



IN THE HIGH COURT OF MALAWI
(CRIMINAL DIVISION)
LILONGWE DISTRICT REGISTRY
SITTING AT DOWA
CRIMINAL CASE NUMBER 109 OF 2018

THE STATE

-v-

GERALD PHIRI.....1ST ACCUSED
MEDISON MADZIALENGA.....2ND ACCUSED
JESMON BALUWA.....3RD ACCUSED
STEVEN CHING'OMBE.....4TH ACCUSED
MACDONALD KANYERERE.....5TH ACCUSED
DAMIANO PHIRI.....6TH ACCUSED
ISAAC MSAMBALUME.....7TH ACCUSED
DAMISON MANYONI.....8TH ACCUSED

CORAM: Honourable Justice Dr. C.J. Kachale, Judge

Matonga, Senior State Advocate for the Prosecution

Masiye, Senior Legal Aid Advocate of Counsel for the Defence

Namagonya, Court Reporter

Choso, Court Clerk/ Official Interpreter

SENTENCE

1. *Enelesi Nkhata* was a young lady aged 21 living with her grandmother at her village in Dedza. In April 2016 her uncle *Gerald Phiri* was living in Madisi, working at a bakery owned by one *Medson Madzialenga*. *Enelesi Nkhata* had recently successfully attained her MSCE certificate. *Medson* knew that *Gerald* used to live with *Enelesi* and her sibling who were children with albinism. In the course of time *Medson* managed to convince *Gerald* to go and fetch *Enelesi* from the village so that they could kill her and harvest her

organs for sale; this was because of a prevailing superstitious belief in the mystical powers of organs of persons with albinism for making one rich. Therefore *Gerald* travelled to Dedza to fetch the unsuspecting young lady; he managed to convince her granny that he would help her get a decent job somewhere in town.

2. Within a few days of reaching Madisi *Gerald* deceived *Enelesi* that they needed to travel to Mzuzu where the employment opportunity was; so the two left home one evening for that purpose. However, along the way *Gerald* and his accomplices strangled the young lady and mutilated her body to remove bones from her lower limbs. Her torso was dumped in a hole they had dug within a nearby garden. This corpse was later discovered by chance by a farmer working on the land. Initially nobody could identify the decomposing body and it was buried in the same garden. Afterwards investigations revealed that it belonged to *Enelesi Nkhata*; with the support of well-wishers it was exhumed and given a proper burial in her home village in Dedza.
3. In the present proceedings *Gerald Phiri*, *Medson Madzialenga*, *Jesmon Baluwa*, *Steven Ching'ombe*, *MacDonald Kanyerere*, *Damiano Phiri*, *Isaac Msambalume* and *Damson Manyoni* were jointly charged and have since been convicted in this court with respect to different offences arising from the death and mutilation of *Enelesi Nkhata's* corpse around 11th April 2016 at Madisi in Dowa:
 - i. The first four accused persons namely *Gerald Phiri*, *Medson Madzialenga*, *Jesmon Baluwa* and *Steven Ching'ombe* have all been convicted of murder contrary to section 209 of the Penal Code. Whereas *Gerald* and *Medson* pleaded guilty in court *Jesmon* and *Steven* were only convicted after full trial.
 - ii. *Gerald Phiri* also pleaded guilty to two other crimes: transacting in human tissue contrary to section 224A(e)(ii) of the Penal Code as well as trafficking in persons contrary to section 14(1) of the Trafficking in Persons Act.

- iii. *Medson Madzialenga* was further convicted on his own guilty plea to a charge of transacting in human tissue contrary to section 224A (e) (ii) of the Penal Code.
 - iv. After full trial the court also found *Damiano Phiri, Damson Manyoni, MacDonald Kanyerere, Steven Ching'ombe* and *Isaac Msambalume* all guilty of transacting in human tissue contrary to section 224A(e)(ii) of the Penal Code.
 - v. *Jesmon Baluwa* and *Steven Ching'ombe* have further been convicted of extracting human tissue contrary to section 224A (a) (ii) of the Penal Code.
4. In the course of considering the appropriate sentences for each offender this court has received very elaborate submissions from both the prosecution as well as the defence counsel advancing their positions in that regard. While it is not possible to recite such excellent arguments verbatim in this decision, the court has found those to be quite illuminating on the pertinent legal issues; where necessary therefore, reference shall be made to those submissions. In essence both sides have been very keen to remind the court about the fundamental principles which govern the sentencing process: for example it has been rightly pointed out that in our jurisdiction it has been well established that every sentence must fit the crime as well as the criminal and be fair to the society and the victim. In other words when considering an appropriate sentence the court must account for all relevant factors both in mitigation as well as aggravation of the penalty, as was decided in the case of **Rep-v-Nazombe [1997] 2 MLR 105**.
5. In that regard, it has been emphasized especially by the defence counsel that justice should always be tempered with a measure of mercy lest it degenerates into mere vindictiveness. While fully appreciating those sentiments as generally being valid when assessing a criminal sanctions, this court has further been reminded of the following pithy remarks by *Mwaungulu, J* (as he then was) which provide a more fitting context for the approach adopted in fashioning the appropriate sentences for each offender in the present proceedings:

“...there are some crimes so heinous that a plea of youth, a plea that the crime was a first offence or that the prisoner has not been to prison before are of little relevance. Those who participate in them, even if they pleaded guilty, even if they were young, even if they had no previous convictions, even if the victims were not brutalized in the presence of young children, should know that they will eventually be subjected to long and immediate custodial sentences. If the victims are young or old the sentences would be even longer...”

6. Those remarks were made in the case of **Rep-v-Makanjila and others [1997] 2 MLR 150** at 152. Granted that was not a homicide but rather armed robbery case; nevertheless the critical legal principle is very well made: leniency may not be appropriate in certain peculiar circumstances. Thus in the considered view of this court the present scenario provides such a rare scenario: here a youthful life was mercilessly taken in cold blood having been lured from the sanctuary of her village by a ruthless uncle who wanted to acquire sordid gain through her disability; in doing so he acted in concert with other equally callous men. When considering the fitting penalty for such inhumane actions one should be very slow to promote mercy and lenience for such unmerciful offenders. Of course, each single offender will have to receive punishment commensurate with the role he played as reflected in the offence for which he has been convicted in these proceedings.
7. In that vein it would be important at this stage to express the views of the court towards the very elaborate submissions received from defence counsel especially on the question of the proper sentence on the murder charge. Specifically counsel has relied extensively on two decisions of the High Court in *the Kafantayeni Resentencing Project*, namely **Rep-v-Funsani Payenda, Sentence Rehearing Case No. 18 of 2015** as well as **Rep-v-Margaret Nadzi Makolija, Sentence Rehearing Case No. 12 of 2015** to persuade this court on the unsuitability of any death penalty in these proceedings. In the first place this line of argument misses the point well made by the learned *Justice Kamwambe* in another decision within the same context, namely **Rep-v-Chiliko Senti, Sentence Rehearing Case No. 25 of 2015** that ‘*resentencing is a special exercise*’ which required the court to exercise appropriate considerations for post-conviction factors to ensure that justice accrued to an offender whose initial sentencing was arrived at in breach of ordinary fair trial guarantees. This proposition alone would render the decisions relied upon by the defence quite distinguishable from

the present proceedings i.e. this is not a resenting process but actual sentencing upon conviction.

8. Another even more fundamental flaw in the position proposed by the defence is that it clearly ignores unqualified and binding local judicial precedents emanating from our own apex court which unequivocally affirms the correct legal position as regards the constitutionality and applicability of the death penalty in our jurisdiction. Specifically in the case of **Rep-v-Cydreck Nambazo and another [2009] MLR 105** the Supreme Court restated the correct legal implications of the ***Kafantayeni Case (below)*** (which was the legal premise for the whole resentencing process). Delivering the unanimous decision of the Supreme Court *Singini, JA* said:

“.....the appellants are not appealing against their conviction but....against the sentence of death passed on them. Their appeal against sentence is in view of the new jurisprudence under the *Kafantayeni* case, now requiring the particular circumstances of the commission of the offence and of the offender to be specially considered when passing sentence for murder. **We state that the *Kafantayeni* case outlawed only the mandatory aspect of the death penalty and not the death penalty itself, which is still lawful in this country and may be passed by a Court where appropriate....** (Emphasis supplied)

9. In confirming the death penalty imposed by the High Court the learned *Singini JA* went on to observe in words which might offer some guidance on some of the critical factors to consider whether such a rare penalty might be warranted:

“We remind ourselves that this is an appeal complaining about the severity of the death sentence passed on the appellants in the circumstances of the offence as being manifestly excessive. In outlining the circumstances of the commission of the offence, we observe that the blows the appellants inflicted on Reverend Chatama were severe resulting in his almost instant death. They went to his house, and that was at night, for no other purpose than to assault him. They went armed with weapons of assault of a lethal kind that included a panga knife. They readily used whatever arms they had to inflict deep cuts to his head exposing his brain tissue as the report of the post-mortem examination revealed....In the case before us we consider that the severity and gravity of the acts of violence by the appellants in assaulting the deceased aggravated, rather than mitigated, the offence of murder they committed upon him. They clearly planned their plot to carry out those acts of violence against him. In those circumstances....we cannot see any factors that would warrant consideration of a lesser punishment upon the appellants than the death penalty....”

Thus the Supreme Court proposes that where deliberate cold blooded violence results in a death, the highest penalty could be appropriate.

10. For present purposes it would be critical to acknowledge that the constitutional position adopted in **Francis Kafantayeni and others-v-AG [2007] MLR 104** (which was a decision of the High Court empaneled as a Constitutional Court which learned *Singini*, J then on the lower bench delivered) was duly reaffirmed by the Supreme Court in the subsequent case of **Twoboy Jacob-v-Rep [2007] MLR 414 (SCA)**. Interestingly, in further Supreme Court decisions the apex court sought to clarify the appropriate constitutional import of that decision as regards the death penalty: hence in the case of **Binny Thifu-v-Rep [2008] MLR 18 (SCA)** at page 20 *Mtambo JA* said

"...the deceased was killed in cold blood. The objective of the killing appears to have been to remove certain body parts. We are aware that the death sentence is no longer mandatory in this country, see the case of **Twoboy Jacob-v-Rep**....We have therefore had to consider the circumstances of this particular case, and it does not seem to us that it can be said, even one little bit, that it is a proper case for a lesser sentence than that which the High Court passed. The sentence appears to us to have been well merited." (Emphasis supplied)

Hence we learn here that killing with a view to harvest organs becomes another relevant factor in considering suitability of the death sentence.

11. Likewise in the case of **Wyson Thomas Kapunda Manda-v-Rep [2008] MLR 421 (SCA)** the Supreme Court confirmed the position that murder committed in cold blood deserves death penalty; thus at page 424 *Tambala, JA* said

"... the appellant challenges the sentence passed in the court below as unlawful or excessive. We are mindful that in our decision in the case of **Twoboy Jacob-v-Rep**....we came to the conclusion that it is unlawful to impose death sentence for every conviction of murder without discrimination. However, in the present case we are unable to see justification or any kind of mitigating factor for the conduct of the appellant. **The murder appears to have been committed in cold blood. We are of the view that, in the circumstances, the death sentence was merited.**" (Emphasis supplied)

12. In the light of all these decisions from our Supreme Court of Appeal, it would be quite misleading to suggest that our courts have somehow completely outlawed the death penalty because it is severely retributive as proposed by the defence submissions. Quite the contrary, it would be more accurate to recognize that our jurisprudence contemplates the rather rare possibility that where murder occurs in certain circumstances the most severe penalty might be an appropriate judicial response in sentencing. Those circumstances include the specific motive for the murder (to remove body parts), the level of violence employed, the presence of lethal weapons and whether or not the same occurred in cold blood or such other callous or calculated circumstances. The significant legal point to state here is that as a matter of established principle this court would be required to pay due jurisprudential regard to decisions of the Supreme Court in exercising its sentencing mandate in the present proceedings.

13. As earlier concluded herein *Gerald Phiri* lured the girl from the safety of her village in order to kill her for purposes of harvesting her bones: he worked with other equally depraved men not only to kill her in cold blood but also to merchandize her bones in a most callous fashion imaginable. It would be remiss for this court in sentencing to pay mere lip service to such gross and dehumanizing criminality practiced by the offenders herein and somehow refrain from imposing what would be the most fitting sanctions for such actions. Under section 210 of the Penal Code the maximum penalty for murder is death. The punishment for aggravated form of trafficking of which *Gerald Phiri* has been convicted is life imprisonment: see section 16(2) of the Trafficking in Persons Act. For extracting human tissue under section 224A (a)(i) and transacting in the same under section 224A(e)(ii) of the Penal Code the maximum penalty is also life imprisonment.

14. In **Rep-v-Sam Kaumba, Criminal Case No. 2 of 2015** *Madise J* imposed the maximum penalty of life imprisonment on a charge of attempted murder of an eleven year old boy with albinism. According to my learned brother the circumstances of that case debunked the judicial myth that the worst offender is yet to arrive. Violence calculated to earn a financial benefit on the basis of someone else's disability warrants the sternest of sanctions; justice cannot attain the right balance if it fails to fully account for the vulnerability of the victim and the calculated callousness with which the

entire criminal enterprise had been hatched, planned and executed. For butchering a child in cold blood and hacking her body for nothing but sordid gain this court believes that justice has to be firm in order to reflect the sanctity of life and the gruesome gravity of the wrongs committed herein.

15. The defence has proposed sentences of 40 and 45 years for the murder charges as well as 15 years each for the human trafficking, extracting and transacting in human tissue charges respectively. The state, on the other hand, has prayed for maximum penalties in respect of all counts (except the human trafficking, where 50 years has been proposed instead). In its determination this court, proceeding~~s~~ on the reasons advanced hitherto will impose the following sentences:

A. Murder contrary to section 209 of the Penal Code

- i. The court hereby condemns you **Gerald Phiri** to suffer death in the manner prescribed by law; subject to section 326 of the Criminal Procedure and Evidence Code (CP&EC). *CP&EC 29. Nov. 2019*
- ii. The court further condemns you **Medson Madzialenga** to suffer death in the manner prescribed by law; subject to section 326 of the CP&EC. *CP&EC 29. Nov. 2019*
- iii. The court condemns you **Jesmon Baluwa** to suffer death in the manner prescribed by law, subject to section 326 of the CP&EC. *CP&EC 29. Nov. 2019*
- iv. The court also condemns you **Steven Ching'ombe** to suffer death in the manner prescribed by law, subject to section 326 of the CP&EC. *CP&EC 29. Nov. 2019*

B. Trafficking in persons contrary to section 14(1) of the TIP Act

- i. This court condemns you **Gerald Phiri** to life imprisonment for the offence of trafficking in persons. *CP&EC 29. Nov. 2019*

C. Extracting human tissue contrary to section 224A(a)(i) Penal Code

- i. **Jesmon Baluwa** is hereby condemned to life imprisonment for extracting human tissue. *CP&EC 29. Nov. 2019*
- ii. Likewise **Steven Ching'ombe** is condemned to life imprisonment for extracting human tissue. *CP&EC 29. Nov. 2019*

D. Transacting in human tissue contrary to section 224((e)(ii) Penal Code

- i. The court condemns **Gerald Phiri** to life imprisonment for transacting in human tissue. *C. J. Kachale J 29. Nov. 2019*
- ii. The court condemns **Medson Madzialenga** to life imprisonment for transacting in human tissue. *C. J. Kachale J 29. Nov. 2019*
- iii. The court condemns **Steven Ching'ombe** to life imprisonment for transacting in human tissue. *C. J. Kachale J 29. Nov. 2019*
- iv. The court condemns **MacDonald Kanyerere** to life imprisonment for transacting in human tissue. *C. J. Kachale J 29. Nov. 2019*
- v. The court condemns **Damiano Phiri** to life imprisonment for transacting in human tissue. *C. J. Kachale J 29. Nov. 2019*
- vi. The court condemns **Isaac Msambalume** to life imprisonment for transacting in human tissue. *C. J. Kachale J 29. Nov. 2019*
- vii. The court condemns **Damson Manyoni** to life imprisonment for transacting in human tissue. *C. J. Kachale J 29. Nov. 2019*

All the custodial sentences will take effect from the date of arrest of each offender.

Order accordingly.

Pronounced in Open Court this 29th day of November 2019 at Lilongwe.

C. J. Kachale
C.J. Kachale, PhD
JUDGE