IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

HOMICIDE SENTENCE RE-HEARING NUMBER 9 OF 2016

BETWEEN:

THE REPUBLIC

AND

VENITA MAICHE **DEFENDANT**

CORAM: JUSTICE M.A. TEMBO,

Malunda, Counsel for the State

Chithope-Mwale, Counsel for the Defendant

Chanonga, Official Court Interpreter

ORDER ON SENTENCE REHEARING

On 26th May 2016, this Court was scheduled to conduct a sentence rehearing in this matter with respect to the defendant. The sentence rehearing follows the fact that the mandatory death sentence to which the defendant was sentenced in 2003 was invalidated as unconstitutional in the subsequent case of *Kafantayeni and others v Attorney General* [2007] MLR 104 *(the Kafantayeni case)* decided on 2ih April 2007.

The defendant was brought before this Court by the Director of Public Prosecutions in compliance with the decision of the Supreme Court of Appeal of 1st November 2010 in *Yasini v Republic* MSCA Criminal Appeal number 29 of

2005 (unreported) *(Yasini case)* which compelled the Director of Public Prosecutions to bring before the High Court, for a sentence rehearing, all convicts who were sentenced to the unconstitutional mandatory death penalty.

This court directed that both the State and defence address it on the preliminary issue of jurisdiction raised by the State, namely, whether the High Court can proceed with a sentence rehearing in view of the fact that Venita Maiche, after the *Kafantayeni case* but before the *Yasini case,* lodged an appeal in the Supreme Court of Appeal against the mandatory sentence of death imposed on her at trial and her appeal on the mandatory death sentence was dismissed by the Supreme Court of Appeal on 5th February 2010.

At the date set for hearing on the preliminary matter herein both the State and the defence submitted their different views orally after filing skeleton arguments.

The State observed that the present matter poses some issues pertaining to jurisdiction in that the present matter has been before the Supreme Court of Appeal which dismissed the appeal on sentence.
The State indicated that it is aware that the *Yasini case* gave the jurisdiction to the High Court to rehear convicts in mitigation but that the question that obtains is whether this *Yasini* jurisdiction could be interpreted as jurisdiction granted to the High Court to vary the decision of the Supreme Court in the present matter.

The State then presented the following arguments on the preliminary matter in this case.
The State submitted on the doctrine of judicial precedent and hierarchy of courts as follows. That the hierarchy of courts is a key feature of the doctrine of judicial precedent. Further that the general rule of the doctrine of precedent is that all courts are bound to follow decisions made by their superior courts. Further that, conventionally, the Supreme Court of Appeal binds all courts in Malawi, followed by the High Court which binds the lower Courts. However that, one High Court Judge cannot be bound by the decision of another High Court Judge.

The State submitted that this is not a strange doctrine. But that it is one of a jealously guarded and entrenched doctrines. It is a way of bringing sanity in the manner laws are handled to ensure uniformity in the application of laws.
The State submitted that the Supreme Court of Appeal is the only court that can overrule itself. Further, that when a decision has been made by the Supreme Court of Appeal, however wrong, if it cannot be adequately distinguished, lower courts must be bound.

The State then made the concluding observation that in the present case, there is a Supreme Court of Appeal judgment which is still standing because it has not been overruled or revisited by the Supreme Court of Appeal itself. The State submitted that it is therefore, for all purposes, a judgment that has to be respected irrespective of the fact that the parties considers it to be wrong.

The State submitted that it is bearing that in mind that brings up the question whether if we consider the Supreme Court of Appeal decision in this matter to be wrong, we can then tamper with it? Or say, by virtue of the *Yasini* decision, the Supreme Court of Appeal overruled its own future judgments? The State wondered if we should let the Supreme Court overrule or revisit its earlier decision. The State contended that the Supreme Court never intended to overrule its future judgments. It submitted that overruling a case law done is retrospectively. Further that it is weird to think that the *Yasini* decision of 2006 overruled a judgement of the Supreme Court of Appeal in 2010. This Court notes that in the present matter the issue raised by the State about the Supreme Court of Appeal by its *Yasini* decision overruling future decisions does not arise because the present matter was decided before *Yasini.* Rather this Court will deal with the issue of the import of *Yasini* on the present matter in view of the submissions by the defence.

The State then submitted that in the case of *Republic vs Chimkango* Sentence rehearing Number 36 of 2015 (High Court) (unreported) (*Chimkango)* a similar situation was before the court. Further that, as noted by the Judge in that case, this issue is one that invokes the fear of denigrating the doctrine of judicial precedent, where hierarchy is not respected or past decisions could overrule future decisions. Further that this is the same fear that is before this court. The State further

submitted that the Supreme Court should therefore be called to rectify the situation, as no other court could, let alone, the High Court.

The State also submitted that when the Supreme Court of Appeal heard the appeal herein the defendant had opportunity to plead in mitigation although she never utilized that opportunity. Further that the Supreme Court of Appeal on that occasion considered the mitigating and aggravating factors in this matter.

The State then submitted that this matter should be transferred to the Supreme Court which should revisit its own judgment rather than the High Court varying it. The State pointed out that this approach is the same one that was adopted by my brother Judge Potani in the case of *Chimkango.* This Court wishes to point out that, if this Court finds that it is bound by the Supreme Court of Appeal decision in the case of *Maiche v Republic* MSCA Criminal Appeal number 4 of 2005 *(Maiche)*, it would find it impossible to remit this matter to the Supreme Court of appeal as it does not see under what authority it would do that.

On its part the defence's analysis started with a discussion of the three relevant cases to its submissions namely *Kafantayeni, Yasini* and *Maiche* followed by justification for a sentence rehearing in this matter.

The defence pointed out at the outset that there is only one other case in which a jurisdictional issue similar to the one in the present case was raised and addressed by the High Court namely in *Chinkango.* Defence Counsel indicated that he represented the convict in that matter and he already submitted a copy of the judgment in the *Chinkango* case to this Court. He further indicated that some of his arguments were accepted in that case and others were rejected.

Counsel for the defendant further stated that since this Court was already furnished with a copy of the *Chinkango* decision he will not entirely dwell on it but rather simply make reference to it when and where necessary but will otherwise mainly broaden the scope of his arguments.

The defence commenced its arguments by making reference to the three relevant cases to its submission.

The defence submitted that the constitutionality of the imposition of the mandatory death sentence for murder convicts under section 210 of the Penal Code was challenged in the *Kafantayeni Case.* It further submitted that on 27th April 2007 the High Court, sitting on a constitutional matter, held that the imposition of the mandatory death sentence amounted to cruel, inhuman and degrading treatment prohibited by section 19 of the Constitution and was a violation of the right to a fair trial provided for under section 42 of the Constitution and was unconstitutional. The defence correctly observed that the effect of the judgment was that the High Court has discretion to pass a sentence in accordance with the circumstances of the offender and the offence. Further that the Court ordered that the Applicants in the *Kafantayeni Case* should be brought once more before the High Court so that the Court could pass a sentence in accordance with the circumstances of the offence.

The defence quoted the relevant parts of the *Kafantayeni case* as are relevant to its submission as follows.

> The ground of fair trial
> First, we conclude that "trial" of a person accused of crime extends to sentencing where the person is convicted of the crime. Therefore, the principle of "fair trial" requires fairness of the trial at all stages of the trial including sentencing.

The defence stated that on this ground, the Court went on to find as follows

> We agree with counsel that the effect of the mandatory death sentence under section 210 of the Malawi Penal Code for the crime of murder is to deny the accused as a convicted person the right to have his or her sentence reviewed by a higher court than the court that imposed the sentence; and we hold that this is a violation of the right to a fair trial which in our judgment extends to sentencing.

The defence further pointed out that the *Kafantayeni case* also relied on the right to access to justice as follows.

> The ground of the right of access to justice

In our judgment we also consider that the right of access to justice guaranteed by section 41 of the Malawi Constitution also has application in determining the issue of constitutionality of the mandatory death penalty. Section 41, in subsection (2), states that "Every person shall have access to any court of law or any other tribunal with jurisdiction for final settlement of legal disputes.

We affirm that issues of sentencing are legal issues for judicial determination and are therefore within the purview of section 41 (2) of the Constitution; and the mandatory death sentence under section 210 of the Penal Code, by denying a person convicted of murder the right of access on the sentence to the final court of appeal, is in violation of section 41(2) of the Constitution. In regard to death penalty, which is the ultimate punishment any person can suffer for committing a crime, irrevocable as it is once carried out, we 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. In the final analysis, we hold that the mandatory requirement of the death sentence for the offence of murder as provided by section 210 of the Penal Code is in violation of the constitutional guarantees of rights under section 19 (1), (2), and (3) of the Constitution on 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; the right of an accused person to a fair trial under section 42(2)(f) of the Constitution; and the right of access to justice, in particular the right of access to the court of final settlement of legal issues under section 41(2) of the Constitution. Pursuant to section 5 of the Constitution, we declare section 210 of the Penal Code to be invalid to the extent of the mandatory requirement of the death sentence for the offence of murder. For the removal of doubt, we state that our declaration does not outlaw the death penalty for the offence of murder, but only the mandatory requirement of the death penalty for that offence. The effect of our decision is to bring judicial discretion into sentencing for the offence of murder, so that the offender shall be liable to be sentenced to death only as the maximum punishment. The action of the plaintiffs therefore succeeds and we set aside the death sentence imposed on each of the plaintiffs.

We make a consequential order of remedy under section 46 (3) of the Constitution for each of the plaintiffs to be brought once more before the High Court for a Judge to pass such individual sentence on the individual offender as may be appropriate, having heard or received such evidence or submissions as may be presented or made to the Judge in regard to the individual offender and the circumstances of the offence.

The defence then correctly submitted that a number of crucial principles to be isolated from the *Kafantayeni case* are as follows.

(i) It abolished the mandatory death sentence and brought about discretion in sentencing for murder convicts.
(ii) It came up with the legal position that those who were party to the case had to be brought before the High Court (and not the Supreme Court of Appeal) for a Judge to pass sentence.
(iii) It provided that an appropriate sentence should be one passed after hearing or receiving such evidence or submissions as may be presented to the judge in regard to the individual offender and the circumstances of the case. Put differently, it held that a person should be heard in mitigation before sentence is meted out.
(iv) It made a finding that denying a convict the right to have the sentence imposed on him or her to be reviewed by a higher court than the one that imposed the sentence is a violation of right to fair trial.
(v) It made a finding that "fair trial" requires fairness of the trial at all stages of the trial including sentencing.
(vi) It made a finding that issues of sentencing are legal issues for judicial determination hence denying a person right of access on sentence to final court of appeal is a violation of right to access to any court of law for final settlement of legal disputes.

The defence further correctly submitted that beyond the above and specifically providing a remedy to the specific litigants in that case, *Kafantayeni* fell short of addressing two major issues firstly, whose duty was it to bring the litigants therein before the High Court once again and, of course, what procedure was to be followed.

The defence also noted connected questions that remained unanswered like: would each specific convict be required to make an application before the High Court to be reheard on sentence? Or, would the High Court on its own motion summon all convicts to appear before it once again? Or, were the convicts supposed to appeal to the Supreme Court of Appeal but in that appeal slot in a prayer that they be reheard on sentence in the High Court? Or indeed would some other procedure be adopted?

The defence further correctly noted that the second, and most important issue, was what would happen to all other convicts who were not part of the *Kafantayeni* but were equally sentenced to the mandatory death sentence before it was declared unconstitutional?
The defence submitted that before the above issues were resolved, and before even the specific litigants in the *Kafantayeni* had enjoyed the fruits of their litigation, it was left to each and every convict sentenced to the mandatory death penalty to try his luck as he or she deemed fit based on *Kafantayeni.*

The defence submitted that the convict herein was one of those litigants who, without specific known direction to be taken, tried her luck by exercising her right of appeal to the Supreme Court of Appeal. And further that that is what brings us to this case.

The defence submitted that confusion in matters like the instant one then is very clear if we take *Yasini* case as an example. The defence pointed out that Yasini had to ask the Supreme Court of Appeal for a sentence rehearing before the High Court not realizing that it was an automatic right.

The defence then dealt with the events in the present matter. The defence correctly submitted that Ms Maiche's appeal was registered as Supreme Court of Appeal Criminal Appeal Case No. 4 of 2005 and she appealed against the mandatory death sentence only and not her conviction. Further that Ms Maiche's appeal judgment was eventually handed down on 5th February 2010, subsequent to *Kafantayeni* but prior to the Supreme Court of Appeal's decision in *Yasini,* which affirmed *Kafantayeni* and directed that all prisoners previously subjected to the mandatory death sentence were to be brought back to the High Court by the Director of Public Prosecutions for purposes of a sentence rehearing. Ms Maiche's appeal was, therefore, heard during a gap between the repeal of the mandatory death sentence *(Kafantayeni)* and the institution of a proper remedy for cases sentenced under the prior law *(Yasini).*

The defence stated that indeed, it was not until at least four years after Ms Maiche's appeal judgment was handed down that the Supreme Court's order in

Yasini was implemented. Funding for mitigation investigations was made available for the first time in 2014, and the first of the sentence rehearing proceedings, as ordered by the Court in 2010, commenced in February 2015.

The defence stated that Ms Maiche's appeal on the mandatory death sentence was dismissed. It observed that her counsel neither presented any mitigating evidence relating to Ms Maiche's intellectual disability nor did she interview members of Ms Maiche's community to gather additional facts relating to Ms Maiche's character, background, and the facts of the offence. This was so because mitigation of sentence was of no consequence since death sentence would follow anyway.
The defence stated that the Supreme Court of Appeal was unaware that Ms Maiche is intellectually disabled grandmother whose tiny stature is the likely result of foetal alcohol spectrum disorder and malnutrition. Similarly, that the Supreme Court of Appeal was unaware that in early 2002, at the time of the offence, Ms Maiche's village, and the surrounding region, were in the grips of a devastating famine. And that the Supreme Court did not review the statement of Wongani Saikolo, Ms Maiche's grandson and the brother of the deceased, who recalled that

> People in our village were driven mad by hunger. If they saw someone else eating they would leap on them to take their food.... People couldn't think properly, their mental capacity was so disturbed by the hunger and stress.

The defence submitted that the mitigating relevance of this testimony is made clear by the conclusions of Dr. George Woods, a neuropsychiatrist who evaluated Ms Maiche at the request of the Malawi Human Rights Commission and observed that

> under the circumstances, it seem[ed] clear that she reacted impulsively and over-aggressively to a situation that called for a more moderate and reasoned response" and concluded that the "over-reaction to her grandson's wrongdoing was a consequence of her intellectual disability.

The defence submitted further that moreover, because Supreme Court of Appeal did not receive this evidence, it was unable to consider the legality of sentencing to death a person with intellectual disabilities, as provided by international law. The defence noted that in 1989, in a resolution regarding the implementation of the

Safeguards, the Economic and Social Council urged states to eliminate the death penalty "for persons suffering from mental retardation or extremely limited stated mental competence, whether at the stage of sentence or execution." See ECOSOC Resolution 1989/64, "Implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty" (24 May 1989). Further that in subsequent resolutions urging full compliance with the Safeguards, the United Nations Human Rights Commission repeatedly called upon states '[n]ot to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person".
The defence submitted that similarly, the Supreme Court of Appeal heard no new evidence pertaining to the "circumstances of the individual," which in Ms Maiche's case would also have included testimony from family and community members about her impeccable character prior to this offence, as well as her nonviolent nature.

The defence submitted that in a nutshell key things worth noting are as follows

(i) The issue of sentence was not referred to the High Court as the first court to deal with it so as to afford the convict a tier of appeal if aggrieved by a first constitutional sentence to be imposed after the unconstitutional sentence.

(ii) No evidence was adduced or received as may be called evidence of "circumstances of the individual" (including reform in prison, health, mental or emotional disturbances, hardships). The Supreme Court of Appeal was limited to facts on record only to come to its conclusion.

The defence then submitted with respect to *Yasini.* It submitted that the answer regarding the position of all other convicts who were not part of the *Kafantayeni* as well as the procedure to be utilized for all such convicts only came later in the case of *Yasini.*

The defence submitted that in *Yasini* delivered on 1st November, 2010 the Supreme Court of Appeal held that

> The Court [in *Kafantayeni*] clearly ordered that the Plaintiffs were entitled to a resentence hearing on the death sentence individually. The Court's decision on this point, affected the rights of all 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. This default however did not and does not take away his rights to appeal against the death sentence. We wish to observe that it is the duty of the Director of Public Prosecutions to bring before the High Court for resentence hearing all prisoners sentenced to death under the mandatory provision of Section 210 of the Penal Code.

The defence correctly submitted that a number of things are worth noting from the *Yasini* as follows

(i) it held that "all" convicts who were sentenced to the mandatory death penalty were "all" entitled to a sentence rehearing .
(ii) It held that the procedure to be adopted for the sentence rehearing should be that the convicts be brought again before, not the Supreme Court of Appeal, but the High Court by the Director of Public Prosecutions (DPP).

The defence submitted that the above essentially means that all convicts do not have to make an application before the High Court in order to be reheard on sentence or that they ask the Supreme Court of Appeal via an appeal to be reheard on sentence. Rather that the right accrued automatically to all convicts sentenced to death under the mandatory death penalty and the Director of Public Prosecutions is under a duty to bring each and every one of them before the High Court. Not doing so would mean the Director of Public Prosecutions would be in contempt of court and disregarding a Supreme Court of Appeal judgment. The defence further submitted that this right to a sentence rehearing requires the High Court to disregard the previous imposition of the mandatory death sentence, and to consider fresh evidence regarding the facts of the offence and the circumstances of the offender before imposing a sentence.
Put differently, the sentence rehearing is to proceed as if a guilty verdict has just been pronounced and there is no sentence yet imposed. The defence stated that we tum a blind eye to the existence of the original unconstitutional mandatory death sentence and proceed on the basis that a constitutional sentence is yet to be imposed by the court.

It is the defence's position that the High Court enjoys full jurisdiction to proceed with sentence rehearing in this matter for the following reasons: sentence rehearing and an appeal are different; *Yasini* impliedly overruled the Supreme Court of Appeal decision in *Maiche; Maiche* sentence was invalided by *Kafantayeni;* to decline convict a sentence rehearing would be both discriminatory and arbitrary since principles of equity and fairness require that she be given the same treatment as others who are now benefitting from *Yasini* and the High Court would be disregarding Supreme Court of Appeal judgment in *Yasini* and the Director of Public Prosecutions would be in contempt of Court. The defence expounded each ground below.

On the submission that sentence rehearing differs from an appeal the defence submitted that sentence rehearing and an appeal are two separate legal processes such that an appeal cannot displace a convict's right to a sentence rehearing.
This Court agrees with that submission. The State also agrees that an appeal and a sentence rehearing are two different processes.

The State however argued that in the unique circumstances herein where Ms Maiche had every opportunity to be heard on mitigating and aggravating factors on appeal and that therefore the appeal was the same as a sentence rehearing.
The State added that in other cases such as *Ngulube and another v Republic* [2008] MLR 413 the Supreme Court had occasion to reduce the sentence after considering the mitigating and aggravating factors on consideration of an appeal after a previous mandatory death sentence just like in the instant matter.

The defence correctly submitted that an appeal to the Supreme Court of Appeal proceeds by way of rehearing. The appeal court restricts itself to the facts/evidence already on the record and ordinarily no new evidence is adduced. The defence referred to the Supreme Court of Appeal decision in the case of *Chimanda v Maldeco Fisheries Ltd* [1993] 16 (2) MLR 493 (SCA) where the Supreme Court of Appeal stated on page 494

> The appeal to this Court is by way of rehearing. We must consider the facts and the materials which were before the trial court. We must then make up our mind,

> remembering the judgment appealed from and weighing and considering it. If after full consideration of the trial court judgment we come to the conclusion that it was wrong, then we must not hesitate to disagree with it. We must always remember, of course, that the trial court had the advantage of seeing and hearing witnesses. We must be slow to reject the findings of fact made by the trial court unless we are satisfied that there is insufficient evidence to support those findings, or we must be satisfied that there is cogent evidence to the contrary which has been misinterpreted or overlooked.

The defence also referred to other cases on the same point and correctly submitted stated that what comes out clearly is that on appeal, as a general rule, no new evidence is adduced and the appellate court relies on or restricts itself to those facts or evidence as is already on the trial court record and scrutinizes that to come up with its own conclusions.

On the other hand, the defence correctly submitted that the answer as to what sentence rehearing means or how it has been understood by courts in Malawi is found in a number of "Kafantayeni Resentencing Project" cases from the High Court. In the case of *Republic v Dzimbiri*, Sentence Rehearing Number 4 of 2015 (High Court) (unreported) Justice Kenyatta Nyirenda correctly stated that

> 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)7 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.

In *Republic v. Payenda* Homicide Sentence Rehearing Number 18 of 2015, (High Court) (unreported), Kapindu J correctly stated about sentence rehearing in the following words

11. It is in respect of the mandatory imposition of the death penalty on the convict herein that this matter has now come up before this Court for sentence rehearing. This follows the decision of the High Court Sitting on a Constitutional Cause under Section 9(2) of the Courts Act (Cap 3:02 of the Laws of Malawi) in Kafantayeni & Others vs Attorney General, Constitutional Cause No. 12 of 2005 which declared all mandatorily imposed death sentences for murder to be unconstitutional and invalid."
47. All these authorities emphasise the centrality of taking into account the individual circumstances of the defendant when sentencing. The previous sentence having been declared constitutionally invalid, the valid sentencing is taking place now.
48. The precise issue of whether, when an initial sentence has been invalidated after a substantial passage of time since conviction, post-conviction factors of the convict must be taken into account on resentencing, recently came up for determination before the US Federal Supreme Court in the case of *Pepper vs United States*, 131 S. Ct. 1229 (2011).

In *Republic v Galeta and Makina,* Sentence Rehearing Number 06 of 2015, (High Court) (unreported) Justice Potani stated that sentence rehearing is

aimed at affording convicts a chance "to mitigate sentence" which opportunity was not present when the convicts were being sentenced to the mandatory death penalty.
The defence correctly submitted that from the above a number of things clearly come out as regards what sentence rehearing is and, of course, is not. The following are noteworthy points about sentence rehearing from the above cases:

(i) Sentence rehearing affords convicts sentenced to the mandatory death penalty a chance to adduce evidence and/or tender reports in mitigation as a matter of right.
It is not necessary to apply to court to be reheard on sentence or to adduce new evidence concerning sentence. Sentence rehearing carries with it an automatic right to be heard on sentence: to adduce evidence and/or tender reports as may assist the convict get a reduced sentence. This is not possible in an appeal.

The defence correctly submitted that this in tandem with section 3211 of the Criminal Procedure and Evidence Code, a provision which has been followed by High Court Judges in all sentence rehearing so far and provides that

> (1) Where a verdict of guilty is recorded, the High Court may, after judgment but before passing sentence, receive such information or evidence as it thinks fit, in order to inform itself as proper to the proper sentence to be passed.
> (2) The information or evidence that the court may receive under subsection (1) may, in addition to the evidence of the accused or the prosecution, include information or 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.

(ii) A convict is to be brought before the High Court for mitigation on sentence. This in tum affords convicts a tier of appeal if aggrieved.
(iii) That since the death penalty was declared unconstitutional, it is "invalid" *ab initio* and valid sentencing can only take place via sentence rehearing.

In the end the defence correctly submits that it becomes very clear that sentence rehearing is totally different from an appeal. And further that therefore the right to an appeal cannot displace the right to a sentence rehearing.

This Court also had occasion after the hearing to consider the commentary by Dr Esther Gumboh in her paper entitled: *Republic v Chimkango:* A missed opportunity to clarify the status of pre-resentencing appeals against mandatory death sentences in Malawi (2016) where she lucidly and correctly makes the same point that a sentence rehearing is different from an appeal and other valid points that have been argued by the defence below on why a sentence rehearing should be had on account of invalidation of the mandatory death sentence .

The submission by the State that the defendant had an opportunity to have her mitigating and aggravating factors considered by the Supreme Court of Appeal on the appeal therefore does not detract from the clear and valid argument that such an appeal does not equate to a sentence rehearing. The State cannot equate an appeal to a sentence rehearing. The fact that in cases like *Ngulube* the Supreme Court of Appeal decided to reduce the mandatory death sentence to a term of years does not at all entail that the defendants in that matter were reheard on sentence at all. They were dealt with on an appeal. It is therefore not surprising that during oral argument, in response to a question from this Court, the State eventually admitted that an appeal would be deficient compared to a sentence rehearing in a case like the instant one of Ms Maiche where matters of mental health are to be considered. These are matters that cannot easily be gathered unless evidence is properly heard on a sentence rehearing as opposed to appeal where the Court was restricted to what was on the lower court record and does not include such matters as the mental health of the defendant.

Consequently, the defendant in this matter is clearly entitled to a sentence rehearing, and not an appeal, as per *Kafantayeni* which has been affirmed by the Supreme Court of Appeal on numerous occasions including in *Yasin.*

The defence then submitted that *Yasinin* overruled *Maiche* on a point of procedure. The defence contended that another way of looking at the matter is to bear in mind the obvious fact that the Supreme Court of Appeal overrules itself. That it can overrule itself either expressly or impliedly. Further that it would overrule itself expressly where it specifically states the legal position or precedent which it is overruling. It would overrule itself impliedly where is does not specifically state the legal position or precedent it is overruling but where the new legal position

taken is different from its own previous legal position. In short, that a latter legal position of the Supreme Court of Appeal on an issue overrules a former legal position of the Supreme Court of Appeal on that issue.

Coming to the present case the defence contended that it has to be noted that the Supreme Court of Appeal delivered *Maiche* first (on 5th February, 2010) and *Yasini* later (on 1st November, 2010). The defence contended further that it follows, therefore, that in as far as the general procedure applicable in dealing with all convicts who were serving mandatory death sentences before it was declared unconstitutional, to wit, that they must be brought before, not the Supreme Court of Appeal, but rather the High Court *Maiche* was overruled to such extent that it differs from the said general procedure laid down in *Kafantayeni.*
On this basis the defence submits that the High Court is entitled to conduct a sentence rehearing in this matter.

The defence further contended that, moreover, the convict cannot be blamed for not having availed herself of a sentence rehearing first before the appeal. And further that it was only in November, 2010 that the Director of Public Prosecutions was placed under a direct order to bring the prisoners for sentence rehearing and only in 2015 did sentence rehearing commenced. And further that, as such, all defendants who had been sentenced to death under the mandatory regime (other
than the *Kafantayeni* plaintiffs) could not possibly have availed themselves of their right to a sentence rehearing or indeed had any reasonable expectation of receiving a sentence rehearing at any point before the decision in *Yasini.*

What must be noted is that indeed the Supreme Court of Appeal stated in *Yasini* as follows with respect to *Kafantayeni*

> The court 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 all prisoners who were sentenced to death under the mandatory provisions of Section 210 of the Penal Code. The right to a re - sentence hearing therefore accrued to all such prisoners.

During oral argument the State cautioned against the contention that there was implied overruling of the *Maiche* decision by *Yasini* because the issue of those in

the situation of Maiche was never argued in *Yasini.* This Court wishes to point out that in fact *Yasini* is very clear as to the import of *Kafantayeni.* Which is that all affected convicts were to be brought before the High Court for sentence rehearing. Indeed the Supreme Court of Appeal in *Yasini* stated what should have happened in *Maiche* before the Supreme Court of Appeal. This Court would however not go as far as saying that then in *Yasini* the Supreme Court of Appeal impliedly overruled *Maiche.* All that *Yasini* posited was that in line with *Kafantayeni* all affected convicts were to be reheard on sentence. This was not done in *Maiche* and it has to be done now.

The defence submitted that the other reason for the seeking a sentence rehearing is that the mandatory death sentence was invalidated. The defence referred to what was stated by Kapindu J in *Republic v Payenda,* Sentence Rehearing Case Number 18 of 2015 (High Court) (unreported) that as a result of *Kafantayeni* all mandatorily imposed sentences became invalid and as such a valid sentence can only be imposed now after hearing the convict in mitigation.

The defence added that the simple way of explaining this is to say that once the mandatory death penalty was declared unconstitutional all mandatory death sentences became invalid and void *ab initio.* And all such convicts on mandatory sentences were restored to a position they were as at the time of pronouncing a guilty verdict. It is as if a guilty verdict had just been pronounced and sentence is yet to be passed.

The defence contended, correctly in the view of this Court, that if this were not the case then it would not be possible for the High Court to mete out a sentence lower than death, say of 20 years imprisonment, in place of the death sentence.

So that the only reason that the High Court can pass a sentence lower than that of death can only be that the original sentences were invalidated. And it is as good as saying that by the time the appeal was lodged in the Supreme Court of Appeal there was no valid sentence at all to appeal against. The defence stated that the argument that is appropriate in this Court which does not challenge the Supreme Court of Appeal reasoning is simply to say valid sentencing in accordance with *Kafantayeni* and *Yasini* as well as section 321J of the Criminal Procedure and Evidence Code by court is yet to take place in respect of the defendant.

The defence submitted that to shorten a long story the relevant test for Ms Maiche to qualify for the *Yasini* remedy is as follows:
Is the convict one of the people who were sentenced under the provisions of mandatory death penalty? Yes.
Does *Yasini* compel the Director of Public Prosecutions to bring even her before the High Court? Of course. It's a court order and the Director of Public Prosecutions is duty bound to obey Court orders.
Has the convict undergone any valid/constitutional re-sentencing before (which allowed her to adduce evidence in mitigation)? An overwhelming "No". An appeal is not a resentencing.
Is she, therefore, entitled to a resentencing? Of course, just like all other convicts who were sentenced to the mandatory death penalty before it was declared unconstitutional per the *Yasini* and *Kafantayeni.* The defence submitted that otherwise it would be discriminating against her on the basis of having exercised her right to appeal, which legal process is different from a sentence rehearing. The defence then expanded this last point further below.

This Court agrees with the defence that the defendant in this matter is entitled to a sentence rehearing precisely because the whole process of the mandatory sentence at trial was invalidated on various constitutional grounds. That invalidated sentence could not be subject of an appeal as it was indeed void *ab initio.* The defendant must therefore be properly sentenced otherwise the invalidation of the mandatory death sentence would be meaningless and that would also be potentially unconstitutional as the defendant would be denied an effective remedy *vis a vis Kafantayeni* which has been affirmed by the Supreme Court of Appeal in numerous cases including in *Yasini.*

What this means is that the Supreme Court of Appeal decided *Maiche* per incuriam. When the Supreme Court of Appeal observed that the defendant in *Maiche* was entitled to a sentence that would take account of mitigating and aggravating factors as per *Kafantayeni* the Supreme Court of Appeal should have considered that the sentence imposed by the trial court was non-existent as it had been declared unconstitutional by *Kafantayeni.* There was therefore no room for entertaining an appeal on an invalidated and unconstitutional mandatory death sentence.

There was a new retrospective constitutional rule since *Kafantayeni* which was affirmed by the Supreme Court of Appeal in many appeal cases including *Yasini,* that the mandatory death sentence was a constitutionally invalid punishment which should not have been imposed before *Kafantayeni.* This is a fundamental point. It means that whether the sentence was final as having been imposed by the High Court or upheld by the Supreme Court of Appeal the sentence did no longer counted and the remedy was a sentence rehearing as per *Kafantayeni.*

The doctrine of judicial precedent, on which the State based the preliminary issue before this Court, cannot therefore stand in the way of a sentencing rehearing in the foregoing circumstances. That doctrine is inapplicable because the new constitutional rule in *Kafantayeni* is clearly retrospective as held by the High Court sitting in a constitutional matter and as frequently affirmed by the Supreme Court of Appeal including in *Yasin.* The new constitutional rule abolished the mandatory death sentence and provided a remedy that is also retrospective and therefore no Court has authority to leave in place the mandatory death sentence that has been held to be retrospectively constitutionally invalid.

The defence also argued that if there is no sentence rehearing in this matter then that will amount to discrimination as other convicts in a similar position have been reheard on sentence. The defence submitted that there are three angles to this discrimination argument. Firstly, that *Yasini* clearly held all those who were sentenced to the unconstitutional mandatory death sentence have to be resentenced before the High Court. Further that to exclude a category of those people equally sentenced to the mandatory death sentence on the basis of exercise of their right to appeal would be to discriminate against them on the basis of their being proactive in filing their appeals. This result would, perversely, reward those convicts who did not or delayed filing their appeals, and penalize those who expeditiously pursued the remedies to which they were entitled.
The defence observed that the maxim, *vigilantibus et non dormientibus Jura subveniunt,* that the law does not assist those who slumber on their rights would seem to achieve the opposite in this instance. And that it would actually be rewarding those who sat on their rights.

This Court entirely agrees with the defence that the end result of not rehearing the defendant in this matter is exactly that she would be discriminated against. The Courts as custodians of people's rights need to be careful to treat people in equal circumstances equally as is required under the constitutional law. *Kafantayeni* as affirmed by the Supreme Court of Appeal on numerous occasions is to the effect that all affected convicts are to be reheard on sentence. The defendant herein cannot be excluded. In the view of this Court there is no valid justification for excluding her from a sentence rehearing.

The second angle advanced by the defence is that other convicts who were sentenced to the unconstitutional mandatory death sentence and equally appealed to the Supreme Court of Appeal but had their appeals against their death penalty dismissed have been successfully resentenced by the High Court.
The defence referred to two such cases of *Republic v Galeta* Sentence Rehearing Cause No. 47 of 2015 (High Court) (unreported) and *Republic v Lemani* Sentence Rehearing Cause No. 1 of 2015 (High Court) (unreported). The defence submitted that in these two cases the Director of Public Prosecutions - in compliance with the decisions of *Kafantayeni* as applied with *Yasini* - brought the cases before the High Court for re-hearing. Further that the convicts in both cases shared Ms Maiche's procedural posture i.e. their respective appeals had been heard subsequent to *Kafantayeni* but prior to *Yasini.* And further that their sentence rehearing proceeded without any question of whether the convicts were entitled to be reheard. And both convicts were resentenced to a term of years, in Mr Galeta's case resulting in his immediate release from custody.

The defence submitted that however, in the case of *Chinkango* the State raised arguments challenging the jurisdiction of the High Court to proceed with Mr Chinkango's sentence rehearing on the basis that his appeal had been heard subsequent to *Kafantayeni.* This was despite the fact that Mr Chinkango was in the very same procedural posture as Mr Galeta and Mr Lemani, whose sentence proceedings were completed without objection.

The defence submitted further that the *Chinkango* matter came before the High Court on 25th May 2015. And that the Court's ruling was issued three months later, on 28th August 2015. The defence counsel stated that despite noting and

agreeing with the position he advanced in *Chimkango* that an appeal and sentence rehearing are different legal processes, and despite holding that the *Kafantayeni* case and *Yasini* accorded convicts a remedy of sentence rehearing and not an appeal, his the Court in *Chimkango* remitted the case to the Supreme Court for its direction and/or disposal "with the speed and urgency it deserves".

The third angle of the discrimination and unfairness that the defence pointed out is that it is trite that most court records on the sentence rehearing sittings are partly or fully missing. That in fact, it is 57 % of the convicts in the Kafantayeni sentence rehearing Project who have their records wholly or partially missing. The defence pointed out that a number of sentence rehearings have been conducted based on partly or fully re-constructed files. The defence then contended that it cannot rule out a scenario where some convicts who equally appealed to the Supreme Court of Appeal and had their appeals against sentence equally dismissed but had the "good misfortune" of having their court records lost so as to leave no trace they were once in the Supreme Court of Appeal would be re-heard on sentence and perhaps released at the expense of others who have had the "bad fortune" of having their files located.

The defence therefore contended that refusing Ms Maiche and the others in her position a sentence rehearing would mean that those convicts whose appeal judgments the State happened to lose would benefit, whilst those convicts whose judgments happened to be located would, through no fault of their own, be disadvantaged. Further that, not hearing these convicts would therefore violate their right of equal treatment and of access to justice. Discrimination is bound to arise by conducting a rehearing for others in the same situation whilst turning down others.

In response, the State assured this Court that in any case where the Maiche situation arises and that comes to the attention of the State the same would be brought to the Court's attention to avert the discrimination.

The view of this Court is that a careful look at the second and third angle of the discrimination argument as raised by the defence reveals a compelling reason for supposing that in such circumstances there would be a discriminatory treatment of

people in similar circumstances. This is the more reason why all affected convicts have to be brought for sentence rehearing in line with *Kafantayeni* as affirmed numerous times by the Supreme Court of Appeal including in *Yasini.*

The defence finally submitted that if the defendant herein was not reheard on sentence then this Court would be disregarding *Yasini* and the Director of Public Prosecutions would be in contempt of Court.
The defence submitted that *Yasini* did not qualify or discriminate as regards who was entitled to be brought back before the High Court for sentencing rehearing. That it did not hold that those who exercised their rights of appeal were excluded. Further that it simply said "all" who were sentenced to the mandatory death penalty were entitled to be brought back before the High Court for a sentence rehearing.
The defence added that *Yasini* came after the Supreme Court of Appeal had handed down a number of judgments concerning appeals against the mandatory death sentence. Further that the Supreme Court of Appeal was well aware that out of all those convicts who were sentenced to the mandatory death sentence some had appealed to the Supreme Court of Appeal and that some had lighter sentences imposed on them in lieu of the mandatory death sentence and some had their appeals against the death sentence dismissed. Further that whilst fully aware of this, a panel of three learned and highly respected Justices of Appeal deemed it fit that it simply had to be "all" without excluding those who had exercised their rights of appeal. And that this decision came after Venita Maiche appeal.
The defence submits that Ms Maiche falls within the category anticipated by *Yasini.* And·that "all" should be interpreted literally to mean "all".
The defence submitted that it would be absurd that the Supreme Court of Appeal would compel the Director of Public Prosecutions to take a convict before this Court only for this Court to shut its doors to such a convict. And that it would likewise be absurd for the Court to order that the Director of Public Prosecutions bring the convict to this court yet afford the same Director of Public Prosecutions the luxury of not bringing her to this court and risk being in contempt.

This Court certainly would not deliberately wish to fail to uphold *Kafantayeni* as affirmed in *Yasini* and numerous other Supreme Court of Appeal decisions. This Court expects as much from the Director of Public Prosecutions.

In conclusion, this Court will proceed to hold a sentence rehearing particularly because of the constitutionally fundamental reason that the sentence to which the defendant was originally sentenced was invalidated on constitutional grounds and the appeal on the same was not a sentence rehearing that was ordered to follow upon the invalidation of the original mandatory death sentence as per *Kafantayeni.* For the foregoing reasons this Court does not agree with the decision in *Chimkango* that the High Court is precluded by the doctrine of precedent from conducting a sentence rehearing in matters such as the instant one.

This Court is also of the view that for the same foregoing reasons *Yasini* was per incuriam, and not binding on this Court, in so far as it refused to allow the appellant a sentence rehearing before the High Court. That part of the decision would possibly have been different had the arguments considered before this Court were put before the Supreme Court of Appeal. The Supreme Court of Appeal in *Yasini* declined a sentence rehearing to the appellant in the following terms

> Be this as it may, the appellant did not raise any mitigating circumstances as would inform this court to reduce the sentence. The appellant, in fact, prayed for a re sentence hearing. We find no justification for such a hearing. The appellant was before this court and was heard; he elected not to plead in mitigation. We do not find that he is entitled to have another hearing.

However, the Supreme Court of Appeal had earlier in *Yasin* also held that all the affected defendants as per *Kafantayeni* were entitled to a sentence rehearing individually in the following terms

> The court [in *Kafantayeni*] 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 all prisoners who were sentenced to death under the mandatory provisions of Section 210 of the Penal Code. The right to a re - sentence hearing therefore accrued to all such prisoners, In the present case, the appellant was never brought before the High Court for a re - sentence hearing.

The two positions taken by the Supreme Court in *Yasin* are therefore irreconcilable in that regard. This Court is bound by this last position that affirms the new

retrospective constitutional rule in *Kafantayeni* that has been repeatedly affirmed by the Supreme Court of Appeal in similar cases.

Made in open Court at Zomba this 11th July 2016.

M.A. Tembo
JUDGE