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**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION**

HOMICIDE CASE NO. 175 OF 2017

THE REPUBLIC

V

ETHEL MAKWINJA

CORAM: Hon Justice M L Kamwambe

Kumwenda of counsel for the State

Chirwa of counsel for the Accused

Amos ...Official Interpreter

Chiusiwa....Recording Officer

SENTENCE

Kamwambe J

Ethel Makwinja freely pleaded guilty to murder of her husband Davie Makwinja contrary to section 209 of the Penal Code. During plea taking and directions on 8th October, 2018 the convict pleaded guilty and promised to confess details of the murder. She had pleaded not guilty first on the 4th October, 2018. In fulfilling the requirements of the proviso to section 251 of the Penal Code, the convict indicated that with advice of two counsel she understood the consequences of a guilty plea and that the offence is a serious one.

I have decided to bring out all the facts so that we better understand what happened and the veracity of the convict's

narration of facts. As such, I have reproduced facts according to the caution statement and facts as now presented by the convict. The prosecution exhibited a police formal charge which shows that she admitted to the murder and then the police investigator produced facts derived from the caution statement. The court asked her if the facts narrated by the prosecution were true and correct. She answered that most of the matters were true. Seeing that it was not an absolute admission the court gave the convict to give her version which led to a narration of facts with material variations. At one time the court thought of entering a not guilty plea, but since she was adamant that she caused the death of the victim as principal offender, the court decided to proceed with a guilty plea. The other three co-accused who pleaded not guilty were removed from the charge.

The version of the convict as extracted from the caution statement is that she arranged with Mr Kadabwali, the traditional medicine man, to sell her medicine so that the husband does not go out but stay with her. This medicine did not work, as such, Mr Kadabwali suggested that he had friends who could kill her husband. Since the marriage was awaiting divorce, the convict wanted to possess the matrimonial home and the Toyota Hilux vehicle. On 29th April, 2014 Mr Khadabwali phoned the convict that the killers from Mulanje had arrived but arranged to come to the convict's house on 30th April, 2014. She went to Khadabwali's house on the said 30th April where she saw two men one black and the other light in complexion. Mr Khadabwali explained to them that convict wanted her husband dead. Since she did not have money to pay for the services, they arranged that after killing him they would go away with victim's vehicle. At around 21.00 hrs the killers called to say that they are behind the house waiting to hear the sound of the vehicle of the convict's husband. He arrived around 22.00 hrs and he went to sleep. She went outside to meet the three killers who were cutting wire used for drying clothes. She took them inside the bedroom where the husband was sleeping and they jumped on him to pin him down and hit him with a hammer on the head and used the wire to strangulate him on the neck. They used his neck ties to tie his legs and arms. Later they inserted him into a

sack and put the body into the vehicle. She gave them the car keys but the car could not move. They gave up and left with a few properties such as home theatre and blanket. She then informed her neighbour who told the police who came to collect the body.

In a desperate bid not to lose out on the house and the car in the pending divorce judgment which the convict was certain would not be in her favour, she hired the other accused persons to overpower the deceased so as to enable them to get away with the car unimpeded by him.

Her version after a guilty plea was that the other accused persons assailed the deceased person and tied him up with wires to disable him. They took the car keys and left the deceased and the convict in the room. She further stated that after the other accused persons left the room, the deceased, in his drunken stupor, rose up and started shouting at her that he was aware of everything she had done to him. The deceased then lunged at her. She reached for a shovel which was in the bedroom and hit the deceased on the head with the shovel, then held his neck in a strong chokehold until the deceased went limp in her arms.

During that time the other accused persons were attempting to drive away with the deceased's car, but after failing to do so, they returned to the bedroom and found the deceased lying on the floor after having been assaulted by the convict. The accused persons were frustrated that the car could not be driven away and demanded that the convict find a way to recompense them for their efforts there and then. The accused persons then went ahead and appropriated several household items from the convict's home. They then assisted the convict with putting the accused's body in a sack.

When sentencing, the court must consider mitigating and aggravating circumstances. Mitigating factors speak well for the accused person and will often lead to the court exercising lenience on him. Aggravating factors speak against the accused person and will lead the court to pass a more severe sentence from what normally it would be. Penal sections in Malawi provide for maximum sentences. Sentencing practice is clear that only worst offenders

deserve maximum sentences. Ordinarily, imposition of a sentence more than half of the prescribed maximum sentence is not usual. However, in deserving situations, courts may sentence one beyond half the maximum sentence.

In **Ayami v Rep** [1990] 13 MLR 19 the court stated that in considering the appropriateness of the sentence, it is imperative to evaluate the extent of the crime, the effect on the victim (or victims) and the circumstances in which it was committed, and come up with a sentence which is appropriate in that particular case. Sentence must befit the offender in that it should not be manifestly on the lower or higher side, and that the court should take into consideration the mitigating factors that may avail the offender. See **Republic v Samson Matimati** Criminal Case No. 18 of 2007 HC (unreported). The court should take into consideration the personal and individual circumstance of the convict as well as possibility of reform and re-adaptation. **Republic v Samson Matimati (supra)**.

The law favours the young and the old. The young are those between 18 and 25 years, and the old are those over 60 years. These persons deserve some lenience in sentencing because of their tender and old ages. See **R v Ng'ambi** [1971-1972] ALR Mal 457. They should be saved from serving long custodial sentences. Consideration should also be given to first offenders although in very serious crimes as murder, depending on the circumstances of the case, lenience may not be exercised. A custodial sentence is justified in serious offences committed in grave and heinous circumstances. In **Domingo Juwawo v Republic** Confirmation Case No. 1029 of 1996, the accused person though he was young when he committed the offence, had his sentence enhanced because the manner in which the offence was committed was such that his age and his conduct did not match.

Further, that one pleaded guilty will win him reduction of sentence up to one third of the normal sentence. It is in the discretion of the court to determine by how much the reduction should be, up to one third of the sentence.

The court will take into consideration the manner in which the offence was committed, especially, whether an offensive weapon was used or not. See **Winston Ngulube & others v The Republic** MSCA Criminal Appeal No. 35 of 2006 (unreported).

In **The Rep. v Duncan Golasi, Homicide Case No. 27 of 2018**, the convict lost the first fight with William and he went home unhappy and frustrated. His anger had not subsided so, he collected a knife and put it into his pocket. After about twenty minutes, having changed clothes, he was back at the beer party where he looked around for William but did not find him. He bought some beers and sat under a mango tree. When he was confronted by the deceased why he was causing trouble to merry making people, he was not pleased and another fight ensued with the deceased and he stabbed the deceased person in the stomach and he died three days later at Queens Elizabeth Central Hospital where he was referred from Mwanza Hospital. The offence was planned and premeditated and his actions were inconsistent of a drunken person. He knew what he was doing and what he wanted to achieve. He carried the knife for revenge on William who he did not find but opportunity to vent his anger arose when the deceased person confronted him. It cannot be said that his actions were as a result of provocation or drunkenness but out of malice. He used the knife the way he intended it to be used and he fled from the place. He was chased and arrested. We was not remorseful hence, he fled without attending to the person in agony. The circumstances of this case were really serious. A sentence of 24 years imprisonment was meted.

Despite the serious circumstances in which the crime was committed, the case does not fall in the ambit of the rarest of the rare circumstances of murder warranting the imposition of the death sentence. In the case of **Republic v Jordan Criminal Case no 58 of 2008** the convict intentionally insisted that the wife should leave behind the one year nine months old child as she was going to draw water from a nearby tap. The convict killed the stepchild and on her return she found the child dead. A life sentence was imposed despite the court observing that the convict had no history of being a violent and dangerous person to society, and that it was

usual in our local circumstances that step-fathers do not like the presence of step-children. They love mothers of the children and not the children.

In the case of **Republic v Sinos Pasipanadya Criminal Case No. 41 of 2008** the convict cut the child on the finger and as the child was crying his wife reprimanded him for what he had done. The convict's wife went to report to her mother what her husband had done to the child. She left the child behind. When she came back home she discovered that the convict was not with the child. He buried the child in the sand at a river bank. A life sentence was imposed.

According to the caution statement, the convict shouted for help and when the neighbours came, she told them that robbers had assaulted her husband and raped her. The neighbours untied her, helped her dress up and called for the police. When the police took her to hospital for examination, it was found that she had not been raped, which triggered the suspicion of the police. After interrogating her, she admitted that she had not been attacked at all, but that she had conspired with other persons to attack her husband and steal his car.

The court then convicted her upon her own plea of guilty and the facts narrated in her confession, which the prosecution did not dispute.

In our present case, the new version of the convict does not just add up. The question that keeps lingering in my head is why were co-accused invited to the house if not to kill the husband. Why were they there when initially the medicine she got from Mr Kadabwali to administer on her husband did not work? They could not have come just to collect the vehicle. If it was for recompense, at this stage, what services had they rendered if not to kill the victim? Why should they have gone to the house just to assault and tie the victim without intending to kill him? Does it make sense that they intended to keep him alive when he could turn witness against them all, especially the wife? After killing him they decided to get rid of the body and the best means was to use the vehicle and make the vehicle also disappear.

Unfortunately the vehicle refused to start or move. It would have been staged as if the killing happened elsewhere and not at the house. Why did she fake rape? The only option now was to stage a robbery. Unfortunately again it was discovered that she was never raped. This was a plan gone burst. Even if the co-accused went to the house to steal or rob, they would be charged with murder using section 212 (c) of the Penal Code which says that malice aforethought may be deemed to be established where the accused had the intention to commit a felony, such as theft or robbery or burglary, in the course of which, death occurs.

I may seem to have digressed above but I was intending to look closely at the evidence so that I am aided so as to come to an appropriate sentence. The fact remains that she pleaded guilty and in terms of section 215 of the Penal Code, she caused the death of her husband. It would seem that at the time she was strangulating the husband, he was still tied with wires, if not neck ties. It was a job made easy for her by co-accused persons who tied him for whatever reason. Definitely, the circumstances of the killing were gruesome and no doubt the motive was to retain the house to herself which she was likely to lose after pronouncement of divorce absolute.

This is a serious offence and imposition of a suspended sentence according to section 339 as read with section 340 of the Criminal Procedure and Evidence Code would be a mockery to justice. There would be no proper justification for it. So, a suspended sentence is out of the way.

In the case of **Wyson Thomas Kapunda Manda v Republic MSCA Criminal Appeal No.15 of 2007**, the Malawi Supreme Court of Appeal refused to reduce the death sentence imposed by the High Court on the basis that the murder was committed in cold blood.

In the case of **Charles Khoviwa v R Criminal Appeal No. 6 of 2007, MSCA**, the convict was convicted of murder by the High Court sitting at Mulanje. He was sentenced to suffer death. On appeal the Supreme Court said:

"In the present case however, we take the view that the appellant does not deserve lenience. The appellant and a colleague assaulted and stabbed a defenceless person who was fleeing the scene of a fight to save himself from trouble. The appellant and his accomplice did not want to give the deceased the chance to live. His conduct on the material day was inexcusable. He deserves death sentence."

In considering the extent of the assault, the court will take into account the post-mortem report which indicates that not only was deceased strangulated, but that he was also poisoned. Of course the convict confessed that she had obtained poison to kill her husband from the herbalist, Mr kadabwali, but this poison did not take immediate effect on the deceased, and this prompted the convict and the herbalist to plot the deceased's physical murder aided by the other accused persons. The murder was obviously planned and not instantaneous and in a heat of the moment as the convict wants us to believe. It was not even in the act of self-defence. She just wanted to get even with the deceased person who was divorcing her. She could not have hired thugs to assault him and at the same time claim that she did not intend him to die. This does not fit in the jig-saw puzzle. Greed to own the house and car led her to kill the estranged husband.

That she has children is not a mitigating factor to be accepted by this court. She should have considered it before commission of the crime. The deceased died a needless death as innocent as he was. Even if it was a cold-blooded killing warranting the maximum sentence, she does not deserve death punishment as the State has advised. Once the prosecution does not support the death sentence, the court will disregard it as an option. We should not lose sight of the fact that the convict was faced and experienced a nasty divorce preceded by a turbulent marriage which might have psychologically affected her, causing her to act in desperation to the extent of causing death to the once beloved man. This though is inexcusable. This court was not, anyway, going to give her the punishment of death sentence because of the guilty plea. She deserves some measure of lenience. At 39 years of age she is not a young person to be considered for further mitigation. She was the

master-mind of the murder. In the circumstances, the court imposes a sentence of 30 years imprisonment from the date of arrest. Time already spent in custody to be taken into account.

Pronounced in open court this 13th day of February, 2019 at Chichiri, Blantyre.


M L Kamwambe

JUDGE