



REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

ZOMBA DISTRICT REGISTRY

SENTENCE REHEARING CASE NUMBER 12 OF 2018

(Before Honourable Justice Mzonde Mvula)

THE REPUBLIC

v.

PHINZA KUCHANDE

**CORAM HONOURABLE JUSTICE MZONDE MVULA,**

Mr. Trevor Mphalale, State Advocate for the Republic;

Mr. Ian Twea, Of Counsel, for the accused person;

Mr. C. Twea, Court Clerk and official interpreter

Mrs. G.A. Chirombo, Court reporter,

### SENTENCE

Mvula, J.

#### 1.0 Introduction

1.1 The convict, Phinza Kuchande, after full trial, was sentenced to death on 2<sup>nd</sup> September 2009 for the murder of Lillian Zonda. The particulars of the offence were that Phinza Kuchande on or about 21<sup>st</sup> November 2007 in Area 10 in the District of Lilongwe, with malice aforethought, caused the death of Lilian Zonda.

1.2 The brief facts of this unfortunate incident, averred that the convict went to visit his uncle in the uptown suburb of Area 10. He went on 21<sup>st</sup> November 2009 to ask for pocket money which would help him with medical and other personal needs. He did not find his Uncle, but the maid.

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- 3.2 The same mother would rush him to hospital to be treated for the bouts. Despite receiving treatment for cerebral malaria, these symptoms persisted. It is apparent the convict was never really cured of this ailment. As such the family resorted to traditional medicine. The foregoing notwithstanding, the episodes the convict suffered still persisted. Family confirmed in his defence that he often hallucinated and often talked in his sleep. The family believed the problem was spiritual and that he was demon possessed. I shall record this and certainly have it in mind throughout the order herein.
- 3.3. There are medical records of psychiatric evaluation on the convict. Both found that the convict suffers from grand mal epilepsy. This could have been the same when the convict went to area 10 on the fateful day. The convict went to seek financial help to visit an herbalist. There was an altercation between the deceased and the convict. It seems the latter had a bout with the usual ailment which seem to have troubled him for a while. The convict sought to lie down in the lounge to the house.
- 3.4. The maid on the other hand, directed that he lies down in the kitchen. The two engaged in a verbal fight which ended into a physical confrontation. The convict reached for a stool and hit the deceased twice who died later in hospital from resulting injuries. To a reasonable head, these factors are not enough to lead to a fight unless one had aggression or some underlying mental issue.
- 3.5. Having struck the maid twice with the stool, he left by bus to Mulanje to continue with traditional medication. He was arrested on 23<sup>rd</sup> November 2007. He was remanded in custody and after trial, he was found guilty and convicted and got sentenced to death pursuant to section 210 of the Penal Code.

#### 4.0. **Legal considerations for sentencing**

*reasons must be given as to why a non-custodial sentence was inappropriate*" [Emphasis Supplied]

- 4.4. Similar sentiments had been expressed earlier in **Rep v Dan Kasito Conf Case Number 538 of 1996** where **Ndovi J.** said;

*"for first offenders, it is the policy of our law that they should be spared from prison life. However, in circumstances in which imprisonment is appropriate, the custodial sentences should be sharp and quick and consistent with the preventing of the particular defendant from committing further offences"*

- 4.5. This Court has time and again said on the point regarding age of the offender. In the case of **Rep v. Felix Madalitso Keke, Mwaungulu J** (as he then was) propounded some very useful and practical guidelines pertinent when a sentencing court is considering punishment of a convict in the age range of the convict herein. The Court stated as follows:

*"One most critical consideration about the offender is age. For ages between 19 and 25 years, commission of the crime may be a result of impetuous, immaturity, youth or adventure. A severe sentence may be perceived by a young offender as reflecting a harsh society on which to avenge. Long prison sentence for a young person may actually delay social integration to enable a young life to start a new life and lead a meaningful life. For young offenders, therefore a short, quick and sharp sentence may achieve the ends of justice and deter future offending. For offenders between [25 to 35 years] a sentencer may allow a full rigour of the sentence that fits the crime on the assumption that at that age the offender is supposed to have developed a mature temperament towards and mature understanding about crime and consequences about crime and its impact on the offender, the offender's family and the society of which the offender is integral. On the other hand, the sentencer could reduce the sentence considering that an offender at that age has lived longer without trouble with the law. For those aged 36 to 60 years they are entitled to considerations that apply to the prior age group. On the other hand, sentences could be reduced to precisely because of the reduced risk of re offending at that age."*

- 6.3. The third, after the convict hit the deceased, he went to Mulanje. He fled from the consequences of his actions. He did not want to be held accountable for the injury caused to the deceased. Having struck her, he should have remained to see how she recovers, in hospital. Sadly, she did not come out of hospital, alive. He caused loss of life of the deceased under the most unfortunate of circumstances. He should have paid her a visit at hospital, to say the least, as a mark of genuine remorse for his actions.
- 6.4. In this regard, the Republic under paragraph 6, specifically 6.1 of their submissions, despite acknowledging that the mitigating factors outweigh the aggravating factors, they submit a 25 year sentence as appropriate one in this case, to run from the day of his arrest, which is in line with sentencing trends in rehearing exercises.

**7.0. Mitigating factors in favour of the convict**

**7.1. The convict is a first offender.**

The law is clear that first offenders, a custodial sentence ought to be suspended. This is section 339 and 340 of the Criminal Procedure and Evidence Code. This means that any custodial sentence to a first offender should be justified. Long prison sentences are not favoured for first offenders so they are not mixed up with hardened criminals to compromise their rehabilitation. See **Republic v Chikazingwa 11 MLR 160**.

**7.2. Age.**

Added to point on 7.1, is the fact that at time of the offence, the convict was only aged 23. This is a fairly young age. He was previously of good character. In antecedents, it was submitted, that this is his first time in conflict with the law. The good character is manifest in that he used to take part in Sunday school activities in his community he hails from. He

the offence. That is why the deceased told him to lie down. The altercation as to where he must lie down is what led to her being stricken with a stool. The record has it that he still suffers from these fists until the present day.

**7.5. Lack of neurological health assessment.**

The Republic would have done a proper medical assessment of the convict, because they acknowledged this fact on record. The mental state of the convict was affected to a considerable extent especially during the commission of the offence. The convict stated that on the day of the offence he experienced migraines. This is a symptom of an epileptic attack. The ailments of the convicts affected his demeanor as a person as well as his decision making process. Whether he was under some automatism, or under an epileptic attack, this court cannot tell with certainty. However, with evidence of mother and aunt of convict stating that the sickness affected his discharge, despite being a good boy before, one cannot fail to exercise benefit of doubt in his favour. As such, the lack of mental or neurological health assessment by the Republic on the convict, works in his favour, as a mitigating factor. One reasonably can doubt if he intended, let alone, appreciated his actions on the material day.

**7.6. The severity of punishment and condition of the offender.**

It has not been disputed that the convict suffers from mental illness that diminishes his moral culpability and appreciation of the ramifications of his actions. Since his very early days on earth, he has experienced mental lapses, characterized by severe headaches, loss of consciousness, uncontrollable shaking, foaming in the mouth and erratic behavior. The mother of the convict submitted this, as a party that is responsible for the welfare of the person on earth. The court therefore should exercise lenience in his favour in his sentencing because of the health status of the convict which history comes from such a young age.

accordingly will consider to set aside the earlier sentence. Using precedents, the case and the sentence in **Republic v Charles Fred (supra)** forms a benchmark for the sentence in this matter. In **Msanide v Republic (supra)**, a death sentence was replaced with a 15 year sentence for the youth of the convict. He was only 20, 3 years a junior to the current offender, at the time of commission of the offence. For the lack of mental and neurological evaluation of the convict for the mental disease he suffered, and still suffers, I shall take out a 4 year sentence from that imposed in the precedent above before me.

- 8.0. We are not saying the life of Lilian Zonda was lost in vain, no! However, we say the mental faculty of the convict remains impaired. The mental condition he was in at time of the offence, which in some regard was affected by the epileptic condition was neither examined by the Republic nor did the court consider it initially. This court has taken these to mind. Accordingly, I shall set aside the death sentence. Instead the court imposes a sentence of **time spent in custody** from arrest to date, for the death of Lilian Zonda, from 23<sup>rd</sup> November 2009. Since this sentence runs from the date of arrest, I shall release Phinza Kuchande forthwith with a condition, for record purposes. The convict should go for periodic evaluation of his mental condition before certified medical practitioner at a public hospital. The results must be documented periodically in a health passport. The herbalist preferred, should only supplement the former.

#### 8.1. **Right of appeal**

The concerned may appeal to the Supreme Court within 30 days next.

Made in Court at Zomba this 24<sup>th</sup> day of June 2021



**JUDGE**