



IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY
HOMICIDE (SENTENCE REHEARING) CAUSE NO 68 OF 2015

THE REPUBLIC

-VERSUS-

GEOFFREY

MPONDA.....DEFENDANT

CORAM: HON. JUSTICE R.E. KAPINDU

- : Mr. Mtonga, Counsel for the State
- : Mr. Nanthuru, Counsel for the defendant
- : Mr. Tepeka, Official Interpreter
- : Mrs. Chirombo, Court Reporter.

RULING

KAPINDU, J

1. The defendant herein was convicted by the High Court in Zomba on 15th June 2000 for the offence of murder committed in May 1995, contrary to Section 209 of the Penal Code (Cap 7:01 of the Laws of Malawi). He was accused of being responsible for the murder of Edes Daniel. According to the State, Edes Daniel was the defendant's former wife whilst according to the defence, Edes Daniel was the defendant's wife. What is clear in any event is that there was a form of a close domestic relationship between the two. Together, they had a daughter, a baby at the material time by the name of Gladys.
2. This is one of those unfortunate cases where the original file recording the proceedings during the trial of the defendants herein went missing. Neither the Court, the State nor the Legal Aid Bureau have records of the trial proceedings. The State states that after tireless efforts to find any record of the proceedings, the same could still not be found. There have been efforts to reconstruct the facts of the case and what transpired at trial; but there are clearly variances in the versions from the respective parties before this Court, as paragraph 1 above already demonstrates.
3. The State's version is that the defendant herein was a former husband of the deceased. The two had a daughter together. On the material day, the defendant paid the deceased a visit with the intention of reconciling after an earlier break-up. The State states that witnesses

then heard a quarrel from the deceased's house. They heard the defendant yelling and they were soon alarmed to see the house up in flames.

4. According to the State, when the witnesses attempted to put out the fire, the convict was seen running out of the burning house and he disappeared into a nearby bush. At this stage, the blaze on the house was full blown and the witnesses found it impossible to rescue the deceased.
5. The State states that the deceased's body was found but without private parts. It is the State's case that the defendant had removed the deceased's private parts before setting the house ablaze. The defendant was arrested a few days after the incident. He was tried, convicted of murder, and sentenced to death since that sentence was at the time believed to have been mandatorily required by law. The State and the defence made no representations nor led any evidence due to the prevalent belief that the sentence of death was mandatory under the circumstances.
6. The defendant has a different version of the facts. He states that Edes Daniel was his wife and that they lived together at her home village of Linde in Machinga District. The defendant states that on the night of the 17th -18th of May 1995, he was sleeping with his wife in their home together with their seven month old daughter, Gladys. At around 1am or 2 am, he states that he awoke only to suddenly find that the house was alight and that the room was filled with thick smoke. He states that he was unable to see and was struggling to breathe. He states that he felt for the baby Gladys whilst shouting to Edes to get out of the house. He states that he eventually found the baby and stumbled

with her out of the house and was expecting Edes to follow. When Edes did not appear, he states that he tried to re-enter the house but as he was searching, the roof of the house begun to collapse around him. His clothes caught fire and he states that he sustained severe burns on his hands, feet and elbows and that he bears these scars to this very day. He states that under the circumstances, he was forced to abandon his rescue operation. He states that as a result of the fire, he inhaled so much smoke such that he was barely conscious when he stumbled to the door. He states that what he remembers next was that later that morning he was at the Police Station and given a document to thumbprint which, according to his understanding, was to allow him to be transferred to hospital for treatment. He states that this document was later produced in court at his trial and he learnt that it was actually his Caution Statement.

7. The defendant states that he was subsequently taken to Zomba Central Hospital and he was admitted for three months before he was eventually discharged and transferred to Zomba Central Prison on remand.
8. He states that he was tried on 15 June 2000 and was convicted upon the verdict of a jury. He was sentenced to death as it was believed at the time to have been mandatory. He has therefore served over 20 years in custody.
9. I must start my analysis by addressing a very important issue that was raised by Counsel for the defendant, Mr. Nanthuru. He invited the Court to order the immediate release of the defendant and order that his 20 year incarceration in the absence of a record of his trial proceedings has been unconstitutional. He invited this Court to send a

very strong message to the State and the registries of Courts that record keeping is very important.

10. Fortunately for this Court, this is not the first time that these Courts have had to deal with the issue of a missing Court record. In a similar sentence rehearing matter to the present one, the case of **Republic v Dzimbiri**, [2015] MWHC 1 similar issues were raised. In that case the State sought not to proceed with the hearing on account of the missing Court record. Kenyatta Nyirenda J responded by stating, among other things, 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.

11. In the **Mtambo case** (**Mtambo & others v. The Republic**, MSCA Criminal Appeal No. 1 of 2012 (unreported)), Chipeta, JA, stated that:

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..... 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.

12. The learned Judge in the Dzimbiri case also referred to the case of **Andrew Morris Chalera & others v. The Republic, MSCA Civil**

Appeal No. 5 of 2012 (unreported) where the Supreme Court of Appeal addressed the point as follows:

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.

13. He also referred to the decision of the California Court of Appeal in the case of **People v. Morales** (1979) 88 Cal.App.3d 259 (Cal. Ct. App. 1979), where the Court stated that:

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.

14. Further however, in the **Dzimhiri case**, Kenyatta Nyirenda J proceeded to observe that:

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.

15. The learned Judge concluded in the **Dzimhiri case** that the High Court is still within its jurisdiction to proceed with sentence rehearing even where the trial record is wholly or partially missing or destroyed; and that the Court may advert to Section 260 of the Criminal Procedure and Evidence Code (CP&EC) which provides for receipt by the court of evidence for arriving at a proper sentence. Section 260 of the CP & EC provides that:

(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.

16. I agree with the observations of Kenyatta Nyirenda J, and for the reasons he advances, I do not consider that the whole process of

sentence re-hearing ought to fail simply and only because of a missing record.

17. The question remains, however, whether the continued incarceration of the defendant in the absence of the record herein is unconstitutional. In my view, the Court cannot make a sweeping comment that in all cases where there has been a missing record of the trial proceedings, the continued detention (incarceration) has been unlawful or unconstitutional. There must be some positive demonstration of how the missing record has compromised the defendant's rights that he or she would otherwise have sought to exercise. In the absence of such a demonstration, this Court would not consider it appropriate to make such a decision.

18. In the instant case however, Counsel Nathuru has demonstrated that the defendant attempted to appeal, as evidenced by his prison file, but his attempt to appeal hit a blank wall. Counsel submitted that a copy of the defendant's *pro se* appeal, dated 7 September 2000, is available on his prison file. He lamented in his submission that over 15 years later, the defendant's appeal has not been heard, and that in all probability, the lack of movement in the appeal could be attributed to the missing Court record.

19. I have carefully considered this issue. Section 42(2)(f)(viii) provides every person arrested for, or accused of, the alleged commission of an offence, the right "to have recourse by way of appeal or review to a higher court than the court of first instance." The defendant herein attempted to appeal in the year 2000 to no avail. The State did not respond to the defendant's submission on this point. In determining whether a person's right to appeal has been violated within the

framework of constitutional criminal procedure law, each case must be determined on its own facts. However, I am of the view that whatever factors one may take into consideration, 15 years or more than that, is an inordinately long time and the delay to process the defendant's appeal for such a long time is an obvious violation of the right of appeal. As I have mentioned earlier, the Court's conclusion is further bolstered by the fact that the State did not reply to dispute the defendant's claim of violation, perhaps to show that there were factors that would constitute a permissible limitation on the defendant's right to appeal under the circumstances.

20. In the premises, this Court, having found a violation of the right of appeal under Section 42(2)(f)(viii) of the Constitution, must provide an effective remedy. The Court considers that the effective remedy is to order the immediate release of the defendant.

21. Having said that, I do not consider it necessary to traverse all the other issues relating to the possible imposition of another sentence in this matter. That has been rendered otiose by my finding of violation of the constitutional right of appeal herein. I need to mention though that but for the finding of the violation of the right to appeal above, having considered all the mitigating and aggravating factors, I would still have imposed such a sentence as would have led to the immediate release of the defendant, considering that he has already spent about 21 years in custody.

Made in Open Court at Zomba this 4th Day of March 2016

RE Kapindu, PhD
JUDGE