

**IN THE HIGH COURT OF MLAWI
PRINCIPAL REGISTRY**

Constitutional case no. 12 of 2005

BETWEEN:

Francis Kafantayeni1st Plaintiff
Edson Khwalala2nd Plaintiff
Faison Mawomba Gama3rd Plaintiff
Richard Chipoka4th Plaintiff
Tony Thobowa5th Plaintiff
Aron John6th Plaintiff

AND

Attorney GeneralDefendant

CORAM: Hon. Justice E.M. SINGINI, SC
Hon. Justice F.E. KAPANDA
Hon. Justice M.L. KAMWAMBE

Counsel for the Plaintiffs: Mr. Kasambara, Mr. Mwachwawa,
Mr. Chalamanda and Ms. Chibisa

Counsel for the Defendant: Hon. Justice Ansah, Attorney General,
Ms. Kayuni, Mr. Chidzonde and
Ms. Ng'ong'ola

Mr. Kapindu, of counsel for the Malawi Human Rights
Commission,
appearing as friend of the court
Mr. Jere, Official Interpreter

JUDGMENT

The action in these proceedings was commenced by one Francis Kafantayeni as plaintiff against the Attorney General as defendant. The plaintiff is a convict for the offence of murder and is under the sentence of death.

It was on 11th August, 2002, when the plaintiff, as accused, was tried

for murder in the High Court sitting at Thyolo before Chiudza Banda, J and a jury. He was represented by counsel. The State's case against the plaintiff as accused was that he had tied up his two year old stepson and buried him alive. He admitted that he had killed his stepson, but in his defence he claimed to have been acting in a state of temporary insanity induced by smoking Indian hemp. He was convicted on the same day of the offence of murder and sentenced, according to law, to the mandatory death penalty.

On 21st September, 2005, the plaintiff took out an originating summons in the High Court seeking a declaration on a point of law that the mandatory death penalty is unconstitutional on several grounds, as we have reproduced below. On the same day the learned Chief Justice certified the proceedings for hearing by a panel of three High Court Judges for adjudication over the constitutional point of law.

By a consent order for joinder of parties issued on 9th August, 2006, the plaintiff was joined by five others, namely, Edson Khwalala, Faison Mawomba Gama, Richard Chikopa, Tony Thobowa and Aron John who, on divers dates and in divers criminal proceedings in the High Court of Malawi, were also convicted of the offence of murder and were similarly sentenced to suffer the mandatory death penalty.

The plaintiffs are represented jointly by a team of counsel. The court also allowed the Malawi Human Rights Commission to appear in this action as friend of court and to be heard in support of the action of the plaintiffs.

The single issue that is before the court in this action is about the constitutionality of the mandatory death penalty for the offence of murder. It is important to clarify that the issue before the court is not about the death penalty as such, but rather about the mandatory requirement of the death penalty for

murder.

Counsel for the plaintiffs have submitted a wealth of what is an impressive bundle of pleadings, containing case authorities and international human rights instruments on the death penalty, including regional human rights protocols, as well as determinations by various international and regional human rights bodies. The Attorney General, too, in pleadings meant to be in opposition to the action, has made considerable submissions. The court is appreciative of the work done by counsel on both sides as presented in their pleadings and skeleton arguments. We heard the case in open court at the Principal Registry in Blantyre on 30th October, 2006, and we took time to give our judgement.

During hearing, however, the Attorney General, Justice Dr. Jane Ansah, informed the court that the State would not advance any position before the court but instead the State took a neutral stand in the matter and would not address the court on any points for determination by the court. As court we respected the stand taken by the State but we indicated that we would determine the question before us on its merits regardless of the neutral stand by the State. Indeed, we have freely considered the merits of the opposing written submissions by the Attorney General as were filed in the pleadings.

The challenge by the plaintiffs of the constitutionality of the mandatory death penalty is on four grounds. They submit that the mandatory death penalty is unconstitutional because-

- “ (a) it amounts to arbitrary deprivation of the person’s life in violation of section 16 of the Constitution on the right to life in that the mandatory imposition is without regard to the circumstances of the crime and is thus arbitrary;

- b) it is inhuman and degrading in violation of section 19(3) of the Constitution which prohibits torture of any kind or cruel, *inhuman* and *degrading* treatment or punishment;
- c) it violates section 42(2)(f) of the Constitution on the right to a fair trial in denying judicial discretion on sentencing;
- d) it violates the principle of separation of powers of State enshrined in the Constitution.”.

The court has found that there is a large volume of judicial decisions from a wide range of comparable jurisdictions on the question of the constitutionality of the mandatory death sentence. In most of the decided cases from comparable jurisdictions the question has been the same as the one before this court and it has consistently been a constitutional point of law. Although there is discernible consistency declaring the mandatory death sentence to be unconstitutional, we wish to observe that several court decisions have been characterised by dissenting opinions.

In Malawi, the death penalty is sanctioned by the Constitution and this has been done in relation to the right to life guaranteed by section 16 of the Constitution. The saving clause for the death penalty is in the proviso to section 16. We reproduce the wording of section 16, thus-

“The right 16. Every person has the right to life and no person shall be to life arbitrarily deprived of his or her life:

Provided that the execution of the death sentence imposed by a competent court on a person in respect of a criminal offence under the laws of Malawi of which he or she has been convicted shall not be regarded as arbitrary deprivation of his or her right to

life.”.

In our judgment, what the proviso to section 16 saves is the death penalty. We do not find that the wording necessarily also saves the mandatory requirement of the death penalty. We therefore find that it is open to us to examine and decide the question of the constitutionality of the mandatory requirement of the death penalty for the offence of murder.

In Malawi, the offence of murder is provided for under the Penal Code in sections 209 and 210, as follows-

“Murder 209 Any person who of malice aforethought causes the death of another person by an unlawful act or omission shall be guilty of murder.

Punishment for murder - 210. Any person convicted of murder shall be sentenced to death.”.

The wording of section 210 of the Penal Code makes the death penalty mandatory upon conviction for murder and removes any judicial discretion as to sentencing.

We recognise that common law jurisprudence over the offence of murder and over the death punishment for the offence has evolved over a long period through decided cases. Specifically as to the question about the constitutionality of the mandatory death penalty, we acknowledge the leading authority at present of the decision in the recent case of *Reyes v The Queen* [2002] 2AC, 235, a Privy Council decision in an appeal from Belize in the Caribbean in which one of the questions before the court challenged the constitutionality of the mandatory death penalty on the ground that it infringed the protection against subjection to inhuman or degrading punishment enshrined in section 5 of the Constitution of Belize. We note that the constitutional guarantee in section 19 of the Malawi Constitution is to the same

effect and of the same wording as in section 5 of the Constitution of Belize.

The decision in *Reyes v The Queen*, while a judicial decision, is also a whole treatise on the prevailing common law jurisprudence on the question of the constitutionality of the mandatory requirement of the death penalty; and we acknowledge that the decision in *Reyes v Queen* has been a valuable leading source for us in reaching our own decision in the matter before us in which we are having to determine precisely the same issue.

Of the four grounds submitted by the plaintiffs, we have reached our unanimous decision upon consideration of two of those grounds: the right of every person under section 19 of the Constitution to protection against being subjected to inhuman and degrading treatment or punishment; and the right of an accused person under section 42(2)(f) of the Constitution to a fair trial. We are content therefore not to address the other two grounds argued by counsel. However, we have gone further to also give consideration to the right, under section 41(2) of the Constitution, of access to justice, which extends to access to a court with jurisdiction for final settlement of legal issues.

The ground of inhuman and degrading treatment or punishment

Section 19 of the Malawi Constitution, in subsection (1), provides that the dignity of all persons shall be inviolable, and in subsection (3) guarantees every person the right against being subjected to torture of any kind or to cruel, inhuman and degrading treatment or punishment. Although not cited by counsel in submissions on behalf of the plaintiffs, and indeed often overlooked even in the case authorities that we have examined from comparable jurisdictions, we have considered that the protection in subsection (2) of section 19 of the Malawi Constitution also has application to this head in providing that “**In any judicial proceedings** or in any other proceedings before any organ of the State, and during the enforcement of a penalty, **respect for human**

dignity shall be guaranteed”.

As was stated in the *Reyes* decision at page 241, paragraphs 10 and 11-

“Under the common law of England there was one sentence only which could be judicially pronounced upon a defendant convicted of murder and that was the sentence of death. This simple and undiscriminating rule was introduced into many states now independent but once colonies of the Crown.

...

“It has however been recognised for many years that the crime of murder embraces a range of offences of widely varying degrees of criminal culpability. It covers at one extreme the sadistic murder of a child for sexual gratification, a terrorist atrocity causing multiple deaths or a contract killing, at the other the mercy killing of a loved one suffering unbearable pain in terminal illness or killing which results from an excessive response to a perceived threat. All killings which satisfy the definition of murder are by no means equally heinous.”.

The decision in *Reyes* also cites with approval several other authoritative commentaries disapproving of the mandatory imposition of the death penalty. For example, in England a House of Lords Select Committee on Murder and Life Imprisonment in 1989 considered that “murders differed so greatly from each other that it was wrong that they should attract the same punishment”.

In our judgment, we agree with the reasoning in some of the submissions and passages, cited with approval in the *Reyes* decision, first, at page 247 paragraph 29 that “a sentencing regime which imposes a mandatory sentence of death on all murderers, or murderers within specified categories, is inhuman and degrading because it requires sentence of death, with all the

consequences such a sentence must have for the individual defendant, to be passed without any opportunity for the defendant to show why such sentence should be mitigated, without any consideration of the detailed facts of the particular case or the personal history and circumstances of the offender and in cases where such a sentence might be wholly disproportionate to the defendant's criminal culpability.”

Another passage found at page 249 of the *Reyes* decision, attributed to Byron CJ sitting in consolidated appeals of *Spence v The Queen* and *Hughes v The Queen* (unreported) 2 April 2001 (Criminal Appeals Nos. 20 of 1998 and 14 of 1997) in the Eastern Caribbean Court of Appeal, puts the issue of the constitutionality of the mandatory death penalty more succinctly. The two cases originated from two Caribbean states, the state of Saint Vincent and the Grenadines and the state of Saint Lucia, which have a similar clause in their respective Constitutions, section 5, to the same effect and wording as section 19(3) in the Malawi Constitution. Byron CJ states: “The issue here is whether it is inhuman to impose a sentence of death without considering mitigating circumstances of the commission of the offence and the offender; whether the dignity of humanity is ignored if this final and irrevocable sentence is imposed without the individual having any chance to mitigate; whether the lawful punishment of death should only be imposed after there is a judicial consideration of the mitigating factors relative to the offence itself and the offender”.

Based on that phrasing of the issue, Byron, CJ, concludes, in part, that “the requirement of humanity in our Constitution does impose a duty for consideration of the individual circumstances of the offence and the offender before a sentence of death could be imposed in accordance with its provisions.”.

Saunders, JA, in the same decision agreed with Byron, CJ, and held that

“the dignity of human life is reduced by a law that compels a court to impose death by hanging indiscriminately upon all convicted of murder, granting to none an opportunity to have the individual circumstances of his case considered by the court that is to pronounce the sentence”. He went further to hold that-

“ It is and has always been considered a vital precept of just penal laws that the punishment should fit the crime. If the death penalty is appropriate for the worst cases of homicide, then it must surely be excessive punishment for the offender convicted of murder whose case is far removed from the worst case. It is my view that where punishment so excessive, so disproportionate *must* be imposed on such a person courts of law are justified in concluding that the law requiring the imposition of the same is inhuman. ... I am driven firmly to one conclusion. To the extent that the respective sections of the Criminal Codes of the two countries are interpreted as imposing the mandatory death penalty those sections are in violation of section 5 of the Constitutions”.

In those consolidated appeals, the majority decision of the court declared the mandatory requirement of the death penalty unconstitutional for being inhuman treatment or punishment by not allowing for individualised consideration of the offender and the commission of the offence.

Similarly, in the *Reyes* case the Privy Council by unanimous decision held that the mandatory requirement of the death penalty was inhuman treatment or punishment and in violation of section 7 of the Constitution of Belize on the right against the subjection to inhuman and degrading treatment.

Proportionality of a sentence is also a factor in deciding whether a sentence is inhuman. We consider that the Constitutional Court of South Africa

aptly addressed the issue of proportionality in the case of *State v Makwanyane* 1995 (3) SA 391 where it said at page 433, paragraph 94-

“Proportionality is an ingredient to be taken into account in deciding whether a penalty is cruel, inhuman and degrading...; factors such as the enormity and irredeemable character of the death sentence in circumstances where neither error nor arbitrariness can be excluded, the expense and difficulty of addressing the disparity which exists between accused persons facing similar charges... are also factors that can and should be taken into account in dealing with the issue.”.

We consider the reasoning in those passages persuasive and to be compelling jurisprudence on the position that the mandatory death penalty is unconstitutional on the ground of being inhuman treatment or punishment.

Additionally, in our own consideration we find for example that where a group of persons commit murder and are tried as co-accused there is sometimes bound to be varying degrees of culpability among them in their involvement in the commission of the offence warranting differentiation in the punishment that may be imposed on each individual offender; and the mandatory death penalty under section 210 of the Penal Code would not permit of individualised sentencing, unless the court were to engage in superficially reducing the offence to one of manslaughter or some lesser offence with respect to a co-accused with lesser culpability, and obviously such approach would betray justice in the matter.

In our judgment we have reached the same conclusion as in the *Reyes* decision and in the other passages we have cited, and we hold that the mandatory imposition of the death penalty for the offence of murder as provided by section 210 of the Penal Code amounts to inhuman treatment or punishment in its application.

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.

Counsel for the plaintiffs submit that the mandatory death penalty as provided by section 210 of the Penal Code violates the Constitution which in section 42(2)(f) guarantees the right of every accused person to a fair trial in that the mandatory death penalty in effect “prohibits the courts from determining the sentence for anyone convicted of murder. Instead section 210 of the Penal Code requires a sentence of death to be imposed without regard to the individual circumstances of either the offence or the offender”.

Under this heading of denial of fair trial, counsel for the plaintiffs have cited in their support the provision in Article 14, paragraph 5, of the International Covenant on Civil and Political Rights, to which Malawi is a State Party. We accept and recognise that the Covenant forms part of the body of current norms of public international law and in terms of section 11(2) of the Malawi Constitution courts in Malawi are required to have regard to its provisions in interpreting the Constitution. Paragraph 5 of Article 14 of the Covenant provides that-

“Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.”

Counsel for the plaintiffs contend that the mandatory death penalty under section 210 of the Penal Code violates this right of a convicted person, citing a number of case authorities in support. Notable among those is the case

of *Edwards v The Bahamas* (Report No. 48/01, 4th April 2001), decided by the Inter-American Commission on Human Rights, which held that “By reason of its compulsory and automatic application, a mandatory sentence cannot be the subject of an effective review by a higher court. Once a mandatory sentence is imposed, all that remains for a higher court to review is whether the defendant was found guilty of the crime for which the sentence is mandated”.

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 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.

PRONOUNCED in open court at the Principal Registry in Blantyre this 27th day of April, 2007.

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HONOURABLE JUSTICE E.M. SINGINI, SC

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HONOURABLE JUSTICE F.E. KAPANDA

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HONOURABLE JUSTICE M.L. KAMWAMBE