IN THE HIGH COURT OF MALAWI

ZOMBA DISTRICT REGISTRY

HOMICIDE (SENTENCE REHEARING) CAUSE NO 18A OF 2015

THE REPUBLIC

-VERSUS-

ERNEST ADAM.....1st DEFENDANT

ELENELEWO SAKONDWERA.....2ND DEFENDANT

CORAM: HON. JUSTICE R.E. KAPINDU

: Mr. Malunda, Counsel for the State

: Mr. Nkosi, Counsel for the State

: Mr. Katundu, Counsel for the defendant

: Mr. Nkhwazi, Official Interpreter

: Mrs. Mboga, Court Reporter.

RULING

KAPINDU, J

1. The 11th of April 2002 was a very dark day in the Mphepo household. In the early hours of that day, just before dawn, Mrs. Leah Mphepo, wife to His Worship Mr. David Kenneth Mphepo (retired), was murdered under very aggravated violent circumstances. She was shot dead inside her own house by members of a criminal gang of robbers. She was shot using her own family gun. The gun was grabbed away from her by one member of the gang, which he in turn used to shoot her dead at close range. She had pulled out the gun after realising that her household had been invaded by criminals. Her reaction when her house was invaded was typical of the law-abiding citizen that she was, not given or disposed to violence. She pulled her husband's licenced gun and opened fire twice inside the house. At first she shot into the air and then she shot again into the roof inside the house in order to scare the criminals away rather than aiming directly at them.

2. For all we know, the deceased would have been well within her rights if she had shot directly at them, even if it meant killing them, in order to defend herself, her family and her property. Her decision not to shoot directly at them is probably the reason some of them are alive today seeking to have their punishment for killing her, reduced. They could possibly have been lawfully killed in self-defence that night.

3. Mrs. Mphepo was killed in front of her own children on that fateful night. She was shot in the abdominal region. Immediately after being shot, she went out of the house crawling and crying in pain, crying out in agony to her children, telling them that she was dying. Dying indeed she was. It is difficult to imagine many events that can be as traumatising to a child as to see her own mother being murdered before her very eyes. The late Mrs. Mphepo managed to get to the servants' quarters where she collapsed and died. She was severely bleeding from the abdominal region.

4. The evidence of PW1 during the trial proceedings, Mary Kuthyola, the deceased's daughter then aged 17 years old, who was in the house that night and witnessed all this unfold before her very eyes, is heartrending. It must have been very traumatising for her to narrate the above facts in court, thus reliving the vivid memories of that dark April day. Her evidence was actually corroborated by the sworn evidence in court of the 4th accused person in that case, the 1st Defendant herein, Mr. Ernest Adamu. Mr. Adamu stated in his evidence that the deceased shot in the air, confirming the evidence of PW1. He stated that it was dark in the house. He then mentioned that one of his accomplices, a boy whose name he did not provide, silently went behind her back in the dark, grabbed the gun away from the deceased and gave the gun to one Teddy. He said it was this Teddy who shot the deceased dead. Apparently Teddy was never found.

5. On that fateful night, the family had secured the house and retired to bed. There were 7 people in the house including Mrs. Mphepo, the deceased. At around 2 am, the family was woken up by a big bang on the front door of the house. The house had just been broken into by a gang of criminals, about 15 to 20 of them. Some had Panga knives whilst others carried stones. Simultaneously, as some of the robbers and burglars entered the dwelling house, other members of the gang who had remained outside were busy pelting the windowpanes with stones, breaking them up. It was at this point that Mrs. Mphepo pulled the gun with the ultimate tragic consequences as described above.

6. At the material time, His Worship Mr. Mphepo had travelled to Mangochi for a Workshop. The shock and horror that must have stricken him upon

receiving the news of the death of his dear wife, and the circumstances of her death, is difficult to imagine.

7. The late Mrs. Mphepo's life was taken away at the prime of her life – she was only 37 years of age. Such is the horrific picture that characterises the instant case. This was a living nightmare for the rest of the family.

8. As if the murder of the deceased was not bad enough, the gang proceeded to take whatever they could lay their hands on in the house and then fled. Typical heartless criminals.

9. I restate these facts in this way so that we must all be reminded that today is not just another occasion for the defendants herein, Mr. Ernest Adam and Mr. Elenelewo Sakondwera, to have their day, another day, in Court. It is also another posthumous occasion for the deceased and also for the victimised family to have this matter subjected to judicial consideration and determination. It is an occasion for all of us to reflect on the tragedy that befell the deceased and the entire Mphepo family on that night as a result of violent criminal conduct, and for this Court to make a pronouncement on the consequences of that criminal conduct. Criminal justice means as much, if not more, to the victim as it does to the suspect or the proven perpetrator – such as the convict in the instant case.

10. The defendants herein were two among other people that were arrested by the Police on suspicion of having committed the gruesome offences herein. The others were Charles Makaika, Felani Chidede, Kumbukani Mateyu, Lewis Bamusi, Funsani Payenda and Kennedy Musende. They were charged with the offences of Armed Robbery contrary to Section 301 of the Penal Code (Cap 7:01 of the Laws of Malawi) and Murder,

contrary to Section 209 of the Penal Code. Trial was by jury. The jury convicted the two defendants herein, ~~Funsani Payenda and Lewis Bamusi guilty on both counts~~. They were all sentenced to 25 years Imprisonment on the armed robbery charge (apart from Mr. Ernest Adamu who was sentenced to 20 years following a guilty plea of the armed robbery charge); whilst on the murder charge, they were all sentenced to suffer death as mandatorily required by law at the time. The death sentences were later commuted by the President to life sentences.

11. It is in respect of the mandatory imposition of the death penalty on the defendants 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.

12. Both defendants are praying for lesser term imprisonment rather than life imprisonment which they are currently serving following a Presidential commutation of their death sentences in January 2005 to life imprisonment.

13. I must mention, just like I observed in **Republic v Funsani Payenda**, Homicide (Sentence Re-Hearing) Case No. 18 of 2015, that in his "Affidavit Evidence on Sentence Rehearing", deponed by the defendant's Counsel Mr. Katundu, in respect of both defendants, Counsel refers this Court to the "Expert Declaration" by Professor Babcock, Professor Schabas and Professor Christof Heyns, the United Nations Special

3. Courts will always be slow in imposing long terms for first offenders, the rationale being that it is important that first offenders avoid contact with hardened criminals who can negatively affect the process of reform for first offenders.
4. Courts will have regard to the time already spent in prison by the convict and will usually order that the sentence takes effect from the date of the convict's arrest thus factoring in time already spent in prison. Courts will however discount this factor if the time spent was occasioned by the convict themselves, that is, where they skip bail or because of unnecessary adjournments.
5. Courts also have to look into the personal and individual circumstances of the offender as well as the possibility of reform and social re-adaptation of the convict. Arguably, this may relate to the convict's individual circumstances at the time of committing the offence and at the time of sentencing, that is, their "mental or emotional disturbance", health, hardships, etc. The learned Judge also quoted the case of **Republic vs Samson Matimati**, Criminal Case No. 18 of 2007 (unreported) in support of this proposition.
6. The Court may take into account the manner in which the offence was committed, that is, whether or not (a) it was planed rather than impulsive, (b) an offensive weapon was used; (c) the convict was labouring under intoxication at the time of committing the offence even though intoxication was not successfully pleaded in defence;

7. Duress, provocation and lesser participation in the crime may be mitigating factors in certain circumstances.
8. Remorse, lack of clear motive, childhood deprivation and abuse, good conduct in prison, effect on the victim, likelihood of committing further acts of violence, sense of moral justification, and in appropriate cases, socioeconomic status;
9. The learned Judge concluded that this list of aggravating and mitigating circumstances is not exhaustive.

16. Defence counsel has provided a catalogue of other factors that he argues are mitigating factors for each of the defendants in this case. For the 1st defendant, Counsel has outlined the following factors:

(a) That the murder of the deceased was not premeditated.

Court's observation: Hitherto, our courts have not classified murder into degrees or categories, such as premeditated murder and non-premeditated murder. Perhaps the legislature needs to consider creating such a distinction to improve efficiency in the handling of murder trials by the relevant institutions and parties involved.

In my view, the term premeditation suggests that the defendant must have carefully planned or designed, deliberated on the plan or design and consciously decided to execute the plan or design. The term "premeditation"

does not appear in the Penal Code. According to Section 209 of the Penal Code, a person commits the offence of murder if he or she kills another person with "malice aforethought." Malice aforethought is the guilty mind or mens rea requisite for murder. "Malice aforethought" is given a technical, legal definition in Section 212 of the Penal Code. Section 212 provides as follows:

> Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—
>
> (a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;
>
> (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
>
> (c) an intent to commit a felony;
>
> (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

An examination of Section 212 of the Penal Code seems to lay down instances of malice aforethought in a

descending order of gravity. The first instance, in Section 212(a) is a case where the defendant had an "intention" either "to cause death" or "do grievous harm". When one compares Section 212(a) with the remainder of the other provisions, what emerges clearly is that the requisite *mens rea* expressed in Section 212(a) is the most aggravated form of malice aforethought. It cannot for instance, rank the same in aggravation with the intention envisaged under Section 212(d), i.e "an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony." To me, Section 212(a) is the provision that provides for the most serious instance where the defendant possessed the necessary intention to murder someone. The legislature, in its wisdom, put "intention to cause the death" in the same Subsection, and in circumstances that, to me, suggest parity with intention "to do grievous harm to any person." Grievous harm is not just any other physical harm. It is grave harm. Whoever intends to do such grave harm knows or ought to know that it may possibly lead to death. Section 235 of the Penal Code lays down the offence of acts intended to cause grievous harm. It is a very serious offence. It carries a maximum of life imprisonment. A person who intends to do grievous harm intends to do very serious harm on the victim.

In the instant case, the evidence suggests the gang of robbers and murderers came to the deceased's house fully armed with, among other things, panga knives and

stones. Why did they carry panga knives and other offensive weapons and projectiles with them? At the least, to me, they intended and were prepared to do grievous harm to any person who might come in their way as they committed the armed robbery. This was premeditation. Their guilty ~~might~~ mind went to the Section 212(a) category in any event. They fore-planned to at least do grievous to any person they found in the house should they show resistance. Even worse though, I actually think they fore-planned to, where necessary, kill any such person. The way in which they killed the deceased, as I explained in the facts above, shows that it was unnecessary to kill her for the to achieve their robbery. The gun had been taken away from the deceased. She was defenceless. They killed her all the same.

I find that there was premeditation to at least do grievous harm, and since this constitutes a very grave form of malice aforethought, there was premeditation to murder. I will not therefore consider lack of premeditation as a ~~defence~~. mitigating factor

(b) That the defendant did not take part in the planning of the robbery which formed the context of the murder

Court's observation: This claim is not backed up by the evidence. In both his oral testimony as well as the Statement he made at the Police which he freely adopted at trial, the defendant mentioned that their gang had been breaking into people's houses and stealing in Area 49

(Gulliver) and Area 15 in the City of Lilongwe. He mentioned that on this day they planned to go to Area 15 which they did. He mentioned that when they got to the house, led by Andy, Ken and Chief, he started to break into the house. He cannot be heard to say he did not take part in the planning.

(c) That the convict is a first offender;

Court's observation: This is a well-known mitigating factor. There was and is no evidence of the defendant's previous conviction. He is a first offender. That must count in his favour.

(d) That the convict was young at the time of the commission of the offence;

Court's observation: At the time of the commission of the crime, the defendant herein was 22 years old. He was indeed a young offender, and this is a factor that needs to be taken into account in his favour when sentencing.

(e) That the defendant had and has disabilities

The Court was told that the 1st defendant has a stammer and is partially deaf (in his left ear). His mother stated in a statement that the defendant has some mental incapacity. She stated that he had difficulties interacting with others whilst growing up. He did not like playing with other children. She stated that he started walking

late. She stated that her child was having "problems with his head" as he "was not functioning normally". Counsel Katundu has stated in his affidavit as well as submissions that the 1st defendant was taken to hospital for treatment on various occasions both prior to and after incarceration, and that the condition is incurable. Counsel for the defendant submits that Mr. Adam's disabilities are relevant for this sentencing rehearing in three ways. First he contends that the existence of a mental disability provides a bar against execution of the death sentence at international law. Secondly he argues that the 1st defendant's "deafness" (am sure Counsel intended to say partial-deafness) meant that he had very limited understanding of the events of that day 10-11 April 2002. Thirdly he argues that these disabilities entail that the 1st defendant is ill-equipped to deal with the cruelties of prison life.

Court's observation: I must observe that where the mental condition of the defendant is brought into play, there is a burden of proof, on a balance of probabilities that the defendant must discharge. Once that burden is discharged, the burden then shifts to the State to disprove the existence of such mental conditions beyond reasonable doubt. This applies at all stages of trial. The question I have to ask myself first is whether the 1st defendant has discharged the burden of proving the existence of the disabilities in the first place. If the burden is discharged, and the evidence is not disproved by the

State, I will then have to proceed to consider the consequences.

During the rehearing, it became necessary to hear the evidence of Village Headman Mtima, Village headman in the 1st defendant's village who saw the 1st defendant growing up. The Court paid close attention to his testimony. He was composed and observing his demeanour, this Court had no doubt that he was a witness of truth. His oral testimony under oath was in tandem with his unsworn statement. The thrust of his evidence was that the 1st defendant was growing a normal life in the village, and that, just like his late father, he loved to play soccer. He stated that they never had any problems with him whilst he was a child in the village. It was after he had left for the city, about two years later, that they heard that he had been involved in crime and this was a shock to the village. He stated that after the 1st defendant was brought to Zomba Central Prison, he visited him once.

I did not get the impression from Village Headman Christopher Mtima that the 1st defendant was leading a lonely and isolated life as his mother stated in her unsworn statement. Village Headman Mtima says he was a normal child who loved to play football with his friends.

On the deafness or partial deafness, there was no suggestion from Village Headman Mtima that when he visited the 1st defendant in prison, they had difficulties

communicating. I believe the evidence of Village Headman Mtima. In addition, the 1st defendant himself elaborately explained what was happening on that fateful 10 April – 11 April 2002 night. Counsel's argument that he had limited understanding of the events cannot be upheld.

Other than that, I should also explain that the defence ought to have brought some medical evidence to back up the incapacity claims. This is more so considering that it has been claimed that the 1st defendant was taken to hospital for treatment both before and after incarceration.

All in all, the claims of mental incapacity have not been made out and I will not consider them.

(f) That his father's premature death has negatively affected the 1st defendant

Court's observation: The fact that the 1st defendant's father died whilst the 1st defendant was still very young seems to be made out by the facts. The connection with the crime herein remains tenuous for me, but I will consider this in mitigation.

(g) That the 1st defendant has reformed

Court's observation: I did not see much evidence that the 1st defendant has reformed in prison other than the fact that he is now a nyapala in prison. A nyapala operates like a prefect in prison. It is unclear as to what

the appointment criteria for becoming a nyapala are. I will however take that factor into account.

(h) That the prison conditions the 1st defendant has thus far been subjected to in prison constitute cruel, inhuman and degrading punishment

Court's observation: It is true that in **Gable Masangano vs Attorney General**, Constitutional Case 15 of 2007 (HC, PR) (unreported), it was held that conditions in our prisons amount to cruel, inhuman and degrading treatment or punishment. However, this must be balanced up with the necessity to ensure that offenders are punished in order to achieve the various purposes of punishment, i.e *rehabilitation, deterrence* and *retribution;* and in appropriate cases *incapacitation.* The rights and interests of the offender in prison must be balanced up with the rights and interests of the victims and society at large. When these are balanced, my finding is that the balance tilts in favour of ensuring that offenders who deserve terms of imprisonment should serve their terms whilst the State, at the same time, takes progressive steps to ensure that prison conditions are improved. I expect that an explanation is in place as to the steps that the State took and has taken in giving effect to the court's directions in the **Masangano case**, including explanation for any failures to act thereon.

Having said this, each case on this point must be determined on its peculiar facts. Thus there would be

cases where, for instance, the court may take cognizance of our judicial responsibility to ensure that overcrowded prisons are decongested, and pass an appropriate sentence aimed at contributing towards that goal, whilst at the same time ensuring that the offender is punished in order to fulfil the various internationally accepted punishment aims and purposes.

(i) That he has demonstrated potential for successful reintegration into society;

Court's observation: This in part hinges on what Village Headman Mtima stated in his testimony. Evidence has also been led that the 1st defendant has acquired carpentry skills in prison which he can put to good use when he gets released from prison. Again, this is something for this Court to consider.

17. For the 2nd defendant, Counsel has outlined the following factors:

(a) That the murder of the deceased was not premeditated.

Court's observation: The position of the 2nd defendant is just the same as that of the 1st defendant above. If anything, the evidence suggests that he was a more active participant that the 1st defendant. Perhaps this is why defence Counsel did not even include the aspect of lack of participation in planning the robbery which he raised with regard to the 1st defendant. I therefore similarly find that there was premeditation on his part to at least do

grievous harm, and that since this constitutes a very grave form of malice aforethought, there was premeditation to murder. I will not therefore consider lack of premeditation as a ~~defence.~~ mitigating factor.

(b) That the2nd defendant herein was possibly intoxicated at the time of the commission of the crime.

Court's observation: I quickly dismiss this argument. All that the 2nd defendant has done is to lead evidence, through the affidavit of one Wilson James that the 2nd defendant drank alcohol on a regular basis. Based on this affidavit evidence, defence Counsel seeks to persuade this Court to believe that it is therefore more probable than not that at the time he was committing the offence herein, the 2nd defendant was under the influence of alcohol, and therefore under some form of diminished responsibility. I find this argument to be a long stretch. I cannot accept it. I will not consider that for mitigation purposes.

(c) That the 2nd defendant was mistreated in police custody.

Court's observation: Whilst this is listed as a point that Counsel has raised in his submissions as a relevant consideration to be taken into account, on page 22 of the Submissions, he has not canvassed the point in argument. Neither has he canvassed the same in his affidavit in support. Further, the trial court did not make a positive finding at trial on the alleged mistreatment of

the 2nd defendant by the Police whilst in custody. I therefore will not rely on this.

(d) That the convict is a first offender;

Court's observation: This is a well-known mitigating factor. There was and is no evidence of the defendant's previous conviction. He is a first offender. That must count in his favour.

(e) That the convict was young at the time of the commission of the offence;

Court's observation: At the time of the commission of the crime, the defendant herein was 23 years old. He was indeed a young offender, and this is a factor that needs to be taken into account in his favour when sentencing.

(f) That the 1st defendant has reformed

Court's observation: Just as in the case of the 1st defendant herein, I did not see much evidence that the 2nd defendant has reformed in prison other than the fact that he is now a nyapala in prison. A nyapala operates like a prefect in prison. It is unclear as to what the appointment criteria for becoming a nyapala are. I will however take that factor into account.

(g) That the prison conditions the 1st defendant has thus far been subjected to in prison constitute cruel, inhuman and degrading punishment

Court's observation: My observations on this point are the same as they apply to the 1st defendant above.

18. The State has responded to the mitigating factors raised by the defendants. Firstly, the State agrees with the defendants' Counsel that the defendant convicts do not deserve the death penalty, arguing that whilst the killing of the deceased was considerably brutal, the defendants herein cannot be described as belonging to the "rarest of the rare" categories.

19. The State also agrees that the defendants were young men, the 1st defendant aged 22 years and the 2nd defendant aged 23 years at the time of commission of the offence. This, the State concedes, is a mitigating factor.

20. The State further concedes that the fact that the defendants were first offenders, and that for 22 years and 23 years respectively, thye had led crime-free lives, and that this entailed that they deserve leniency when sentencing.

21. The State further states that there is no record that the defendants herein jumped bail or that they contributed in any way towards delaying the trial. This therefore also needs to be considered in their favour when meting out the sentence.

22. However, the State argues that the Court should also consider that the circumstances of the deceased's murder were very horrific. He stated that the aggravation was compounded that the offence was committed in concert, at night and that a dangerous offensive weapon was used to commit the murder. This was also compounded by the fact that another felony, that of armed robbery, was committed. In addition, both the 1st and 2nd defendants were armed.

23. Before I proceed to determine the appropriate sentence, there is one argument that the defence advanced over which there was some extensive engagement with the Court. Counsel Katundu argued that since the State President had already commuted the death sentences of the defendants herein to life imprisonment, it would be unconstitutional for this Court to re-impose the death penalty of the defendants upon rehearing on sentence. He argued that it would be unconstitutional to do so and it would amount to a violation of the doctrine of separation of powers. He submitted that the exercise of the prerogative of mercy was an executive function which should not be interfered with by the Court, save for exceptional circumstances which in any event did not apply to the facts of this case.

24. I warned Counsel that this was potentially a very dangerous argument to make for his clients as, when taken to its logical conclusion, it basically entailed that this Court must simply confirm the life sentence on both defendants. I still think so. I pointed out to Counsel that if the Court ought not to change the life sentence operating as a result of the Presidential commutation, I see no reason why this Court should impose a punishment lesser than life imprisonment as that too, would be interfering with the life sentence as "imposed" through commutation by

the President. I pointed out to Counsel that under Section 89(2) of the Constitution, the President had various options which are to: "pardon convicted offenders, grant stays of execution of sentence, reduce sentences, or remit sentences." This shows that the President was not bound to reduce the death sentence to life imprisonment only. He had wide discretion. If he wanted, he could have pardoned them. If he was minded to, he could have remitted (terminated) the sentences altogether whilst retaining the conviction (i.e criminal record). Again, if he were desirous to do so, he could have reduced the death sentences to any term sentence he might have deemed fit. Therefore, having exercised his discretion and decided on a life sentence, if Counsel's argument is taken to its logical conclusion, reducing the life sentence would just be as unconstitutional as enhancing it to death (if at all the death sentence is indeed more severe than life imprisonment, I make no decision there).

25. The implications of upholding Counsel's argument are indeed more far-reaching that he would have intended. Upholding the argument should necessarily mean that this whole exercise of sentence rehearings, the overwhelming majority of which relate to prisoners currently serving life sentences resulting from presidential commutations, would also be unconstitutional for violating separation of powers.

26. My position is that the analysis should begin from the basics. In **Kafatayeni & Others vs Attorney General**, the High Court declared the mandatorily imposed death sentences unconstitutional and invalid. The sentences were invalid on and from the very moment of their pronouncement – *void ab initio* as it were. In the circumstances therefore, the President purported to commute an invalid sentence. Since the commuted sentence was non-existent, the life sentence imposed by the President must fall away. I hold the view that in fact the

reverse scenario would be what would be tantamount to violation of separation of powers. Where the sentence passed by the judiciary is declared *void ab initio* – i.e invalid and therefore non-existent, and yet the life sentence arising from executive action following on the invalidated judicial sentence is allowed to stand all the same, this would be tantamount to the President now indirectly and unintentionally assuming judicial powers. This would be so since the only sentence applicable would be one imposed by executive action with no prior punishment imposed by the judiciary. That could not have been what the framers of the Constitution had designed; and indeed it would be an interpretation contrary to the object and purpose of the Constitution as whole as it relates to the separate powers and functions of organs of Government.

27. I therefore dismiss the defendants' Counsel's submission that re-imposing the death penalty would amount to a violation of separation of powers.

28. Having said all this, the question now is what, then, is the appropriate sentence for each of the defendants herein for the murder that he committed on 11 April 2002? Having regard to all that I have said above, it is this Court's overarching duty to impose a sentence sufficient, but not greater than necessary to serve the purposes of sentencing. Prime among these purposes are reformation or rehabilitation of the offender and deterrence of the offender himself and also of would-be offenders.

29. I mentioned at the beginning how gruesome this murder was. I stressed that the murder was committed in highly aggravated circumstances. However, I have also outlined a series of mitigating factors relating to the defendant that I have found acceptable.

30. The maximum sentence for murder under Section 210 of the Penal Code is death or life imprisonment. I bear that in mind. I am also mindful that the death sentence should only be meted out in cases that fall in the category of "the rarest of murder cases", or put differently, the category of the "worst of murder cases". That said however, it must also be stated that murder, perhaps with the exception of genocide, is the most serious offence known to our law. The punishment that this Court metes out must also reflect this fact. If we do not do that, as Chombo J astutely observed in the case of **Republic vs Masula & others**, Criminal Case No. 65 of 2008, members of the public could start asking themselves whether "something has gone wrong with the administration of justice."

31. I have examined some decisions passed for similar offences which were brought to my attention by the State. In **Winston Ngulube & Another vs Republic**, MSCA Crim. App. No. 35 of 2006 (unreported), the Supreme Court of Appeal imposed a sentence of 20 years imprisonment for murder after it had observed that no weapon had been used to commit the murder. In **Binny Kalime Thifu vs Republic**, the Supreme Court of Appeal upheld the death penalty, notwithstanding representations made that the death penalty had to be reserved for worst criminals that are yet to be born. In Republic vs Payenda (above), I made my views known on this "worst offender is yet to be born argument". I said at paragraph 68:

> I am also mindful that the death sentence should only be meted out in cases that fall in the category of "the rarest of murder cases", or put differently, the category of the "worst of murder cases". I take the view that we must, in this regard, be using the "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 decorative purposes, or as conceptual fictions, or as mere illusory punishment signposts. Parliament means what it says and it meant what it said in Section 210 of the Penal Code. It meant for those penalties to be applied in appropriate cases and not to be theorised into non-existence.

In the **Thifu case**, the deceased was killed for purposes of removal of certain body parts for ritualistic purposes. The Supreme Court imposed the maximum penalty. The maximum penalty for murder is death or life imprisonment. Based on what I said in the **Payenda case** above, I would agree with the principle that the Supreme Court adopt in imposing the maximum sentence in the **Thifu case**. This Court would probably have imposed life imprisonment, but I fully agree with the principle. The circumstances in **Thifu** fell in the category of the "worst of murderers" in my view.

In **Twoboy Jacob vs Republic**, MSCA Crim. App. No. 1 of 2006 (ureported), which decision also affirmed **Kafantayeni & Others vs Attorney General**, the Supreme Court of Appeal also upheld the death penalty. The defendant in that case was a polygamist. He killed his 2nd wife in cold blood using a panga knife, alleging that she had bewitched him into failure to have sexual intercourse with his first wife. In **Namizinga & Another v Republic**, MSCA Crim App. No. 18 of 2007 however, the Supreme Court imposed a 25 years imprisonment term in

circumstances where armed robbers held the guard to the ground, tied his hands and feet, put a cloth in his mouth and hit him on the bottle on the head until he was unconscious. He later died.

32. In the present case, the defendants broke into the deceased's home. They were all acting in concert. They share the culpability for killing the deceased under such gruesome circumstances as described earlier in this decision. See **Harry Chigalimoto vs Republic**, 1968-70 ALR Mal 324.

33. I start with the1st defendant, Mr. Ernest Adamu. Mr. Adamu has shown some remorse. Indeed he started doing so from the time of his arrest, through trial, until now. He did not deny participation in the crime. He explained with clarity the nature of his involvement. He pleaded guilty to robbery, evidently because he accepted that he took part in the criminal activities of that night simply to rob. As I have said however, he shares the culpability with the rest. My analysis of the evidence shows that the 1st defendant's frank testimony helped the jury a lot in deciding who was guilty and who was not at trial. His cooperation in this regard therefore must be acknowledged with some positive consequence on sentence. In addition, I take into account all the relevant factors in mitigation that I outlined.

34. **In the case of Republic v Funsani Payenda**, Homicide (Sentence Re-Hearing) Case No. 18 of 2015, where the defendant was also convicted and sentenced for the same murder as in the instant case, I sentenced Mr. Payenda to 20 years imprisonment. I made strong observations in that case that the connection of the defendant to the murder was rather tenuous. My hands were tied though as I was not hearing the matter on appeal. I proceed to observe that the offence of which the defendant

stood convicted was a grave offence. I also highlighted the horrific circumstances of the murder.

35. In the case of the 1st Defendant, his connection with the offence is not in doubt. He was on the scene of the crime. He described how the deceased was shot.

36. All in all, I am of the opinion that a sentence of 25 years imprisonment with hard labour, effective from the date of arrest, is appropriate for the 1st defendant, Mr. Ernest Adamu, and I so order. This sentence is to run concurrently with the sentence of 20 years imprisonment with hard labour that was imposed on him for armed robbery in 2004.

37. I move on to the 2nd defendant. Unlike the 1st defendant, the 2nd defendant, who was on the scene of the shooting and was identified by several witnesses to have been among the main perpetrators of the crimes committed on that April night, has been full of excuses. He alleged he was not at the scene when clearly he was. He alleged that he was at home with his young brother on that day. He alleged that he was tortured by the Police. Generally, there has been no demonstration of remorse. Even now, during the sentencing proceedings which offered an opportunity for the 2nd defendant to show remorse, own up to the offence and apologise to the victimised family, no apology has been forthcoming. The impression that one is left with is that he is not apologetic.

38. All in all, I am of the opinion that a sentence of 36 years imprisonment with hard labour, effective from the date of arrest, is appropriate for the 2nd defendant, Mr. Sakondwera Elenelewo, and I so order. This sentence

is to run concurrently with the sentence of 25 years imprisonment with hard labour that was imposed on him for armed robbery in 2004.

39. Both defendants have the right to appeal against their respective sentences to the Supreme Court of Appeal within 30 days from the date hereof.

Made in Open Court at Zomba this 8th Day of May 2015

RE Kapindu, PhD

JUDGE