



IN THE REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
CRIMINAL DIVISION: PRINCIPAL REGISTRY
HOMICIDE CASE NO 63 OF 2019

The Republic

-v-

Philip Voets

CORAM

HONOURABLE LADY JUSTICE DOROTHY DEGABRIELE

Ms. B. Kumwenda

for the State

Mr. P. Minjale

for the Accused

Mr. H. Amos

Official Interpreter

Ms. V. Mombera

Court Reporter

DeGabriele, J

Order on Sentencing

1. Introduction

1.1. On 13 May 2021, Phillip Voets was found guilty of causing the death of his wife Elizabeth Betty Khozi-Voets with malice aforethought, and was convicted of the offence of murder contrary to section 209 of the Penal Code, (Cap 7:01) of the Laws of Malawi.

1.2. The brief facts of the offence were that Elizabeth Khozi died at Mwaiwathu Private Hospital on 21 May 2019, and the clinical cause of death was recorded

as sepsis. The deceased was exhumed on the request of the family, and a forensic autopsy was carried out, which revealed that death was caused by subdural haemorrhage caused by a blunt traumatic force injury to the ocular-cavity.

1.3. The Court now proceeds to sentence the convict. Pursuant to section 321J of the Criminal Procedure and Evidence Code (hereinafter referred to as the CP & EC) the Court can receive evidence which can be used in arriving at a proper sentence and the information may include evidence from the offender or his defence team, the prosecution, as well as information or evidence by or on behalf of the victim of the offence and any relevant reports, as well as the evidence that was received and led to the conviction, to enable the sentencing court assess the gravity of the offence and arrive at an appropriate sentence. Both the State and Counsel for the convict filed written submissions.

2. The State's submissions

2.1. The State submitted that the Court should take into consideration the personal and individual circumstance of the convict as well as the possibility of reform and re-adaptation, as was held in ***Republic v Samson Matimati Criminal Case No. 18 of 2007 HC (unreported)***.

2.2. The State reminded the Court law favours the young (18-25 years old) and the old (above 60 years old) in that they must be considered with some lenience in sentencing and be considered for shorter custodial sentences, see ***R v Ng'ambi [1971-1972] ALR Mal 457***. However, the State reminded the Court the manner in which the offence is committed will reduce the weight that is accorded to the mitigation of age; see ***Domingo Juwawo v Republic Confirmation Case No. 1029 of 1996***. Further, the sentencing court must take into consideration the manner and circumstances under which the offence was committed, whether an offensive weapon was used or not, see ***Winston Ngulube & others v The Republic MSCA Criminal Appeal No. 35 of 2006 (unreported)***.

2.3. The State has submitted on principles that govern sentencing for all offences including the fact that the sentencing court must exercise its discretion judicially, as well as consider both the mitigating and aggravating factors, as was

pronounced in the case of **Republic vs Mafuta Samson Confirmation Case Number 632 of 1996 (HC-LL)**.

2.4. The sentencing court must evaluate the extent of the crime, the effect on the victim (in this case the victim is deceased) and the circumstances in which it was committed, see **Ayami v Rep [1990] 13 MLR 19 (SCA)**. The appropriate sentence must fit the crime. It must fit the antecedents of the convict, as well as taking into consideration public interest in crime prevention. An appropriate sentence must, to some extent, be blended with a measure of mercy; see the case of **Rep. v Shauti Confirmation Case No. 175 of 1975 (unreported)**. However, the State submits that such mercy considerations, should not apply to serious offences like homicide. The State cited the observation made by Justice Chipeta, as he was then, in the case of **Republic vs Chinguwo Criminal Case number 53 of 200 [HC] [Unreported]** that:-

"it beats me how in exercising leniency [in a case where a life has been lost] a court can go overboard and punish the offender with a penalty going below a penalty it gives where no loss of life is involved"

2.5. The sentencing court must record good reasons why a non-custodial sentence would not be appropriate for first offenders in homicide cases, bearing in mind sections 339 and 340 of the CP & EC, because the offence is serious and attracts a sentence of death or life imprisonment.

2.6. The sentencing court can look at the personal and individual circumstances of the offender, in particular the possibility of reform and social re-adaptation of the convict as was held in the case of in the case of **Republic v Samson Matimati (supra)**. The State argues that these considerations in themselves should not be used as mitigating factors. The sentencing court must consider the sentiments of Justice Chipeta (as he was then) in the case of **Republic vs Eneya and 6 others Criminal Case no 53 of 2000, High Court Principal Registry (unreported)**, that:-

"Under the applicable principles of sentencing in criminal procedure courts are normally guided by the principle that before one embarks on a path of crime, it is incumbent on him to take these circumstances on board. A man who opts for and goes ahead to commit a crime should factor in the possibility that if the long

arm of the law catches up with him and accords him a custodial penalty his family will suffer and that courts are not encouraged to be moved by such pleas”.

2.7. The State also submitted on the general punishment for murder and sentencing trends. The State brought to the attention of the Court section 210 of the Penal Code as amended in 2011, that any person convicted of murder shall be liable to be punished with death or with imprisonment for life. The State observed that prior to the amendment, section 210 of the Penal Code imposed a mandatory death sentence for the offence of murder. The High Court in the case of ***Francis Kafantayeni and others v Attorney General Constitutional Case No. 12 of 2005 [2007] (unreported)*** took the view that the imposition of a mandatory death sentence for murder regardless of the circumstances of each case is a violation of section 16 of the Constitution of the Republic of Malawi. As such, the State argues that the Convict does not qualify for a death penalty, but for a consideration under the life imprisonment option open to the Court. Further, the State argues that homicide cases should be treated with utmost seriousness, because the offence amounts to an affront against the value and sanctity of human life, see ***Republic v Dalitso Mathuso Criminal Case No. 27 of 2008 (unreported)***.

2.8. In conclusion, and bearing in mind the evidence before the Court and the circumstances of the case, the State proposes a sentence of 20 years imprisonment from the date of conviction as a befitting the crime and the convict.

2.9. The convict is a first time offender and as such the Court must consider section 339 and section 340 of the CP & EC in the process of considering an appropriate sentence. Counsel for the Convict argues that since he was convicted on what he terms “circumstantial evidence” and since the convict had cared for his wife by taking her to hospital, a non-custodial sentence can be considered as being appropriate.

2.10. The age and health of the convict should be considered as a mitigating factor. The Convict is 64 years old and he does not look fit and healthy. Counsel for the convict cited the case of ***Republic v Horris Mithathi, Criminal case No. 17 of 2002 (unreported)*** in which the court held that young (18-25) and old (60 and

above) offenders deserve lenience in sentencing and be considered for short custodial sentences.

2.11. Counsel implored this Court to look at the manner in which the offence was committed, in that since there was no direct evidence proving he committed the offence, and the convict had taken his wife to hospital, the convict did not actually commit the offence. This Court would like to state that at this stage, the Court has already entered a conviction. This statement of submission is questioning the conviction and it is in bad taste. It can be used for an appeal, but not as a fact to support a need for a non custodial sentence.

2.12. As regards the injuries on the deceased, Counsel for the convict submits that the convict can still be considered for a short custodial sentence. Counsel cited the case of ***Republic v Patson Criminal No. 59 of 1996 (unreported)*** which decided whether the assault on the victim was deliberate and serious. In the *Patson Case*, the accused hit the victim with the brick, later the victim walked a short distance and was assaulted again by the accused after which the victim fell down and later died of the injuries. The accused was sentenced to 3 years in prison.

2.13. The Court must also look at the time the convict was on remand from October 2020 where he had no proper life style, food and better place to sleep and he has contracted a number of diseases whilst in custody and his health is deteriorating. He had been staying in Chirimba, Blantyre since 2014.

2.14. The convict has been a person of good behaviour, causing no problems in the community, and he has employed 4 employees who, together with his step-son Dan will suffer if he is incarcerated for a long time. Since he was granted bail in 2019, he has been in the society until his bail was revoked in October 2020. He has never been a threat to the society. He was reporting for bail at Chirimba Police without absconding even a single day and was available for trial throughout.

2.15. The convict has good prospects of rehabilitation as evidence by his conducting prayers and leading a prayer organisation while in custody and he is a good standing Christian. The convict dreams of setting up a clinic in Malawi as he is a medical doctor.

2.16. In conclusion, the convict seeks to be considered for a non-custodial sentence, but if the Court will impose a custodial sentence, the custodial sentence that would be fair, reasonable and just, would be of not more than 3 years imprisonment. In conclusion, the defence prays for a sentence of not more than 3 years imprisonment, which is in their view, reasonable, appropriate and fair in the circumstances, calling the Court to invoke section 13(m) of the Malawi Constitution which calls for humane application of the law.

3. The Sentence

3.1. The punishment for the offence of murder under section 210 of the Penal Code is death sentence or life imprisonment. Section 210 of the Penal Code, as amended in the year 2011, now provides the maximum sentence as death or life imprisonment. This Court therefore has discretion to impose an appropriate sentence up to life imprisonment, and the length of years imposed would reflect the seriousness of the offence, see *Kafantayeni and others v Attorney General (supra)*. In the recent judgement of *Khoviwa v R (MSCA Miscellaneous Criminal Appeal Number 12 of 2017) [2021] MWSC 3 (28 April 2021)*, the Malawi Supreme Court has effectively abolished the death penalty as violation section 16 of the Constitution. This means the option open to this Court is to exercise its sentencing discretion within the maximum sentence of life.

3.2. The law offers guidelines on sentencing offenders. Section 339 of the CP & EC states that

"(1) When a person is convicted of any offence the court may pass sentence of imprisonment but order the operation thereof to be suspended for a period not exceeding three years, on one or more conditions, relating to compensation to be made by the offender for damage or pecuniary loss, or to good conduct, or to any other matter whatsoever, as the court may specify in the order.

(2) When a person is convicted of any offence, not being an offence the sentence for which is fixed by law, the court may, if it is of the opinion that the person would be adequately punished by a fine or imprisonment for a term not exceeding twelve months, fine the person or sentence the person to a term of imprisonment not exceeding twelve months but the court may, as the case may be, order the suspension of the payment of the fine or operation of the sentence of

imprisonment on condition that the person performs community service for such number of hours as the court may specify in the order”.

3.3. Section 340 (1) of the CP & EC provides that

“Where a person is convicted by a court of an offence and no previous conviction is proved against him, he shall not be sentenced for that offence, otherwise than under section 339, to undergo imprisonment, not being imprisonment to be undergone in default of the payment of a reasonable fine, unless it appears to the court, on good grounds, which shall be set out by the court in the record, that there is no other appropriate means of dealing with him”.

3.4. Section 340 of the CP & EC explains that those who are first time offenders can be sentenced in accordance with section 339 of the CP & EC by imposing a suspended sentence, a fine, a compensatory order or a community service order. Further, the section states that a custodial sentence can be imposed upon the sentencing court recording good grounds, and only if there is no other way of dealing with the offender. Indeed the convict herein is a first time offender and was an old man at the time of committing the offence of murder, the options of non custodial sentences as outlined in sections 339 and 340 of the CP & EC , such as a suspended sentence, a fine or a community service order, are in appropriate as there are no exceptional circumstances to call for these. Furthermore, it would be an affront to public interest and the public's sense of justice to impose such non-custodial sentences for the offence of murder. Therefore, this Court will impose a custodial sentence to reflect the seriousness of the offence and the circumstances under which the offence was committed.

3.5. In punishing offenders who commit murder, the sentencing court has to exercise its discretion, which discretion is informed by the law, relevant and applicable case law, and impose a sentence that is for the crime as committed, that fit the offender, that response to public interest in ensuring that offences are punished appropriately, that ensures that the State is able to carry out its duties for preventing crimes effectively, that ensures that would-be offenders are sufficiently deterred, and the sentence would be blended with some measure of mercy, regardless of the fact that a life is lost for good. A meaningful and

appropriate sentence must also reflect the sanctity of life, and that every offender who takes the life of another ought to be punished properly.

- 3.6. In looking at decided cases, this Court will focus on case law that discuss the offence of murder because of the severity of the offence, and the non-reversible loss of life. This case is aware that no two homicide cases are the same as the circumstances of the commission of the offence differs and the penalties will also differ, see ***Twoboy Jacob v Republic MSCA Criminal Appeal No. 18 of 2006 (unreported)***. A number of cases on sentencing come to mind. The first is where a life sentence was imposed by the High Court in the case of ***Rep v Sinosi Pasipanadya, Criminal Case Number 41 of 2008 (unreported)*** where a father killed his child in cold blood because he was afraid when his wife went to report him for cutting the thumb of the 7 month old child to stop the child from sucking the thumb. The second case is where the High Court imposed a death penalty, which was set aside by the Supreme Court of Appeal because Highest Court found that there was no use of a weapon in the assault and the assault was due to intoxication and there was no motive. The Supreme Court of Appeal imposed a sentence of 20 years imprisonment with hard labour, see ***Winston Ngulube and Another v Rep (supra)***.
- 3.7. The third case is where the Supreme Court of Appeal also set aside a sentence of death and substituted it with one of 20 years imprisonment with hard labour because the fight that occurred was initially without weapons, and a panga was only used during the fight, see ***Twaibu Uladi v Rep, MSCA Criminal Appeal Number 5 of 2008 (unreported)***. It is clear that each murder case has to be sentenced based on the circumstances and considerations of whether aggravating factors outweigh mitigating factors, vice versa. Again, it is open to the Court to pass term of years for imprisonment instead of the life sentence, again depending on the aggravating and mitigating factors.
- 3.8. This Court notes that murder is a very serious offence. However, the law allows that even in cases where the offence is serious, a non-custodial sentence can be imposed if there are 'extremely rare circumstances' see ***Rep v Tomasi [1997] 2 MLR 70***. Such extremely rare circumstances ought to be proved by the convict. The convict herein has submitted that based on the mitigating factors

he outlined, he should be considered for a non-custodial sentence. The convict has stated that his health has deteriorated while in custody. However, there is no medical report to show how such health has deteriorated. The fact of his previous good behaviour, honouring bail some bail conditions, being a good community person do not amount to extremely rare circumstances. Therefore, this Court will not consider a non-custodial sentence for the convict, despite his being a first offender. Further, the fact that the deceased liked her drink was not reason that she had to be murdered, and the cause of her death being so found after she had been exhumed. In imposing the sentence, the Court will take consideration of the case of ***Republic v Keke, High Court Confirmation Case 404 of 2010 (unreported)*** that courts should be slow at imposing long prison terms for first time offenders who are above the age of 60 years, due to old age and the unlikelihood of offending again.

3.9. In this case, this Court will not impose a non-custodial sentence. A life was needlessly lost and a non custodial sentence would not reflect the sanctity of that life, lost through circumstances of intimate violence committed in a home that was presented as a loving home. If it was not of the observance of a swelling on the forehead that led to exhumation, the murder of the deceased would not have been known. The circumstances under which Elizabeth Khozi died were appalling. She was vulnerable because of being a non-certified alcoholic and she never received the treatment she deserved. She was victimised because of being a non-certified alcoholic and she was punished with the ultimate punishment which was death. The life of a struggling non-certified alcoholic deserves the same care as any other life, and more so as alcoholism may be an indication of some other issues. She was not shown any mercy, stripped of any dignity in her final moments, and this Court would find it hard to show mercy to the perpetrator of the offence. The blending of mercy in a sentence should really be based on exceptional circumstances which the convict must present and prove before the sentencing court, instead of a general undertaking that sentences should be blended with mercy.

3.10. The convict married the deceased in the year 2014 and presents that their marriage was good. His workers and also prosecution witness said the same,

that even if they quarrelled, the marriage was good. However, as a person who was surrounded by the narrative that she was an alcoholic, the deceased was not able to present her own side of the story then, nor to this Court. Only her body told the tale at the forensic autopsy examination. It is established case law and practice that maximum sentences must be reserved for severe circumstances of an offence and for the worst offender, as was held in the case of **Winston and Michael Ngulube v Rep (supra)**. Even if the convict was found guilty of the offence of murder, committed in domestic and intimate circumstances, he is not a worst offender. This means that this court will not impose the maximum sentence of life imprisonment.

3.11. The case of **Republic v Keke (supra)** is authority that courts should be slow at imposing long prison terms for first time offenders, who are 60 years and above, where necessary as dictated by mitigating and aggravating factors. The rationale is that at that age, there are towards the end of their lives and are likely not to reoffend. Furthermore, the convict herein is 64 years old and, as far as there is no contrary indication, has hitherto led a blameless and crime-free life prior to this conviction. This Court will take that age mitigation coupled with his being a first time offender into account. However, this Court is more and more convinced that old age should also demonstrate the maturity of a person and that such person would know better and avoid committing such offence. In this particular case, the fact that the convict is a medical doctor who acted with such negligence and lack of care counts as an aggravating factor, despite his age and his being a first time offender.

3.12. The Convict would like to be considered on ill-health, but just as at the re-application for bail which was denied, he has failed to present this Court with medical evidence. Further, the fact of his being a good citizen in his community in Chirimba has not been supported by any testimony of the people he would go and live with again if a non-custodial sentence were to be imposed. The statement that his stepson and employees will suffer does not hold water as the Stepson who took over the deceased property testified in this court that he was managing well. Further, one of the employees had already left and the rest were under the management of the step son Dan Khozi. The plea for a non-custodial

sentence cannot be sustained. Further, the plea that the sentence should be not more than 3 years cannot be sustained as such a sentence is inappropriate.

3.13. Looking at the evidence before this Court as outlined in the judgement and as submitted for purposes of sentencing, the convict herein deserves a substantive sentence that reflects the manner in which the offence was committed, as well as a sentence that upholds and respect the sanctity of life. This Court agrees with the State that regardless of his age, a sentence of 20 years would be appropriate in this matter. It is the order of this Court that the convict herein be sentence to 20 years imprisonment from the date his bail was revoked 27 October 2020.

3.14. The convict has a right to appeal against the judgement and sentence.

It is so ordered.

Pronounced in Open Court at Principal Registry this 16th day of July 2021 at Blantyre.


D. A. DeGabriele

J U D G E