

**IN THE MALAWI SUPREME COURT OF APPEAL  
AT BLANTYRE**



**MSCA CRIMINAL APPEAL CASE NO. 18 OF 2006**

*(Being High Court Criminal Case No 55 of 2002)*

**BETWEEN:**

TWOBOY JACOB ..... APPELLANT

- AND -

THE REPUBLIC ..... RESPONDENT

**BEFORE: THE HON. JUSTICE TAMBALA, SC, JA.**

**THE HON. JUSTICE MSOSA, SC, JA.**

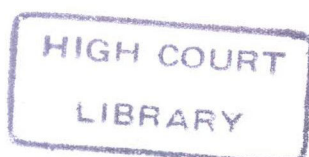
**THE HON. JUSTICE MTAMBO, SC, JA.**

Chipao, Senior Legal Aid Advocate, for the Appellant  
Phiri (Mrs), Assistant Chief State Advocate, for the  
Respondent  
Selemani, Court Official

**J U D G M E N T**

**MTAMBO, SC, JA.**

The High Court sitting with a jury at Balaka convicted the appellant of the offence of murder contrary to s. 209 of the Penal Code and sentenced him to suffer death according to law. The appeal is against the sentence only.



It has been argued that the sentence is too excessive and that the court was influenced by s. 210 of the Penal Code, which makes the death penalty mandatory as follows:

*"210 Any person convicted of murder shall be sentence to death.*

It is clear upon reading the record that the Court passed the sentence of death not necessarily because it felt the sentence was merited but rather because it felt bound by s. 210.

Learned Counsel referred us to a recent decision of the High Court in the case of **Francis Kafantayeni and Five Others – Vs – Attorney General**, Const. case No. 12 of 2005 (unreported). It was decided in that case that the sentence of death cannot be justified because the mandatory requirement of death sentence for the offence of murder as provided by s. 210 is in violation of:

- (a) the constitutional guarantees of rights under s. 19 (1), (2) and (3) of the Constitution regarding the protection of the dignity of all persons as being inviolable, the requirement to have regard to the dignity of every human being and the protection of every person against inhuman treatment or punishment;
- b) the right of access to justice, in particular, the right of access to court for final settlement of legal issues under s. 41 (2) of the Constitution and,
- (c) the right of an accused person to a fair trial under s. 42 (2) (f) of the Constitution.

We have ourselves read the case of **Kafantayeni and Five others (supra)**. We agree with the High Court that the execution of the death penalty in this country is sanctioned by the Constitution under s. 16 thereof as follows:



*"16 Every person has the right to life and no person shall be arbitrarily deprived of his or her life:*

*Provided that the execution of the death sentence imposed by a competent court on a person in respect of a criminal offence under the laws of Malawi of which he or she has been convicted shall not be regarded as arbitrary deprivation of his or her life."*

We would also agree with the High Court that the **proviso** to the section only saves the execution of the penalty and not the mandatory requirement for it. We would also agree that the constitutionality of the mandatory requirement is an aspect not saved by the **proviso** and, therefore, susceptible to judicial examination and determination.

We begin with s. 19. Subsection (1) provides that the dignity of all persons shall be inviolable. Subsection (2), in the relevant part, guarantees respect for human dignity in any judicial proceedings, and subsection (3) prohibits torture of any kind or cruel, inhuman or degrading treatment or punishment.

In its judgment the High Court was largely persuaded by the decision of the Privy Council in the case of **Reyes - v - The Queen** [2002] 2 AC, 235, an appeal case from Belize. The constitutionality of the mandatory death sentence was one of the questions in that appeal on the ground that it violated the protection against subjection to inhuman or degrading punishment enshrined in section 5 of the Constitution of that State which is to the same effect, and of the same wording, as s. 19, the High Court observed. The Court referred to a very valuable passage, among other passages, in that case as follows:

*"Under the common law of England there was one sentence only which could be judicially pronounced upon a defendant convicted of*

*murder and that was the sentence of death. This simple and indiscriminating rule was introduced into many states now independent but once colonies of the Crown. It has however been recognized for many years that the crime of murder embraces a range of offences of widely varying degrees of criminal culpability. It covers at one extreme the sadistic murder of a child for sexual gratification, a terrorist atrocity causing multiple deaths or a contract killing, at the other the mercy killing of a loved one suffering unbearable pain in terminal illness or killing which results from an excessive response to a perceived threat. All killings which satisfy the definition of murder are by no means equally heinous .....*

The Court referred to another passage as follows:

*"A sentencing regime which imposes a mandatory sentence of death on all murderers, or murderers within specified categories, is inhuman and degrading because it requires sentence of death, with all the consequences such a sentence must have for the individual defendant, to be passed without any opportunity for the defendant to show why such sentence should be mitigated, without any consideration of the detailed facts of the particular case or the personal history and circumstances of the offender and in cases where such a sentence might be wholly disproportionate to the defendant's criminal culpability".*

The Court also referred to another passage to the same effect attributed to Byron CJ, in another case, as follows:

*"The issue here is whether it is inhuman to impose a sentence of death without considering mitigating circumstances of the commission of the offence and the offender; whether the dignity of humanity is ignored if this final and irrevocable sentence is imposed without the individual having any chance to mitigate; whether the lawful punishment of death should only be imposed after there is a judicial consideration of*



*mitigating factors relative to the offence itself and the offender."*

In the same decision, the High Court observed, Saunders, JA agreed with Byron when he said:

*"The dignity of human life is reduced by a law that compels a court to impose death by hanging indiscriminately upon all convicted of murder granting to none an opportunity to have the individual circumstances of his case considered by the court that is to pronounce the sentence".*

The judge (Saunders, JA) then reasoned:

*"It is and has always been considered a vital precept of just penal laws that the punishment should fit the crime. If the death penalty is appropriate for the worst cases of homicide, then it must surely be excessive punishment for the offender convicted of murder whose case is far removed from the worst case. It is my view that where punishment so excessive, so disproportionate must be imposed on such a person courts of law are justified in concluding that the law requiring the imposition of the same is inhuman ..... I am driven firmly to one conclusion. To the extent that .... the sections of the Criminal Codes ..... are interpreted as imposing the mandatory death penalty those sections are in violation of section 5 of the Constitutions."*

We have carefully considered the above passages and feel persuaded to agree that offences of murder differ, and will always differ, so greatly from each other that we think it is wrong and unjust that they should attract the same penalty or punishment.

The High Court further considered the constitutionality of the mandatory death sentence *vis-à-vis* s. 41 (2) of the Constitution which provides that every person shall have

access to any court of law or any other tribunal with jurisdiction for final settlement of legal issues.

We agree with the High Court that a matter of sentence is a legal issue for judicial examination and determination, notwithstanding that by convention the prosecution will adopt a neutral attitude at that stage by not seeking to influence the court in favour of a heavy sentence. We also agree, therefore, that it is an issue within the purview of s. 41 (2). But we remind ourselves here that an appeal may not lie against a mandatory death sentence which means that a person so sentenced would be denied the constitutional right under s. 41 (2), namely, to have access to **any court of law for final settlement of the issue.**

The High Court went further and considered the constitutionality of the mandatory death sentence in relation to s. 42 (2) (f) which provides, in the relevant part, that every person arrested for, or accused of, the alleged commission of an offence shall have the right, as an accused person, to a fair trial. We would add that the right to a fair trial includes, under sub-paragraph (iv) of that section, the right to adduce and challenge evidence. We thought we should make reference to sub-paragraph (iv) for the reason that sometimes it is necessary to adduce evidence, for instance, of character and antecedents, after the prosecution summary of facts, in the case of a plea of guilty, or immediately after the verdict of guilty.

We should therefore next decide whether a trial includes sentencing. The Constitution or any other law is silent on this. We, therefore, have to look elsewhere. BLACKS LAW DICTIONARY, sixth Edition, defines the word "trial" as follows:

*"A judicial examination and determination of issues between parties to action, whether they be issues of law or of fact, before a court that has jurisdiction." "A judicial examination, in accordance with law of the land, of a cause, either civil or criminal, of the issues between the*



*parties, whether of law or fact, before a court that has proper jurisdiction."*


We have said above that a matter of sentence is a legal issue for judicial examination and determination. We have also said that evidence may be adduced at that stage as well. It seems to us therefore that "trial" in the case of a person accused of a crime includes sentencing. The High Court was of the same view in the **Kafantayeni** case. Accordingly, it seems to us that the mandatory requirement for death sentence under s. 210 of the Penal Code denies an offender the right to fair trial under s. 42 (2) (f) of the Constitution by prohibiting the court from judicial examination and determination of sentence.


By reason of all the foregoing we endorse the decision of the High Court in the case of **Kafantayeni and Five Others - V - Attorney General (supra)** to the extent only that the mandatory requirement of the death sentence for the offence of murder as stipulated in s. 210 of the Penal Code is a violation of ss. 19 (1), (2) and (3), 41 (2) and 42 (2) (f) of the Constitution of the Republic of Malawi, and to that extent s. 210 is hereby invalid pursuant to s. 5 of the Constitution.


The facts in the present appeal showed that the deceased person was the appellant's second wife; that he killed her in cold blood using a *panga* knife on suspicion that she bewitched him so that he was unable to have sexual intercourse with his first wife. It does not seem to us on the facts of this case that it can be said that it is a proper matter for a lesser sentence than the one the High Court passed. We are saying here that the sentence of death which the High Court passed appears to us to have been well merited. Besides, we have been informed that the sentence has now been commuted to life imprisonment by the appropriate authority. Therefore, notwithstanding the fact that the points raised in the appeal have been decided in favour of the appellant, we dismiss the appeal because we consider that no

substantial miscarriage of justice has actually occurred thereby.

**DELIVERED** in Open Court this 19<sup>th</sup> day of July 2007 at Blantyre.

Signed:  .....  
**D.G. TAMBALA SC, JA.**

Signed:  .....  
**A.S.E. MSOSA (MRS), SC, JA**

Signed:  .....  
**I.J. MTAMBO, SC, JA**