IN THE HIGH COURT OF MALAWI

CRIMINAL DIVISION

Zomba Registry

Criminal Case No. 19 of 2023

THE REPUBLIC

VS

CYDRECK NAMBAZO.....1ST CONVICT

MAISON NAMPANGA.....2ND CONVICT

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

Limbe, of Counsel for the State

Ndeketa, 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 13th December, 2002, the Convicts were each, after a full trial, convicted by the High Court, sitting with a jury, at Thyolo 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 Convicts were each sentenced to the then mandatory death penalty.

On 9th April, 2004, the then president of this Great Republic commuted each of the Convict's death penalty to life imprisonment, which punishments they are currently serving.

Subsequently, the Convicts appealed to the Supreme court only against their sentence, and the appeal was dismissed (the decision of the Supreme Court in the present matter is reported in **[2009] MLR 105**).

This matter now comes up before this Court for a resentencing hearing, in respect of the mandatory death penalties that were meted out to the Convicts. 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 all parties hereto who appeared through Counsel. May it be noted that in support of the resentencing hearing, there is an affidavit sworn by Zaheed Ndeketa, of Counsel. The Convicts 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 sentences for the Convicts herein. And our starting point shall be to outline the material facts of the present matter, so as to put everything in context. Before we do so, we would like to mention that the trial record of the Convicts is not available. According to the Convicts, an extensive search for the record was made to no avail. For the material facts, therefore, we shall rely on the facts as summarized in the judgment of the Supreme Court hereinbefore referred to.

As it has been mentioned earlier on, the Convicts were each, after a full trial, convicted by the High Court sitting at Thyolo of the offence of murder contrary to **Section 209** of the **Penal Code**. The Particulars of the charge were that the Convicts, on or about the 19th day of January, 2000, at Liati Village, T/A Bvumbwe in Thyolo District in the Republic of Malawi, with malice aforethought, unlawfully caused the death of Effat Chatama (hereinafter referred to as 'the Deceased').

The material facts were that on the night of 19th January, 2000, the Convicts herein and one Harold Chauluka forcibly, using a big stone, entered the home of the Deceased, a Reverend. The three were armed with weapons of assault of a lethal kind, including a panga knife. The men had been hired by an adversary of the Deceased at his church congregation to beat him up in order to settle disagreements between the two over some church affairs. The three men's mission was for a cash reward of K10,000.00, and they had received K3,000.00 before carrying out the mission as part payment, the balance to be paid after the mission had been executed. As it happened, the three men were forced out of the house by the Deceased, who continued chasing them into a nearby maize garden. At some point during the chase, the Deceased tripped and fell, upon which the

assailants fatally assaulted him, inflicting deep cuts to his head, which exposed his brain tissue, as per the post-mortem examination report. In all this, Harold Chauluka just stood by and watched the Convicts carry out the assault. The assailants then fled the scene. The attack was witnessed in part by the Deceased's nephew, Rexford Chatama. However, Rexford Chatama was not able to identify any of the assailants as it was at night and having only reached the maize garden when the Deceased had already been attacked and was lying on the ground severely wounded. The first person to be arrested was one Harold Chauluka, who then gave the Police the names of the Convicts, who were, accordingly, arrested on 28th February, 2000. The three were jointly charged and tried. By a judgment that followed, the Convicts were convicted whereas the said Harold Chauluka was acquitted. Hence the sentencing of the Convicts to the then mandatory death penalty. This marks the end of the material facts of the present matter that 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 boils down this, in our view. Therefore, in the matter at hand, in determining the appropriate sentence for the Convicts, we shall consider the aggravating and mitigating factors of the offence herein and the mitigating factors of the Convicts. At this juncture, we would like to thank 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. Surely, 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. In this regard, it should be noted that the Convicts' submissions did not raise any aggravating factors of the offence herein, which is obvious. Likewise, the Respondent's submissions did not raise any aggravating factors of the offence herein. So, we shall, here, highlight those aggravating factors of the offence herein, if any, as may be found by this Court. On our part, we have found only one aggravating factor of the offence herein, which, obviously, is that it involved group action.

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, from our analysis, there is only one mitigating factor of the offence that was put forward by the Convicts. And the only mitigating factor of the offence herein, as advanced by the Convicts, is that, in the absence of the Convicts' trial record, either the degree of their involvement in the commission of the offence is rather cloudy or, if this Court assumes that they played a role, then they should be considered as having played a minor role, either of which is a mitigating factor. Going by the known facts herein, it is clear that that it the Convicts herein who actually assaulted the Deceased, resulting in his death, Harold Chauluka having been acquitted. Because of absence of the trial record, we shall assume that the degree of involvement of each Convict was equal to that of the other. In the premises, we dismiss the Convicts' submission in this regard. In terms of mitigating factors of the offence herein, we did not find any additional one to consider, apart from the one advanced by the Convicts which we have just dealt with. 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 Convicts herein. In this vein, it should be noted that the Convicts' submissions did put forward several mitigating circumstances of the Convicts. 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 Convicts, as advanced by them, relates to their respective serious health concerns. Exhibited to the affidavit in support of the resentencing hearing are the 1st Convict's ART Patient Card and the 2nd Convict's ART Patient Card, marked as "ZN 1" and "ZN 4", respectively. According to these documents, both Convicts are HIV positive but it is the 1st Convict who has advanced AIDS. According to the Convicts, their health is deteriorating because Zomba Central Prison is so under-resourced that it cannot provide them with the most basic healthcare in terms of food supplements, *et cetera*. They, accordingly, invite this Court to consider their serious health condition as a

mitigating factor. In this regard, they rely on the case of **Republic v Evance Chipungu** (Sentence Rehearing Cause No 72 of 2015), which is said to have held that ill health is a strong mitigating factor. No copy of the decision was supplied to us, and our own search for the same proved futile. Nevertheless, as it comes out clearly from the above-reproduced dictum from the **Payenda Case** (*supra*) that health of a convict is an issue that a court may take into account, at sentencing. Therefore, the Convicts' respective health conditions shall count as a mitigating circumstance for each of them. The second mitigating circumstance of the Convicts, as advanced by them, relates to their age at the time of sentencing. According to Paragraph 160 of the Convicts' submissions, the 1st Convict is now aged around 53 years whereas the 2nd Convict is aged around 47 years. The Convicts, accordingly, submit that this court should take into account their respective advancing ages as a mitigating circumstance for each of them. Indeed, case law of this Great Republic generally affords old age protection against long custodial sentences (see **Republic vs. Ng'ambi** [1971-1972] ALR Mal 457). However, we are of the considered view that, at 47 and 53, the Convicts may not properly be considered as old men. Therefore, the respective ages of the of the Convicts shall not count as their mitigating circumstance herein. The third mitigating circumstance of the Convicts, as advanced by them, is the fact that they are first offenders. 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 Convicts are first offenders. Therefore, the fact that the Convicts are first offenders shall count as their mitigating circumstance herein. The fourth mitigating circumstance of the Convicts, as advanced by them, is the fact that they were 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. According to the Convicts, their conviction by the jury was highly equivocal, since it was by a majority decision of 7 against 5. We summarily dismiss this submission. Although the verdict by the jury was not unanimous, the Convicts' conviction stands. Therefore, any attempt to criticize the conviction through the backdoor in these proceedings cannot be entertained.

In the premises, the fact that the Convicts were convicted by a jury shall not herein count as their mitigating circumstance. We so hold. The fifth mitigating circumstance of the Convicts, as advanced by him, is their previous good character. In this regard, the Convicts relies on interview statements made by their traditional leaders and relatives, attached to the affidavit in support of the resentencing hearing. However, 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 Convicts' previous good character, with the consequence that the same shall not count as their mitigating circumstance herein. The sixth mitigating circumstance of the Convicts, as advanced by them, is their capacity for rehabilitation and reintegration. In this regard, the Convicts rely on affidavits of prison officers Biston Chakhumbira and Andrew Dzinyemba, attached to the affidavit in support of resentencing hearing and marked as "ZN 16" and "ZN 17", respectively. However, although these are sworn statements, they are only exhibits in the matter at hand. And, in our opinion, if the Officers have provided false information, they cannot successfully be prosecuted for perjury. Reason? The Officers have not made any statement, as it were, before this Court, as their affidavits have only been brought to our attention through their being exhibited to a statement made before us in the form of an affidavit in support of the resentencing hearing. So, the Officers' affidavits should simply have been put in as separate and additional affidavits in support of the resentencing hearing. We are, therefore, unable to attach any weight to any of these sworn statements, and we ignore them, accordingly. In the premises, we find that there is no evidence on record of the Convicts' capability for reform and reintegration into society. Accordingly, we dismiss the Convicts' submission in this regard. The seventh mitigating circumstance of the Convicts, as advanced by them, is forgiveness by the Deceased's family. In this regard, the Convicts rely on an interview statement by one Margaret Chilombo, the Deceased's niece. It has been attached to the affidavit in support of the resentencing hearing and marked as "ZN 15". According to this statement, Margaret Chilombo claims to have forgiven the Convicts, and states that she and her family would not have any

problems if the two were to be released, the two having served enough time in prison. However, this statement was not made under oath. And, also, Margaret Chilombo was not called to testify and be subjected to cross-examination. Therefore, we are unable to attach any weight to her statement, and we ignore it, accordingly. In the premises, we find that there is no evidence on record about the Deceased's family' forgiveness of the Convicts, with the consequence that the same shall not count as their mitigating circumstance herein. The eight mitigating circumstance of the Convicts, as advanced by them, is the effect of their incarceration on innocent third parties. In this regard, the Convicts rely on interview statements of the 1st Convict's cousin, niece and traditional leader and the 2nd Convict's mother and daughter, on the hardships encountered by the Convicts' respective extended families. However, all these statements were not made under oath. And, also, these persons were not called to testify and be subjected to cross-examination. We are, therefore, unable to attach any weight to any of these sworn statements, and we ignore them, accordingly. In the premises, we find that there is no evidence on record of the hardship suffered by the Convicts' respective extended families, with the consequence that the same shall not count as their mitigating circumstance. What we take as constituting the eighth mitigating circumstance of the Convicts, as advanced by them, are alleged previous serious violations of the Convict's constitutional rights. The first constitutional rights violation raised is the Convicts' imprisonment that they have suffered in pursuance of an unconstitutional sentence, exacerbated by constant fear of possible execution 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 Convicts have been in custody, this far, which is over 23 years. In the premises, the Convict's imprisonment that they have suffered in pursuance of an unconstitutional sentence shall not count as a separate mitigating circumstance for them. The second constitutional rights violation raised is the alleged torture and mistreatment by police. We summarily dismiss the Convicts' submission in this regard, for the simple reason that if indeed the Convicts were tortured during investigations, then, if minded, they may bring a civil suit against Government, seeking compensation. Therefore, the alleged

torture and mistreatment of the Convicts by police shall not count as their mitigating circumstance herein. The third constitutional rights violation raised is the cumulative delay they have endured this far. According to the Convicts, they have suffered two instances of delay, in contravention of his rights to a fair trial. According to the Convicts, firstly they were held on remand for 2 years and 9 months, before he was finally tried. Secondly, according to the Convicts, they have been forced to wait until now to be sentenced. In our view, however, the delays that the Convicts have 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 Convicts haves been in custody, this far. Therefore, the delays that the Convicts have endured shall not count as a separate mitigating circumstance for them. The fourth constitutional rights violation raised is that the Convicts have 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 Convicts' 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 Convicts have allegedly been subjected to shall not count herein as their mitigating circumstance. This marks the end of consideration of mitigating circumstances of the Convicts, as advanced by them. May it be noted that we did not find any additional mitigating circumstances of the Convicts, apart from those advanced by them. This, therefore, marks the end of consideration of mitigating circumstances of the Convicts, and indeed of all aggravating and mitigating factors herein.

We now come to the actual determination of the appropriate sentence to be imposed herein. On the one hand, the Convicts seek reduction of sentences to ones resulting in immediate release. On the other hand, the State simply submits that a term of fixed years of imprisonment is apposite herein. To begin with, as we have already mentioned, the Convicts herein are first offenders. Therefore,

ideally, they were 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 Convicts ought not to benefit from the prescriptions of the two provisions we have just referred to above. Therefore, the Convicts shall not 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 sentences 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 sentences 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 relating to the 1st Convict had above, the applicable legal principles and the legally-acceptable considerations discussed above, we find that the 1st 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 1st Convict herein does not also 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 34 years is apposite herein. On the foregoing, this Court hereby sentences the 1st Convict, Cydreck Namabazo, to 34 years' imprisonment with hard labour, with effect from the date of arrest.

Again, 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 relating to the 2nd 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 2nd Convict herein does not also 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 34 years is apposite herein. On the foregoing, this Court hereby sentences the Convict, Maison Nampanga, to 34 years' imprisonment with hard labour, with effect from the date of arrest.

Each Convict has got the right to appeal against his 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