IN THE HIGH COURT OF MALAWI

CRIMINAL DIVISION

Zomba Registry

Criminal Case No. 05 of 2023

THE REPUBLIC

VS

CHARLES TSEKA

CORAM: **HONOURABLE JUSTICE D.H. SANKHULANI**

Sakaunda, of Counsel for the State

C. Phiri, of Counsel for the Convict

Malipa, Court Clerk and Official Interpreter

Mboga, Court Reporter

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JUDGMENT ON RESENTENCING

Sankhulani, J

Background Information

On 1st April, 2002, the Convict, Charles Tseka, was, after full trial, convicted by the High Court, sitting with a jury, at Ntcheu of the offence of murder contrary to **Section 209** of the **Penal Code**. We shall provide the particulars of the charge and the material facts surrounding the commission of the offence, when we get to the actual determination of the appropriate sentence to be imposed herein. Suffice it to say, at this stage, that, upon being convicted, the Convict was sentenced to the then mandatory death penalty.

On 15th November, 2002, the Convict's sentence was commuted to life imprisonment.

Subsequently, the Convict appealed to the Supreme court against both his conviction and sentence, and the appeal was dismissed.

This matter now comes up before this Court for a resentencing hearing, in respect of the mandatory imposition of the death penalty that was meted out to the Convict. This follows the decision of the High Court in **Kafantayeni & Others vs Attorney General** [2007] MLR 104, which declared all mandatorily imposed death sentences for murder to be unconstitutional and, therefore, invalid. We proceeded to conduct a resentencing hearing on the strength of this case and also on the strength of the 2010 decision of the Supreme Court of Malawi in the case of **Yasini v Republic** (MSCA Criminal Appeal No 25 of 2005, Unreported), which held that all persons sentenced to the mandatory death sentence are entitled to a resentencing hearing.

We held the resentencing hearing in the presence of both parties hereto who appeared through Counsel. May it be noted that in support of the resentencing hearing, there are is one affidavit that was filed, sworn by Chrissy Kolezi Phiri, of Counsel. The Convict also filed submissions in support of the resentencing hearing. On its part, the State did not file any affidavit. Instead, it only filed submissions on resentencing hearing. After the resentencing hearing, we adjourned the matter to a date to be set for judgment on resentencing. Hence our delivery of judgment on resentencing on today's date.

The Applicable Legal Principles

It was held in the **Republic vs. Payenda** (Criminal Cause 18 of 2015) [2015] MWHC 489 (23 April, 2015) that in cases of such a nature as the present one, the actual sentencing takes place at resentencing, the previous sentence having been declared constitutionally invalid. Since the actual sentencing takes place at resentencing, it means that the general legal principles of sentencing apply to resentencing hearings, just as they do to sentencing for any other crime. By 'general legal principles', we mean those legal principles of sentencing that are applicable to sentencing for murder as they are to sentencing for all other crimes. Accordingly, we shall, at this juncture, restate those general legal principles of sentencing that we think we are relevant to the present matter. The first general legal principle of sentencing that we would like to restate is that a sentence should be one that fits the crime, the offender, is fair to society and is blended with a measure of mercy (**Rep vs. Muhamad Abdul Ibrahim** [2010] MLR 311). The second general legal principle of sentencing that we would like to restate is that every sentence must "adequately reflect the revulsion felt by the great majority of citizens" (per Chikopa J., as he then was, in **Steven Mbewe vs. Republic**, Criminal Appeal Case Number 48 of 2006, Unreported). The third general legal principle of sentencing that we would like to restate is that, at sentencing, the court should bear in mind the various aims of punishment such as retribution, deterrence, incapacitation and rehabilitation, the most important one being rehabilitation (see the **Payenda Case**, *supra*). The fourth general legal principle of sentencing that we would like to restate is that every sentence must have reasons

therefor provided (**R vs. Matebule** (Confirmation Case 150 of 1997) [1997] MWHC 29 (12 November, 1997). The fifth and last general legal principle of sentencing that we would like to restate is that ultimately the sentencing process is all about arriving an appropriate sentence in each given case (see the **Matebule Case**, *supra*).

The Applicable Legally-Accepted Considerations

Regarding considerations that must be taken into account when sentencing murder convicts, the case on point is the **Payenda Case** (*supra*). In that case, Honourable Justice Professor Kapindu said as follows, and we quote with approval:

"*In my considered view, the decision of Kenyatta Nyirenda, J in the case of* ***Republic vs Margaret Nadzi Makolija****, Homicide (Sentence ReHearing) Case No. 12 of 2015, has properly summarised the important considerations that have to be taken into account when sentencing convicts in murder cases. The following considerations have been outlined:*

1. *The maximum punishment must be reserved for the worst offenders in the worst of cases.*
2. *Courts will take into consideration the age of the convict both at the time of committing the offence and at the time of sentencing. Young and old offenders are preferred to receive shorter sentences.*
3. *Courts will always be slow in imposing long terms for first offenders, the rationale being that it is important that first offenders avoid contact with hardened criminals who can negatively affect process of reform for first offenders.*
4. *Courts will have regard to the time already spent in prison by the convict and will usually order that the sentence takes effect from the date of the convict's arrest thus factoring in time already spent*

in prison. Courts will however discount this factor if the time spent was occasioned by the convict themselves, that is, where they skip bail or because of unnecessary adjournments.

5. *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. Arguably, this may relate to the convict's individual circumstances at the time of committing the offence and at the time of sentencing, that is, their "mental or emotional disturbance", health, hardships, etc. The learned Judge also quoted the case of* ***Republic vs Samson Matimati****, Criminal Case No. 18 of 2007 (unreported) in support of this proposition.*
6. *The Court may take into account the manner in which the offence was committed, that is, whether or not (a) it was planned rather than impulsive, (b) an offensive weapon was used; (c) the convict was labouring under intoxication at the time of committing the offence even though intoxication was not successfully pleaded in defence;*
7. *Duress, provocation and lesser participation in the crime may be mitigating factors in certain circumstances.*
8. *Remorse, lack of clear motive, childhood deprivation and abuse, good conduct in prison, effect on the victim, likelihood of committing further acts of violence, sense of moral justification, and in appropriate cases, socioeconomic status;*
9. *The learned Judge concluded that this list of aggravating and mitigating circumstances is not exhaustive."*

The dictum reproduced above, though not exhaustive, aptly captures most important legally-accepted considerations that must be taken into account when sentencing murder convicts. The rest of the legally-accepted considerations that are relevant to the present matter will be dealt with when we get to the actual determination of the appropriate sentence herein.

This Court's **Determination On** Appropriate Sentence

We now get to determine the appropriate sentence for the Convict herein. And our starting point shall be to outline the material facts of the present matter, so as to put everything in context. We must point out that the Convict's trial record has not been made available to us. As such, we shall outline the material facts as gotten from the judgment of the Supreme Court dismissing the Convict's appeal against conviction and sentence, dated 12th November, 2010 (see **Charles Tseka vs. The Republic** MSCA Criminal Appeal No. 6 of 2005, Unreported).

The Particulars of the charge were that the Convict, on or about 17th May, 2000 in Ntcheu District in the Republic of Malawi, with malice aforethought, unlawfully caused the death of Bester Frank (hereinafter referred to as 'the Deceased').

The material facts are that the Deceased died on or about the 17th May 2000 at Kameza Village in Ntcheu District. The Deceased died as a result of stab wounds which were inflicted on him by the Convict with a knife. The evidence showed that on the day in question, the Convict carried with him a knife. With that knife he stabbed first Jamson Daza PW 5 and subsequently the Deceased. The stab wounds on Jamson Daza were serious. The knife went through Daza's bicep, into the ribs, through the chest and came out on the sternum. Daza miraculously survived the injury. The wounds on the Deceased were equally serious and became fatal. The knife went into the left chest, through the ribs, tearing the spleen and the liver. The Convict did not deny stabbing the Deceased. His explanation, by his caution statement, was that the Deceased was encouraging Daza to take over his estranged wife, with whom he was on separation at the material time. Subsequently, as we mentioned earlier on, the Convict was tried for, and convicted of, murder contrary to **Section 209** of the **Penal Code** and sentenced to the then mandatory death penalty. And as we have also earlier mentioned, the Convict appealed to the Supreme court against both his conviction and sentence, and the appeal was dismissed. This marks the end of the material facts surrounding the commission of the offence herein which we thought were important for purposes of putting things in their proper context.

In arriving at an appropriate sentence, a court essentially considers aggravating factors of the offence, mitigating factors of the offence and mitigating circumstances of the offender. All that may be said about sentencing as a process boils down to this. Therefore, in the matter at hand, in determining the appropriate sentence for the Convict, we shall consider the aggravating and mitigating factors of the offence herein and the mitigating factors of the Convict. At this juncture, we would like to register our gratitude to Counsels for both sides hereto for their industry in coming up with the comprehensive submissions that we have on record. These submissions have been of great help to us. Accordingly, in determining the appropriate sentence herein, we shall have regard to these submissions.

We now get to consider the aggravating factors of the offence herein, if any. At this juncture, it should be noted that the Convict's submissions did not raise any aggravating factors of the offence herein, which is obvious. The State's submissions, however, did raise one aggravating factor of the offence herein, which is that a weapon, a knife, was used in the commission of the offence. We entirely agree with the State on this. Accordingly, the fact that a weapon was used shall count as the first aggravating factor of the offence herein. Apart from this, we, as a court, also found one more aggravating factor of the offence, which is that the offence was premeditated, going by the material facts outlined above. And this marks the end of consideration of aggravating factors of the offence herein.

Having dealt with the aggravating factors of the offence herein, we now get to consider the mitigating factors of the offence herein. In this regard, it should be noted that the Convict's submissions did put forward several mitigating factors of the offence. So, here, we shall consider each of the mitigating factors, as put forward by the Convict and even those, if any, not put forward but as may found by this Court. We shall also consider the State's responses to the mitigating circumstances of the offence as raised by the Convict, and, where necessary, we shall refer to those responses. The first mitigating factor of the offence herein, as advanced by the Convict, relates to provocation. According to the Convict, he endured a high level of provocation from both Mr. Daza and the Deceased. In this

regard, the Convict relies on an interview statement made by Village Headman Fickson Mpondandowe, attached to the affidavit in support of the resentencing hearing and marked as "KXP 1". However, "KXP 1" was not made under oath. And, also, the Village Headman was not called to testify and be subjected to cross-examination. Therefore, we are unable to attach any weight to "KXP 1", and we ignore it, accordingly. Moreover, even the Supreme Court, by its aforesaid judgment dismissing appeal against conviction and sentence, dismissed the Convict's claim of provocation. In the premises, we find that there is no evidence on record substantiating the Convict's submission in this regard, which submission we dismiss hereby. The second mitigating factor of the offence herein, as advanced by the Convict, is that at the time of the offence he was heavily intoxicated. For this submission, the Convict partly relies on the trial record, which unfortunately has not been supplied to us. From the material facts outlined above, it is unclear whether or not the Convict was indeed intoxicated at the time of the offence. Accordingly, we shall resolve this doubt in favour of the Convict, and assume that he was intoxicated at the time of the offence. The third mitigating factor of the offence herein, as advanced by the Convict, is absence of premeditation. We summarily dismiss this submission, on account of the fact that we have already found above that the offence herein was premeditated. In terms of mitigating factors of the offence herein, we did not find any additional ones to consider, apart from those advanced by the Convict. So, this marks the end of consideration of the mitigating factors of the offence herein.

Having considered aggravating and mitigating factors of the offence herein, we shall now consider the mitigating circumstances of the Convict herein. In this vein, it should be noted that the Convict's submissions did put forward several mitigating circumstances of the Convict. So, here, we shall consider each of the mitigating circumstances as put forward by the Convicts and the State's responses thereto, which we shall refer to, where necessary. We shall also consider those mitigating circumstances, if any, not put forward but as may found by this Court. The first mitigating circumstance of the Convict, as advanced by him, is his age at the time of offence. According to the Convict, he was aged between 23 years at the time of committing the offence. The Convict, therefore, submits that his youthful age at the time of the offence ought to count in his favour. The State is

agreeable to this submission. Indeed, case law of this Great Republic generally affords youthful age protection against long custodial sentences (see Republic vs. Ng'am bi [1971-1972] ALR Mal 457). In affirming this position, the case of R vs. Keke (None) [2013] MWHC 45 (17 June, 2013) held that for ages between 19 and 25, commission of a crime may be a result of impetuous, immaturity, youth or adventure. We entirely subscribe to this view. In the matter at hand, it is not in dispute that the Convict was aged between 23 years at the time of the offence. Therefore, the youthful age of the Convict at the time of the offence shall count as his mitigating circumstance herein. The second mitigating circumstance of the Convict, as advanced by him, is the fact that he is a first offender. The State is also agreeable to this submission. It is trite that the fact that a convict is a first offender is his or her mitigating circumstance counting against a long custodial sentence (see R vs. Chikazingwa (1984-86) 11 MLR 160). In the matter at hand, it is incontrovertible that the Convict is a first offender. Therefore, the fact that the Convict is a first offender shall count as his mitigating circumstance herein. The third mitigating circumstance of the Convict, as advanced by him, is his cooperation with the authorities. The fact that a convict cooperating with the authorities has been held to be his or her mitigating circumstance (see the **Payenda Case**, supra). In the present matter, by his submissions, the Convict claims that, appreciating what he had done, he immediately handed himself over to the police. Unfortunately for the Convict, this Claim has not been substantiated. We, therefore, dismiss the Convict's submission in this regard. The fourth mitigating circumstance of the Convict, as advanced by him, is the fact that he was convicted by a jury. The Convict submits that, while there is no challenge to his conviction, in line with the presumption in favour of a convict when dealing with an absence of relevant court records, his conviction by jury is a relevant factor in his favour. We summarily dismiss this submission. It is not in dispute that the Convict's conviction, which was even upheld by the Supreme Court, still stands. Therefore, any attempt to somehow call into question the conviction through the backdoor in these proceedings cannot be entertained. Therefore, the fact that the Convict was convicted by a jury shall not herein count as his mitigating circumstance. The fifth mitigating circumstance of the Convict, as advanced by him, is his previous good character. In this regard, the Convict relies

on interview statements made by his Village Headman and his cousin. However, all those statements were not made under oath. And, also, those persons were not called to testify and be subjected to cross-examination. Therefore, we are unable to attach any weight to any of those statements, and we ignore them, accordingly. In the premises, we find that there is no evidence on record of the Convict's previous good character, with the consequence that the same shall not count as his mitigating circumstance herein. The sixth mitigating circumstance of the Convict, as advanced by him, is his capacity for rehabilitation and reintegration. In this regard, the Convict relies on several documents. The first document that the Convict relies on is an affidavit of Sgt. Lewis L. Dziko, a prison officer of Zomba Central Prison. The affidavit has been attached to the affidavit in support of resentencing hearing and marked as "KXP 3". However, although "KXP 3" is a sworn statement, it is only an exhibit in the matter at hand. And, in our opinion, if the Officer has provided false information, he cannot successfully be prosecuted for perjury. Why? The Officer has not made any statement before this Court, as his affidavit has only been brought to our attention through its being exhibited to a statement made before us in the form of an affidavit in support of the resentencing hearing. So, Officer Dziko's affidavit should simply have been put in as a separate and additional affidavit in support of the resentencing hearing. In the premises, we are unable to attach any weight to "KP 5", and we ignore it, accordingly. The other documents that the Convict relies on in this regard are interview statements of his Village Headman, his cousin and his mother. However, as we have already held above in respect of the statements of the Convict's Village Headman and cousin, all those statements were not made under oath. And, also, all those persons were not called to testify and be subjected to cross-examination. Therefore, we are unable to attach any weight to any of those statements, and we ignore them, accordingly. In the premises, we find that there is no evidence on record of the Convict's capability to rehabilitate and reintegrate into Society. Therefore, nothing in this regard shall count in the Convict's favour. The seventh mitigating circumstance of the Convict, as advanced by him, relates to the effect of his incarceration on innocent third parties. The Convict submits that, whilst it is recognized that those who commit crimes must be punished, the court is respectfully invited to bear in mind the impact of any

sentence upon those who bear no culpability for the offence herein and who have suffered greatly during the Convict's incarceration to date. In this regard, the Convict relies on interview statements made by his mother and his cousin. However, for reasons we have already furnished above, we are unable to attach any weight to those statements, and we ignore them, accordingly. In the premises, we find that there is no evidence on record substantiating the Convict's submission in this regard, which submission we dismiss hereby. What we take as constituting the eighth mitigating circumstance of the Convict, as advanced by him, are alleged previous serious violations of the Convict's constitutional rights. The first constitutional rights violation raised is the Convict's imprisonment that he has suffered in pursuance of an unconstitutional sentence, exacerbated by terror that he could be executed at any moment. However, in our most-considered opinion, the appropriate remedy for this violation is the present resentencing exercise. In addition to this, we shall, in our sentencing take into account the length of time in which the Convict has been in custody, which is over 23 years. In the premises, the Convict's imprisonment that he has suffered in pursuance of an unconstitutional sentence shall not count as a separate mitigating circumstance for him. The second constitutional rights violation raised is the delay he has endured this far. According to the Convict, he has suffered two instances of unreasonable and unjustifiable delay, in contravention of his rights to a fair trial. According to the Convict, firstly he was held on remand for 2 years before he was finally tried. Secondly, according to the Convict, he has been forced to wait until now to be sentenced. In our view, however, the delays that the Convict has endured will be taken care of by the position we have already taken that, in our sentencing, we shall take into account the length of time in which the Convict had been in custody, this far. Therefore, the delays that the Convict has endured shall not count as a separate mitigating circumstance for him. The third constitutional rights violation raised is that the Convict has been subjected to cruel and inhuman treatment throughout his incarceration by virtue of the deplorable prison conditions, in contravention of the Constitution and applicable international law. We, however, find the Convict's line of thought in this regard to be faulty. If the so-called deplorable prison conditions were to be counted as a mitigating circumstance, then the same would automatically accrue, at

sentencing, to all convicts that have not been on bail, which would be absurd. As it has rightly been contended by Counsel for the State, considering deplorable prison conditions as a mitigating circumstance does not speak to the individualized nature of sentencing. In the premises, the so-called deplorable prison conditions that the Convict has allegedly been subjected to shall not count herein as his mitigating circumstance. This marks the end of consideration of mitigating circumstances of the Convict, as advanced by him. Apart from these, we did not find any additional mitigating circumstance of the Convict to consider. So, this also marks the end of consideration of mitigating circumstances of the Convict, and indeed of all aggravating and mitigating factors herein.

We now come to the actual determination of the appropriate sentence to be imposed herein. May it be noted, at this juncture, that the Convict, on the one hand, prays for a sentence that results in his immediate release whereas the State, on the other hand, submits that imprisonment for a fixed term of years is apposite herein. For starters, as we have already mentioned, the Convict herein is a first offender. Therefore, ideally, he was supposed to benefit from the prescriptions of **Sections 339** and **340** of the **Criminal Procedure and Evidence Code**, for purposes of sentencing. However, **Sections 340** of the **Criminal Procedure and Evidence Code** allows a court, on good grounds to be set out in the record, to impose a sentence of imprisonment to a first offender without having recourse to **Sections 339** of the **Criminal Procedure and Evidence Code** if it is satisfied that there is no other appropriate means of dealing with the convict. In the matter at hand, bearing in mind the seriousness of the offence involved, this Court is of the considered view that the Convict ought not to benefit from the prescriptions of the two provisions we have just referred to above. Therefore, the Convict shall not to benefit from the prescriptions of **Sections 339** and **340** of the **Criminal Procedure and Evidence Code**, for purposes of the present resentencing. We so hold.

The maximum penalty for the offence herein is death or life imprisonment. It was held in the **Payenda Case** (*supra*) that murder, perhaps with the exception of genocide, is the most serious offence known to the law of this Great Republic and so, the sentence that the court was going to pass had to reflect that fact. We

cannot agree more. Accordingly, the sentence we are going to mete out herein will reflect the fact that murder, with the exception of genocide, is the most serious offence known to the law of this Great Republic. In addition to that, the sentence will also have to reflect the fact that life was lost permanently, and without any possibility of restitution.

Bearing in mind the seriousness of the offence herein, consideration of the aggravating and mitigating factors of the offence had above, consideration of the mitigating circumstances of the Convict had above, the applicable legal principles and the legally-acceptable considerations discussed above, we find that the Convict herein does not deserve a death penalty, since, in our most-considered opinion, he does not fall in the category of the 'worst of murderers' (see the **Payenda Case**, *supra*). And it was held in the **Payenda Case** (*supra*) that a convict who must be given a life term should be one who only marginally fails to reach the threshold of the category of the 'worst of murderers'. In the present matter, we, again, find that the Convict herein does not deserve life imprisonment, because, in our most-considered opinion, he does not marginally fail to reach the threshold of the category of the 'worst of murderers', him being way below that. Instead, we find that a custodial sentence of 37 years is apposite herein. On the foregoing, this Court hereby sentences the Convict, Charles Tseka, to 37 years' imprisonment with hard labour, with effect from the date of arrest.

The Convict has got the right to appeal against this sentence to the Supreme Court of Appeal within 30 days from the date hereof.

Pronounced in Open Court at Zomba this 20th day of December 2023

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D.H. SANKHULANI

JUDGE