REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

SITTING AT MANGOCHI

HOMICIDE CAUSE NUMBER 02 OF 2021

(Before Honourable Justice Mzonde MVULA)

BETWEEN:

REPUBLIC

Vs

JAMES PILO KHANG'A

SUMAILA NIKISI

AND GAYESI KATUPE

CORAM: HONOURABLE JUSTICE MZONDE MVULA

Mr. A. Salamba, Assistant Chief State Advocate for the Republic

Mr. P. Masanjala, Senior State Advocate

Mr. R. Mkweza, Senior State Advocate

Mr. Z. Ndeketa, Principal Legal Aid Advocate for the Accused

Mr. N. Mdazizira, Senior Legal Aid Advocate

Ms. K. Chingeni, Senior Legal Aid Advocate

Mr. M. Malipa, Court Clerk and Official Interpreter.

Mrs. G. Chirombo, Court reporter

SENTENCE

1.0 Introduction

1.1 The Court is grateful for pre-sentencing motions which were electronically filed by the parties by midnight of 9th May 2022. All parties complied by the direction of the Court. They helped us to arrive the sentence we shall pass to the convicts therein, who, after full trial were found guilty on 9th May 2022, upon being jointly charged with three offences. The first count of murder contrary to section 209 of the Penal Code. According to section 210 of the Penal Code the maximum sentence for murder is death or life imprisonment. The second count being extracting human tissue contrary to section 224A (a)(ii) of the Penal Code. The maximum sentence for the offence of extracting human tissue is life imprisonment. The third count is Trafficking in Persons contrary to section 14 (1) of the Trafficking in Persons Act. The maximum sentence is 14 years imprisonment. If aggravated, life imprisonment is the maximum sentence. The sentence following is deemed proper to the convicts in the circumstances.

2.0 The Law on sentencing

2.1 Since the delivery of judgment by the High Court of Malawi in the case of **Francis Kafantayeni and Others v Attorney General (Constitutional Case 12 of 2005**), as read with the case of **McLemone Yasini v Republic MSCA Criminal Appeal 25 of 2005 (unreported)**, the courts in Malawi made orders which benefited convicts who were on death row. Mandatory death sentence was outlawed. Those who faced mandatory death penalty had to undergo sentence rehearing. This court equally observed in the sentence rehearing case **12 of 2018 Between the Republic v Phinza Kuchande** (Zomba District Registry).

2.2 It is along the same line that a death sentence in this order is not an appropriate sentence. It is a cruel, inhuman and degrading treatment or punishment. In fact, Section 19 of the Constitution speaks against cruel, inhuman and degrading treatment or punishment against any person. This includes persons found guilty of offences in the courts. The extent to which our Constitution proscribes torture or cruel inhuman or degrading treatment is clear from section 45 (1) of the

Constitution. This section prohibits derogation from the right not to be subjected to cruel, inhuman and degrading treatment.

2.3 It makes it mandatory that there shall be no derogation with regard to right to life, prohibition of torture and cruel inhuman or degrading treatment. The inappropriateness of the death sentence can be appreciated from the angle that it renders the State doing exactly what the convict did. An *"eye for eye"* is not the spirit of our justice system. Recidivism is what our sentences should aim at. Death sentence essentially means it is okay to kill so long as it is the State doing it. If killing by a citizen is wrong, it should be equally wrong if done by the State. The act of killing remains the same. Life gets lost no matter who does it or under what authority.

2.4 The Legendary icon Lucius Banda once sang in "Zasiyana Pati" off his Cease Fire Album, that, an eye for an eye is not a good thing of which if we did we all would be blind. A criminal is hardened to take away the life of another. If Government under sentence takes away the life of the criminal, what difference does it make? It goes:

"*Diso kulipa diso, ndinaimba kale, si chinthu cha bwino,*
Zikanamatero, bwezi tonse lero tili a khungu!...
Chigawenga ndi chouma mtima chimapha munthu,
Koma ngati Boma lichibwezera, zasiyana pati?"

2.5 In other words, Government should stand on higher moral ground and not repeat the death penalty on the offender. In any event, the death sentence cannot be reversed. Had the same been passed, Mr Kafantayeni would not have changed the course of legal jurisprudence from **Kafantayeni Resentencing Project,** stemming from the orders in **Kafantayeni v Attorney General Constitutional Case No. 12 of 2005, High Court, Principal Registry** (hereinafter referred to as **Kafantayeni case)**, that involved resentencing of all death-row convicts who were sentenced to the mandatory death penalty in Malawi.

2.6 The defence argue that propriety of death penalty worldwide has always been debatable, with other jurisdictions abolishing it and most jurisdictions having a moratorium in place. Over 100 countries voted overwhelmingly in favour of a second resolution on Moratorium on the use of the death penalty at the UN on 18th December 2018. It also reports that it is mostly carried out in non-African Countries. In sub-Saharan countries, there were only 25 executions carried out with Botswana being the only SADC country to have carried out the punishment in 2019. Malawi has not carried out execution since the birth of multiparty democracy. As such the Court should not even belabour themselves to pass the death sentence that cannot be carried. This is indeed a convincing argument.

3.0 **General considerations for sentencing suspects**

3.1 Law is trite, that a court can impose a sentence which the law permits it to pass. Moreover, a sentence by the court should not only be permissible, but should fit the criminal and the crime, blended with a measure of mercy. See **Rep v Muhammed Abdul Ibrahim [2010] MLR 311.** In this regard, the court will look at a number of factors to consider before arriving at the appropriate sentence in this matter. These are, the law, precedents, and extenuating circumstances to this offence. Starting with the legal point, the law succinctly provides under section 340 of the Criminal Procedure and Evidence Code (the Code) that a first offender should not be sent to prison, unless justified. As a general rule, a first offender should ordinarily be afforded a high degree of leniency by the sentencing court.

3.2 Moreover, despite the stipulation of the sentence in a statute, the dead letter provides for the maximum sentence. This is no exception in homicide cases, which before the legal development above, were treated with the full wrath of the sentence. In practice however, courts in the rarest of circumstances impose maximum sentences. This is because of the position that the maximum sentence is reserved for the worst offender, or the worst ways of offending. See **Rep v Kamil and Yaghi 6 ALR Mal 356.** The Court should therefore justify the maximum sentence, if it is committed by the worst ways. In the alternative, the ways of committing the offence are deemed as the worst ways.

3.3. Another critical factor in sentencing is the age of the offender at time of the offence. Age of the offender must be taken to mind as a critical factor in sentencing. See **Rep v Ng'ambi 6 ALR Mal 457.** In **Thomson Kalua v The State Criminal Appeal No. 96 of 2014, High Court, Mzuzu District Registry** (unreported) **Madise J.** made the following instructive statement;

> "It is important to note right at the outset that the policy of the law is not to imprison first and young offenders unless circumstances dictate otherwise. Subordinate courts are specifically called upon by the law to desist from sending first offenders to prison unless there is no any other sentence to fit the offender and the offence. The law as provided for under **section 340 (1) of the Criminal Procedure and Evidence Code** generally does not promote the imprisonment of first offenders unless otherwise stated by law or precedent. Where a court intends to forego the provisions of **section 340 (1)** good reasons must be given as to why a non-custodial sentence was inappropriate"
>
> [Emphasis Supplied]

3.4. Similar sentiments had been expressed earlier in **Rep v Dan Kasito Confirmation Case Number 538 of 1996.** 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"

3.5. This Court is has time and again said on the point regarding age of the offender. In the case of **Rep v. Felix Madalitso Keke Confirmation case 44 of 2010 (Principal Registry), 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."

3. 6. There is thought that first offenders, must not be mixed with hardened criminals. This compromises their reform. See **Rep v Chikazingwa 11 MLR 160.** Most critically in this case, the court has to look at the possibility of reform and social preadoption of the convict. See **Republic v Samson Matimati Criminal Case 18 of 2007 (unreported).** However as an adult the law presumes that every adult intends the probable and natural consequences of their actions. See **Nankondwa v Republic 4 ALR Mal 388**. An adult therefore should think through their actions first, because the law will be slow to find that it was an accident for it.

3.7 Punishment must be humane**.** The Constitution of the Republic of Malawi under section 19(3) provides that any punishment that is deemed cruel, inhuman and degrading or akin to torture should not be sustained. It reads:

'No person shall be subjected to torture of any kind or to cruel, inhuman or degrading treatment or punishment.'

3.8 The above position is reinforced by section 45 (2) of the Constitution which prohibits derogation of the right not to subject any person to cruel, inhuman and degrading treatment or punishment. It reads:

'There shall be no derogation with regard to-

(a) the right to life;

(b) the prohibition of torture and cruel, inhuman or degrading treatment or punishment;'

3.9 The Constitution of the Republic of Malawi in Section 13(m) lays out the principle to be followed in enforcing laws as follows :-

> To promote law and order and respect for society through civic education, by honest practices in Government, adequate resourcing, and the humane application and enforcement of laws and policing standards.

3.10 In sentencing, Courts are encouraged to guard against pressure to please members of the society at the expense of peculiar circumstances of the offence and offender. In the case of **Rep v MacDonald Kumwembe, Pika Manondo and Raphael Kasambala Criminal Case No. 65 of 2013, High Court, Lilongwe Registry (unreported).** It was stated:

> 'The interest of society demand that those who commit crimes be punished and in deserving cases, that they be punished severely. Counsel for the defence correctly submitted, we ought to differentiate between what the public interest is what society wants. Members of society cannot always get what they want as courts do not exist to win popularity contests, but solely to dispense justice.'

3.11 In **Republic v Funsani Payenda, Homicide (Sentence Rehearing Case) No. 18 of 2015, High Court,** Justice Kapindu was even more elaborate. We quote:

> 42... It is important to point out that Malawian Courts have stated that when sentencing, it is appropriate that the nature of the crime, the circumstances of the crime, the public interest and the individual circumstances of the crime must be taken into account.
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> 43. As shown above, in the case of **Republic vs Margaret Nadzi Makolija,** Kenyatta Nyirenda J. held that Courts also have 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. He mentioned that this may relate to the convict's individual circumstances "**at the time of committing the offence"** and "**at the time of sentencing"**, that is, his "mental or emotional disturbance, health, hardships, etc".
>
> ...
>
> 47. All these authorities emphasize the centrality of taking into account the individual circumstances of the defendant when sentencing.

4.0 **Antecedents**

4.1 Section 260 of the Code, the section applicable In high court sentence hearing in cases where the trial was not by jury by virtue of section 294(2) of the Code, provides that where a verdict of guilty is recorded, the Court may, after judgment but before passing sentence, receive such information or evidence as it thinks fit, in order to inform itself as proper to the proper sentence to be passed.

4.2 The information or evidence that the court may receive under may, in addition to the evidence of the accused or the prosecution, include information or evidence by or on behalf of the victim of the offence and any relevant reports to enable the court assess the gravity of the offence.

4.3 The Prosecution observes that the convicts are first offenders. First offenders should indeed earn leniency of the Court when it comes to sentence: See section 340(1) of the Code. That fact they are first offenders should not make us lose sight of the bigger picture; a life of Saidi Dyton was lost because of them. In the case of **Rep v Joyce John [2012] MLR 329 (HC),** Kalembera, J., gave the convict a 30-year sentence for the murder of her own son. He said:

> "I have indeed considered that the convict is a first offender with no history of criminal conduct and that she has shown remorse. However, I have also considered that the life of a small boy was prematurely curtailed. Murder is a very serious offence hence it carries a maximum sentence of death."

4.4 The aggravating factor here is that fact that the whole offence was planned. The convicts had met previously planning to kill the deceased and extract his body for sale. That meticulous planning is an aggravating factor was upheld as such in the case of **Ngulube and Another v. The Republic, [2008] MLR 413.**

4.5 The selective targeting to murder the victim because of his skin pigment is another aggravating factor. The other is how they selected the spot to launch the attack. A place where water flows fast so that blood spillage is not picked up. This case has spoken and society has held hands that the senseless attack on persons living with albinism should be met with hefty penalties. Offences against persons

with albinism will never earn the courts mercy because of the perpetrators misinformed beliefs and laziness to find honest means of financial gain.

4.6 In **Rep v Willard Mikaele Homicide Case No. 238 of 2018,** Kamwambe, J. meted out the death sentence against the convict. The court had this to say in relation to the killings against persons with albinism:

> People who share in this belief that [albinism] body parts are a source of wealth and luck are lurking somewhere around us and they may surprise us with new attacks…. 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.

4.7 In the present matter, therefore, the State submits that killing a person with albinism is itself an aggravating factor. In fact, that the deceased was a nephew to the second convict. He also regarded the first convict as his uncle as the first convict was a friend to his father. The deceased trusted the convicts. Relatives and village folks are supposed to protect their relations and equally important people living with albinism and not see them as market commodities.

4.8 The deceased was vulnerable because of his albinism. It is important that the sentencing court should pass a sentence reflecting this fact. Betraying that trust is an aggravating factor when we look at the fact that it was because of this trust that led to the deceased spending the fateful night at the first convict's home. The case of **Republic v Sam Kaumba, Criminal Case No. 02 of 2015(Unreported, MZ HC Registry)** discussed above is illuminating here. In that case the court found that the convict who had lured the victim, a boy living with albinism, abused the trust that the young boy had in him to attempt to murder him. This trust, the court noted that it was an aggravating factor. He was sentenced to life imprisonment.

4.9 The nature of the offence is also an aggravating factor. It should also inform the court of an appropriate sentence. In particular, serious cases such as murder of people living with albinism should not carry short sentences. In **Rep v Joyce John [2012] MLR 329 (HC),** the court noted that at the heart of murder cases is

that a life was lost and nothing can change that. The seriousness of the offence is an aggravating factor.

5.0 The last aggravating factor is that the offence herein was committed by a group of persons or in the company of others. In the case of **Republic v Patel Criminal Appeal No. 267 of 2005** the appellant conspired with other two persons to buy a gun and own it. The court considered that the fact that the offence was committed by a group of persons, or in the company of others, it was an aggravating factor.

5.1 In the present circumstances, the aggravating factors far outweigh the mitigating factors for the convicts. In line with the cases of **The Rep v Willard Mikaele Homicide Case No. 238 of 2018; The Republic v Samson Matimati Criminal Case No. 18 of 2007; The Republic v Dickson Eliya, Criminal Case No 07 of 2015; The Republic v Humphrey Eliya and Another, Criminal Case No. 164 of 2018; The Republic v Gerald Phiri and Others, Criminal Case No. 109 of 2018**

5.2 The State submits that sentences of life imprisonment be imposed. The convicts' active participation in the death of the boy with albinism call for such sentences. The killing of a boy with albinism is vile and the fact that this is still happening should demand for a sentence that is also deterrent in nature. In **The Republic v Humphrey Eliya and Another, Criminal Case No. 164 of 2018,** for the offence of murder, the court sentenced the first convict to life imprisonment for his active involvement in the death of his step-son who also had albinism. In **The Republic v Gerald Phiri and Others, Criminal Case No. 109 of 2018,** for the offence of murder, the court sentenced the first four accused persons to death for their involvement. The deceased, who was a girl with albinism, was the niece of the first convict.

5.3 Section 210 of the Penal Code provides that the maximum sentence for the offence of murder is death. Looking at the circumstances in the commission of the offence in this case, they are similar in the cases of **The Rep v Willard Mikaele Homicide Case No. 238 of 2018; The Republic v Samson Matimati Criminal Case No. 18 of 2007; The Republic v Dickson Eliya, Criminal Case No 07 of 2015; The Republic v Humphrey Eliya and Another, Criminal Case No. 164 of**

2018; The Republic v Gerald Phiri and Others, Criminal Case No. 109 of 2018. These cases involved luring, hacking and dismembering/body mutilation of the deceased. The same can be said of the present case.

5.4 In the premises the Prosecution pray for custodial sentence. The defence pray for a sentence that is less than 20 years on count 1. This is because they led clean life and they are fairly advanced in age. They cooperated with investigations. The time spent in custody awaiting sentence of 1 year 5 months. They had been subjected to harsh conditions of prison life despite not to have been convicted of the offence. A convict that cooperates with the criminal justice system players deserves leniency from the honourable Court. It is a sign of remorse. They save State's or Court's time and other resources. The convicts cooperated with the police. After committing the offence, they never escaped. Even after it was heard that investigations were being carried out, the convicts did not flee until they were arrested.

6.0 **Mitigating Factors**

6.1 The defence state that we take two key considerations that must jointly exist as singled out. Firstly, the murder ought to be extremely heinous - analogous to deliberate mass murders and serial killers. Secondly, there has to be absence of possibility to reform and likelihood of reoffending if not killed.

6.2 On the first leg, that there is no evidence in this court that the convicts were part of a group of people that was perpetrating acts of killing people with albinism. Further, that there was no evidence of the convicts being involved in any homicide other than of the single deceased in this case. Consequently, the convicts herein could not qualify as serial killers or analogous to that. In the alternative, those involved in deliberate mass murders or analogous to those involved in the same. On that score alone, they would not qualify for the maximum sentence/death penalty. They do not qualify as the rarest of the rare.

6.3 Further, they also would not qualify for death penalty on the second leg. There is no evidence that the convicts would re-offend. I certainly agree to this submission and I will certainly factor it to mind.

7.0 **Offence of extraction of human tissue**

7.1 The maximum sentence for this offence is life imprisonment. The State submitted that the convicts should be sentenced to life imprisonment for their role in the commission of this offence. While there are mitigating factors mostly because of the fact that they are first offenders, this is not an offence which gives an option of non-custodial sentence. This stems from the gravity of the offence. This offence was introduced into the Penal Code through the 2016 amendments as a direct legislative response to the offences against persons with albinism.

7.2 Essentially a sentencing court in offences against persons with albinism which have been convicted under the 2016 amendments does not give lower sentences than the general offences related to the specific ones under the sections 224A, 224B and 224C of the Penal Code.

7.3 In arriving at the appropriate sentence, the prosecution has implored this court "not to apply the general sentencing trend under the general penal provisions" to this offence. The court "should impose significantly stiffer sentences in order to reflect the unique gravity of offences targeted at persons with albinism." This court cannot agree more. Section 224A of the Penal Code complements section 16 of the Anatomy Act on prohibition of sale of body parts or tissue, which also attracts a maximum penalty of life imprisonment, just like maximum punishment under section 22A of the Penal Code.

7.4 The State submits that the case of **The Republic v Gerald Phiri and Others, Criminal Case No. 109 of 2018**, should offer guidance here. In that case, the accused were charged with various offences including extracting human tissue contrary to section 224A(a) (i) and transacting in human tissue section 224A(e)(ii) of the Penal Code**.** In both counts, the convicts were condemned to life imprisonment. The offence under discussion here and those in the **Gerald Phiri** case are a result of the 2016 Penal Code amendment.

7.5 Looking at the nature of the offence, the reason the legislature brought this offence to the Penal Code and following **The Republic v Gerald Phiri and Others (supra)** the State submits that the convicts also be sentenced to life imprisonment for the offence of extracting human tissue.

8.0 **The Offence of Trafficking in persons**

8.1 The maximum sentence for this offence is 14 years. If the offence is aggravated under section 16 (1) (g) of the Trafficking in Persons Act, the maximum sentence is life imprisonment without a fine**.** Looking at how this offence was committed, it was aggravated. An unsuspecting ward was taken advantage of. Made to stay over, waken up at night and told he would go fishing. Only to be hit in the head and hacked on the throat and have bodily parts dissected and put in a sack. This is a worst way of committing the offence. In my considered view, should attract life imprisonment. See section 16(2) of the Trafficking In Persons Act. The State submits that the convicts should be given the maximum sentences of life imprisonment.

8.2 In **Enos Mwafenga v The Republic Crimina1 Appeal Case No. 107 of 2016**, the appellant was convicted and sentenced by the lower court on 6 counts of child trafficking and trafficking in persons to varying sentences ranging between 10 and 14 years. The High court on appeal confirmed the 10 year sentences and substituted the 14 year sentences with that of 10 years. DeGabriele, J., held the view that the law did not provide an option of a non-custodial sentence.

8.3 The aggravating factors in the case of **Enos Mwafenga** case are different from the present one. It must be stated that the latter case did not involve a victim who was living with albinism nor did it deal with the exploitation of harvesting body parts. In order to appreciate the appropriate sentences here, the sentiments of Madise, J., in **The Republic v Kaumba** offers guidance. It was said:

> The policy of the law is that courts should pass what is **considered the usual sentence in similar cases before courts of similar jurisdictions**. A sentence must fit the crime, the offender, the victim and society should be satisfied that justice has been done….
> [Emphasis supplied]

8.4 In the circumstances, the State relies on the case of **Republic v Gerald Phiri and Others (*supra*)**. In that case, the court sentenced the Gerald Phiri to life imprisonment for trafficking in persons contrary to section 14(1) of the Trafficking in Persons Act. The aggravating factors highlighted above warrant that the

convicts herein also be sentenced to life imprisonment in the present case. The **Gerald Phiri Case** which involved the trafficking of a person with albinism. In the cited case, the first convict was a relation of the victim, her uncle. She was trafficked in order that her body parts should be sold. These facts are all present and on all fours with this case.

8.5 In order for the sentence to fit the crime, the offender, the victim and the society to be satisfied, no other sentence other than life imprisonment, is warranted in the present case, according to the Prosecution. This is because the trio here are, are worst offenders in the circumstances. This court cannot agree more. In fact, looking at how the offence was committed, the narration per confession by the second convict, still pictures of the deceased in pieces, was such a sorry sight of a reasonable person against a person who lived with albinism. No person deserves to die in this manner. In fact, the late Saidi Dyton in particular did not deserve to die in this manner. He was discriminated against and carefully targeted by the convicts. Disability rights need protection whose court sentence should reflect.

9.0 **Finding by the Court.**

9.1 James Pilo Khang'a was seen as father figure to the late Saidi Dyton. He took him for an Uncle. In fact the same could be said of the second convict, whose wife is aunt to Saidi Dyton and indeed her cousin. Saidi Dyton is nephew to the second convict. This is a family affair. Little wonder when the late Dyton went with Mohammed to the house of the first convict, he felt at home. The wife of the first convict prepared food and he ate. The abuse comes in because while Saidi Dyton though he was safe and could sleep over, he did not know that the same was a trap to have him mercilessly murdered for the pigment of his skin, for money.

9.2 The 3 convicts met earlier at the house of the first convict and on this night they were together. The second convict came to call the first and with the third they set out to wake up the deceased from the kitchen in which he slept. They told him they were to go fishing. He left innocently. Until they got to a point where water was flowing fast along the river. The idea was to conceal any blood spillage. The second convict used a club and hit the deceased in the head. It was his account that the used a panga knife to hack the 23 year old deceased on the neck. What

followed is disgusting and I do not even want to imagine how heartless the trio were this night, as they executed this dispeakable act.

9.3 The picture I have is of a butcher slicing apart, limbs from the carcass of meat to dismember the portions to make pieces ready to sell customers in a butchery. The trio did a similar thing this in dead of night. They brought to pieces the body of an innocent, unsuspecting 23 year old young man for his limbs because of K60,000,000 they were promised by the person the second convict knows well. The conduct of the trio herein is sickening because they treat Saidi Dyton and indeed persons living with albinism as second class, who should be attacked and their limbs sold for money despite lack of proof that they are worth something.

9.4 The Malawian society spoke through the legislature. Parliament passed laws by amending the Penal Code whose enhancement sentences of offences under count 2 was passed, to protect the persons living with a disability, who are just like every other person. Persons living with albinism are an integral part of. That is why when anyone in their right sense of mind makes a bad turn and unlawfully assaults any person living with albinism and get caught, they must be met with full wrath of the law. Persons like you 3 do not deserve any mercy despite the mitigating circumstances available to you.

9.5 The only remorse that came is the statement of the first convict who told the spouse "*zachitikazi sichilungamo!*" Wish the same came earlier during meetings which PW5 and wife of the first convict saw take place at your house. She is on record to have overheard the discussion, commenting on the disposition of Saidi Dyton that "he is a good size!" The utterance of the second convict to his wife PW 6 that "*zisakukhudze ndiwe mzimayi*" tells the men were bent at concealing their illicit act. This was the same yellow sack in which were the remains of the late Saidi Dyton, who hours ago was walking, healthy and loved by his girlfriend Hawa PW 3, Mother PW 2, Uncle PW 1 and best friend Mohammed PW 4. A life was cut short and reduced to a sack and dug up in a shallow grave in the maize field of the second convict. You all deserve long custodial sentences.

9.6 The first convict is fairly advanced in age. He is 71 years old. The rest are 45 and 44 years old respectively, for second and third convicts, as at the time of the

offence. Where the offender is a young person the law requires the offender should be given a more lenient sentence to accord them, the opportunity to reform: **Rep v Chizumila and others [1994] MLR 288.** Courts will take into consideration the age of the convict both at the time of committing the offence and at the time of sentencing. The law generally favors relatively young or old people to protect them from being in custody for longer periods: **Rep. v. Ng'ambi (*supra*).**

9.7 The law on sentence will also consider those not so young or not so old but the middle age group particularly if they are first offenders. Such offenders will be accorded leniency for previously leading crime free life. **Republic v Felix Madalitso Keke (*supra*).** However, looking at cases of this nature ever so controversial in our country, if we let off offenders because they are young or old, we shall leave "members" of Association of Persons living with Albinism in Malawi, and indeed all of us affected with this vice, on an edge. The offenders will be encouraged knowing they will get off the hook on account of age.

9.8 After all, the first convict should have used his age and life experience to protect Saidi Dyton and not be the enabler that he was. He is as guilty as the one who chopped off the limbs because of joint criminal enterprise. He waives the right to be treated as an aged. If he did alone, certainly I would have considered that factor. However doing, he should know that an adult intends the probable and natural consequences of his action. See **Nankhondwa v Rep (*supra*).** Age for the first convict therefore will not matter much. Just as a young offender waives right to be tried as minor if he offends with adults, so does an aged offender lose privilege for lenience id he commits offences in convert and serious ones for that matter.

10.0 **The Sentences**

10.1 The Court has considered the circumstances how the offence was committed. The offence was carefully planned, it was committed by more than one person, and meetings were held to execute it, carefully deciding who to attack and where to do it. The where was done so that blood spillage is covered up, and cutting up the deceased into small pieces of tissue so that the body parts are ready for "the

market". The court will not impose the maximum sentences so that you live in guilt for your error. Every day you should reflect if it was worth taking out a life of Saidi Dyton in this manner. The other consideration is deterrence. Others should learn from your miscalculation and misguided minds. Persons with albinism are like every one of us. They equally deserve love and attention like everyone out there. They are not to be discriminated by turned into careful targets. You 3 deserve no mercy. A life in prison you must live so that anyone who has similar evil intention should refrain even from mere thought of doing such a vice.

10.2 You all have spent 1 year 5 months in custody from date of arrest. I will consider this time in my order. The prison conditions in Malawi are deplorable. That is why one must think twice before engagement in voluntary illegal act. While out here, one has to make good choices. Prison life is hard and one should not expect it will be simple especially when one goes out of their way voluntarily to kill an innocent person thinking they will make money off his loss of life. This is selfish act. Degree of participation in a crime was considered at length in this sentence as required by law. In **Republic vs Felix Madalitso Keke (*Supra*)** the High Court said;

> Generally criminal justice treats different people differently based on age, mental capacity, antecedents and sometimes, gender, **degree of participation in the crime.**
> [Emphasis supplied]

10.3 The court looked at the level of participation of each offender. Each played a crucial role. If there is anyone who deserves some level of mercy is the second convict who explained to investigators how the offence was carried out. However looking at the complexity of the offence, we do not want to send wrong if not conflicting signals to society. He is the one who struck the lethal blows and cut up the deceased. That is why the court will not impose a maximum sentence *per se*. A long custodial sentence that sends comfort that justice has been served is the aim of the present sentence.

10.5 The Court sentences you James Pilo Khang'a, Ishmail (Sumaila) Nikisi and Gayesi Kaupe to **68.5 years in prison** on the offence of murder of Saidi Dyton under count 1.

10.6 The Court sentences you James Pilo Khang'a, Ishmail (Sumaila) Nikisi and Gayesi Kaupe to **48.5 years in prison** on the offence extracting human tissue from the corpse of Saidi Dyton under count 2.

10.7 The Court sentences you James Pilo Khang'a, Ishmail (Sumaila) Nikisi and Gayesi Kaupe to **38.5 years in prison** under count 3, on the offence of trafficking in persons which was aggravated for luring and keeping him overnight at the house of the first convict only to wake him up at night to mercilessly butcher him. You deserve no grain of mercy for the murder, extraction of tissue and trafficking of Saidi Dyton.

10.8 This hair raising sentence which sends shivers to those planning similar acts, should think over and over if it is worth it. We hope the sentence shall make the family of the late Saidi Dyton find closure and mourn their beloved son. He did not deserve to die in the manner he did. A life brutally cut short and dreams shattered because of selfish men who attacked him for the skin pigment. Messages have gone out. Long life in prison has been passed to stop people from attacking persons living with albinism. By grace, you will reform and come out changed. One life is too precious to be lost in this manner. The offenders did not belong to a wave that attacked persons living with albinism. However, one attack amongst a wave of attacks makes the lone attack as part of the wider attacks on this category of persons. Let that be borne in mind.

10.9 You have the right of appeal against the Judgment and sentence. 30 days shall suffice. The sentences I shall order should run concurrently effective date of arrest. You serve the higher which is 68.5 years imprisonment.

10.10 Made in court this 11th May 2022 at Mangochi

JUDGE