IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CRIMINAL CASE NO 65 OF 2013

THE REPUBLIC

V

MACDONALD KUMWEMBE……1st Convict
PIKA MANONDO……..…….2nd Convict
RAPHAEL KASAMBARA…..……..3rd Convict

CORAM

Honourable Justice Dr. Michael Mtambo
Mrs Kachale, Director of Public Prosecutions (D.P.P)
Chibwana, Special Prosecutor, assisting the D.P.P.
Malunda, Senior State Advocate, assisting the D.P.P.
Goba Chipeta, Counsel for the 1st and 2nd Convicts
Gondwe and Msisha SC, Counsel for the 3rd Convict
Kalambo, Court Clerk

JUDGMENT ON SENTENCE

Background

The 1st and 2nd convicts, Mac Donald Kumwembe and Pika Manondo,were on 21 July 2016, convicted by this Court on charges of attempted murder contrary to Section 223 and conspiracy to murder contrary to Section 227 of the Penal code.The 3rd convict, Raphael Kasambara, was convicted on a charge of conspiracy to murder contrary to section 227 aforesaid. The Court found that the 1st and 2nd convicts, on or around 13 September 2013, with malice aforethought, and in the company of other people,attempted to cause the death of one Paul Mphwiyo, who was then Budget Director in the civil service by firing three shots into him. Twoof thebullets hit the victim in the face while the third one hit him at the back of the shoulder.While two of the bullets were removed, the doctor recommended that one of the bullets should not be removed for fear of complications. Mr. Mphwiyo survived by divine intervention but was seriously injured and disfigured. The matter now comes for sentence.

The maximum sentence for the offence of attempted murder as provided under section 223 of the Penal Code is life imprisonment whereas that ofconspiracy as provided under section 227 of the Penal Code is 14 years imprisonment.It is the D.P.P.'s submission that borrowing from the United Kingdom (UK) sentencing guidelines, the attempted murder in this case is a level 1 offence whose starting point in sentence should be 30 years in custody. The State therefore submits that the 1st and 2nd convicts be sentenced to a custodial term of imprisonment of not less than 30 years for the first count andthat they be sentenced to a custodial term of imprisonment in the range between 10 to 11 years for the second count. That in light of section 17 of the Criminal Procedure and Evidence Code (CP & EC), the sentences for the 1st and 2nd convicts be ordered to run consecutively (cumulatively).

In relation to the 3rd convict, the D.P.P. submits that he be sentenced to a custodial term of imprisonment of not less than 11 years but specifically of the range between 12 to 13 years in order to adequately reflect the seriousness of the crime. Reliance is placed on**Mussa v Republic, Criminal Appeal No. 44 of 1995 HC 2**(unreported),**Republic v Masula and Others, Criminal Case number 65 of 2008B**(unreported)**, R v Karg 1961 (1) SA 231(A)**;**S v Pistorious (CC113/2013 [2004] ZAGPPHC 793**,and **Republic v Lutepo, Criminal Case No. 2 of 2014** (unreported) where the seriousness of the offence was stated to be a factor in the imposition of custodial as opposed to suspended or community service sentences.

Mr. Goba Chipeta, learned counsel for the 1st and 2nd convicts, submits that the convicts, being first offenders, should be sentenced to 5 and 3 years imprisonment for attempted murder and conspiracy respectively, the sentences to be suspended for 3 years. Reliance is placed on section 339(2) of the CP & EC which allows suspended sentences for **any offence**,section 340 CP & EC which deals with the treatment of first offenders,and the dictum of Msosa J. (as she then was) in **Republic v Liwonde [1992] 15 MLR 454**.

On his part, Mr. Msisha SC, learned counsel for the 3rd convict, submits that as a first offender who has lived long without any brushes with the law and has excelled in private practice and public office to the point of being elevated to Senior Counsel, Minister of Justice and Constitutional Affairs and Attorney General, the 3rd convict should be given a 3 year sentence suspended for 3 years. Reliance is also placed on sections 339 and 340 of the CP & EC.

It must be appreciated at the outset that the aims of punishment and the principles thereof are different. The aims are general aspirations whereas the principles are guiding factors. The main objects of punishment are to provide the public with a period of protection from the offender; to deter the offender from future crimes; to deter others from committing crimes; to rehabilitate; and reform the offender (s). And as Mr Msisha SC has correctly submitted, section 13 (m) of the Constitution enjoins the Court to mete out sentences in a humane manner. Therefore, it is my conclusion that retribution in the form of vengeance is no longer a civilized objective of punishment although it is generally accepted that punishment should fit the crime. When considering punishment, a court of law should ensure that the same befits the crime as well as the convict whilst at the same time being fair to society (see **Rep vs Shauti, Confirmation case number 175 of 1975**) (unreported). As stated by Lord Denning, every sentence must adequately reflect the revulsion felt by the great majority of citizens. This dictum was cited by Chikopa J.(as he then was), in **Steven Mbewe v Rep.**,**Criminal Appeal Case Number 48 of 2006**, High Court, Mzuzu District Registry (unreported).

The length of sentence to be imposed is at the discretion of the court. However, such discretion must be exercised judicially after considering all relevant circumstances (see**Republic v Mafuta Samson, Confirmation Case Number 632 of 1996, High Court Lilongwe District Registry**) (unreported).

The learned D.P.P. has submitted that sentences generally are made bearing in mind the protection and the reaction of the public. Reliance is placed on the dictum of Chombo J. In **Republic v Masula and others, Criminal Case number 65 of 2008, High Court Lilongwe District Registry** (unreported)where the learned judge observed that it is important to mete out sentences that are meaningful, otherwise the public could start asking themselves whether something has gone wrong with the judiciary.This approach bears resemblance to that taken in the South African case of **R v Karg 1961 (1) SA 231 (A)** where it was held that it is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences the courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute.

However, a more poignant observation has been brought to my attention by Mr. Gondwe, learned counsel for the 3rd convict. He relies on the case of**S v Pistorious (CC113/2013) [2004] ZAGPPHC 793** cited by Kapindu J. in **Republic v Lutepo, Criminal Case No. 2 of 2014** (unreported), where Masipa J. stated:

> "The interests of society demand that those who commit crimes be punished and, in deserving cases, that they be punished severely. As counsel for the defence correctly submitted, we ought to differentiate between what the public interest is and what society wants. Members of society cannot always get what they want as **courts do not exist to win popularity contests,** but exist solely to dispense justice". (my emphasis)

My own view is that it is possible to have a situation where what the public wants and the public interest converge and as such it is not always correct to assume that these are two incompatible positions.

Sentencing of first offenders under section 340 of the CP &EC is linked to suspended sentences under section 339 of the CP & EC. As such, the two sectionsmust be read together. Section 339(1)provides that when a person is convicted of any offence, the court may pass a sentence of imprisonment but order the operation thereof to be suspended for a period not exceeding three years. Section 339(2)provides that when a person is convicted of any offence, the court may, if it is of the opinion that the person would be adequately punished by a fine or imprisonment for a term not exceeding twelve months, fine the person or sentence the person to a term of imprisonment not exceeding twelve months but the court may, as the case may be, order the suspension of the payment of the fine or operation of the sentence of imprisonment on condition that the person performs community service. Section 340 provides that where a person is convicted by a court of an offence and no previous conviction is proved against him, he shall not be sentenced for that offence, otherwise than under section 339, to undergo imprisonment, unless it appears to the court, on good grounds, which shall be set out by the court in the record, that there is no other appropriate means of dealing with him.

It is therefore clear that in the discharge of my sentencing duty, I, subject to other non-custodial alternatives to sentencing, have to undertake the exercise of determining whether the offences in this case are ones that attract a sentence of less than 12 months; whether the convicts can adequately be punished by a fine or community service; and whether such sentence can be suspended.Consequently, I remind myself that I have to comply with section 339 of the CP & ECby recording reasons why custodial sentences are the appropriate to impose if I so find.After considering that the offences of conspiracy to murder and attempted murder are serious ones and that they are accordingly classified as felonies; the manner in which the offences were committed; the serious harm done to the victim; the trauma caused to the victim's family; and the conduct of the convicts during trial all of which will be discussed later on in this judgment, I find that this is a case that warrants custodial sentences.

The 1st and 3rd convicts were during the trial convicted of contempt of Court. This related to demeaning, rude and derogatory remarks made about the trial judge and intimidatory remarks to and conduct directed at the D.P.P. in front of the Court respectively. The question therefore is whether they are first offenders or not. Although the learned D.P.P.at first submitted that they are not first offenders, she abandoned that argument when attention was brought to her that in one case, the contempt therein was treated as a mere a civil offence. However, it must be noted that contempt of court can be a criminal offence. It all depends on the circumstances. In the instant case, the 1st convict was sentenced to four months imprisonment whereas the 3rd convict was admonished. The sentence of imprisonment is clear indication that the contempt was criminal. But since the D.P.P. withdrew her submission, I will let the matter rest.

A balanced consideration of the interests of the society together with the interests of the offender as well the crime itself is called a 'triad' approach. In the South African case of **Sawule v The State [2014] ZAGPPHC 534**, RATSHIBVUMO AJ said:

> "The art of applying the proper guidelines in imposing a sentence is achieved by a consideration, and an appropriate balancing, of what the well-known case of S v Zinn 1969 (2) SA 537 (A), at 540G-H described as a 'triad consisting of the crime, the offender and the interests of society.' Although these interests may be conflicting in nature, it is expected of a sentencing court to keep a fine balance between them, and it must endeavour not to over or to under emphasise anyone of them – see S v Moodley (SS42/05) [2005] ZAGPHC 78 (4 August 2005). Overemphasizing some interests over others is misdirection".

The South African 'triad' approach to sentencing has been adopted in Malawi in several cases including that of **The Republic v Caroline Savala, Criminal Cause No. 28 of 2013**(unreported) and **The Republic v Oswald Lutepo** *(supra)*.The "triad" factors must form the backdrop of sentencing when considering the other purposes of sentence; including reform and deterrence as stated in the case of **Hatting v S [2013] ZAFSHC 189**where it was observed that

> "In determining an appropriate sentence, the main purpose of sentencing must be constantly kept in the forefront of a trial judge's mind. The regional magistrate appreciated that a balanced sentence strives to attain the reformative, preventative, deterrent and retributive objectives of punishment – S v Rabie 1975 (4) SA 855 (A) 862A. **The protection of society is central to all those objectives.** None of these objectives can be overlooked in the difficult search

for an appropriate and balanced sentence. The regional magistrate was aware of this – vide p 622:10 – 623:10" (emphasis supplied).

The court must consider the mitigating and aggravating circumstances with regard to the accused person, the offence for which he has been convicted and the interests of the society in a balanced manner, not necessarily in equal measure. Criminal cases will be different and thus the factors may not have equal weight but the weight attached to each factor must be appropriate and then on a balance of all the factors in mitigation and aggravation, the court must determine whether in the particular case the accused can adequately be punished with a non-custodial sentence, community service, payment of a fine, a suspended sentence with or without conditions or a custodial sentence. Being a first offender is a factor that the court will take into account in evaluating these factors. It is a factor in favour of the accused and mitigating the gravity of the offence.However, in applying the triad tests as well as in taking into account mitigating factors, courts have stated that care must be taken not to unduly yield to mitigating factors especially when sentencing in serious cases. This is the approach that was adopted by Kapindu, J in thecase of **The Republic v Oswald Lutepo (***supra*).

In criminal cases, the Court has discretion to decide that the mitigating factors are eclipsed by the seriousness of the offence such that little or no weight at all should be attached to such factors. Thus, for instance, in **R v Inwood** (1974) 60 Cr App R 70 Scarman LJ was faced with a first time offender who, among various other mitigating factors, cited his youth as a mitigating factor to count towards being given a more lenient sentence. The learned Judge stated that in the balance that the court had to make between the mitigating factors and society's interest in marking the disapproval for the type of conduct in question, he came to the irresistible though unpalatable conclusion that he should not yield to the mitigating factors. It was held that the sentence was correct in principle when measured against the gravity of the offences.This principle was affirmed in the Malawian case of **Mussa v Republic, Criminal Appeal No 44 of 1995 [1996] MWHC 2**, where Mwaungulu J, (as he then was) citing with approval the above dictum in **R v Inwood**, stated that the Court can very well ignore pertinent mitigating factors.

Malawi currently has no sentencing guidelines that may guide the Court when determining the appropriate sentence to impose in attempted murder cases and as such, the learned D.P.P. has brought to my attention the following sentencing guidelines from the U.K. for adoption.

NATURE OF OFFENCE	STARTING POINT	SENTENCING RANGE
Level 1 *The most serious offences including those which (if the charge had been murder) would come within para. 4 or para. 5 of schedule 21 to the Criminal Justice Act 2003*		
- Serious and long term physical or psychological harm	**30 years custody**	**27 – 35 years custody**
- Some physical or psychological harm	**20 years custody**	**17 – 25 years of custody**
- Little or no physical or	**15 years custody**	**12 – 20 years of custody**

psychological harm		
Level 2 *Other planned attempt to kill* • - Serious and long term physical or psychological harm • - Some physical or psychological harm • - Little or no physical or psychological harm	**20 years custody** **15 years custody** **10 years custody**	**17 – 25 years of custody** **12 – 20 years of custody** **7 – 15 years of custody**
Level 3 *Other spontaneous attempt to kill* • Serious and long term physical or psychological harm • Some physical or psychological harm • Little or no physical or psychological harm	**15 years custody** **12 years custody** **9 years custody**	**12 – 20 years of custody** **9 – 17 years of custody** **6 – 14 years of custody**

I agree with learned counsel for the 3rd convict Mr. Msisha SC that we should not follow these guidelines wholesale and that regard must be had to section 13(m) of the Constitution which calls for humane application of the law. In my view, it is instructive to look at how individual judges have meted out sentences in Malawi. I will therefore seek guidance from two resentencing cases brought to my attentionby the learned D.P.P.In **Winston Ngulube and another v Republic, MSCA Crim Appeal No 35 of 2006** (unreported),the court replaced a sentence of death with that of 20 years imprisonment after observing that no weapon was used, that the appellants were persons of no previous bad character and that there was no clear motive for the killing of the victim. In **Twalibu Ali v Republic, MSCA Criminal Appeal Number of 2008**(unreported), the appellant and the deceased were drinking together when a quarrel ensued between the two. A fight broke out and in the course of the fight, the appellant took a panga knife and used it to hack the deceased. The Supreme Court of Appeal set aside a sentence of death and substituted it with one of 20 years after it observed that the appellant had been fighting using bare hands and had only resorted to use of the panga knife in the course of the fight.

The learned D.P.P. has submitted that in so far as sentencing is concerned, the offence of attempted murder is the same as that of murder since the *mens rea* is the same. Reliance is placed on the case of **Cawthorne v Her Majesty's Advocate[1968] ScotHC HCJ 1**,wherethe Scottish High Court at page 2 stated:

> "In my opinion attempted murder is just the same as murder in the eyes of our law, but for the one vital distinction, that the killing has not been brought off and the victim of the attack has escaped with his life. But there must be in each case the same mens rea, and that mens rea in each case can be proved by evidence of a

> deliberate intention to kill or by such recklessness as to show that the accused was regardless of the consequences of his act, whatever they may have been"

Even though the learned D.P.P. has forcefully submitted that Mr. Mphwiyo did not die because of the benevolence of the convicts and as such they cannot derive any benefit from that, my own view is that all things being equal, attempted murder should attract a lesser sentence than that of murder. I therefore will impose a sentence of less than 20 years in the case at hand.

Maximum sentences must be reserved for the worst of offenders in the worst of cases. However,Courts have moved away from the notion that maximum sentences must be reserved for the "rarest of rare" cases and that "the worst offender is not yet born".In **Funsani Payenda v Republic,Sentence Rehearing Case No. 18 of 2015**(unreported),the Court stated at paragraph 38 of the Judgment:

> "I take the view that we must, in this regard, be using a category of cases for a 'test' and not the fictitious individual test of the 'worst offender'- who is, according to the common myth, yet to be born- which individual test effectively makes it illogical for the maximum penalty to ever be imposed. Parliament did not prescribe the maximum penalties in legislation, for decorum purposes, or as conceptual fictions, or as mere illusory punishment signposts. Parliament means what it says and it meant what it said in S210 of the Penal Code. It meant for those penalties to be applied in appropriate cases and not be theorized into non-existence."

The learned D.P.P. has correctly submitted that courts will take into account the age of the convict at the time of committing the offence and at the time of sentencing. However, this does not mean the imposition of a non-custodial sentence as serious offences often call for custodian sentences. Age, especially where it is not a juvenile involved, is one of those mitigating factors that courts have reminded themselves not to yield to (see **Rep v Oswald Lutepo** *(Supra, para. 119).*

In **R v KekeConfirmation Case No. 404 of 2010** Mwaungulu J noted that the underlying rationale, for the abovementioned consideration, is that the youthful may commit an offence out of impetuousness, immaturity or ill-conceived thirst for adventure. He, however,stated that those older than a 36 years ought to be mature enough to comprehend the consequences of crime upon themselves, their families and society as a whole.In the present case, whilst arguably youthful the 1st and 2nd convicts at the ages of 43 and 40, respectively, are of an age that they should be mature and wise enough to understand the consequences of loss of life. Another aggravating factor is that an offensive weapon was used, a gun, which was discharged not once, but three times. This was in the company of other people.

Remorse or lack thereof is a factor that courts take into account when sentencing. The law does not state that it is only people who have pleaded guilty that need to show remorse. To suggest so would be foolhardy and suicidal on the part of a convict. On remorse, Justice Dr. Kapindu stated in **Republic v Ernest Adamu and Eneleyo Sakondwera, Sentence Rehearing Case Number 18A of 2015 at paragraph 37**:

> "…the Second Defendant who was on the scene of the shooting… on that April night has been full of excuses. He alleges that he was not at the scene when he clearly was. He says he was with his younger brother at home. He alleged that he was tortured by the police. Generaly, there has been no demonstration of remorse. Even now, during the sentencing proceedings, which offered the Second Defendant the opportunity to show remorse, own up to the offence and apologize to the victimised family no apology has been forthcoming. The impression that one has is that he is not apologetic."

It has been correctly submitted by the learned D.P.P. that none of convicts has been remorseful. If anything, the Court observed that throughout the trial, they remained cheeky; at times laughing while witnesses such as the victim testified in Court. Surely this is not how people show remorse. I find that although the 3rd convict advised his counsel to tell the Court that he regretted the position he was in after the Court asked counsel to address it on the issue of remorse in open court, this was too little too late and insincere only intended to buy favours from the Court. I agree with the learned D.P.P. that that the lack of remorse is an indicator that it is very unlikely that the convicts will be reformed.

The 1st convict was trained by the army to protect members of the public. Yet he used that training for a criminal purpose. The 2nd convict, in using his organizational skills to participate in the attempted murder of his close friend, has demonstrated such a ruthless and cold-blooded character that makes him a very dangerous person indeed.

Having carefully considered the law and evidence, I sentence the 1st and 2nd convicts to 15 years imprisonment each for the offence of attempted murder and 11 years imprisonment each for the offence of conspiracy to murder. Where a convict is sentenced in one trial on more than one conviction, the sentences may run consecutively or concurrently. In this regard, section 17(1) of the CP & EC provides as follows:

> "Where a person is convicted at one trial of two or more distinct offences, the court may sentence him, for such offences, to the several punishments prescribed therefor which such court is competent to impose; such punishments, when consisting of imprisonment, to commence the one after the expiration of the other…unless the court directs that such punishments shall run concurrently"

When I asked Mr. Goba Chipeta, learned counsel for the 1st and 2nd convicts whether the offences of conspiracy to murder and attempted murder in this case are distinct offences, his answer was in the affirmative. And when Mr. Msisha SC, learned counsel for the 3rd convict was asked for his input as an officer of the court whether I should make the sentences run consecutively or concurrently, his answer was that it was up to my discretion.

In **Republic v Matiki [1997] 1 MLR 159 (HC)**, the accused was convicted on two counts of theft of a bicycle and one count of resisting arrest. He was sentenced to two years' imprisonment with hard labour on the theft charge and one year for resisting arrest. The sentences were ordered to run concurrently. On review Justice Mwaungulu, as he then was, held that a sentence for resisting arrest should run consecutively with other crimes in order to emphasise the importance of protecting the execution of public duty.

Having exercised my mind on this issue and in view of the need to show strong disapproval of the commission of such serious offences by the convicts using the modus operandi they employed, I hold that the sentences for the 1st and 2nd convict will run consecutively.

As for the 3rd convict, his level of responsibility is higher than that of the other two. Being in his early 50's, he is a more mature person; he once occupied positions of Minister of Justice and Constitutional Affairs and Attorney General; he was Senior Counsel at the time of the commission of the offence; and was gang leader. In **McNee and Others v R [2007] EWCA Crim 1529**, the Court of Appeal, stated with regard to a gang leader:

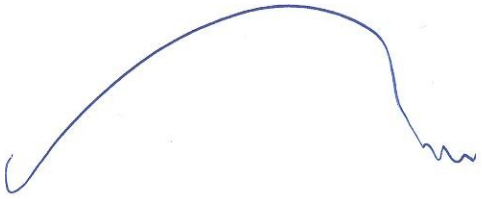
> **"You were responsible for the organization of the crime and the organization of the other conspirators…This dreadful crime is your full responsibility**…It seems to me that the utterly evil nature of what you did shows that you, a criminal man, are prepared to commit the ultimate offence of violence if and when it suits your purpose. You are prepared to do that to utterly blameless and innocent people. You are prepared to do that out of a perverted desire for revenge". (emphasis added)

The 3rd convict's claim of having an impeccable record of conduct is not substantiated. On the contrary, what has come out during the trial is that he is a dangerous person who does not take kindly to anyone crossing his path. This was reflected in his intimidatory tactics towards the trial judge. As already discussed above, the 3rd convict also intimidated the D.P.P. in front of the Court. As the learned D.P.P. has rightfully submitted, there is likelihood that he can again use other persons to do harm to people who cross his path. After all, he is on record as having used the 1st convict to write a rude letter to the trial judge in which a purported CV of the judge was enclosed. The letter accused the judge of trying to be a modern day Robinhood. When asked by the learned D.P.P. whether he knew who Robinhood was, the 1st convict stated that it was a judge in a foreign country. This was clear confirmation that someone else wrote this letter for him in English which language he was incompetent to communicate in at the trial and opted to use the vernacular language of Chichewa. The Court in an earlier ruling found that it was the 3rd convict who had fed that information to the 1st convict as he had earlier on in oral submissions brought up the issue of CVs. In the same letter, the trial judge was accused of asking for police protection o his way back to Blantyre after delivering a ruling on case to answer and that this demonstrated that he was bent on convicting the accused. The name of the police officer and the fact that he was armed were disclosed probably to show that the movements of the judge were under observation. Notwithstanding that the trial judge ruled that he did not feel threatened but had to act in the interest of other judicial officers, this criminal propensity must be checked by a longer period of incarceration in the interest of society and public servants including the D.P.P.who should be protected so that they discharge their duties without fear or favour.

I therefore sentence the 3rd convict to 13 years imprisonment on the conviction of conspiracy to murder.

Time spent in custody when bail was revoked for the 1st and 3rd convicts and time spent in custody from the date of conviction to the date of sentence for the three convicts will be subtracted from the sentence. However, time spent in custody by the 1st convict for contempt of Court will not be subtracted.

Pronounced in Open Court this 29th day of August 2016 at the High Court, Lilongwe District Registry.



Dr. M.C. Mtambo
JUDGE