is therefore presented as having laundered MK3,252,002,025 which is less than the amount laundered by ***Lutepo*** who laundered MK4,206,337,562. Whatever the nomenclature of the offences, be they conspiracy to defraud and facilitating money laundering, the basis of the offences are sums of money that are no longer at the disposal of the Government fiscus and the convict has admitted to the criminal activity that led to their fraudulent and nefarious exit.

33. A sum in the region of four billion Malawi Kwacha or even three billion as the parties have put forward for this case, exceeds imaginable realms of pilferage. Professor Kapindu J. in the ***Lutepo*** case succinctly captures the magnitude of this amount in his analysis:

> I have gone to the lengths, breadths and depths of jurisprudential research – carefully going through all the available African Law Reports (Malawi Series), the Malawi Law Reports from the initial volume of 1923 to present decisions published online, and I have gone through a panoply of unreported decisions of superior courts in Malawi, both old and new. I could find no single case where a person was ever convicted of conspiring to defraud, defrauding and/or laundering, or otherwise embezzling sums of money of such huge proportions as in this case. None of the cases of this genus or species could even come close. This case therefore stands out as unprecedented in Malawian economic crimes law for its seriousness.

Professor Kapindu J. felt so strongly about the seriousness of this offence in view of this figure that he considered the offence before him appropriate for categorization as the worst instance of the offences of that nature and as such deserving the statutory maximum penalty.

34. The State have also acknowledged that based on the magnitude of the figures alone (in the absence of the convict's cooperation) it is impossible to mitigate punishment, the amounts involved being very high on Malawian standards. I would venture to add that these amounts are very high on any standards. The point is well illustrated with

reference to the total 2015/16 Annual Budget for Justice Institutions in the Ministry of Justice as being MK3,998,935,996. To stress the point, these institutions are the Ministry of Justice headquarters, the Anti-Corruption Bureau, the Legal Aid Bureau, the Administrator General's Department, the Registrar General's Department, and the Directorate of Public Prosecutions. The total amount of money that was embezzled from Government as a result of the offences with which the convict is charged actually exceeds that sum. I find it very difficult to agree with Counsel for the Defendant when he protests that juxtaposing the sums laundered with the budget of the Government justice sector is of limited force. Quite the contrary, it provides a graphic illustration of the value of the funds embezzled.

35. I am mindful of the Defence submissions that the State has not really provided any proof for its submissions on the impact of these crimes on Malawi and its people, which have led the State to conclude that these are offences of "high culpability" for the purposes of sentencing. The State has been accused of superficially glossing over the issues, making fleeting references to the harm in terms of high cost paid by the Malawian public on account of three factors. The first factor of this high cost is attributed to reputational damage and the withdrawal of donor aid. The State has argued that "cash-gate" has shown Malawi to be a country characterized by recklessness and wanton disregard of public finance management laws with the result that it can no longer be trusted with money from development partners. The second factor is that "cash-gate" has had a negative impact on the economy in terms of Government borrowing. The State has argued, with reference to a "report" released by the Reserve Bank of Malawi in its Economic Review that during the "cash-gate" period, that the Governments fiscal deficit worsened to MK40.4 billion in August 2013 from K15 billion in the previous month. The "report", for which no citations were provided, further indicates that owing to financial mismanagement, the International Monetary Fund and Norway decided to withhold a credit facility and aid respectively.

36. The State's position on the level of harm caused finds support in observations made by the Courts in the. Case of ***The Republic v Tressa Namathanga Senzani***, Criminal Case No. 62 of 2013, (HC) (Unreported), (the ***Senzani*** case), the ***Lutepo*** case, the Katengeza case and the case of The **Republic v Caroline Savala** Criminal Case No.

28 of 2013, (HC) (Unreported) (the ***Savala*** case). As noted in the ***Katengeza*** case, Kamanga J. took judicial notice in the ***Senzani*** case of the impact of "cash-gate" on the "*health sector and the economy among others, due to a withdrawal of donor aid and budgetary support ultimately affected the country in such a manner that the country has no other option but to adopt a Zero Aid Budget*".

37. The defence has however provided evidence to the contrary having undertaken a rigorous scrutiny of the official record of the National Assembly Daily Debates at the time,[9] submitted by the State as part of its submissions. The general thrust of what is contained in the Hansard is that even prior to the pilferage of public funds through "cash-gate", Malawi was already undergoing a gradual process of self-sufficiency in budgetary matters. The Honourable Minister of Finance, Economic Planning and Development is quoted as stating at page 1032, that as Malawi would "*be forced into that position quite quickly*" (i.e. the position of self-sufficiency) it was therefore incumbent upon Government "*to reach that eventuality in a planned manner.*" The inference being that if donors have withdrawn from Malawi as the State have argued, it is as a result of a planned strategy towards a realization of self-sufficiency" rather than a consequence of "cash-gate". Thus, the Honorable Minister is further quoted as stating at page 1035 that, "*as a matter of fact, a number of institutions have commended Malawi to be one of the best in accounting for monies we spend in terms of performance that were planned at the time of the approval of the budget.*"

38. Further, the Honourable Minister is quoted as reporting at page 1039 that Government is at a stage where she is negotiating with the European Union to use more than 100 Million Euros (about $120 Million) of the 560,000,000 Euros that will be available to Malawi from the European Union during the next five years. In conclusion, it is the Defence's submission that the post 2013 socio-economic, health and general well-being of Malawi and Malawians is not as "gloomy and as desperate" as the State suggests. Consequently, the convict should not be handled with an inordinate level of severity than would otherwise have been the case if the Hansard had actually pointed to concrete examples of how the enormous amount of money involved in these frauds had, in terms

[9] *The National Assembly (Malawi) Daily Debates (Hansard) Fourth Meeting-Forty-Fifth Session, Twenty-Fourth Day Monday 22nd June, 2015,* Serial No.024 1033-1036

of culpability or harm, contributed to national reputation damage and withdrawal of donor aid to affect Malawi's social economic, health and general wellbeing.

39. Although the defence has laboured to paint a neutral picture of the harm done with reference to specific remarks of the Honourable Minister of Finance, Economic Development and Planning, the overall picture is not as inconsequential as this. I reiterate, the entire Government justice sector (for which it is common knowledge that it is chronically underfunded, and I therefore take judicial notice of this) could have functioned for an entire year on the amount of money that was embezzled. In fact, Professor Kapindu J. in the ***Lutepo*** case citing the same Hansard that the Defence has relied on concluded that:

> The State has incurred losses represented by the actual sums of money, in billions of Kwacha embezzled from the Consolidated Fund. The State has to devote so much resources in investigating and prosecuting these offences. In addition, the State has to invest so much money to ensure that Government financial systems are strengthened to the point where Malawians and Malawi's cooperating partners can confidently use them.

40. Whilst I appreciate the Defence's viewpoint on the need to avoid over sensationalizing the issues which has the danger of seeing the Court engage in non-evidence based "hysterical or intuitive"[10] sentencing, these facts speak for themselves. The more tasteful way to approach the seriousness of the particular criminal acts that make up these offences is not to underplay them but to acknowledge their seriousness and then begin the laborious task of mitigating them. Even though the State has not been able to produce evidence of any specific instances of the actual harm inflicted on Malawi and the Malawian people, I believe the sheer magnitude of the sums involved speak for themselves. It is impossible for such astronomical sums to be removed from the fiscus and there be no harmful effect to Malawi and its people. I would therefore add to the list of factors listed in the sentencing guidelines, originally derived from England and Wales that are now a feature of our jurisprudence, an additional factor that qualifies an offence for being classified as a "High Culpability", the sheer magnitude of the sums of money involved and their corresponding impact on the economy. In this respect, I cannot ignore the Reserve Bank of Malawi "*Economic Review*" cited by the State which

[10] Bere J. in the Zimbabwean case of **The State v C Ndhlovu**, 29 October 2015 Bulawayo, HB213-14, HCAR1733-15, CRB WR 86-15, "*It has been stated for times without number that when it comes to sentencing the trial court must avoid adopting a hysterical or intuitive approach.*"

indicates a rise in the fiscal gap in the aftermath of "cash gate" which prompted borrowing of MK28.billion from the bank system through Treasury Bills and MK8.3 billion from the non-banking sector. Despite the statements in the Hansard, this same "*Economic Review*" indicates that owing to financial mismanagement, the International Monetary Fund decided to delay the approval of MK8 billion under the 3-year Extended Credit Facility and Norway withheld $24 million budgetary support which compelled others to do the same. This is a technical report from our nation's Central Bank.

41. The traditional factors that make an offence eligible for categorization as "High Culpability" include:

(a) a leading role where offending is a part of group activity;
(b) involvement of others through pressure, influence;
(c) abuse of a position of power or trust or responsibility;
(d) sophisticated nature of offence/significant planning;
(e) criminal activity conducted over sustained period of time; and the now added,
(f) shockingly high amount of the sum of money involved.

In money laundering cases of this nature, the harm occasioned consists both of the high value of the money laundered but also of the level of the harm which as I have reasoned, in this case speaks for itself.

42. The facts in this case as elaborated by the convict and the State, on the contrary to what Counsel for the Defence has argued, show that the convict played a leading role, albeit not the leading role in this offence which was part of a group activity. He recruited others and created a ripple effect where those others in turn recruited others. Further, the convict was a civil servant, and his participation in these offences was in breach of the trust reposted in him as a holder of the office of Assistant Director of Tourism (Planning and Development) who had served Government for a period of 22 years. In order to commit this very complex offence, sophisticated means in bypassing the Integrated Financial Management Information System (IFMIS) had to employed in this heinous activity that was planned over a period of time.

E. MITIGATING FACTORS

(a) Mitigating Factors in the Commission of the Offence

43. In order to set the scene in its proper context for mitigation, Counsel for the Defendant has directed the Court's attention to two critical issues and considerations. The first centres around the question, what happened to the national public finance mechanism to lead to embezzlement of public funds in the name of the 2013 cash-gate frauds for the convict to be involved in them. Secondly, the defence has prayed that I consider the actual harm sustained in consequence of the offences with which the convict has pleaded guilty to. The latter argument has already been considered above and been found to be untenable.

44. Thus, from what Counsel for the Defendant has submitted and has to some extent been intimated by the State, there is a broader context to the criminal behaviour that comprises the counts the convict has pleaded to. It has been argued that the convict's entry into the conspiracy to defraud the Malawi Government was neither premeditated or at his own instance. In order for the "cash-gate" frauds to have been perpetuated, the IFMIS in place at the time to secure Government funds had to be compromised. From what Counsel for the Defendant has argued which is consistent with the testimony in the cases of ***Senzani, Lutepo, Katengeza, Savala*** and the case of ***The Republic v Maxwell Namata and Luke Kasamba***, Criminal Case No. 45 of 2013, it emerges that IFMIS was a system that relied on a number of persons at various levels with different user rights to manage and operate the system and its processes in a bid to make fraud difficult. To bypass the system and to accommodate the fraudulent cheque transactions, a characteristic of the "cash-gate" brand, a number of individuals including those at the top end of the control chain in the Government apparatus had to be involved. This involved even controlling officers including the convict's controlling officer, ***Senzani***.

45. Counsel for the defendant has argued by virtue of his position, an Assistant Director of Tourism, he was not part of technical and managerial function that manipulated the system. He has in his Witness Statement and his Amended Mitigation Statement, both of which were entered in evidence for purposes of sentencing, contended that other individuals both named and unnamed who had access to system were responsible for the frauds. His Counsel has also argued that the convict only facilitated the purchase of 5 buses using a MK520 million cheque at the bidding of one of the named masterminds.

46. I find these arguments in mitigation to be of negligible impact. To begin with, convict introduced a number of 10 contractors to the scheme and one mastermind provided him with details of 4 more. Two contractors introduced one contractor each. The contractors were the conduits through which Government funds were paid out for work that had not been done, all mechanisms that control payments having been bypassed. He exerted either pressure or influence to motivate 11 contractors to join what he very well knew was a fraudulent scheme in which he obviously had decision making powers. Further, the State have acknowledged the convict's role in bringing to fore issues that even ***Lutepo*** despite being high up in the leadership ranks during the perpetration of these offences, did not reveal. The convict cannot assume any airs of naivety at this point. He was trusted enough within the ranks to be entrusted with the responsibility of acquiring buses, the act of trust going beyond delivering a cheque. "Cash-gate" was indeed bigger than the convict and it is those in whom public trust is reposited by law to manage the Government fiscus that compromised themselves in order for these frauds to be perpetuated. There is however need to clarify that the convict is answering charges that specifically reflect his own personal involvement in the frauds. The charges he pleaded guilty to were reduced charges negotiated with the State in view of the Witness Assistance Agreement executed between the parties. The convict should not expect to benefit twice when by the very nature of the charges he faced, his level of complicity was already factored in.

47. The convict has claimed influences over him by senior officers and the fortuitous encounters with masterminds in the fraudulent scheme that included politicians. I appreciate fully that the context in which this scheme operated involved a number of perpetrators of varying expertise and influence, but I find no evidence that his ability to refrain from committing an offence was compromised. We are not talking about a naïve or impressionable junior officer here but a seasoned civil servant who had risen to the ranks of Assistant Director (Planning and Development). The convict has not given any evidence of duress in his involvement. A person who was an entrepreneur running side business and an educated man cannot feign modesty at this stage. What I do find is that the motivation from the evidence is that what he gained for his involvement in the transactions was a cut in the proceeds. The more money that was embezzled, the larger his cut regardless of whether his involvement was at the instance of more powerful principals or not.

48. Counsel for the Defendant has also raised as mitigation that the first and second counts are inchoate offences which are a precursor to the third offence. In fact, Counsel for the Defendant has argued that all the three charges in the current indictment are of the same character and do not warrant separate penalties. The defence has substantiated this contention by highlighting cases on money laundering and theft that highlight the principle. This is not the first time this issue has arisen before this Court and I am disappointed that counsel for the defendant had not taken the time to read and challenge my decisions at the "Case to Answer Stage" and upon convicting the defendant in the ***Savala*** case. In that case, I went to great lengths to distinguish the very authorities the defence is relying on which are incidentally Australian and chose to align myself with the practice in the United Kingdom where "self-laundering" or charging and convicting a person of laundering the proceeds of their own crime are permissible. There is nothing wrong in this jurisdiction with charging and convicting a person of both conspiracy and underlying crime based on the same circumstances. I must therefore discount this argument.

(b) The Guilty Plea

49. By far, the most significant mitigating factor in these offences is the guilty plea. It is trite law that the basis for a reduction in sentence upon a plea of guilty is the saving of time and resources that an early guilty plea occasions. The ***Lutepo*** case with reference to the case of ***The Republic v Kachingwe***, 2 MLR 111 HC affirms the position that guilty pleas should be encouraged with a meaningful reduction in sentence of up to a third of the possible sentence. In keeping with the dictates of judicial discretion in sentencing, the reduction should not be considered as fixed, its extent being dependent on the circumstances. The earlier the plea, the more credit is given for it.

50. In deciding how much credit to give to a defendant who has pleaded guilty in the reduction of his or her sentence, the judge must, as was discussed in the ***Lutepo*** case, consider two main factors. The first, is the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and the second are the circumstances in which this indication was given. The benefits to the criminal justice system in such situations are that the early plea:

(a) normally reduces the impact of the crime upon victims;

(b) saves victims and witnesses from having to testify; and

(c) is in the public interest in that it saves public time and money on investigations and trials.

51. One reason these sentencing proceedings have taken such a long time was dispute between the prosecution and the defence as to the timeliness of the guilty plea. The Defence was of the view that the convict had pleaded guilty at the earliest possible opportunity whilst the State initially opposed this position. As stated earlier, the parties subsequently reached agreement that the plea was made at the earliest possible opportunity. In support of their case, the defence has provided a list of no less than six cases, including the present one, in which the convict was charged with various co-accused. The schedule to the third count in this case also shows the number of persons that the convict was connected with criminally some of whom have already been prosecuted. The point to this background is that the Defence has argued that the convict was embarrassed to plead in each of these individual cases and therefore craved consolidation. Counsel for the Defence has argued therefore that the convict pleaded not guilty in Criminal Case No. 26 of 2013 in which he was jointly charged with ***Angella Katengeza*** for this reason. As soon as the convict was withdrawn from that case and the cases in which he was involved in were consolidated, which was effectively on 25th August 2015, the convict immediately pleaded guilty. The State have confirmed that indeed in the ***Katengeza*** case the convict did apply for consolidation through his counsel. For some undisclosed reason his request was never countenanced and as such the State has concurred that the convict did plead guilty at the earliest opportunity.

52. Of the three reasons why a timely guilty plea is rewarded in criminal justice outlined above, it is the third consideration that is relevant in the case at hand. The reason, is that it is in the public interest to make such a reduction as the plea saves public time and money on investigations and trials. The defendant in the ***Lutepo*** case failed to benefit from a total remission for the guilty plea because of the expense he occasioned to the State by pretending to be mentally ill. The State had to fly in two psychiatrists

at considerable expense on its already limited resources. Professor Kapindu J. found this most disagreeable and described it as being worse than the situation of going through the whole trial process because most defendants who do so do not engage in such conduct. For this reason, he was not entitled to the full one third remission in sentence that accompanies a timely guilty plea. Although the dispute in facts that led this Court to order a Newton Hearing and saw the case through a prolonged process can be attributed to the Defence, I must distinguish the issues that caused delay and expense from those in the ***Lutepo*** case which were rather outrageous. The convict as any person accused of a crime is entitled to processes that ensure a fair trial; sentencing him on facts that went against his version of the events would have flouted the rules of fairness in criminal procedure.

53. As an alternative to a one third remission in sentence, the reduction in sentence for a guilty plea can also be taken in account by imposing one type of sentence rather than another. This additional approach is practiced in the United Kingdom and has been listed in the Sentencing Council's 2017 Guidelines[11]. Under these Guidelines, where a court has imposed one sentence rather than another to reflect the guilty plea there should normally be no further reduction on account of the guilty plea. Where, however, the less severe type of sentence is justified by other factors, the appropriate reduction for the plea should be applied in the normal way. Under the circumstances, **I therefore order that the sentences in this case run concurrently and not consecutively**. In view of the most prominent aggravating factor of these offences which the amount of money involved, this lesser sentence would not be justified by other factors.

(c) Cooperation and Assistance Rendered to the State

54. The State has highlighted the fact that as Malawi is a State party to the United Nations Convention against Corruption, it is obliged to consider, amongst other things, mitigating the punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence (article 37(2)). This obligation is

[11] "*Reduction in Sentence for a Guilty Plea. Definitive Guideline*"

supported by numerous cases that were cited in the cases of ***Lutepo***, ***Katengeza*** and ***Savala***.

55. The convict's cooperation which was structured through a Witness Assistance Agreement has won him plaudits with the State. The guilty plea and cooperation and assistance rendered to the State thus distinguish this case from the cases of ***Katengeza*** and ***Savala***. In both these cases, the defendants did not plead guilty and yet they claimed cooperation and assistance to the State. The eligibility requirement for a reduction in sentence for cooperation and assistance is an unequivocal guilty plea. The determining factors that have come out from these cases is that in order to qualify as having assisted and cooperated, the following requirements must be satisfied:
    (a) the defendant must have admitted the offences and pleaded guilty;
    (b) the defendant must then offer substantial assistance of quality and quantity;
    (c) the defendant must bring to the attention of the authorities' names of criminals who were previously outside police intelligence, and even if these criminals do not plead guilty, this is still substantial information as the authorities then have a basis to find other evidence to ascertain their guilt;
    (d) the information supplied by the defendant must be accurate he or she must display willingness to testify or otherwise confront other criminals; and
    (e) the defendant may have put himself or herself and his or her family at risk by reason of the information he has given, in other words the risk of reprisal.

As a civil servant and an insider, the State has argued that the convict signed a full confession under the Witness Assistance Agreement that revealed the scope and intricacies of the complex, calculated and sophisticated "cash-gate" scheme. The detail and accuracy of his revelations were previously unknown to the State and went beyond the revelations made by the convict in the ***Lutepo*** case. The revelations included the names of personnel involved both inside and outside the key ministries and departments which were implicated in the abuse of the IFMIS. The convict has also pleaded guilty to offences that might otherwise have never been attributable to him or proved against him and unknown to the law enforcement agencies. In the course of this process, more names of contractors that were used to launder money in this scheme have come to light than were known to law enforcement.

56. During his stay in prison post-conviction, he has appeared before State authorities for further interrogation. The convict has consistently at all material times assisted the law enforcement agents get to the truth of "cash-gate" so as to bring all perpetrators to justice. The convict has also provided interpretations of and insights into documentary evidence which shall be used by the State in future prosecutions. The convict has not only provided names of persons against whom the State contemplates filing process, but he has prior to this sentencing process given evidence for the State in the ongoing case of ***The Republic v Paul Montfort Mphwiyo and others***, Criminal Case No. 35 of 2014. The State concludes that by all these acts which I have briefly summarized, the convict has broken the silence which has long characterized "cash-gate" with obvious risk to himself and his family. The convict remains willing to provided further assistance and testimony when called upon.

57. Substantial cooperation and assistance of this nature are equally as important as guilty pleas in the administration of justice because as the State has argued, they:

    (a) avoid lengthy and expensive trials (which may result in acquittals);
    (b) make it easier for practitioners to advise their guilty clients to plead guilty;
    (c) render the outcomes of the case predictable;
    (d) secures convictions of offenders and keeps them within the criminal justice system; and
    (e) can be a successful tool in combatting corruption and organised crime through engagement of co-operating defendants as prosecution witnesses against others (and informants).

    I must now turn to translate the gains won by the convict's cooperation into a meaningful reduction in sentence. As I noted in the case of ***The Republic v Angella Katengeza*** (cited above) with assistance from the common law position in England and Wales, a defendant who pleads guilty and then cooperates substantively with the law enforcement agents gets two credits for reduction in sentence. The reduction for a guilty plea as discussed above can either be a reduction of up to one third of the sentence depending on the timeliness of the plea, or by imposing one type of sentence rather than another, where the sentence imposed would be lesser than the other. When it comes to reduction for cooperation and assistance, the approach taken in England and Wales is

to reduce the sentence. There is no option under this head to impose a different type of sentence.

58. In the case of **R v King** (1985) Cr. App. R (S) 227 which was cited with approval in the ***Katengeza*** case, the court held that it was,

> impossible to lay down any hard and fast rule as to the amount by which the sentence could be reduced by reason of the assistance he gave to the police.

Thus, according to that case, the practical approach in such circumstances according to that court is to,

> turn to the offences which the offender has admitted to assess their gravity and their number. That should enable the court to arrive at what might be called a starting figure.

How much a reduction is made on the starting figure will then depend on the quality and the quantity of the material disclosed, its accuracy and the willingness of the defendant to confront other criminals and give evidence in court. The degree to which he put his family at risk and other factors.

59. Based on the level of seriousness of this case, it behoves me to consider the 'totality principle' of sentencing which requires a level of reduction that results in an overall sentence that is just and proportionate not only to convict, punishes and allows for his rehabilitation but also considers the views of the public or society who also happen to be the victims in this case. Rigidly insisting on a mathematical formula based on the case law which suggests a reduction of either half or two-thirds, would not be appropriate in the present case. Indeed, it was emphasised in the case of **R v King** (cited above) that "*in this type of sentencing decision a mathematical approach is liable to produce an inappropriate answer, and that the totality principle is fundamental.*" In view of all the factors that aggravate this offence, one year would be a suitable reduction for the convict's substantial cooperation.

(d) Personal Mitigating Factors

(i) Age

60. The defence have argued that the convict is a young man at 48 years of age and one who can be productive to Malawi if given a second chance. Age must fit within certain

ranges to qualify for mitigation as was clearly set out in the ***Katengeza*** case, the relevant parts of which are reproduced below:

> Following numerous authorities of which the case of the ***Republic v Tomasi*** [1997 MLR 70), age is a mitigating factor. It should be noted that age is only a mitigating factor if it is either as advanced age, or immature age. At 55 years, the convict cannot claim to be of immature age and the only concession she can get in relation to age is the consideration for her advanced age. It is worth noting following the case of ***The Republic v Felix Madalitso Keke, Confirmation*** Case No.404 of 2010 (HC) (Unreported) that for offenders in the age bracket between 36 to 60 years of age, the court may:
>
> > *follow a full rigour of the sentence that fits the crime on the assumption that the offender is supposed to have developed a mature temperament and mature understanding about crime and consequences about crime ...*
>
> Thus, a person of the convict's age is mature enough to have considered the consequences of her actions.

From the preceding, it is apparent that the convict is not of immature age, given he is at an age where he might still be productive to society, which he can still contribute after he has served his sentence. The convict has also just missed the mark for advanced which according to the case ***The Republic v Tressa Namathanga Senzani*** (cited above), the judge set at 50 years. I must in the present case therefore treat the convict as one who is of sufficient maturity to have a mature temperament and a mature understanding about the consequences of his crime.

(ii) Family Circumstances and Humiliation and Stigmatisation

68. Counsel for the convict argued with reference to the case of ***Mariette v The Republic*** 4 ALR Mal.119 (H.C.) that hardship to the accused's family ought to be taken into account. The particulars of such hardship are that:

    (a) The convict is married, and his spouse is a "mere house" wife.

    (b) The convict has 6 children, the youngest of whom are primary school pupils.

    (c) One of his children is 22 years old and is a student in tertiary education outside the country.

    (d) One child, aged 18 years is currently due for university enrolment.

    (e) One child aged 17 years is in secondary school and two below the age of 10 years are at a private school.

Before I go into the merits of these mitigating factors, I must first express my displeasure at the gender insensitive manner in which the convict's spouse has been described. Calling her a "mere housewife" is offensive as it underplays any contributions she makes to the family. I understand that the point counsel for the convict is making is that the convict's spouse does not contribute to the family's

financial resources, but this can be conveyed without degrading her status and worth as a human being.

69. On family circumstances as mitigating factors I must repeat my position in the ***Katengeza*** case as follows

> Chipeta J. (as he was then) in the case of ***The Republic v Eneya and 6 Others,*** Criminal Case No. 53 of 2000. High Court Principal Registry (unreported), most lucidly summarized the position of the courts with regard to the family responsibilities of the convict such as the care of dependents and orphans that:
>
> > *... under the applicable principles of sentencing in criminal procedure courts are normally guided by the principle that before one embarks on a path of crime, it is incumbent on him to take these circumstances on board. A man who opts for and goes ahead to commit a crime should factor in the possibility that if the long arm of the law catches up with him and accords him a custodial penalty his family will suffer and that courts are not encouraged to be moved by such pleas.*
>
> Exception only being made where the interests of justice would require that such family interests be taken into account. This was endorsed by Mtalimanja J. in the case of the ***Republic v Maxwell Namata and Luke Kasamba*** (cited above), with reference to the case of ***Chitsonga v The Republic [1995] 1 MLR 86 (HC)*** where the Court had this to say:
>
> > *Domestic matters are not matters that a court takes into account when sentencing. All offenders have families. For almost any sentence brings some measure of hardship and deprivation. It is only when these are exceptional or unusual that the courts are duty bound to depart from the normal. In R v Ingram, 3 October 1924, Lord Widgery CJ said:*
> >
> > > *So it is not altogether an easy case, but of course this always happens, time to time again, that imprisonment of father inevitably causes hardship to rest of the family. If we were to listen to this argument regularly and normally in cases that come before us, we should be considering not the necessary punishment of the offender but the extent to which his wife and family might be prejudiced by it. The crux of the matter is that part of the price to pay when committing a crime is that punishment does involve hardship on wife and family, it cannot be one of the factors which can affect what would otherwise be the right sentence.*

Counsel for the convict has not provided me with any basis from departing from the position in the cases cited above and I see no reason to depart from these principles in the present case.

70. With regard to the level of humiliation and stigmatization that have accompanied those who have participated in "cash-gate" offences, the position in the cases I have stated above is equally applicable. Like personal circumstances, humiliation once apprehended for committing an offence is consideration that should have been taken into account prior to embarking on the criminal activity and as such does not constitute mitigation.

(i) *Loss of Employment and Business*

71. The defence has further argued that as a result of the transactions behind the offences for which he has appeared before this Court, the convict has lost his job of close to 22 years and attendant benefits as Assistant Director of Tourism (Planning and Development) at Grade P5. The cases of ***Makonyola v The Republic***, 6 ALR Mal. 74 (H.C.) and ***Makalamu v The Republic***, 16 (2) MLR 559 were cited to support the argument that loss of job, employment and service benefits as well as further career prospects may also be mitigating factors. Further compounding his woes, the convict was involved in a business that after this conviction he is unlikely to continue. The latter part of this argument was relied on in both the cases of ***Katengeza*** and **Savala** with the overall conclusion that loss of business opportunities like family circumstances should have been contemplated by the convict before he embarked on a life of crime. With regard to loss of employment and its attendant benefits, counsel for the convict has provided local case law which acknowledges that loss of employment could be mitigation. Recognising the loss of a job and its attendant benefit as mitigation prevents double punishment as to a certain degree, the convict will have already been punished by the job loss. In bid to temper the overall sentence with a level of mercy in this case, this mitigating factor will be considered though minimally so, in conjunction with other factors.

(e) Health

72. Counsel for the convict has brought to Court's attention that the convict suffers from a medical condition that requires a strict diet. No medical report or other proof of the condition was submitted as the convict was diagnosed and treated in Japan in 2005 at the International Medical Centre there and no formal medical transfer made to a local medical practitioner. Obtaining these records would occasion the Defence a considerable expense and Counsel for the convict has informed the Court that the local prison staff have taken a note of his condition and will refer him to appropriate service providers in-prison or locally.

73. Mitigating factors must be proved before a court on a balance of probabilities and medical evidence could have assisted the Court in determining whether the Malawi Prison Services or local providers would be able to manage the condition or not. This is in keeping with the finding of Mtalimanja J. in the case of ***The Republic v Maxwell Namata and Luke Kasamba***, Criminal Case No. 45 of 2013 (HC) (Unreported), that

some conditions may be managed by the Malawi Prison Service and as such do not warrant reduction in sentence. In the absence of the required proof, I must disregard this factor.

(f) Restitution/Remorse or Contrition

74. Remorse or contrition must be expressed in an action that expresses regret. Actions that demonstrate remorse include an early guilty plea, cooperation with the authorities, voluntarily handing oneself over to the police, and an offer of restitution or an apology. Such actions acquire mitigatory strength because they demonstrate great courage and manifest repentance. Further a person who demonstrates remorse in this manner is consequently less likely to recidivate and has a higher potential for rehabilitation. Remorse can therefore me considered an addition mitigating factor to the guilty plea.

75. Counsel for the defendant has ably argued the convict's remorse demonstrated by his courageous act of surrendering himself to the police when it became known in the public domain that he was wanted by the police. He was then instantaneously arrested but he nonetheless consistently attempted to engage with the State in revealing the truth behind the offences. For this the convict is entitled to credit.

76. The convict has demonstrated remorse through an offer of restitution for properties roughly estimated at MK76 million in total should the Court be so minded as to accept his offer. The convict has volunteered to surrender the following:

    (i) Two houses in Kawale that have not be valued but were worth an aggregate of K19 million.
    (ii) A 2009 Range Rover Sport with an estimated value of about MK23 million.
    (iii) A 2013 Mercedes Benz with an estimated value of about MK14.5 million.
    (iv) A 2007 Toyota Majesty with an estimated value of about MK 9 million.
    (v) A 2013 Toyota Corolla with an estimated value of about MK 7 million.
    (vi) A 2005 Toyota Corolla with an estimated value of about MK3.5 million.

    The State have filed an application under section 48 of the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act for a confiscation order or a pecuniary order in respect of any tainted property and the convict deserves credit for voluntarily

rendering their task in tracing such tainted property easier. Nonetheless, as a starting point, **I hereby order that all the listed property be restituted to the State.**

(g) Time spent in custody

77. The convict has spent 2 months in custody prior to his conviction and has now been in custody since his conviction on 25th August 2017. The defence has argued that these periods should not be ignored in sentencing and should therefore be taken into account. This is a fair point and one which I fully countenance especially in view of the convict's demonstrated remorse through his offer of restitution and in the manner he handed himself over when he heard he was wanted by the police.

F. APPROPRIATE SENTENCE

61. At its simplest, the function of a sentencer serves to achieve an optimum combination of the following needs:
    (a) Punish the offender
    (b) Protect the public
    (c) Change the offender's behaviour
    (d) Get the offender to make up for their crime
    (e) Cut crime in the future

An approach that summarises an effective disposition of all these considerations is recorded in the case of ***The Republic v Shauti,*** 8 MLR 69, which solidified in our local jurisprudence the principle that:

> Punishment must fit the criminal as well as the crime, be fair to society and blended with a measure of mercy according to the circumstances.

Packed within these famous words are several notions. The sentence must be sufficient, thus fair or just with a dose of leniency where necessary. Further, the sentence must be proportional to the gravity of the offence and the personal circumstances and the responsibility of the offender. Personal circumstances play an important role in sentencing as they force the court to focus on sentencing not just the offence, but the particular offender before it. Ultimately the sentence that lives up to these notions must also be one that will not leave society with a sense of outrage that justice has not been done. The words from the quotation above also encapsulate what other jurisdictions have called the "Triad" approach to sentencing which requires the courts to consider carefully balance "the crime, the offender and the society" in arriving at an appropriate

sentence. The delicacy of the balancing approach is noted, with a warning that overemphasizing some interests over others results in either an inadequate or an excessive sentence[12].

62. I must begin the sentencing process on the premise that I am dealing with a high culpability crime in view of the high monetary value of the offences, the leadership role, the large numbers of victims or affected persons (Malawians at large) the fact that the convict was motivated by gain to enter into the scheme and the sophistication in the manner of the commission of the offence. In assessing the harm done in the commission of these offences, I must consider both the actual, intended and risked loss as well as the level of harm caused to the victim or others affected. To this end, the relevant factors are again the monetary value of the loss and the impact to the victim which causes serious detrimental effects. As I noted earlier, the extraordinary high amounts involved speak for themselves.

63. Categorising the offence as "High Culpability" is a critical consideration in the process of determining whether sections 339 and 340 of the Criminal Procedure and Evidence Code avail the convict a suspended or non-custodial sentence in this particular instance. The convict being a first offender, the Counsel for the convict has cited these provisions to support their preference for a non-custodial sentence. To this end, the Counsel for the convict has cited various local cases and foreign cases which stand for the position that non-custodial sentences are optimal for first time offenders, the general principle being that long-term sentences for first offenders are not rehabilitative as they expose them to contact with hardened criminals[13]. Counsel for the convict have also cited precedent which prohibits the imposition of deterrent sentences on first time offenders.[14] The Defence concluded its submission on this issue with the argument that the law upholds the mitigating factor of having no previous convictions religiously and as such the convict should benefit from the same. Under the current circumstances,

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[12] ***S v Zinn*** 1969 (2) SA 537 (A). ***S v Moodley*** SS42/05 [2005] ZAGHPC 78 (4 August 2005)
[13] ***The Republic v Chiboli*** [1997] 2 MLR 89, ***The Republic v Yalu and Others*** [1996] MLR 509, ***The Republic v Manyamba*** [1997] 2 MLR 39, ***The Republic v Sakhwinya,*** Confirmation, Case No. 359 of 2013, (HC) (unreported)
[14] ***The Republic v Banda (B.M.),*** 8 MLR 7.

Counsel for the convict may have over-stated the mitigating value of a defendant's first offender status somewhat.

64. It must be remembered that in all cases that the court reserves the discretion to decide whether any "*mitigating factors are eclipsed by the seriousness of the offence such that little or no weight should be attached to those factors*". This was the conclusion arrived at by Professor Kapindu J in the ***Lutepo*** case with reference to the case of ***R v Inwood*** (1974) 60 Cr App R 70, a case that has since been cited with approval in the Malawian case of ***Mussa v The Republic***, Criminal Appeal No. 44 of 1995 [1996] MWHC 2. The point in ***R v Inwood*** is that the court has to reach a balance between the mitigating factors and society's interest in marking the disapproval of the offence. In circumstances such as this where the offence is of such a serious and morally reprehensible nature, condemnation must be obvious. Thus, as was stated in the case of ***R v Inwood,*** above, the court "*can very well ignore pertinent mitigating factors.*"

65. The seriousness of this offence in view of the sums of money involved and an overall assessment of the convict's criminal conduct eclipses the fact that the convict is a first offender. I cannot arrive at any other conclusion than to impose a custodial sentence.

66. It is clear from the case law and the cumulative effect of sections 339 and 340 of the Criminal Procedure and Evidence Code that before the court can decide on a suspended sentence, it must go through a process of eliminating other possible courses such as a fine, a prison term not exceeding twelve months and conditions in suspending the above which may include community service. The issue of the appropriateness of fines in offences of this nature was considered in the ***Savala*** case with reference to the case of ***The Republic v Akimu***, Revision Case No. 9 of 2003, (HC Principal Registry) (Unreported), where it was held that fines are inappropriate in some offences. Particularly high gain offences because they are well-resourced. In such circumstances, a fine would simply be factored into the expense of committing the offence. Thus, for fraud and money laundering offences, a fine cannot be an appropriate sentence.

(a) Count 1: Conspiracy to Defraud, contrary to section 323 of the Penal Code

67. The particulars of this offence are that the convict conspired together with others to defraud the Government of Malawi of money, by the creation and use of forged or false

documents and thereby, procuring the execution of valuable securities, namely Government of Malawi cheques drawn on the Reserve Bank of Malawi to the total value of not less than MWK1 billion, payable to bogus suppliers of goods and services to the Government of Malawi. The maximum penalty for this offence which is a misdemeanour is 3 years imprisonment. According to the State, this offence was intended to identify the precursor criminal agreement which was then executed by way of counts 2 and 3.

68. Counsel for the convict has suggested a sentence of 1-year imprisonment for this offence but neither a sentencing range nor a starting point has been suggested by the State. Counsel for the convict has further justified its suggested sentence by distinguishing the factors that led to the court in the ***Lutepo*** case to impose a 3-year sentence on a similar charge. This distinction is attributable to the amount of money laundered and the role played by the convict in that case. While I agree that the convict played a different role to ***Lutepo***, I reiterate that the convict's role in these offences should not be minimized. He was not a lowly minion with orders only to execute, he also had decision-making powers and was awarded privileges for his part. For his part in the execution of the first count, Government lost close to 1 billion Malawi Kwacha. The specific reference to MK1 billion also signals to me that that rather than being an inchoate offence that is completed in the third count, it is a stand-alone offence that was completed when bogus suppliers of goods and services were paid that amount for purportedly supplying goods and services. The acts in the first count may very well have led to the offence in the third count but the offence in the third count is valued at MWK3,252,002,025.00. I see no reason why the different counts should not be treated separately for sentencing.

69. All in all, having considered the cooperation and assistance rendered by the convict, the remorse demonstrated by his offer of restitution and recognizing that the convict has lost his job and career, **I hereby impose a sentence of 1 year for conspiracy to defraud contrary to section 323 of the Penal Code on the convict, Leonard Karonga**.

(b) Facilitating Money Laundering contrary to section 35(1)(d) of the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act

70. The particulars of this offence are that the convict delivered a fraudulently obtained Reserve Bank of Malawi of Malawi cheque to the value of MWK520,000,000. By delivering this cheque to an automobile dealer, the convict aided, abetted and facilitated the acquisition of six Marco Polo Torino buses, knowing or having reason to believe that funds used were directly or indirectly derived from proceeds of crime. The maximum penalty for this offence is 10 years imprisonment. The State have submitted that this is a High Culpability offence but in a lower category of harm. Thus, according to the State, the appropriate sentencing range would be between 5 to 8 years imprisonment.

71. The Defence is not in agreement with the State on the second count for a number of reasons. It is the Defence's view that technically, section 35 of the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act does not create two separate offences for the purposes of sentencing. In this vein, there are therefore no separate acts of criminality by the convict to warrant separate penalties for both the first and second count. Again, I must point out the flaw in this argument. The second count is with specific reference to the acquisition of buses. The act of the defendant in conspiring with others in the first count differs from the act of aiding and abetting money laundering in the second count. In the second count the specific amount is MK520,000,000. It has nothing to do with the amount in the first or the third count.

72. What I will accept as a relevant factor to sentencing with regard to this count is the level of the convict's involvement. What the convict did in this instance was to deliver a fraudulently obtained cheque to an automobile dealer knowing the criminal origins of the cheque and knowing that by purchasing the buses, those criminal origins would be obscured. Although I would still argue that this is a High Culpability offence, the level of harm is somewhat lower in this count based on the lesser amount in comparison to the other counts and the sums involved in the **Lutepo** case. Further, as Counsel for the convict has pointed out, these buses have since been recovered by the Government and have been put to good use by different agencies or departments. Whilst I must attach significant credit to the recovery of the buses, I must point out that the money that was used to buy these buses was never earmarked by Government for such a purchase. Government may very well have had more pressing priorities than the acquisition of

buses and as such, the seriousness of what the convict facilitated should not be watered down.

73. Nonetheless in view of all the factors I have considered and the other mitigating factors for the entire offence, I find the 5-8-year sentence range suggested by the State rather high. I would therefore start the sentencing process at 4 years and considering the mitigating factors associated with this count, the cooperation and assistance rendered by the convict, the remorse demonstrated by his offer of restitution and recognizing that the convict has lost his job and career, **I hereby impose a sentence of 2 years for Facilitating Money Laundering contrary to section 35(1)(d) of the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act on the convict, Leonard Karonga**.

(c) Money Laundering, contrary to section 35(1)(c) of the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act

74. In the third count the convict jointly with other persons and with the persons or contractors named in a schedule knowing or having reason that the money directly or indirectly derived from proceeds of crime, acquired possessed and used fraudulently obtained Government cheques to pay the persons or contractors a combined total of MWK3,252,002,025.00. A similar charge attracted an eight-year term of imprisonment in the ***Lutepo*** case, the court having given credit for the guilty plea and the convict's cooperation and assistance. Because of the amount involved in that case and the convict's prominent role in the offence, the court in that case began the sentencing process at the maximum sentence of 10 years. The State has suggested that 8 years would be an appropriate starting point in this case, whilst the Defence is of the view that 3 years imprisonment would be a sufficient penalty.

75. I agree with the State based on all I have reasoned about the seriousness of this offence that the starting point for this count should be high. I have also reasoned that the difference between the MWK3,252,002,025.00 laundered by the convict and the MK4,206,337,562.00 laundered by ***Lutepo*** is not as significant as the parties would have me believe. Yes, the sum laundered by the convict is lower and it was divided between a number of contractors, some imposed on the convict and others that he brought into the fraudulent scheme. However, I must remind myself that some of the

contractors the convict brought into the scheme are serving prison sentences because of him, and more will continue to do so. In taking these issues into account I find 9 years an appropriate starting point in sentencing. In view of the mitigating factors that I have discussed above, namely the cooperation and assistance rendered by the convict, the remorse demonstrated by his offer of restitution and recognizing that the convict has lost his job and career, I apply a reduction of 1 and a half years in this particular count. **I hereby impose a sentence of 7 and a half years for Money Laundering contrary to section 35(1)(c) of the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Acton the convict, Leonard Karonga**.

76. In view of the guilty plea, I further order that the sentences run concurrently and not consecutively.

77. The sentences are to run from the date of conviction and any time spent in custody prior to that date is to be deducted from the overall sentence.

78. The defendant has a right to appeal against this sentence within 30 days of this order.

I so order.

I so order.

Pronounced in Open Court in Lilongwe in the Republic on this 16th day of March 2018.

F.A. Mwale

JUDGE