JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

HOMICIDE (SENTENCE RE-HEARING) CAUSE NO. 4 OF 2015

BETWEEN

THE REPUBLIC

AND

LACKSON DZIMBIRI

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Gondwe, Senior State Advocate, for the State
Magombo, Senior Legal Aid Advocate, for the convict
Ms. Emily Chimang'anga, Court Clerk

JUDGEMENT

Introduction

The case of the Lackson Dzimbiri [hereinafter called the "Convict") is before the High Court for re-sentencing in very unusual circumstances. There is practically no record of court proceedings in respect of the trial of the Convict. The only evidence showing that the Convict was prosecuted and convicted of the offence of murder is to be found in primarily three documents, namely, Authority for Detention of Person Sentenced to Death dated 2nd July 2002 (Authority for Detention), and Notice of Appeal against Conviction and Sentence dated 6th November 2002 (Notice of Appeal), and Prisoner's Record. There is also an affidavit in support of a bail application dated 15th May 2002 (Bail Affidavit). In the premises, a very interesting question arises, namely, how is the Court to handle sentence re-hearing in the absence of the trial record?

Facts

Despite spirited and extensive efforts to trace the trial record, the file has yet to be found. The facts of the case, as discerned from the available documents, would appear to be as follows. The Convict hails from Mangombo Village, Traditional Authority Nkanda, Mulanje, and was aged 18 years old in May 2002. On or about 25th April 1999, the Convict's brother and another boy from the same village (the Deceased) picked a quarrel to the extent of exchanging blows and the Deceased lost his cap during the fight.

On 2nd May 1999, the Convict and the Deceased's brother purposed to go for a dance at night and on their way they met a friend of the Deceased. The Deceased's friend alleged that the Convict had taken the Deceased's cap during the fight the previous week and he asked the Convict to give back the cap. The Convict denied the allegation, stating that he was not present when the fight took place. Despite the denial, the Deceased's friend grabbed the Convict by his trousers and the same got torn. Thereupon the Convict decided to report the matter to the parents of the Deceased's friend but they were not at home.

On the Convict's way back from the home of the parents of the Deceased's friend, he met the Deceased's friend who was then together with the Deceased and both of them attacked the Convict. The Deceased's friend had a panga knife in his hand and he intended to hit the Convict with it but he missed the Convict and hit the Deceased fatally injuring him. The Deceased's friend run away and people picked the Convict to Police. Shortly thereafter, the Deceased's friend became sick and died.

A perusal of the Authority for Detention reveals that the Convict was on 2nd July 2002 convicted of murder and sentenced to suffer death. The death sentence was on 15th October 2002 commuted to one of imprisonment for life.

Issues for Determination

The main issue for the Court's determination is what is the appropriate sentence to impose on the Convict having regard to all circumstances of the case. The other issues have to do with the how sentence re-hearing has to be handled where the entire trial record is missing. It is the submission of Counsel that a considered examination of the main issue has to extend to discussion of the following questions:

(a) whether the Court has jurisdiction to proceed with sentence re-hearings where the court record is wholly or partially lost or destroyed?

(b) whether in a case where the entire court record has been lost or destroyed, justice requires the immediate release of the convict in question?

(c) whether where the lost or destroyed part of the record is substantial, material or consequential, justice requires the immediate release of the convict in question?

(d) whether in a case where only part of the record is missing, it is entirely appropriate for the Court to examine sources outside of the incomplete court record in order to assess whether the missing part of the court record is so substantial, material and consequential that proceeding would result in injustice?

(e) whether where the Court is of the view that the missing part of the court record is not so substantial, material and consequential that proceeding would not result in injustice, the Court may proceed with sentence re-hearing and may consider such evidence in mitigation as put before the Court by the State and defence respectively?

(f) whether any unknown facts, that is, unknown because of the missing of the Court record, must be assumed to be mitigating unless proven otherwise beyond reasonable doubt by the prosecution?

(g) whether the death sentence can ever be appropriate in a case where the court record has been wholly or partially lost or destroyed?

Submission by Counsel for the Convict

The submissions by Counsel for the Convict can be conveniently divided into three parts.

The Court's jurisdiction to hear matters without a court record and how to proceed

Counsel for the Convict argues that it would be a breach of the rights to a fair hearing and to access to justice guaranteed by the Constitution to fail to proceed with a sentence re-hearing on the basis that the Convict's court record has been lost or destroyed. It is further argued that the Convict's entitlement to a remedy in

respect of the constitutional violations in the present case cannot be defeated because the case file has been lost, through no fault of his own. For this proposition, Counsel for the Convict relies essentially on four local cases and three foreign cases.

The first of the local cases is **Francis Kafantayeni and others v. The Attorney General, Constitutional Case No. 12 of 2005 (unreported)** [hereinafter referred to as the "**Kafantayeni Case**"]. In this case, the court records of all six of the plaintiffs had been lost or destroyed. This being the case, Counsel for the Convict contends that the High Court made the order for the Director of Public Prosecutions to bring the convicts, including the Convict herein, before the High Court for sentence re-hearings in full knowledge that their court records were not available and could not be found.

Counsel for the Convict has explained why the Court in Kafantayeni Case found it imperative to order sentence re-hearing even though the trial files were missing:

> *"The Court ordered sentence rehearings to take place, notwithstanding that by necessity these would have to be carried out without the benefit of the Court records, because to do otherwise would be contrary to the interests of injustice; would cause further breaches of the plaintiff's constitutional rights to a fair trial including sentencing and to access to justice; and, would mean that the Court would fail to provide an essential and effective remedy to the breaches of constitutional rights already suffered by the plaintiffs at that time. Importantly, the High Court explicitly condemned any potential limitations on the right to access a Court for discretionary sentencing as amounting to a violation of rights guaranteed by the Constitution:*
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> > *'[W]e would reject any notion that any restriction or limitation on the guarantee under section 41(2) of the Constitution of the right of access to a court of final settlement of legal issues, denying a person to be heard in mitigation of sentence by such court, can be justified under section 44(2) of the Constitution as being reasonable or necessary in a democratic society or to be in accord with international human rights standards.'"*

The second local case is **McLemore Yasini v. Rep, MSCA Criminal Appeal No. 29 of 2005 (unreported)** [hereinafter referred to as the "**Yasini Case**"] which was cited for the following statements:

> *"The Court [in the Kafantayeni case] clearly ordered that the Plaintiffs were entitled to a re-sentence hearing on the death sentence individually. The Court's decision on this point, affected the rights of <u>all</u> prisoners who were sentenced to death under the mandatory provisions of section 210 of the Penal Code. The right to a re-sentence hearings therefore accrued to all such prisoners. […] We wish to observe that it is the duty of the Director of Public Prosecutions to bring before the High Court for re-sentence hearing <u>all</u> prisoners sentenced to death under the mandatory provision of Section 210 of the Penal Code*." – [Emphasis by underlining added by Counsel]

Counsel for the Convict submitted that the Supreme Court of Appeal extended the order in the **Kafantayeni Case** for the Director of Public Prosecutions to bring the plaintiffs in the **Kafantayeni Case** before the Court for sentence re-hearings to all prisoners previously sentenced to the mandatory death penalty. It was further submitted that the Malawi Supreme Court of Appeal did not intend that limitations be artificially read into its order for the prisoners to be brought before the High Court for sentence hearings.

Counsel for the Convict then turned to the case of **Mtambo & others v. The Republic, MSCA Criminal Appeal No. 1 of 2012 (unreported)** [hereinafter referred to as the "**Mtambo Case**"] wherein the Court was called upon to determine whether the appeal could proceed to be heard without the Records of Appeal being available. It seems very likely that this case was cited for the following statements by Chipeta, JA, at p. 6:

> *"It is clear from what has been deposed to in the material affidavits of this application that no stone had been left unturned in the search for the records of trial and sentence for all three applicants. The records have so missed for not less than 10 years in respect of each applicant. It is accordingly as clear as daylight to me that save for the fact that the applicants have not asked the High Court to judicially confess its failure to help them, chances are so remote that the trial records will be traced. The meaning of this is that if it be insisted that their appeals only proceed on production of their records of appeal, then it would be as good as saying they should not exercise their right to appeal. What would be painful about such a result is that the appeals these applicants claim they lodged resolve on a very narrow compass that might not overly depend on what their records of appeal could have contained. The appeals, I have been assured, relate to the sentences they got vis-à-vis the ages they were at during their commission of the respective murders they were convicted and sentenced for. All they want to argue before the Supreme Court is that although tried and sentenced as adults, they were minors at the time of the commission and arrest."*

The Court then proceeded to make the following conclusion:

> *"I certainly think that from the efforts they have demonstrated in relation to the tracing of their trial records for the purposes of having the High Court prepare their records of appeal, it would be unjust to block the applicants from presenting their appeals on the question whether they were not entitled to be treated as juveniles regardless of the ages they had attained by the time of trial and sentence. In the result, therefore, despite my procedural concerns, I grant the prayer of the applicants by permitting them to proceed with the hearing of their respective appeals by the full bench of the Supreme Court on their sentences without their records of appeal."*

Counsel for the Convict understands the **Mtambo Case** as authority for the proposition that the mere fact that the whole record is missing ought not to deprive an applicant of an opportunity to be heard on appeal. It is contended that the same

approach be followed by this Court in proceeding with the hearing of the sentence re-hearing in respect of the Convict.

The fourth and last local case is that of **Andrew Morris Chalera & others v. The Republic, MSCA Civil Appeal No. 5 of 2012 (unreported)**. In this case, the appellants were charged with and convicted of murder and were each sentenced to suffer death. They all appealed against their conviction and sentence. The record of proceedings in the court below was incomplete in that the summing up to the jury by the trial court was not part of the record. The Court was informed that all efforts had been made to trace that part of the record but to no avail. It, therefore, became a preliminary matter for the Court to determine what becomes of appeals in such circumstances. The Court addressed the point in the following manner, at p. 217:

> *"What we make of the scanty precedent that we have been able to scout is that a court of appeal will weigh the degree, extent and relevance of the part of the record that is missing and cannot be reconstructed. Where the missing part of the record is not substantial, immaterial and inconsequential as would not result in miscarriage of justice, the appeal shall be proceeded with and finally determined. Where the missing part of the record is not substantial, material and consequential, such that proceeding with the appeal would result in injustice, the conviction should be set aside without the full appeal being heard."*

The three foreign cases, from United States of America, dealt with issues concerning failings in good record keeping. In **People v. Jones (1981) 125 Cal.App.3d 298**, the court found that the mistaken destruction of the court reporter's notes deprived the court of such a substantial and material part of the trial record that the court was compelled to vacate the conviction. In giving judgment in **People v. Jones** (*supra*), the court stated that:

> *"Here, we have a case in which the defendant without any fault of his own was deprived of the right to an effective presentation of his appeal due entirely to a failure on the part of an official of the trial court to comply with the law. It would be a violation of the fundamental rights of the defendant to hold that an effective possibility of appealing the convictions was properly taken away by our system of justice. To forget that this defendant was in prison for all those years, without permitting him to urge his legitimate appeal, is insufferable. […] Therefore, the judgment should be reversed."*

In **People v. Morales (1979) 88 Cal.App.3d 259 (Cal. Ct. App. 1979)**, the court applied a test similar to that used in the **Chalera** Case:

> *"The test is whether in light of all the circumstances it appears that the lost portion is 'substantial' in that it affects the ability of the reviewing court to conduct a meaningful review and the ability of the defendant to properly perfect his appeal. It is not every loss of any part of the reporter's notes that requires vacating of the judgment."*

The Court may consider evidence from sources other than the court record

Counsel for the Convict contends that whether the missing part of the court record is so substantial, material and consequential, it is entirely appropriate for the Court to examine sources outside of the incomplete court record in order to determine the appropriate sentence. It is the argument of Counsel for the Convict that such an approach would ensure that a fair hearing is provided and the appropriate sentence is given in the circumstances.

It was also submitted that evidence outside the court record may be gathered from a wide range of sources and that the best possible sources may vary from case to case. It was further contended that in the majority of cases, the convict may be one of the best available sources of evidence and the recent experience of the English courts, in context of lost warrants of arrest, is instructive.

For that proposition, Counsel for the Convict relies on the analogous situation which obtains in England in the context of sentencing in criminal matters where a defendant has absconded for a number of years and the Crown Prosecution Service has been unable to locate the court file at time the warrant of arrest has been eventually executed. It was submitted that in such cases, English courts have proceeded on the basis of what the defendant himself says happened in the alleged offence, applying the same principles as apply within what are known as "*Newton hearings*":

> *" [In 'Newton hearings'] the burden rests with the prosecution throughout and* ***the court shall give full consideration to the defendant's own account of events unless proven otherwise by the prosecution beyond reasonable doubt.*** *The only limitation on this is that the court is not obliged to accept explanations or assertions that are "manifestly absurd" merely on account of the fact that the prosecution is unable to adduce evidence to disprove them (R v Hawkins (1985) 7 Cr App R (S) 351; R v Kerr (1980) 2 Cr App R (S) 54. This approach gives effect to the need to balance the interests of the respective parties, without diminishing the principle that the burden of proof rests always with the prosecution. A helpful summary of these principles is exhibited to defence counsel's affidavit.*

Counsel for the Convict concluded under this part of the submissions by drawing the Court's attention to the Bail Affidavit. It was submitted that the Bail Affidavit constituted part of the best available record.

All doubt must be resolved in favour of the accused

Counsel for the Convict submitted that the articulation of the burden and standard of proof in discretionary capital cases entails that where the case file has been lost or is incomplete and the facts of the offence are unknown there should be a

presumption in favour of the convict. It was further contended that such a presumption should, at a minimum, mean that the unknown facts of the case are mitigating. In this regard, it was argued that the burden rests on the prosecution to rebut the presumption in favour of mitigation.

On the basis of the foregoing paragraph, Counsel for the Convict submitted that:

> "*for all cases where the Court record is partially or wholly missing, it is a logical impossibility that the prosecution could meet these tests beyond reasonable doubt because the missing parts of the record contain unknown facts and information which must be assumed to be mitigating. Furthermore, all prisoners coming before this honourable Court for sentence rehearings have suffered previous violations of their constitutional rights for which they are entitled to an effective remedy. From the onset, therefore, all these cases therefore have at least two very heavy mitigating factors in their favor. Individual cases may have further strong mitigators relating to any of the possible areas of mitigation laid out by Honourable Justice Nyirenda in* ***Republic v Margret Makolija*** *(Sentence Rehearing Cause No. 12 of 2015).*
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> *On the basis of the foregoing, the cases of prisoners coming for a sentence rehearing without a complete court record therefore cannot ever be the 'worst of the worst'. Hence, the death sentence cannot ever be appropriate in a case where the Court record has been wholly or partially lost or destroyed."*

Submission by Counsel for the State

A central element in the submissions of the State is that sentencing the Convict in the absence of the trial record would be setting a wrong precedent. It may be useful to reproduce the relevant part of the State's Initial Written Submissions:

> *"All the above [sentencing] principles can be applied on a matter where facts are available.*
>
> *There are no other facts that can inform this court about anything apart from age of the convict. …*
>
> *This is to say, in the present case, this court will not have proper guidance in terms of the law on sentencing and Kafantayeni resentencing process. The state is of the view that the issue raised can be adequately dealt with on appeal where evidence can be led and cross examined.*
>
> ***PRAYER***
>
> *We have carefully considered the facts, our prayer would be to put this resentencing on hold to maintain the integrity of the Kafantayeni resentencing process and to avoid setting a precedent of sentencing a convict without important information about the offence and the offender. We submit that it would be proper if we get directions from the court or the Chief Justice."*

The State has pursued the same theme in its Supplementary Submissions. Counsel for the State submitted that the trial record is the keeper of the circumstances regarding the offence and the offender and:

> *"Without the record, the court will not be able to come up with the right sentence to fit the offender and the offence. There will be no record of aggravating and mitigating factors from the circumstances surrounding the offence. As such, it will not be possible to come up with an appropriate sentence in the terms of the* ***Republic vs Ayami principle*** *[cited in earlier submission] that circumstances of the offence and offender be taken into consideration."*

Counsel for the State contended that an appeal is the right approach to be taken by a convict where the trial record is missing, owing the sole fault of the state's servants, and chances of reconstruction of the record are too remote, and where a retrial is not a viable option like in the present case, since "*As on appeal, the remedy to release the convict is available on different arguments than arguing on re-sentence"*. It was argued that on appeal, *"the issue will not be the resentencing in terms of the Maclemonce jurisdiction, rather the remedy that may be asked is for the convicts' release on bail pending appeal citing the missing record as unusual and exceptional circumstances"*.

Analysis and Disposition

I have considered the formidable submissions put forward by learned Counsel. They argued with great skill and clarity on behalf of the Convict and the State respectively. I am greatly indebted to them and wish to encourage them to continue with such excellent work for the good of the profession of law.

In spite of my extensive research, I have not been able to find any decided case directly on point. Most of the cases cited by Counsel, if not all, relate to situations where the convicts were questioning both the conviction and sentence, and not just the sentence. My view is that the issues decided in those cases were much broader than what I am being called upon to decide in respect of the re- sentencing of the Convict.

To my mind, the starting point is for the Court to adopt the reasoning in the **Mtambo Case** to the effect that the mere fact that the whole trial record is missing ought not to deprive a convict an opportunity of a sentence re-hearing. This would appear to be the ultimate objective of the Guidelines on Homicide Sentence Re-Hearing. The Guidelines are a product of a Special Committee that was appointed by the Chief Justice to oversee the implementation of the principle of sentencing espoused in the **Kafantayeni Case** and the **Yasini Case**.

In order to guide the homicide sentence re-hearing, the Special Committee agreed on the following guidelines:

> *"2. Cases should be notified to the Director of Public Prosecutions, Legal Aid Department and legal firms of lawyers that represented the convicts.*
>
> *3. Cases be set down for sentence re-hearing before the judge who tried the case unless he or she is not available.*
>
> *4. When the case is called the State should address the Court first. The re-hearing process should follow the normal adversarial process. The State may call witnesses or submit relevant reports in terms of section 260(2) of the Criminal Procedure and Evidence Code.*
>
> *5. The defence will be called upon to give its version and may, likewise, call witnesses or submit relevant reports in terms of section 260(2) of the Criminal Procedure and Evidence Code.*
>
> *6. The State has a right to reply.*
>
> *7. The Judge will, after hearing both sides, pass sentence. The burden and standard of proof remain the same.*
>
> *8. The convict should still be advised that he or she has the right to appeal against the sentence to the Supreme Court of Appeal."*

S.260 of the Criminal Procedure and Evidence Code (CP&EC) provides for receipt by the court of evidence for arriving at a proper sentence:

> *"(1) The Court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.*
>
> *(2) Evidence that the court may receive under subsection (1) may, in addition to the evidence of the accused or the prosecution, include the evidence by or on behalf of the victim of the offence and any relevant reports to enable the court assess the gravity of the offence."*

I fully agree with the Guidelines on Homicide Sentence Re-Hearing and, accordingly, endorse them. I think that the broad principles stated in the Guidelines can be extended to the situation obtaining in the present case and to any other case of homicide sentence re-hearing where the trial record is wholly or partially missing or destroyed. The point being made may be illustrated by reference to the commonplace factors taken into account in homicide sentencing and mitigation generally.

One of the factors is that the maximum punishment must be reserved for the worst of offenders in the worst of cases: See **Rep. v. Anderson Mabvuto, Criminal Case No. 66 of 2009 (unreported)**. Some of the factors that may necessitate the

imposition of such a punishment include the fact that the offence was occasioned in very decrepit and gruesome circumstances, meticulously intentioned and planned and that the motive for the killing was extremely heinous. Where the trial record is wholly or partially missing such that there is uncertainty as regards the circumstances of the commission of the offence it would be completely inappropriate to impose a death sentence. Such a position would apply with equal force where the homicide re-sentencing is based on evidence received under s. 260 of the CP&EC but such received evidence is from sources other than the trial record.

The other factor is the age of the convict both at the time of committing the offence and at the time of sentencing. In my view, I see nothing wrong in principle why resort to s. 260 of CP&EC cannot be made, where the trial record is wholly or partially missing, in so far as the issue of the age of the convict is concerned subject to the following caveat: it is trite that it is not open to any party to question the conviction within the context of sentence-rehearing.

S. 260 of CP&EC may also be conveniently resorted to in dealing with the following factors:

(a) whether or not the convict is a first offender;

(b) the time already spent in prison by the convict;

(c) the manner in which the offence was committed; and

(d) the personal and individual circumstances of the offender as well as the possibility of reform and social re-adaptation of the convict.

Needless to say, the Court will have to carefully assess pieces of evidence adduced by the State and the convict under s.260 of CP&EC before accepting them. The Court is not bound to admit statements that are obviously ridiculous merely on account of the fact that the trial record is missing and the other party has not rebutted them.

Sentence in respect of the Convict

The facts in the present case, as gleaned from the Bail Affidavit, the Authority for Detention, the Notice of Appeal, and the Prisoner's Record, show that mitigating factors outweigh aggravating ones herein.

Murder is undoubtedly a very serious offence in that it involves the taking of an innocent life. Much as the Court, in exercise of its judicial discretion, may in some cases not pass a death sentence, I can hardly fathom a murder case which would

not attract a custodial sentence: see **The State v. Laston Mukiwa, Homicide (Sentence Re-Hearing) Case No. 21 of 2015 (unreported).**

As already mentioned herein, the law sanctions a measure of leniency in favour of young offenders. The argument of Counsel for the Convict, as I understand it, is that the Court should give full consideration to the Convict's own account of his age unless proven otherwise by the prosecution beyond reasonable doubt. In this regard, the defence has adduced three documents that allude to the age of the convict herein, that is, the Bail Affidavit ("*the applicant is a Malawian Citizen aged 18 years old*"), the Notice of Appeal ("*I am a form three student at chambe secondary school*") and the Prisoner's Physical Characteristics ("*AGE: 18 years*").

On the other hand, the position of the State is that proceeding on the basis of the available Court records (that is, Authority for Detention), the Convict was prosecuted and convicted as an adult. The point has been put by the State in its written submission thus:

> *"It could also be that the convict's age was not an issue in the convicting court because it was convinced that the convict's age at the time of committing the offence was a major and not a minor as some peripheral evidence may show. As a result of this, this case may be marred with speculation*
>
> *This is to say, in this present case, this court will not have proper guidance in terms of the law on sentencing and Kafantayeni resentencing process. The state is of the view that the issue raised can be adequately dealt with on appeal where evidence can be led and cross examined"*

In my view, the starting point has to be an acknowledgement that it is not open to any party to question the conviction within the context of homicide sentence re-hearing. The Convict was tried and sentenced as an adult. On that understanding, I am prepared to accept this much: at the time of committing the offence, the Convict was a "*very young adult*".

The other mitigating factor is that the Convict has no previous conviction, thus he is a first offender. It is also in evidence that the Convict has reformed during the period that he was in prison such that there is a high probability of him seamlessly re-integrating into society upon his release

Besides the above mitigating factors, although it is on record that the Convict enjoyed bail pending trial, the bail was for a very short period of time (from 16 May 2002 to 2 July 2002), meaning that the Convict was remanded for over three

years prior to his trial. He has thus been incarcerated for at least 16 years.

All in all, the justice of the matter calls for a reduction of the sentence. Accordingly, the sentence of death is set aside and replaced by a sentence that would result in the immediate release of the Convict from prison unless there is another lawful cause for him to continue to be kept there. If the Convict is dissatisfied with the sentence, he has the right to appeal against it to the Supreme Court of Appeal.

Pronounced in Open Court this 1st day of June 2015 at Zomba in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE