IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION

HOMICIDE CASE NO. 238 OF 2018

REPUBLIC

V

WILLARD MIKAELE

CORAM: Hon. Justice M L Kamwambe

Chisanga of counsel for the State

Chirwa and Ndeketa of counsel for the Defence

Amos...Court Clerk and Official Interpreter

Mombera...Court Reporter

SENTENCE

Kamwambe J

On 19th March, 2019 the court convicted Willard Mikaele, 28 years old then, of murder on his own plea of guilty and admission of facts narrated by the State as correct. After conviction counsel agreed to make written submissions in consideration of sentence. There were no witnesses called to testify in this regard in accordance with section 321 J of the Criminal Procedure and Evidence Code. This is the way counsel chose to go about it. The law allows counsel to call witnesses in mitigation or aggravation when considering sentence. However, it is not mandatory to do so even if it is good practice.

The facts of the case are that the convict, Willard Mikaele hails from Mulonda village, T/A Nsabwe, Thyolo district. He was a barber

plying his trade at Sandamu. Sometime back he met a herbalist in Mozambique, a Mr Makuluni of the Republic of Mozambique when he was advised by the herbalist to kill a person with albinism and report to him if he wanted to get rich. On the 10th day of January, 2017 the convict and the person with albinism, **MPHATSO PENSULO,** 19, now deceased, met at Sandamu market. The convict bought deceased fritters for K100 which they shared. Latter the deceased person accompanied the convict to convict's house at Mulonda village. While in the house the convict grabbed the deceased by the neck and strangled him to death. He buried the body in one of the rooms of the house, then he came out and locked the house and left for Mozambique in order to inform the herbalist. Convict's neighbour, Agness Sandram who is PW 1, saw the victim enter the house with convict and heard the screams from the house and later saw convict locking the house in haste, and going away. PW 1 reported the matter to some people who reported to the village headman. The police forum and members of the community broke into the house and exhumed the deceased's body. Willard Mikaele was arrested in Mozambique on 12th day of January, 2017.

THE LAW

Section 210 of the Penal Code provides:

> "Any person who commits the felony of murder shall be punished with death or with imprisonment for life."

It looks to me that the maximum sentence is death yet the court is at liberty to consider life imprisonment as ultimate sentence from which a term sentence may be imposed. It was deliberate for the law makers to put two maximum sentences probably due to the background of section 210 of the Penal Code which before the current amendment, death penalty was mandatory for every murder conviction. This left the courts unable to exercise their sentencing discretion. The courts' powers were thus fettered as regards this offence. Thus, courts failed to look into the circumstances of the murder and the convict to consider any other appropriate sentence apart from death. It is on this basis, *inter alia,* that the Constitutional panel of the High Court in **Francis Kafantayeni and others v Attorney General** Constitutional Case

No.12 of 2005 declared the mandatory death sentence as provided then as unconstitutional.

In the case of **Twoboy Jacob v Republic MSCA Criminal Appeal No. 18 of 2006** the Malawi Supreme Court of Appeal came up with a landmark statement that:

> *'offences of murder differ, and will always differ so greatly from each other and it is therefore unjust and wrong that they should attract the same punishment.'*

The statement above puts the Malawi Supreme Court of Appeal in concord with the **Kafantayeni case** (supra) justifying why courts should exercise their discretion in determining on the appropriate level of punishment in murder convictions which is a judicial function. It is not surprising that section 210 amendment of the Penal Code is couched in that manner so as to retain the courts discretion in determining sentence in murder convictions. The interpretation by the courts and the law today are in tandem, which is a good thing. Hence, in practice, the convict is given the opportunity to be heard on sentence which was not the case before. The requirements of the Constitution are thus also fulfilled.

Malawi has retained the death sentence but has done away with it being mandatory. Courts should therefore not shun imposing death sentences under the pretext that they are inhuman, cruel and that they affect human dignity. It has been reiterated that there will be times when death sentence shall be unavoidable due to the circumstances and that it should be reserved for such occasions. Courts are aware that death sentence should not be the first option unless the State strongly supports it and there is nothing else the court can do in the circumstances, but to impose it. There should always be compelling circumstances or reasons for the court to ultimately agree with the State and impose the death sentence. This means that the court should not be quick to mete a death punishment. It should be satisfied that the circumstances warrant death punishment so that public expectation is met. The accused himself will understand and convince himself that indeed he/she deserved the ultimate punishment even if it is natural to plead for lenience.

SENTENCING PRINCIPLES

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 also 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. The court should take into consideration the personal and individual circumstances of the convict as well as possibility of reform and re-adaptation. (**Republic v Samson Matimati** Criminal Case No. 18 of 2007 HC (unreported)).

The law favours the young and the old. The young are those between 18 and 25 years of age, and the old are those over 60 years. These persons deserve some lenience when 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. However, the nature and gravity of the offence will determine whether the young or old offender really deserves consideration of mercy by reduction of sentence.

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 long custodial sentence would be 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 did not match his conduct.

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. But again the court is

not obliged in all cases of guilty plea to consider to apply some leniency. Not all cases are the same, hence, we have seen above that murders are not the same so as to attract a uniform punishment. Each case needs to be treated specially according to circumstances surrounding it if justice is to be attained. Circumstances may arise that even if one pleaded guilty the court will still deny him leniency nevertheless.

The death penalty is to be applied to the 'rarest of the rare' cases and is appropriate only if the State has rebutted the presumption in favour of life if the offence is one of the worst of its kind and that there is no hope of reforming the offender or that even hope of reformation does not come in in aid of the offender due to the nature and gravity of the offence. That one is capable of reforming would not in the circumstances be adequate reason for the court to avoid imposing the ultimate sentence.

To describe the 'rarest of the rare' principle, the High Court in **Republic v Jamuson White** Criminal Case No. 7 of 2008 (Unreported) *said:*

> *"The offence must have been occasioned in very decrepit and gruesome circumstances, meticulously intentioned and planned and that the convict is highly likely to offend again to justify his total removal from associating with other persons even in prison. He must be a threat to society so much so that society would without thinking twice approve of his elimination from planet earth. The motive for killing must be extremely heinous so as to cause a deep sense of society abhorrence and condemnation that such human being does not qualify to live. I may put deliberate mass murderers* and serial killers in this category."

Since a court may pass a death sentence only in exceptional circumstances, as in the 'rarest of rare' cases, it should not be

difficult to apply the standard and when these rarest of the rare circumstances have come up, courts should not hesitate to pass this rare punishment just because ordinarily the maximum punishment is rarely applied.

In the case of **Republic v Samson Matimati** (supra) the court said as follows:

> *"I hope we have now agreed that death sentence is the exception and the courts should impose it where special reasons are given to justify the cutting short of a man's life. Public order and social security must demand it, which is to say that termination of life is sanctioned only if public interest, social defence and public order would be highly jeopardised. It is also such extraordinary grounds that would qualify as 'special reasons' so as to leave no option to the court but to terminate the life of the convict if State and society are to survive. Follow"*

It went further to say:

> *"The dignity of life must be respected at all cost unless the worse of the worst of the killings warranting the ultimate penalty is met. In describing the most exceptional and extreme cases of murder Saunders JA in* ***Christopher Remy v The Queen, St Lucia*** *Criminal Appeal No. 6 of 2002* at paragraph 8 the court gave the following sentiments:
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> > *'It also falls within the category in my view, of the rarest of the rare... and for the reasons that I have discussed earlier, I am satisfied beyond reasonable doubt that the prosecution have proven to me that this case warrants my imposition of the ultimate sanction. I have no doubt that no useful purpose that would be served by the continued presence of the prisoner in the community in St Vincent and the Grenadines. I am fortified in my view having the nature of the offence, his antecedents, his character, the circumstances, and also I have looked at the interest of the community and the sanctity of life also. It is my view that a case like this justifies the retention of*

the death penalty as the ultimate sanction. There is nothing before me to persuade me that Mr *Trimmingham is deserving of my leniency. I am not convinced that any lesser penalty would justice to this matter despite the able submission of his lawyer. I am convinced that the prisoner dehumanised Mr Albert Browne the manner in which he executed his murder.'''*

COMPARATIVE CASES

In **Twalibu Uladi v The Republic Criminal Appeal Case No.5 of 2008** the Supreme Court of Malawi substituted a sentence of 20 years imprisonment for death penalty because there was no planning for the murder. The killing was clearly not premeditated in that the deceased and the accused were drinking beer together as friends when they quarrelled and the accused took a panga knife and hacked the deceased which led to his friend's death.

In **Winston Ngulube and another v The Republic MSCA Criminal Appeal Case No. 35 of 2006** the court set aside the death sentence and substituted it with 20 years of imprisonment on the finding that no dangerous weapon was used in the assault that led to the death of the deceased, and that the quarrel was influenced by intoxication; there was no clear motive to cause death, and there was no evidence that the convicts were bad characters in life.

In **Charles Khoviwa v Rep.** Criminal Case No. 6 of 2007 the court opined and held as follows:

"In the present case however, we take the view that the Appellant does not deserve the court's 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 a chance to live. His conduct on the material day was inexcusable, he deserves the death sentence."

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

In the case of **The Republic v Samson Matimati Criminal Case No. 18 of 2007** the court pronounced a death sentence to the convict who confronted the first deceased person, Margret Jose, in her garden who he hacked and sliced her throat unprovoked using a panga knife in full view of the victims daughter who pleaded with him not to kill her mother. The victim died on the spot. Then the convict chased the daughter who sought refuge in a hut belonging to Edna Tukula. He torched the hut and in a bid to escape, Edna fell in the hands of the convict whereupon he hit her in the head causing a fractured skull which led to haemorrhage in the brain, and she died on the spot. As if that was not enough he set the body on fire. He was at large and was only arrested three days after the killings.

In the present case, the convict premeditated the killing. He planned to kill an albino so as to get rich fast as advised by the herbalist. The victim Mphatso was of the same village with the convict. On this fateful day of 10th January, 2017 the convict bought the victim fritters which they ate together. The convict enticed the victim to his house wherein he grabbed the victim by the neck and stamped on him till he died. Later, he buried him in a grave in the house. After that he left for Mozambique to inform the herbalist that he has killed an albino. When he went back home he received a phone call from a friend that people are breaking and burning houses. He became frightened so he went back to the herbalist in Mozambique where he started doing piece works for survivor. On 12th January he saw policemen come and he was arrested. The body was exhumed from the convict's house.

It is admitted that the convict is a first offender and he pleaded guilty. But his guilty plea does not show remorse because he had no defence or excuse for what happened. The crime pointed to him since the body was exhumed from his house. He could not say he was not involved when the body was found in his

house. Such a plea of guilty is a hopeless one meant to resign to his fate after killing an innocent person. This court would not exercise any lenience on this basis.

It is true that courts will be slow to impose long sentences for first and young offenders or death penalty. But in special circumstances, this principle shall not apply especially in serious offences committed in bizarre circumstances. He walked with the victim to his house knowing that he was going to kill him and the unsuspecting victim who all along felt so safe in the presence of his predator was surprised and awed to experience the sudden brutal attack. This is the dreadful situation that people with albinism are in. They are very unsafe because it is people who know them well that are prone to attack them. They cannot trust anybody. This feeling of fear is really overwhelming, hence they have nowhere to hide. They would wish they found refuge in other countries where this belief that albino body parts are wealth, does not exist. We are not here talking about this person with albinism alone, since this practice has degenerated into an epidemic without any tangible solution yet. It would be a mockery in such cases for one to even think of a short sentence since these attackers are anyway people with clear sanity. This case would not attract leniency on the ground that the convict is a first and young offender due to its special and hideous facts.

Even if the defence had submitted that according to the decision in **Republic v Samson Matimati** (supra) it was highlighted that in mitigation courts have also to look into the personal and individual circumstances of the offender as well as the possibility of reform and social re-adaptation of the convict, no such personal and individual circumstances have been outlined for the court's consideration. Convict's mental state, health and hardships, past upbringing etc. have not been exposed. Defence counsel is supposed to bring them out.

The case of **Republic v Edson Khwalala, Homicide Case No. 70 of 2015 on page 9** quoted **R v Hitchcock [1982] 4 Cr. App. R. (S) 160, Bibi [1980] cr. App. R. (S) 177** where the trial judge had this to say, "This in my view means that courts must pass meaningful

sentences which will not generate contempt in the eyes of the public or indeed in the eyes of the defendant. Courts must pass sentences that must fit the crime, the defendant and also satisfy the legitimate expectations of the public. Thus, sentence is a legal issue for judicial examination. This calls for courts to mete out meaningful sentences that should not be seen as a mockery to the criminal justice system."

The convict committed a heinous offence against the State. Killings and assaults of persons living with albinism since about 2014 have tainted the image of Malawi, a country which is proudly touted to be the warm heart of Africa. There has been no permanent solution so far even if it appears such attacks have subsided. People who share in this belief that albino body parts are a source of wealth and luck may be lurking somewhere around us only to surprise us with new attacks. We cannot say that threats to people with albinism have ended. We would behave foolishly if we convinced ourselves at this stage that the war is over now. Malawi was shaken by the number of attacks on people living with albinism. The country appeared hopeless to the many calls from the populace to arrest the problem. That people living with albinism are being provided with alarm gadgets attached to their bodies means that threats are alive. Every individual and institution in the country should take part in combating this cancer amongst us to protect our colleagues. The country is/was reduced in a state of terror which is really unthinkable and unwarranted. We cannot allow this to continue as we look on. Courts should take their pragmatic role to protect citizens and others after experiencing public, social and political disorder, instability and insecurity. The case of **Christopher Remy v The Queen, St Lucia** (supra) still lingers at the back of my mind and I feel duty bound to consider this case as one of the rarest of the rare cases deserving the ultimate sanction. The motive behind the killing was as devilish as it is primitive. I want to agree with the State that death sentence is appropriate as it reflects a sense of justice in the circumstances. The public will experience a sigh of relief with such a sentence after so much anxiety. A message should be sent to would be offenders that once arrested they should expect stern punishments, of death. This court thus imposes

a death sentence to Willard Mikaele as provided by the law of the land.

Pronounced in open court this 3rd Day of May, 2019 High Court, Principal Registry sitting at Thyolo.

M L Kamwambe

JUDGE