MALAWI JUDICIARY

IN THE MALAWI SUPREME COURT OF APPEAL

MSCA Miscellaneous Criminal Appeal No 12 of 2017

(Being High Court, Principal Registry, Criminal Sentence Rehearing Case No. 35 of 2016)

BETWEEN

CHARLES KHOVIWA **APPELLANT**

AND

THE REPUBLIC **RESPONDENT**

CORAM: **Hon. The Chief Justice A.K.C Nyirenda SC**

Hon. Justice E.B. Twea SC, JA

Hon. Justice R.R. Mzikamanda SC, JA

Hon. Justice A.C. Chipeta SC, JA

Hon. Justice L.P. Chikopa SC, JA

Hon. Justice F.E. Kapanda SC, JA

Hon. Justice D.F. Mwaungulu SC, JA

Chithope and Phiri, for the appellant

Masanjala and Chitsime, for the respondent

Nkhata, Dr. and Twea, Amicus Curiae

Shaibu, Itimu and Maiden, Judicial Research Officers

Chimtande and Masiyano, Court Clerks

Mthunzi and Mombera, Court Reporters

JUDGMENT

Nyirenda, CJ

The majority judgment of the Court allows the appeal. I agree that the appeal should be allowed for the reasons advanced.

Twea, JA

I dismiss the appeal for the reasons contained in my dissenting opinion.

Mzikamanda, JA

I would allow the appeal for the reasons given

Chipeta, JA

I am like-minded. The appeal should be allowed for the reasons given by Justice Mwaungulu JA.

Chikopa, JA

I would allow the appeal.

Kapanda, JA

There must be a rehearing as prayed for.

Mwaungulu, JA.

This appeal must be allowed for the reasons given in this judgment.

Mwaungulu JA

Precis

The High Court decision of *Kafantayeni and Others v Attorney General* (2005) Constitutional Case No 12 (MHC) (Bt) (unreported), of 27 April, 2007, is an oasis of discussion, academic and judicial, here and abroad. The present appeal demonstrates a fission in the court – the High Court of Malawi – where the case meant to actualize its freshness and prowess. The case has been described, rightly so, as landmark.

Indeed, when debates on the death penalty thrive, the case, albeit only temporarily, brought a lull. Malawi, because of the decision, categorizes in the middle tier between states with the death penalty on statute books and those that abolished the death penalty all together. The Constitution, however, makes the right to life a non-derogable right. So much so that laws made under it cannot legislate for the death penalty. The case sandwiches between sporadic spells of execution, refusal to sign death warrants and a Government moratorium on execution of the death penalty. In the court below, however, the *ratio decidendi* of *Kafantayeni and others*

v Attorney General and its exact scope divide. The practice of this Court, after *Yasini v Republic* (2005) Criminal Appeal No 25 (MSCA) (unreported), delivered on 1 November, 2010, affirming *Kafantayeni and Others v Attorney General,* has been everything but clear.

This decision, where the appeal is allowed and additional directions given, should seal clarity and lead to a smooth application of *Kafantayeni and Others v Attorney General.* When the Court below decided *Kafantayeni and others v Attorney General,* cases were at different stages of the criminal justice system, 150 people sentenced to death under the mandatory section 210 of the Penal Code. It is quite clear, though, that the statement about the constitutionality of the death penalty was obiter. The constitutionality of the death penalty is at askance.

The question in *Kafantayeni and Others v Attorney General* was whether a mandatory death penalty was constitutional. The Court below determined stated that a mandatory death penalty was unconstitutional. The court below, in the course of the judgment, however, said:

> 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…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 Court below, which invalidated section 210 of the Penal Code and, by extension, 38 (1) of the Penal Code section based on section 5 of the Constitution, never closely interpreted section 16 of the Constitution and never considered sections 25 (a) and section 26 in prescribing death as one of the sentences and sections 38 (1) (for treason), 63 (1) (for piracy), 133 (for rape), 210 (for murder), 217A (2) (a) (for genocide) and 309 (1) and (2) (for housebreaking and burglary, respectively) of the Penal Code legislation prescribing the death penalty, from sections 19 (1), 19 (2), 44 (1), 44 (2), 45 (1), 45 (2) and 46 of the Constitution. Sections 25 (a) and section 26 in prescribing death as one of the sentences and sections 38 (1) (for treason), 63 (1) (for piracy), 133 (for rape), 210 (for murder), 217A (2) (a) (for genocide) and 309 (1) and (2) (for housebreaking and burglary, respectively) of the Penal Code, in imposing the death penalty or capital punishment, the style of some, do not pass the constitutional muster. Sections 25 (a) and section 26 in prescribing death as one of the sentences and sections 38 (1) (for treason), 63 (1) (for piracy), 133 (for rape), 210 (for murder), 217A (2) (a) (for genocide) and 309 (1) and (2) (for housebreaking and burglary, respectively) of the Penal Code negate, limit or abolish an otherwise a non-derogable right - the right to life. The death penalty itself is unconstitutional.

This appeal proceeds on decisions of the Court below and this Court in *Kafantayeni and Others v Attorney General* and *Yasini and another v Republic*, respectively, requiring a sentence rehearing after the Court below held that a mandatory death penalty was

unconstitutional. For the order in this matter, it matters less whether the death penalty or the mandatory death penalty is the basis of the invalidity.

History

The Court below on 16 September, 2003, in a jury trial, convicted Charles Khoviwa, the appellant, and others of murder. On that day, the State informed the Court that the appellant had no previous convictions. The appellant's Counsel informed the Court that he was saying nothing at all and in mitigation because the death penalty was, then, mandatory. The judge sentenced the defendant to death when the death penalty under section 210 of the Penal Code was mandatory for all sorts of murder, premeditated or involuntary.

It is unclear when he appealed. There is no application for extension of time. The appellant, therefore, must have appealed within time and, at any rate, no later than 30 days from the date of the conviction and sentence – they occurred on the same day. On 9 April, 2004, the President commuted the death sentence to life imprisonment. This Court, however, never determined the appeal until 1 July, 2010.

It dismissed the appeal against conviction and sentence. Consequently, the death penalty remained as the punishment although, practically, the appellant, because of commutation, was on a sentence for life. This Court, dismissing the appeal against sentence, said:

> We must now considered the appeal against sentence. It is true that in the case of *Twoboy Jacob v. Republic*, M.S.C.A Criminal Appeal No. 18 of 2006**,** this court accepted the High Court's decision that the mandatory imposition of the sentence of death in every conviction of murder, regardless of the presence of mitigating circumstances, is unconstitutional. We also agreed that the trial judge must at all times possess discretion in relation to the gravity of sentence which must be imposed, even in cases where the defendant is convicted of murder; see Constitutional Case No. 12 of 2007 *Kafantayeni and Another v. Attorney General*. In the present case however, we take the view that the appellant does not deserve the court's lenience. The appellant and a colleague assaulted and stabbed a defenseless person who was fleeing the scene of the fight to save himself from trouble. The appellant and his accomplice did not want to give the deceased a chance to live. His conduct on the material day was inexcusable. He deserves the death sentence.

The Director of Public Prosecution's resentencing hearing

On 22 November, 2016 the Director of Public Prosecutions, following *Yasini v Republic*, delivered exactly four months after this Court's decision on this matter, presented the appellant to Court below for a sentencing rehearing. For the rehearing, the appellant, in addition to own evidence, obtained statements from the victim's parents, relations, neighbours of the appellant, the victim and prison authorities. There were, on the appellant's behalf,

lengthy and detailed submissions in the Court below. The Director of Public Prosecutions questioned jurisdiction. The Court below heard the jurisdiction objection on 13 January 2017 and delivered judgment, subject of this appeal, on 27 April, 2017.

The appellant's submissions in the Court below

First, it was submitted that the appellant was entitled a sentencing rehearing following *Yasini v Republic* that applied *Kafantayeni and others v Republic* to all persons sentenced to mandatory death penalty. The appellant, therefore, submitted that it included him, albeit, the death penalty was affirmed by this Court. Moreover, albeit this Court confirmed the sentence, it was submitted, the lower court passed the death penalty when the sentence was mandatory. Even this Court's decision confirming the sentence, it was submitted, occurred after this Court in *Jacob v. Republic* approved *Kafantayeni and others v Republic* and before this Court in *Yasini v Republic* applied *Kafantayeni and others v Republic* to all on the death roll. Under the practice established, since 2015, when *Kafantayeni and others v Republic* and *Yasini v Republic* were implemented, the appellant submitted, the Court below follows section 321J of the Criminal Procedure and Evidence Code.

The appellant submitted that the Court below had in *Republic v Galeta* (2015) Sentence Rehearing Cause No 47 (MHC) (PR) (unreported) and *Republic v Lemani*¸ where the jurisdiction question never arose, allowed a resentencing hearing where, like here, this Court heard the appeal after *Kafantayeni and others v Attorney General* but before *Yasini v Republic.* The jurisdiction question only arose in two cases: this case and *Chinkango Republic* ((2015) Sentence Rehearing Cause No 36 (MHC) (PR) (unreported). The appellant submitted that in *Chinkango Republic* the Court below favoured a rehearing and nevertheless remitted the matter to the Supreme Court of Appeal. This Court, the appellant submitted, refused to set down the case for a sentence rehearing because it had already resolved the matter to finality. In *Republic v Maiche* ((2016) Sentence Rehearing Cause No 21 (MHC) (PR) (unreported), the Court below, refused to follow its concurrent decision. The appellant, therefore, submitted that the Court below had jurisdiction although this Court had on appeal determined the sentence.

The appellant further submitted that *Kafantayeni and others v Attorney General* and *Yasini v Republic* created a right – to a sentencing rehearing – that, distinct from it, an appeal cannot override. Consequently, the appellant submitted, a right to a resentencing hearing subsists despite an appeal. The appellant submitted that a resentencing hearing is a full hearing in the context of section 260 of the Criminal Procedure and Evidence Code – the section applies in subordinate courts, section 321J applies to the High Court. A rehearing, it was submitted, relying on this statement in *Republic v Payenda*, involves considering individual circumstances, not afforded by an appeal:

> All these authorities emphasize the centrality of taking into account the individual circumstances of the defendant when sentencing. The previous sentence having been declared constitutionality invalid, the valid sentencing is taking place now.

Moreover, the appellant, relying on this statement in *Republic v Maiche*, submitted, *Yasini v Republic* created the right to a sentencing rehearing in the High Court, not a right to appeal to the Supreme Court:

> …[T]he defendant in this matter is clearly entitled to a sentence rehearing, and not an appeal, as per *Kafantayeni* which has been affirmed by the Supreme Court of Appeal on numerous occasions including in *Yasini*.

The appellant further submitted that refusing the appellant a sentencing rehearing because his appeal was made earlier would be discriminatory against him. It would leave him, and others like him, in the insidious position where the right to sentencing rehearing would be denied them because they prosecuted their appeals promptly and urgently.

The appellant further submitted that *Kafantayeni and others v Attorney General* and *Yasini v Republic*, properly understood, made mandatory sentences void *ab initio*. Consequently, there was no sentence and the real sentence would be one passed at the sentencing rehearing. Consequently, the appellant submitted, the sentence passed by the Supreme Court was vitiated thereby and could not, properly, prevent a sentencing rehearing. The appellant relied on *Payenda v Republic* and this statement in *Republic v Maiche*:

> … [T]he whole process of the mandatory sentence at trial was invalidated on various constitutional grounds. That invalidated sentence could not be subject of an appeal as it was indeed void *ab initio*. The defendant must therefore be properly sentenced otherwise the invalidation of the mandatory death sentence would be meaningless and that would also be potentially unconstitutional as the defendant would be denied an effective remedy vis a vis *Kafantayeni* which has been affirmed by the Supreme Court of Appeal in numerous cases including in *Yasini*… there was a new retrospective constitutional rule since *Kafantayeni*, which was affirmed by the Supreme Court of Appeal in many appeal cases including *Yasini*, that the mandatory death sentence was a constitutionally invalid punishment which should not have been imposed before *Kafantayeni*.

The appellant submitted that *Yasini v Republic* effectively overruled this Court's decision in *Khoviwa v Republic* and the doctrine of *stare decis* has no application on a sentencing rehearing and, according to *Republic v Maiche*, is inapplicable:

> …[T]he new constitutional rule in *Kafantayeni* is clearly retrospective as held by the High Court sitting in a constitutional matter and as frequently affirmed by the Supreme Court of Appeal including in *Yasini*. The new constitutional rule abolished the mandatory death sentence and provided a remedy that is also retrospective and therefore no Court has authority to leave in place the mandatory death sentence that has been held to be retrospectively constitutional invalid.

There was an equally comprehensive submission on the actual sentence. In the light of the view taken on the matter, only those aspects that assist resolve the appeal require

mentioning. Central to these considerations was the appellants' thrust that, were a sentencing rehearing held, the death penalty would not have been passed and rather a life sentence, being served following commutation, would have been a term of years much shorter than a life sentence. The appellant, therefore, submits that he has served 14 years imprisonment already which with commutation amounts to an imprisonment of 21 years.

He contended that were a sentencing rehearing to be held, he would not have to serve a death sentence. In *Chalera and others v Republi*c (2012) Criminal Appeal No 5 (MSCA and *Republic v Kasunda* [2006] MWHC, 67 and, *Republic v Chimwala* (2015) Sentence Rehearing Cause No 56 (MHC) (PR) (unreported), this Court and the High Court, respectively, like in this case, where the record could not be found, prisoners were acquitted of murder or sentences that resulted in immediate release an immediate release. The appellant, however, concedes that, although the court cannot, on a sentencing rehearing impose or retain the death penalty where the case file is lost, the High Court still retains jurisdiction to rehear the matter and pass a different sentence (*Republic v Dzimbiri* (2015) Sentence Rehearing Cause No 4 (MHC) (PR) (unreported)*;* (*Republic v Kumitumbu* (2015) Sentence Rehearing Cause No 59 (MHC) (PR) (unreported); (*Republic v Tsogolani* (2015) Sentence Rehearing Cause No 52 (MHC) (PR) (unreported);and (*Republic v Elias* (2015) Sentence Rehearing Cause No 44 (MHC) (PR) (unreported).

The final point relevant to disposing this appeal comprises in the appellant's submission in the Court below that if there was no rehearing, the appellant would be incapable of introducing evidence to influence sentencing. One such evidence, where the record cannot be found, is the prisoner's own account of what happened. This, the appellant's submits, has been accepted in *Republic v Dzimbiri, Republic v Kumitumbu, Republic v Tsogolani, Republic v Elias* and (*Republic v Malita* (2015) Sentence Rehearing Cause No 46 (MHC) (PR) (unreported).

The State's submissions in the Court below

The State in the Court below had brief and concise submissions. The State questioned the jurisdiction of the Court below to rehear the appeal and, therefore, never submitted on the sentencing process and actual sentence. The State accepted that *Kafantayeni and others v Attorney General* and *Yasini v Republic* created a right to a sentencing rehearing in the High Court for those sentenced to a mandatory sentence. The State also conceded as much that a sentencingre hearing would, because of section 321J of the Criminal Procedure and Evidence Code, involve receiving information and reports to inform the sentence, matters raised by the Court below in *Republic v Pose and another* [1997] 2 MLR 95,98.

The State, however, submitted that the High Court lacked jurisdiction where, like here, after the Supreme Court determined the death penalty, in the countenance of *Kafantayeni and others v Republic*, is, considering all, the correct sentence. The State submitted that the Supreme Court in this case, rather than confirm the sentence, should probably have, under section 16 (d) of the Supreme Court Act, remitted the case for a rehearing. The respondent,

relying on section 9 of the Supreme Court of Appeal Act, submitted that the High Court could not hear the matter, its remaining duty being to reinforce the judgment of the Supreme Court.

The judgment of the Court below

On 13 January, 2013 the Court below delivered judgment. It, characteristically, never considered, despite all information, the severity of the sentence. Of the two approaches on the question, the Court below inclined to the position that, based on *stare decis*, this Court's decision on the sentence was impeccable and, therefore, could not be overlooked by the Court below. It declined the approach of the Court below in *Uladi v Republic* ((2008) Criminal Appeal Case No 5 (MSCA) (unreported). The Court below followed this statement in the Court below in *State v Nambazo and another* ((2016) Sentence Rehearing Cause No 74 (MHC) (Bt) (unreported)):

> This Court cannot grant an order which will be tantamount to usurping the powers and jurisdiction of the Supreme Court of Appeal having already upheld the applicant's conviction and sentence.

The Court below thought that the Supreme Court having said in this case that the applicant never deserved its lenience, this Court meant that it had considered the gravity of the matter and reached a deliberate and reasoned decision, in the face of *Kafantayeni and others v Attorney General*, that the sentence was incontrovertible. The court also thought that the Supreme Court must have held a prudent counsel on mitigation in favour of the client. The Court below categorically opined that the Supreme Court of Appeal in this case was fully aware of the decision in *Kafantayeni and others v Attorney General*.

The Court below drew a distinction – that bedevils the Court below– between a hearing and an appeal. The court said:

> I do not think that the Supreme Court lost the spirit of the *Kafantayeni* case. It was aware that the dictates of the case were that the convict be given opportunity to be heard on sentence and that the courts do exercise sentencing discretion on murder convicts. This it did through the appeal which is an alternative route to re-sentencing. This alternative route did not have to be mentioned by the *Kafantayeni* case as the case did not envisage then that there would be cases which would go by way of appeal, and in case, those cases on appeal to the Supreme Court of Appeal would undergo the process of reconsidering the same issue of sentence.

The Court below felt justified by this Court's decisions in *Uladi v Republic* ((2008) Criminal Appeal Case No 5 (MSCA) (unreported) and *Ngulube and another v Republic* ((2006) Criminal Appeal No 35 (MSCA) (unreported)). These were cases where, in the countenance of *Kafantayeni and others v Attorney General*, this Court confirmed the death penalty or reduced the death penalty to imprisonment for a term – not life imprisonment.

The Court below resolved the validity of the death penalty passed by a court after *Kafantayeni and others v Attorney General* in this statement:

> May be the real issue is that there was nothing for Supreme Court Appeal to uphold as there was no existing valid sentence of death since it was invalidated. Admittedly, this is a matter of technicality. When the Supreme Court of Appeal says it upholds the sentence, it really means that the invalid sentence of death is validated by the appeal. However, in this appeal case, the Supreme Court did not in any way use the words that it upheld the high court sentence which was invalidated by the *Kafantayeni* case. Instead, it said that the applicant does not deserve the court's leniency and that he deserved the death sentence. The Supreme Court of Appeal chose its words very carefully. However, the appeal may be said not tenable because there was no sentence to appeal against. In other words, the Supreme Court Appeal did not have jurisdiction to attend to appeal matters of cases covered by the Kafantayeni case.

Relying on *Republic v Chinkango* ((2015) Sentence Rehearing Case No 36 (MWHC) (Bt) (unreported)), the Court below thought that this Court preserved the right to appeal against sentence and, therefore, not all cases had to go for resentencing hearing before the High Court. Most importantly, to the Court below, matters under appeal could proceed and if finalized not amenable to a resentencing hearing.

The appeal to this Court

On 10 January, 2017 the appellant filed an appeal to this court against the judgment on the following grounds. First, the Court below erred in not according the appellant a sentence re-hearing based on the Supreme Court of Appeal judgment of *Yasini v Republic* and the judgment of the High Court sitting on a constitutional matter in *Kafantayeni and Others v the Attorney General*. Secondly, the Court below erred in equating an appeal on sentence to a sentence rehearing and deciding that the two are alternatives as the two are different legal processes and an appeal cannot be a substitute or alternate for a sentence re-hearing. Thirdly, the Court below erred in not according the appellant a sentence re-hearing on the basis that the appellant had earlier already appealed to the Supreme Court of Appeal as the decision of the Supreme on the death sentence was decided *per incuriam* since at the time of entertaining the appeal on death penalty there was no valid death penalty at all against the appellant. Fourthly, not according the appellant a sentence re-hearing is both discriminatory and arbitrary.

The appellant's submissions in this Court

On the first ground of appeal, the appellant submits that this court was bound to accord the appellant a resentencing hearing. This was the consequence of *Kafantayeni and Others v Attorney General* confirmed in *Yasini v Republic*. In *Kafantayeni and Others v Attorney General* the Court below ordered that the High Court was to hear the plaintiffs. In *Yasini v Republic* this Court decided that *Kafantayeni and Others v Attorney General* "affected the rights of all prisoners who were sentenced to death under the mandatory provisions of section 210 of the Penal Code", and not just the six plaintiffs and that the "right to a re-sentence hearing therefore accrued to all such prisoners". Moreover, the appellant submits, this Court compelled the Director of Public Prosecutions to bring, something repeated by the Court below in

Republic v Alumeta (2017) Sentencing Re-hearing case No. 36 (MWHC) (Ll) (unreported) and *Republic v Phiri* (2017) Sentencing Re-hearing case No. 25 (MWHC) (Ll) (unreported), to the High Court. The appellant submits, on *Republic v Chinkango* (2015) Sentencing Re-hearing case No. 36 (MWHC) (Bt) (unreported) that the remedy created by *Kafantayeni and Others v Attorney General* was a re-hearing, not an appeal. The appellant submits that, on proper understanding of *Kafantayeni and Others v Attorney General* and *Yasini v Republic*, the High Court was to conduct a re-hearing regardless of an appeal to the Supreme Court of Appeal.

On the second ground of appeal the appellant submits that an appeal is a distinct legal process from a re-sentencing hearing. The appellant disputes that a re-sentencing hearing is alternate to an appeal. Consequently, a re-sentencing hearing can occur despite an appeal. The appellant submits that a re-sentencing hearing is different from a re-hearing that occurs during an appeal. The appellant submits that in an appeal re-hearing, based on *Chimanda v Maldeco Fisheries Limited* [1993] 16 (2) MLR 493, *Pryce v Republic* (1971-72) 6 ALR (Mal) 65, *Chidothi and Another v Republic* [1992] 15 MLR 51, the Court proceeds on the facts and material before the trial court, weighing conflicting evidence and drawing its inferences. An appeal re-hearing therefore does not, generally comport acceptance of new or additional evidence. The appellant submits that, from decisions from the Court below(*Dzimbiri v Republic* (2015) Sentencing Re-hearing case No. 4 (MWHC) (Bt) (unreported), *Republic v Payenda* (2015) Sentencing Re-hearing case No. 18 (MWHC) (Za) (unreported), *Republic v Galeta and Another* (2015) Sentencing Re-hearing case No. 6 (MWHC) (Bt) (unreported) and *Republic v Msimuko* (2015) Sentencing Re-hearing case No. 24 (MWHC) (Bt) (unreported), a Court will allow adducing evidence and the Court will receive such information as it thinks fit to inform itself. The evidence itself may include evidence from the prisoner relations or neighbours. It is not necessary, like in an appeal, for the prisoner to apply for additional or new evidence. The appellant submits that this new evidence becomes necessary because the effect of *Kafantayeni and Others v Attorney General* and *Yasini v Republic* is that the previous death sentence is invalid *ab initio* so much so that the real sentencing hearing is the one that occurs a re-sentencing hearing. The appellant relies on this statement in *Republic v Payenda.*

> All these authorities emphasize the centrality of taking into account the individual circumstances of the defendant when sentencing. The previous sentence having been declared constitutionally invalid, the valid sentencing is taking place now.
>
> The precise issue of whether, when an initial sentence has been invalidated after a substantial passage of time since conviction, post-conviction factors of the convict must be taken into account on resentencing, recently came up for determination before the US Federal Supreme Court in the case of *Pepper vs United States*, 131 S. Ct. 1229 (2011).

The appellant further submits that the case for a resentencing hearing becomes more urgent these days because of amendments introduced in sections 260 and 261 of the Criminal Procedure and Evidence Code.

There are, concerning receiving of evidence, the appellant submits, now Guidelines on the Homicide Sentence re-hearing which, acknowledged in *Dzimbiri v Republic,* emphasize the need to call witnesses and submit relevant report during a sentencing re-hearing. The appellant, therefore, submits that a sentence re-hearing is distinct from an appeal. The Court below could not, therefore, conclude that an appeal is alternate to a re-sentencing hearing.

The appellant further submits, based on *Republic v Chinkango* and *Republic v Maiche,* that the requirements for a re-sentencing hearing are not satisfied by an appeal process. In *Republic v Maiche* the court said:

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

In *Republic v Chinkango* the Court said:

> At this point in time the critical observation which the court would wish to make and which has been passionately canvassed by counsel for the convict is that by not being availed a sentence rehearing the convict was deprived of the right to bring evidence/facts in mitigation as the appeal was decided on the facts/evidence in the lower court which did not receive evidence/facts in mitigation as the death sentence was then mandatory. What remedy then should this court avail to the convict considering that there is a decision on his sentence by a superior court? It seems the remedy, in the circumstances, would be such as would give the convict the chance to present facts/evidence.

The appellant further submits that he would not have appealed if this court, in line with *Kafantayeni and Others v Attorney General* and *Yasini v Republic,* had conducted a resentencing hearing. The Court below could not, therefore properly rely only on the submissions of counsel on the evidence based on the judgment. The appellant, because of the mandatory sentence, never said anything in mitigation or raised any evidence to influence the sentence, something now entrenched, in relation to the High Court, in section 321J of the Criminal Procedure and Evidence Code. Moreover, the appellant submits, the decision, in the circumstances of this case plainly excluded, as is the practice now, post-conviction

circumstances as adumbrated in *Republic v Makolija* (2015) Sentencing Re-hearing case No. 12 (MWHC) (Bt) and *Republic v Payenda*. The appellant, therefore, contends, that this court's treatment of the evidence only proceeding from the trial was inadequate to cover all mitigating and aggravating circumstances arising in a particular case to a particular offender. The appellant submits that the gamut of those considerations are illustrated in *Gulumba v Republic* (2003) Miscellaneous Criminal Application Case No. 51 (MWHC) (Bt) (unreported):

> Sentences courts pass, considering the public interest to prevent crime and the objective of sentencing policy, relate to actions and mental component comprising the crime. Consequently, circumstances escalating or diminishing the extent, intensity or complexion of the actus reus or mens rea of an offence go to influence sentence. It is possible to isolate and generalize circumstances affecting the extent, intensity and complexion of the mental element of a crime: planning, sophistication, collaboration with others, drunkenness, provocation, recklessness, preparedness and the list is not exhaustive. Circumstances affecting the extent, intensity and complexion of the prohibited act depend on the crime. A sentencing court, because sentencing is discretionary, must, from evidence during trial or received in mitigation, balance circumstances affecting the actus reus or mens rea of the offence.
>
> Besides circumstances around the offence, the sentencing court should regard the defendant's circumstances generally, before, during the crime, in the course on investigation, and during trial. The just sentence not only fit the crime, it fits the offender. A sentence should mirror the defendant's antecedents, age and, where many are involved, the degree of participation in the crime. The defendant's action in the course of crime showing remorse, helpfulness, disregard or highhandedness go to sentence. Equally a sentencing court must recognise cooperation during investigation or trial.
>
> While the criminal law is publicly enforced, the victim of the affected of the crime on the direct or indirect victim of the crime are pertinent considerations. The actual circumstances for victims will depend, I suppose, on the nature of the crime. For example on the offences against the person in sexual offences, the victim's age is important. An illustration of circumstances on indirect victims is the effect of theft by servant on the morale of other employees, apart from the employer.
>
> Finally, the criminal law is publicly enforced primarily to prevent crime and protect society by ensuring public offer. The objectives of punishment range from retribution, deterrence, rehabilitation to isolation. In practice, these considerations inform sentencing courts although helping less in determining the sentence in a particular case."

The appellant submits that had the appellant been afforded a sentencing rehearing, he would not have had a death sentence because in all cases where there has been a resentencing hearing,

the death penalty has not been imposed and sentences ranged from immediate release, 6 years to 30 years. The appellant has already served 21 years.

On ground 3, the appellant submits, based on section 5 of the Constitution, *Republic v Payenda* ((2015) Homicide Sentence Rehearing Case No 18 (MWHC) (Bt) (unreported), *Republic v Maiche, Kafantayeni and others v Attorney General, Jacob v Republic* and *Alumeta v Republic* (((2006) Criminal Appeal No 31 (MSCA) (unreported) that when determining it, the sentence was invalid *ab initio* and, therefore, this Court had no sentence to consider. In considering the sentence the Court, therefore, acted *per incuriam.* The appellant submits that the death penalty imposed in this case was invalid vide section 5 of the Constitution which provides.

> Any act of Government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency, be invalid.

The appellant relied on several passages in *Republic v Maiche.* The first passage is

> This Court agrees with the defence that the defendant in this matter is entitled to a sentence rehearing precisely because the whole process of mandatory sentence at trial was invalidated on various constitutional grounds. That invalidated sentence could not be subject of an appeal as it was indeed void ab initio. The defendant must therefore be properly sentenced otherwise the invalidation of the mandatory death sentence would be meaningless and that would also be potentially unconstitutional as the defendant would be denied an effective remedy vis a vis Kafantayeni which had been affirmed by the Supreme Court of Appeal in numerous cases including in Yasini.
>
> What this means is that the Supreme Court of appeal decided Mache per incuriam. When the Supreme Court of Appeal observed that defendant was entitled to a sentence that would take into account of mitigating and aggravating factors as per Kafantayeni the Supreme Court of Appeal should have considered that the sentence imposed by the trial court was non-existent as it had been declared unconstitutional by Kafantayeni. There was therefore no room for entertaining an appeal on an invalidated and unconstitutional mandatory death sentence.

The second passage is

> In conclusion this court will proceed to hold a sentence rehearing particularly because of the constitutionally fundamental reason that the sentence to which the defendant was originally sentenced was invalidated on constitutional grounds and the appeal on the same was not a sentence rehearing that was ordered to follow upon the invalidation of the original mandatory death sentence as per Kafantayeni.
>
> The court is also of the view that for the same foregoing reasons Yasini was per incuriam and not binding on this court in so far as it refused to allow the

> appellant a sentence rehearing before the High Court. That part of the decision would possibly have been different had the arguments considered before this Court were put before the Supreme Court of Appeal.

The Supreme Court could not, the appellant submits, in the decision being reconsidered, therefore, have been validating the unconstitutional sentence. The appellant submits that, with this, the Court below erred in finding that the appellant was not entitled to a resentencing hearing.

On the fourth ground, the appellant submits that, if the appellant does not have a resentencing hearing, he and many others like him, who were vigilant to process their appeals, would have been discriminated from those whose appeals, for some reason, were not processed after *Kafantayeni and others v Attorney General* and before *Yasini v Republic*. The appellant submits that, after *Kafantayeni and others v Attorney General* and before *Yasini v Republic,* there was no procedure for implementing *Kafantayeni and others v Attorney General. Yasini v Republic* set down the procedure. Consequently, before *Yasini v Republic* those who had a death penalty on them could only appeal. 10 prisoners whose death sentences this Court confirmed after and despite of *Kafantayeni and others v Attorney General* went through a resentencing rehearing with mixed results. Some received reduced sentences. Some stumbled over the jurisdiction case under consideration. The appellant submits that this discrimination would be resolved by aiming for consistency and fairness where "all mandatory capital offenders be granted unfettered access to the more robust and comprehensive sentence rehearing process if their fair trial rights recognised by *Kafantayeni* … are to have meaningful practical expression."

The State's submissions in this Court

The state vehemently opposes a resentencing hearing on the doctrine of *res judicata.* The state submits that when the appellant appealed this court had already affirmed *Kafantayeni and others v Attorney General* in *Jacob v Republic.* This Court therefore, considered *Kafantayeni and others v Attorney General* and *Jacob v Republic* in arriving at the death penalty. This Court after considering all, determined that in the circumstances the death penalty was the appropriate sentence. It proceeded to dismiss the appeal.

The State, therefore, relying on *Thomas v Attorney General* (No.2) (1991) LRC (Const) 1001 (PC), *Greenhalgh v Mallard* (1947) 2 All ER 255 at 257, *Henderson v Henderson* (1843 – 1860) All ER 378 at 381 – 382, therefore, submits that, this Court, having passed the death sentence on the matters and issues raised, the matter before the Court below would be *res judicata.* The State submits that should the Court below be allowed to rehear this matter it would be tantamount to second guessing the decision of this Court which, as it must be, binds the court below. It relies on this statement in *Kobedi v The State* (Criminal Appeal No. 25 of 201 [2003] BWCA 22 (19 March 2003) :

> To allow a High Court Judge to gainsay or second guess a decision of the Court of Appeal would undermine the whole structure of the administration of justice

and would open the door to protracted criminal litigation against spirit of the Constitution.

The submissions of the amicus curiae

The *amicus curiae* submits, first, this Court and the Court below were, in this case incompetent to hear the matter in so far as *Kafantayeni and others v Attorney General* and *Yasini v Republic* invalidated the death sentence imposed in this matter based on validity of section 210 of the Penal Code. Secondly the *amicus curiae* submits, first, that the doctrine of *res judicata* never applied in this case because the death sentence was invalid *ab initio.* Secondly, the *amicus curiae* submits, if the doctrine of *res judicata* applied, this matter falls in the exceptions to *res judicata* doctrine.

On the competence of this Court and the Court below in the case under consideration, the *amicus curiae* submits that this Court and the Court below should have sat on panels of five and three, respectively, under section 3(b) of the Supreme Court of Appeal Act and section 9(2) of the Courts Act. The *amicus curiae* submits, therefore, based on *Mbale v Maganga,* Misc Civil Appeal Number 21 of 2013(unreported), *Galadima v Tambai and others* (SC 217/1994, *Njoloma and another v Republic* (1998)MLR at page 165, that both proceedings were therefore null and void. The *amicus curiae* submits that, under section 5 of the Constitution, the death penalty was invalid and that this Court based on *Gwanda v the State and others* ((2015) Constitutional Cause No 5 (MWHC), the Court below could review such decision for constitutional validity. The *amicus curiae* highlights, based on *South African Municipal Workers' Union v Minister of Co-operative Governance and Traditional Affairs and others*,(2017) ZACC 7, the decision of the South African Constitutional Court :

> A declaration of invalidity renders the impugned legislation invalid immediately with retrospective effect… this is because it is undesirable for a constitutionally invalid provision to remain effective once a court of law has found it to be inconsistent with the Constitution ... The second is that, once an Act has been found to be constitutionally invalid, its invalidity operates retrospectively unless a court finds that it would be just and equitable to limit its retrospectively unless a court finds that it would be just and equitable to limit its retrospective effect. This Court's jurisprudence is quite clear about the possible factors to be taken into account when deciding whether it would be just and equitable to grant a party the exceptional remedy of suspension or limited retrospectivity," see discussion in Ex parte Women's Legal Centre: in re *Moise v Greater Germiston Transitional Local Council* (2001) ZACC 2: 2001 (4) SA 1288 (CC): 2001 (8) BCLR 765 (CC) at para 13. See also *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* (1995) ZACC 8; 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) (Executive Council) at paras 104-6.

The *amicus curiae,* based on *Republic v Maiche,* submits that *Kafantayeni and others v Attorney General* operated retrospectively.

The *amicus curiae* submits, based on *Henderson v Henderson* (1843) All ER 378, *Brisbane City Council v Attorney General for Queensland* [1978] All ER 30, *Ngunda v Mthawanji* [1987-89] 12 MLR 187, *Greenhalgh v Mallard* [1947] 2 All ER 255 and *Yat Tung Investment Co Ltd v Dao Heng Bank* Ltd [1975] AC 581, *Malawi Revenue Authority v Azam Tramways* (2005) Civil Cause No 83 (MWHC); *Finance Bank of Malawi Ltd (in voluntary liquidation v Lorgat and others* that the doctrine of *res judicata* applies where the matter is between or among the same parties, for matters which should have been raised and the matter in dispute is the same.

The *amicus curiae* submits, based on *Finance Bank of Malawi Ltd (in voluntary Liquidation) v Lorgat and others* and *Henderson v Henderson,* that on issue estoppel, the judgement relied on must have been delivered by a court of competent jurisdiction. The *amicus curiae* further submits, based on *Henderson v Henderson, Yat Tung Investment Co Ltd v Dao Heng Bank Ltd, Brisbane City Council v Attorney General of Queensland, Carl-Zeiss Stiftung v Rayner and Keller Ltd (No2)* [1966] 2 All ER 536, *Mills v Cooper* [1967] 2 All ER 100, *Arnold and Others v National Westminster Bank Plc* [1991] 3 All ER 41 and *Speedy Ltd v Finance Bank of Malawi Ltd,* that the doctrine of *res judicata,* however, cannot be used for abuse of the process of the court, is used in special circumstances after scrupulous examination of all circumstances, is not applied as to work injustice, and where the fact was an essential element of the decision.

Reasoning

This appeal resolves through understanding what *Kafantayeni and others v Attorney General* decided and examining the constitutional effect of that decision from the aftermath of many decisions of this Court and the Court below. The first question, therefore, is what did *Kafantayeni and others v Attorney General* actually decide? To understand the matter better, more especially, in view of different pronouncements about what *Kafantayeni and others v Attorney General* decided, it is important to start with what *Kafantayeni and others v Attorney General* and others did not decide.

What did Kafantayeni and others v Attorney General *decide?*

The issue before the Court was constitutionality of the mandatory death penalty sentence, not the constitutionality of the death penalty. The issue was not constitutionality of mandatory of other sentences – fines, confiscation or imprisonment, to mention a few. The question framed for the Court below, sitting under section 9 of the Courts Act, was as such. The Court below, however, went to pronounce on the constitutionality of the death penalty. That pronouncement was made without other constitutional provisions that, even if assuming, for purposes of conversation, section 16 of the Constitution, prescribed punishment by death, puts the pronouncement of the constitutionality of the death penalty at askance.

It is the uniqueness of the penalty sentence that, from all pronouncements in the cases cited for and against this appeal, that led the Court below decide that its mandatory in legislation – not in the Constitution – was unconstitutional. *Kafantayeni and others v Attorney General* concludes that the manner in which legislation prescribed its application of this unique

punishment was unconstitutional. Its uniqueness, however, points to its unconstitutionality. What should be unconstitutional is not its manner of application. *Kafantayeni and others v Attorney General* decides that the death penalty cannot be imposed mandatorily. The reasoning breaks into three strands.

At one level, *Kafantayeni and others v Attorney General* holds that the Court must have a discretion whether or not to impose the death penalty or not. At this level of abstraction, the death penalty must not be mandatory, a court must be able to pass other sentences, imprisonment, fines etc., where appropriate. At the second level, the death penalty is annulled because it cannot be imposed for all manner of homicides. In a way the legislature in sections 25 (a) and section 26 in prescribing death as one of the sentences and sections 38 (1) (for treason), 63 (1) (for piracy), 133 (for rape), 210 (for murder), 217A (2) (a) (for genocide), 301 (2) (for robbery and 309 (1) and (2) (for housebreaking and burglary, respectively) of the Penal Code caters for this, prescribing the death penalty for willful and intentional homicide, life imprisonment for voluntary willful and intentional homicide and unlawful or involuntary homicides. Both these questions are really for the legislature. At the third level, *Kafantayeni and others v Attorney General* sues consideration of mitigating factors – this is the sense in which *Kafantayeni and others v Attorney General* is most understood.

The Court can still receive mitigation evidence even where the sentence is fixed by law

It must be understood that there was no law that prohibited receiving evidence in mitigation, even if the death penalty is mandatory. It is only by practice, because it was not going to count, that such evidence was never received. In principle, there was no reason why it was not received. The prospect of an appeal was that the Court on appeal could, among other things, allow the appeal and reduce the crime to manslaughter, grievous bodily home, unlawful wounding or assault. In such circumstances, evidence in mitigation would be handy. It was prudent, therefore, to receive that evidence. The 2010 amendment retained section 321H of the Criminal Procedure and Evidence Code as it was and only added the bit about validity. Section 321H of the Criminal Procedure and Evidence Code read:

> If the accused is convicted or if the accused pleads guilty, it shall be the duty of the judge before passing sentence to ask him whether he has anything to say why sentence should not be passed upon him according to law, but the omission to ask him shall have no effect on the validity of the proceedings.

The 2010 amendment to section 321J of the Criminal Procedure and Evidence Code only introduced subsection 2:

> (1) Where a verdict of guilty is recorded, the High Court may, after judgment but before passing sentence, receive such information or evidence as it thinks fit, in order itself as proper to the proper sentence to be passed.
> (2) The information or evidence that the court may receive under subsection (1) may, in addition to the evidence of the accused or the prosecution, include information or evidence by or on behalf of the victim of the offence and any relevant reports to enable the court assess the gravity of the offence.

The Court on appeal can receive additional evidence on sentencing

In principle, there is no reason why, in this Court, additional evidence cannot, in any event, be received on appeal on an appeal against sentence or where this Court thinks that it should conduct a sentence rehearing itself. Section 16 of the Supreme Court Act is broad enough to cover evidence to influence sentencing and allows such evidence to be given in this Court or the Court below if the Court cannot remit the case to the Court below:

> For the purposes of this Part, the Court may, if it thinks it necessary or expedient in the interests of justice—
>
> (a) order the production of any document, exhibit, or other thing connected with the proceedings, the production of which appears to it necessary for the determination of the case;
>
> (b) order any witness who would have been a compellable witness at the trial to attend and be examined before the Court, whether he was or was not called at the trial, or order the examination of any such witness to be conducted in manner provided by rules of court before any judge of the Court or before any officer of the Court or other person appointed by the Court for the purpose, and allow the admission of any deposition so taken as evidence before the Court;
>
> (c) receive the evidence, if tendered, of any witness (including the appellant) who is a competent but not compellable witness, and, if the appellant makes application for the purpose, of the husband or wife of the appellant;
>
> (d) remit the case to the High Court for further hearing, with such instructions as regards the taking of further evidence or otherwise as appear to it necessary;
>
> (e) where any question arising at the appeal involves prolonged examination of documents or accounts or any scientific or local investigation, which cannot, in the opinion of the Court, conveniently be conducted before the Court, order the reference of the question in manner provided by rules of court for inquiry and report to a special commissioner appointed by the Court, and act upon the report of any such commissioner so far as it thinks fit to adopt it;
>
> (f) appoint any person with special expert knowledge to act as an assessor in an advisory capacity in any case where it appears to the Court that such knowledge is required for the proper determination of the case; and
>
> (g) issue any warrant necessary for enforcement any order or sentence of the court.

Res judicata never arises during a sentence rehearing

The defence of res judicata never arises when this Court decides to conduct a sentence rehearing before or after on appeal confirming the death sentence. The only reason why in *Kafantayeni* the order for resentence hearing was ordered to be in the High Court was because

the constitutionality question arose in that Court. If the question arose in this Court, this Court could very well conduct a re-sentencing hearing or defer to the Court below. In any case, Order 1, rule 18 of the Supreme Court of Appeal Rules would apply and this Court would defer to the Court below. The prudent thing to do, in my judgment, is for this Court to invariably remit a sentence rehearing to the Court below. This enables the appellant to take full advantage of the right under section 42 (2) (f) (viii) of the Constitution to appeal or review from a decision of first instance.

Whatever level of abstraction, *Kafantayeni and others v Attorney General* decides that section 210 and 38 (1) of the Penal Code that make the death penalty mandatory unconstitutional. The first point to make, therefore, on *Kafantayeni and others v Attorney General* is that it made section 210 unconstitutional. It did not, as we see shortly, make the death sentence unconstitutional. *Kafantayeni and others v Attorney General* made section 210 unconstitutional in so far as it made the death penalty mandatory. This decision had two constitutional effects.

The death sentence was not void ab initio

The first constitutional effect of *Kafantayeni and others v Attorney General* was the interpretation of section 210 for all it was worth. This hinges on sections 5, employed by this Court and the Court below for invalidation, and 11 (3) of the Constitution. Section 5 of the Constitution provides:

> Any act of Government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of that inconsistency, be invalid.

The distinction between an act of government and the law is a serious one when section 210 of the Penal Code is declared unconstitutional. In either case, invalidity follows. Declaring section 210 of the Penal Code unconstitutional is, as far as section 5 of the Constitution concerns, declaring a law invalid. Is sentencing itself a Government action in section 5 of the Constitution? Put differently, is a judicial act, such as sentencing, an act of Government that can be declared unconstitutional? The question is urgent and pertinent because, as seen, Counsel spent much ink on invalidity of sentences passed. The submissions, however, are ambivalent on whether it was the invalidity of the death sentence actually passed or invalidity of the penalty sentence itself.

The death penalty, as a mode of punishment or sentence, as far as *Kafantayeni and others v Attorney General* goes, was not unconstitutional. The death penalty is one sentence which the legislature could prescribe and one which, if passed by the legislature, a court could pass. Would the actual sentence passed under the mandatory provision itself be invalid? The passing of the sentence would not be a matter of law and, therefore, could not flow from the invalidity of a law under section 5 of the Constitution. Is passing of a sentence an act of Government? That depends on whether judicial acts are acts of Government.

The word Government must be interpreted liberally and generously and more so where a narrow interpretation – that excludes the judiciary from government – has the prospect of

affecting a citizen, a right or the constitutional spirit or aura adversely. Sentencing, therefore, is, albeit a judicial act, an act of Government and can, under section 5 of the Constitution, be declared invalid. *Kafantayeni and others v Attorney General* and others only declared section 210 of the Penal Code unconstitutional. It did not, as it is contended, make the sentence itself unconstitutional. Consequently, the sentence was not vitiated by that the Court decided that a mandatory sentence is unconstitutional. The impact of the decision was that the sentence was discretionary. The Court could still pass the death sentence. The death sentence was valid and only invalid, if at all, because it was passed where there was no discretion. In the latter case, the death sentence would be constitutional and valid and can, therefore, be varied.

Clearly, from the whole of the judgment, *Kafantayeni and others v Attorney General Kafantayeni and others v Attorney General* only declared section 210 of the Penal Code – as a law – unconstitutional and, therefore, invalid. There is nowhere in the judgment in *Kafantayeni and others v Attorney General* where the sentence – as an act of Government – is declared unconstitutional. On the contrary, the Court below in *Kafantayeni and others v Attorney general* stated severally that the death penalty was not outlawed:

> 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 of the death penalty is in the proviso to section 16 … In our judgment, what the saving clause to section 16 saves is the death penalty. We do not find that the wording necessarily saves the mandatory requirement of the death penalty. We, therefore, find that bit 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.

The Court below later affirms this:

> 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 for the offence of murder so that the offender shall be liable to be sentenced to death only as a maximum sentence.

Kafantayeni and others v Attorney General only, under section 5 of the Constitution, declared section 210 of the Penal Code unconstitutional and, on that, only its mandatory. The death penalty, as a sentence, according to *Kafantayeni and others v Attorney General,* was constitutional. Its mandatory made it unconstitutional. The death penalty itself was not invalid, it was its mandatory which was unconstitutional. Consequently, the death penalty, as a punishment could not and was not invalid *ab initio* because, as a punishment, it was not, according to *Kafantayeni and others v Attorney General,* unconstitutional. The actual sentence passed was not declared – as an act of Government – unconstitutional and, therefore, its constitutionality *ab initio* never arises.

A section 5 invalidation does not apply to Part IV of the Constitution

The decision by the Court below to invalidate section 210 – by extension preserving sections 25 and 26 of the Penal Code – under section 5 is problematic. Section 5 applies to inconsistences with the whole Constitution except Part IV of the Constitution. The Court below was dealing with Part IV provision – section 16 of the Constitution covering the right to life, right to a fair trial and the right against cruel, inhumane and degrading treatment and punishment. Inconsistence with Part IV of the Constitution does not redound in invalidity under section 5 of the Constitution. Except for section 45 (1) and (2) of the Constitution, such inconsistences are limitations and must pass the muster in sections 44 and 46 of the Constitution.

Section 16 creates two rights

Under section 45 (1) and (2) of the Constitution there cannot be derogation from the right to life. Section 16 (1) of the Constitution:

> Every person has the right to life and no person shall be 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 Malaŵi of which he or she has been convicted shall not be regarded as arbitrary deprivation of his or her right to life.

Section 16 creates two rights – the right to life and the right against arbitrary deprivation of life. The rights are complementary but by no means alternate or one right. If the right were only to life, the State could easily resort to summary executions, extrajudicial killings and society degenerate to mob justice without the courts and the laws– arbitrary deprivation of life. The proviso, from its reading, only relates to the right against deprivation of life and not the right to life. It protects citizens from arbitrary deprivation of life. The proviso, therefore, defines arbitrary deprivation of life so as to exclude "a death sentence imposed by a competent court on a person in respect of a criminal offence under the laws of Malaŵi of which he or she has been convicted." Where there has been a due process before a court, there cannot be arbitrariness. There would be arbitrary if a citizen's killing is extrajudicial.

Section 16 of the Constitution is not a sentence prescribing provision

The Court below in *Kafantayeni and others v Attorney General* is quite clear that section 16 is not prescribing a death penalty. The Court below warily and cautiously uses the words "sanctions the death penalty." To sanction is not necessarily to prescribe. Section 16 of the Constitution is descriptive of the right – setting its minimum threshold, life – and determining its scope. Section 16, however, is very clear that the death sentence will be about criminal offences under the laws of Malawi." Prescription will be done by laws made under the Constitution. "Laws of Malawi" includes the Constitution and all laws made under it. The Constitution did not use the word "legislation." Section 16 refers to 'laws of Malawi." The

term "laws" covers, the Constitution, legislation, common law, customary law and international law. Those international obligations that are underpinned by section 1 of the Constitution:

> The Republic of Malaŵi is a sovereign State with rights and obligations under the Law of Nations.

The phrase "of Malawi" covers the Constitution as part of those laws of Malawi. Laws of Malawi, other than the Constitution, however, will be tested for constitutionality. The question, therefore, is do laws of Malawi provide for passing of the death sentence? The death sentence, albeit not an arbitrary deprivation of life, is against the right to life. Life is a sanctity as the preamble to the Constitution reads:

> THE PEOPLE OF MALAŴI— recognizing the sanctity of human life and the unity of all mankind; guided by their private consciences and collective wisdom; seeking to guarantee the welfare and development of all the people of Malaŵi, national harmony and peaceful international relations; desirous of creating a constitutional order in the Republic of Malaŵi based on the need for an open, democratic and accountable government: HEREBY adopt the following as the Constitution of the Republic of Malaŵi.

The Constitution, under sections 4, 5 11 (1) and 199 of the Constitution, is the primary law of laws of Malaŵi, foundational, superior and unique law of the land. The Constitution is primary because it is where all laws – international law, legislation, common law and customary law – start. It is foundational precisely because all laws, as described, are founded or based on it as the radicle. It is unique in the sense that it is not like any other. In the proviso in section 16 of the Constitution the death penalty must be passed by the law of Malawi. Does the Constitution, as laws of Malawi, provide for the death penalty?

There cannot be derogation from the right to life

The Constitution does not provide for the death penalty; on the contrary it prohibits derogation from the right to life. Section 45 (1):

> No derogation from rights contained in this Chapter shall be permissible save to the extent provided for by this section and no such derogation shall be made unless there has been a declaration of a state of emergency within the meaning of this section.

Section 45 (1) of the Constitution is a direct prohibition. Derogation must occur as under the section. Unlike section 46 (2) of the Constitution, which we come to in a while, there is no reference in section 45 (1) of the Constitution to or like "Save in so far as it may be authorized to do so by this Constitution." On the contrary Section 45 (2) of the Constitution does not authorize, even where there is a state of emergency, derogation at all, among others things, from the right to life:

> There shall be no derogation with regard to—

(a) the right to life;

(b) the prohibition of torture and cruel, inhuman or degrading treatment or punishment;

(c) the prohibition of genocide;

(d) the prohibition of slavery, the slave trade and slave-like practices;

(e) the prohibition of imprisonment for failure to meet contractual obligations;

(f) the prohibition on retrospective criminalization and the retrospective imposition of greater penalties for criminal acts;

(g) the right to equality and recognition before the law;

(h) the right to freedom of conscience, belief, thought and religion and to academic freedom; or

(i) the right to habeas corpus.

Derogation from the right to life is prohibited directly and clearly by the Constitution. The essence of section 25, 26, and other sections that prescribe the death penalty in criminal offences is that they are derogations from the right to life – life itself, life in all its sanctity. Under section 45 (1) of the Constitution, the supreme law of all laws of Malawi, the death penalty, since it is a derogation from the right to life, is impermissible. Curiously, when the legislature in 2011 amended section 25 of the Penal Code, it removed corporal punishment, because of its prohibition in section 19 (2) (b) of the Constitution, and retained the death penalty despite that there could not, under section 45 (1) and (2) (b) of the Constitution be derogation from the right to life. This could only be based on the assumption that the Constitution in section 16 was, in the proviso, 'sanctioning' the death penalty. That inference is untenable for many reasons, some of which are clarified earlier.

Section 16 of the Constitution is a right creating provision

Section 16 of the Constitution, being in Part IV of the Constitution, is a right creating provision. Section 16 creates a right. It is not a punishment prescribing provision. Prescribing punishment or types of punishment is not a function of the Constitution but the legislature under the law made under the Constitution. If it was, in this case, it would be prescribing a right to death – an absolute antithesis to the right it was creating – the right to life. Secondly, as demonstrated earlier, section 16 of the Constitution creates two rights: a positive and negative one both centered on the right to life. The positive right to life which is distinct and different from the negative right against life. The proviso clearly relates to the negative right to life. Section 16, read as a whole, creates, in its different definition of the right, creates a right to life. This duality is conspicuous from this long commentary, "International Standard" by the United Nations Human Rights, Office of the Commissioner:

The Special Rapporteur is guided primarily by international legal standards. The main substantive legal framework, as indicated by the Commission on Human Rights, in its resolution 1992/72, and the General Assembly, in its resolution 45/162 of 18 December 1990, comprises the Universal Declaration of Human Rights and articles 6, 14 and 15 of the International Covenant on Civil and Political Rights. These standards, which are universal, are interpreted within the context of other United Nations instruments, enumerated in the sixth preamble paragraph of Commission resolution 1992/72.

The right to life finds its most general recognition in article 3 of the Universal Declaration of Human Rights. Article 6 of the International Covenant on Civil and Political Rights recognizes the inherent right of every person to life, adding that this right "shall be protected by law" and that "no one shall be arbitrarily deprived of life". The right to life of persons under the age of 18 and the obligation of States to guarantee the enjoyment of this right to the maximum extent possible are both specifically recognized in article 6 of the Convention on the Rights of the Child.

In accordance with article 2 of the Universal Declaration of Human Rights and articles 2 and 26 of the International Covenant on Civil and Political Rights, and pursuant to several other United Nations declarations and conventions, everyone is entitled to the protection of the right to life without distinction or discrimination of any kind, and all persons shall be guaranteed equal and effective access to remedies for the violation of this right.

Moreover, article 4, paragraph 2, of the International Covenant on Civil and Political Rights provides that exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any derogation from the right to life and security of the person. The general recognition of the right to life of every person in the aforementioned international instruments constitutes the legal basis for the work of the Special Rapporteur. Various other treaties, resolutions, conventions and declarations adopted by competent United Nations bodies contain provisions relating to specific types of violations of the right to life. They, too, form part of the legal framework within which the Special Rapporteur operates (see E/CN.4/1993/46, Chapter II).

One of the most pertinent of these instruments is the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, adopted by the Economic and Social Council in its resolution 1989/65 of 24 May 1989. Principle 4 sets forth the obligation of Governments to guarantee effective protection through judicial or other means to individuals and groups who are in danger of extra-legal, arbitrary or summary executions, including those who receive death threats.

> The situations of extrajudicial, summary or arbitrary executions that the Special Rapporteur is requested to investigate comprise a variety of cases. All acts and omissions of state representatives that constitute a violation of the general recognition of the right to life embodied in the Universal Declaration of Human Rights (article 3) and the International Covenant on Civil and Political Rights (article 6 and, also, articles 2, 4, para. 2, 26 and, in particular with regard to the death penalty, articles 14 and 15), as well as a number of other treaties, resolutions, conventions and declarations adopted by competent United Nations bodies, fall within his mandate.

Thirdly, the proviso refers to the laws of Malawi imposing the death penalty. Section 16 of the Constitution is not a prescriptive section. The Constitution is part of the laws of Malawi. The question then, even before considering, legislation, is does the supreme law of the land sanction the death penalty? Certainly, No, if section is read as described, as part of Part IV and the Constitution as a whole.

Section 16 has to be read in the light of the whole Constitution or, at least, Part IV of the Constitution

The Court below in *Kafantayeni and another v Attorney General* fell into two gross errors. The first was in concluding that the death penalty was sanctioned by the Constitution from reading one section in isolation of other provisions in Part IV and the Constitution as a whole. The second error was relying on interpretation of provisions – differently worded - of other jurisdictions and equally not explained in the right of other provisions in constitutions of other jurisdictions. In either case, there was a gross error. Section 16 of the Constitution should not have been read in isolation of other provisions in Part IV of the Constitution and indeed the whole Constitution – including the preamble itself which starts with a poignant and ardent clarion for sanctity of life itself.

This Court in *Nseula and another v Attorney General* sub nomine *Nseula and another v Attorney General* deprecated, just as the Court below in the same case, interpreting a constitutional provision in isolation. In the Court below in *Nseula and* another v *Attorney General* Mwaungulu, J, as he then was said:

> The principles just stated are not in derogation that a provision should be read in the light of its context or in the light of the whole. Indeed the words of a statute, albeit should be interpreted in their ordinary meaning, their deployment depends on the subject matter and object. They should be looked in the light of the occasion and the circumstances with which they are used. They can only be understood in the context in which they are used (*Viscountess Rhondda's Claim* [1922] 2 A.C. 339; *Black Clawson International Ltd v*

This statement of the law was accepted in the Supreme Court of Appeal in the often quoted principle in *Nseula and another v Attorney General*:

[…]

Indeed, for an interpretation of a constitutional provision with the ramifications that it was going to have on our constitutional order, the Court below, laying down more than a dozen rules of constitutional interpretation required in section 11 of the Constitution, examined the interpretation of the phrase "public office" after examining all places where the term was used in the Constitution, with the exception of section 40 (3) which, by hindsight, was the game changer of the imbroglio that followed the judgment.

The Court below, despite its industry, and the Supreme Court never examined section 40 (3) of the Constitution as it was then before amendment many years later:

> Save as otherwise provided in this Constitution, every person shall have the right to vote, to do so in secret and to stand for election for any public office.

The narrow interpretation adopted by this Court – confining the meaning public office to the civil service (an expression that had a full Part in the Constitution) – implied that its civil servants, not the rest of us, Members of the National Assembly, who would have the right to vote and be voted into "political" offices of Minister, President and Member of the National Assembly. That was a huge and consequential alteration of the essence of a fundamental Part IV right whose amendment was entrenched. The decisions of the Court below, despite its attempt to cover the whole Constitution, and the decision of this Court, which never even attempted to examine all the provisions of the Constitution, were per incuriam section 40 (3) of the Constitution. Ultimately, the interpretation of the Court below was the correct interpretation in the circumstances.

To circumvent the problem, when section 40 (3) the Constitution was amended later, the word "public" was replaced with the word "elected:"

> Save as otherwise provided in this Constitution, every person shall have the right to vote, to do so in secret and to stand for election for any elective office.

The amendment dropped the word "public" all together and never used the word "political" this Court introduced – against the advice in the Court below – in the Constitution to describe offices of government which were not in the civil service. The use of the word "elected" has problems of its own if the word public is not inserted in front of it.

Does the right extend now generally to include rights in private elective offices? Surely, that is not really the purport of the right in section 40 (3) for which the franchise provision in section 77 of the Constitution directs itself:

> All persons shall be eligible to vote in any general election, by-election, presidential election, local government election or referendum, subject only to this section.

(2) Subject to subsection (3), a person shall be qualified to be registered as a voter in a constituency if, and shall not be so qualified unless, at the date of the application for registration that person—

(a) is a citizen of Malawi or, if not a citizen, has been ordinarily resident in the Republic for seven years;

(b) has attained the age of eighteen years; and

(c) is ordinarily resident in that constituency or was born there or is employed or carries on a business there.

(3) No person shall be qualified for registration as a voter in a constituency if that person—

(a) is under any law in force in the Republic adjudged or otherwise declared to be mentally incompetent;

(b) is under sentence of death imposed by a court having jurisdiction in the Republic, either before or after the appointed day; or

6 of 1995, 11 of 2010(c) is disqualified from registration as a voter on the grounds of his or her having been convicted of any violation of any law relating to elections passed by Parliament and in force at the time of, or after, the commencement of this Constitution, but such disqualification shall be valid only with respect to registration for the election in question and the person so disqualified shall be qualified to be registered as a voter in the next or any subsequent election.

(4) Where any person is qualified to be registered in more than one constituency as a voter, he or she may be so registered only in one of the constituencies.

(5) No person shall exercise more than one vote in any one election.

The right to vote is certainly directed towards those who are holding public – not private – offices in a general election, presidential election, by-election or local government election. Restriction of the word public office to civil service has created problems in subsequent constitutional amendments.

Curiously, the word has not been removed from section 51 (2) (e) concerning qualification for the offices of a Member in the National Assembly; 94 (3) (e) concerning qualifications for the office of minister and section 93 and 88A (1) of the Constitution. This leaves some ambiguity in the Constitution not only in terms of the actual meaning of the phrase "public office" but the restrictive meaning of the phrase this Court.

Section 51 (3) of the Constitution was amended to reflect the problems highlighted in the interpretation caused by the Supreme Court decision. The amendment, however, only concerns nomination and election as a Member of the National Assembly:

> For the purposes of subsection (2) (e), an appointment as a Minister or Deputy Minister in accordance with section 94 (1) shall not be construed to be an appointment to a public office or to be a public appointment.

The wording suggests that for purposes, other than subsection 2 (e), a Minister or Deputy Minister is in a public office or public appointment – not a civil servant, according to this Court's interpretation of public office. The section, however, does not purport that the Member once elected should continue to be in public office as Minister or Deputy Minister. Section 51 (3) does not apply to section 94 (3) (e) of the Constitution in relation to a member of the National Assembly. If a Member of the National Assembly remains a public office, the President cannot appoint a Member of the National Assembly to be a Minister. Section 88A of the Constitution was amended by removing the word "other" which previously meant that the President and members of the Cabinet were in public office. The word "any" there cannot be referring to the civil service. It would comport that the President can appoint a judge or councilor – who are in public office – to the office of Minister.

Indeed problems arose when introducing amendments to the Constitution to introduce disclosure of assets to other offices in section 213 of the Constitution:

> (1) In addition to the President and members of the Cabinet as provided by section 88 (3), the holders of the following offices, that is to say—
>
> (a) a member of the National Assembly;
>
> (b) a public officer of such senior grade or position as shall be specified under subsection (2);
>
> (c) an officer of such senior grade or position as shall be specified under subsection (2), of—
>
> (i) a corporation, board, commission, council, or similar body established by or under an Act of Parliament;
>
> (ii) any other body, corporate or unincorporated which in accordance with any Act of Parliament is subject to the same statutory procedures for financial control and accountability as apply in common to a body referred to in subparagraph (i), shall, within three months from the date of his or her election, nomination or appointment, as the case may be, fully disclose all of his or her assets, liabilities and business interests and those of his or her spouse held by him or her or on his or her behalf as at that date; and, unless Parliament otherwise prescribes by an Act of Parliament, such disclosure shall be made in a written document delivered to the Speaker of the National

Assembly who shall immediately upon receipt deposit the document with such public office as may be specified in the Standing Orders of Parliament.

(2) For the purpose of paragraphs (c) and (d) of subsection (1), the National Assembly shall specify the grades and positions of the officers required to disclose assets in accordance with that subsection, and shall do so by resolution passed by the majority of the members present and voting and which shall be published in the Gazette.

(3) Notwithstanding subsection (1), in the case of those persons who, at the commencement of this section, hold the offices to which this section applies, the period within which they shall comply with subsection (1) shall be a period of three months—

(a) from the commencement of this section, in the case of members of the National Assembly;

(b) from the date of the publication of the resolution under subsection (2), in the case of others.

(4) There shall be a Committee of Parliament appointed by the National Assembly which shall have the function of monitoring the compliance with the requirement on the disclosure of assets under section 88 (3) and under this section and the Committee shall have all the powers necessary to perform its function.

Great care was exerted to ensure that certain officers were not in "public office:" President and members of the Cabinet, a member of the National Assembly; a public officer of such senior grade or position as shall be specified under subsection (2); member of a corporation, board, commission, council, or similar body established by or under an Act of Parliament; any other body, corporate or unincorporated which in accordance with any Act of Parliament is subject to the same statutory procedures for financial control and accountability as apply in common to a body referred to in subparagraph. The Public Officer (Declaration of Assets, Liabilities and Business Interests) Act uses the wider definition of public office of the Court below. Section 2 of the Act:

> "public officer" means any person who is a member of, or an employee of, the Government, a statutory body or any other body appointed by the Government, whether his or her membership or his or her employment is temporary, whole or part-time, paid or unpaid.

This, because of section 2 of the General Interpretation Act, is the current definition of "public office" – the one advanced by the Court below and adheres to the definition in the General Interpretation Act. Section 2 of the General Interpretation Act:

> "[P]ublic office" means any office the holder of which is invested with or performing duties of a public nature …

Section 2 of the General Interpretation Act:

> "public officer" means a person holding or acting in any public office …

This interpretation applies, because of section 2 of the General Interpretation Act, to any "written law" – including the Constitution. Section 2 of the General Interpretation Act:

> "written law" includes the Constitution, Acts and subsidiary legislation;

All this is not criticism of the Courts or the drafters of legislation. It is to illustrate the problems in which the Court below in *Kafantayeni and others* found itself by not considering section 16 – on the death penalty – without regarding other provisions of the Act that had a bearing on the constitutionality of the death penalty. The Court, if it had done so, would have concluded that, despite what looked to the Court below as sanctioning the death penalty, the right to life was a non-derogable right, if the right could be limited, the death penalty was a negation, abridgment and abolition of the right and the legislature could not pass legislation that negates, abridges, abolishes or derogates from the right to lifer and that the executive and Government agencies could not take any action that abolished or abridged the right.

The Constitution of Malawi, the supreme law gags the legislature and government organs from, respectively, initiating and implementing legislation and actions that abridge or abolishes rights under the Constitution. Section 46 (1) of the Constitution:

> Save in so far as it may be authorized to do so by this Constitution, the National Assembly or any subordinate legislative authority shall not make any law, and the executive and the agencies of Government shall not take any action, which abolishes or abridges the rights and freedoms enshrined in this Chapter, and any law or action in contravention thereof shall, to the extent of the contravention, be invalid.

Section 46 (1) has the clause "as it may be authorized to do so by this Constitution." One inference here might be that section 16 of the Constitution is such authority. Section 16 of the Constitution, as observed, requires the death sentence to be prescribed by the laws of Malawi – which includes the Constitution. Section 45 (1) of the Constitution makes the right to life non-derogable. It does not, therefore, authorize the death penalty because the death penalty derogates from the right to life. Section 46 (1) introduces other concept – different from derogation – abolishment or abridgment.

Section 46 (1) of the Constitution prohibits directly and clearly the legislature from abridging or abolishing rights in the Constitution by legislation. As we see shortly, the authorized way of abridging rights is by limitation of rights under the Constitution. The death penalty is an abolishment or abridgment to the right to life. The legislature, therefore, cannot, under section 46 (1) of the Constitution initiate legislation – as they did in 2010 – that prescribes the death penalty. Section 46 (1) of the Constitution, besides banning the National Assembly legislating on abolishment or abridgement, prohibits the Executive and agencies of Government from taking action that abolishes or abridges rights – including the right to life.

The Executive and Government agencies are the implementing side of government and the judiciary implement (or apply) the law. Whether acting generally or under law, those implementing policies or laws are prohibited from taking action that abridge a right. Consequently, the Executive and agencies of Government cannot and should take no action on any law or policy that abolishes or abridges a right. So much so that the Executive and agencies of Government should take no action on a law that passes a death penalty. The law is directly vitiated by section 46 (1) of the Constitution without courts invalidation. The judiciary as an implementing agency should not pass it – even if the legislature – in defiance of section 45 (1) and (2) and 46 (1) – passes a law imposing the death penalty. If the National Assembly, per force, passes the bill, the President, as part of the Executive cannot act by consenting to the bill. Equally, if the Court passes a death sentence in a criminal proceeding, the President – as long as the death penalty is an abridgment or abolition of the right to life – cannot and should not sign the death warrant. The President should not take any action – including commuting the sentence. The President should just do nothing. The judge should not take any action as under section 26 of the Criminal Procedure and Evidence Code. Equally, the prerogative of mercy committee should not sit to consider the sentence. The sentence need not be executed. Presidents, therefore, were right to refuse signing death warrants. Moreover, the manner of execution in section 26 of the Penal Code boarders on disrespect for human dignity under section 19 (1) of the Constitution, cruel, inhumane or degrading treatment or punishment under section 19 (2) or torture under section 19 (3) of the Constitution. The last two are non-derogable rights under section 45 (2) of the Constitution.

The words "save in so far as it may be authorized to do so by this Constitution" in section 46 (1) refer to limitation of rights under section 44 of the Constitution. Even on this postulation, there cannot be limitation on rights preserved from derogation under section 45 (1) and (2) of the Constitution. Section 44 (1):

> No restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society.

Sections 25 (a) and section 26 in prescribing death as one of the sentences and sections 38 (1) (for treason), 63 (1) (for piracy), 133 (for rape), 210 (for murder), 217A (2) (a) (for genocide), 301 (2) (for aggravated robbery) and 309 (1) and (2) (for housebreaking and burglary, respectively) of the Penal Code, prescribing the death penalty, must be understood as statutory limitation on the right to life under section 16 of the Constitution. Consequently, they have to pass through the section 44 of the Constitution test. Certainly, all these sections are a limitation on the right to life by law. The death penalty, however, however, is doubtfully reasonable and necessary in an open and democratic society. There has been no executions since 1975. Certainly, every president since 1994 has refused to sign the death warrant. It certainly, is against international human rights standards. It is when you consider section 44 (2) of the Constitution where the death penalty does not stand the constitutional muster. Section 44 (2) of the Constitution provides:

> Laws prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question, and shall be of general application.

The essence of the right to life is life itself – the sanctity of life. The right to life is the mother of all rights. Without the right to life other rights do not exist. The death penalty not only negates, it abolishes the right. Consequently, sections 25, 26, 210 and others prescribing the death penalty are against Part IV provision of the Constitution. Their validity could not be based on section 5 of the Constitution. The Court below actually invalidates the mandatory nature of section 210 of the Constitution based on rights under Part IV of the Constitution.

One reason advanced for invalidation was that the mandatory in section 210 deprived the Court of discretion in the matter. Invalidation under section 5 of the Constitution requires that the law – section 25 or 210 of the Penal Code – be inconsistent with the provisions – of the Constitution:

> Any act of Government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency, be invalid.

The discretion which courts have in sentencing or indeed in any matter is, however, not provided for in the Constitution. It is provided by general law. Under the general law the power to prescribe crimes – except common law crimes - and the type and extent of punishment is chiefly and solely the function and parameter of the legislature. This legislative power includes the power to impose mandatory sentences or impose sentences where, under a tariff system, courts have a discretion over a maximum sentence passed by the legislature. The legislature can deny courts discretion in a particular sentence prescribed. This Court concluded similarly *Director of Public Prosecution v Kaunda and others* ((2016) Criminal Appeal Case No 10 (MWSCA) (unreported). Mwaungulu, JA:

> The first principle is that under our tariff system, the legislature – the executive and the national assembly – determines, just like for what is criminal, the form and extent and scope of punishment for a crime. Of course, the law recognise common law crimes. In a democratic order, what is criminal and what punishments to pass, is the function of the governed – through their elected officials – to determine. The Constitution does not provide for punishments courts can pass. That is left to the general law made under the Constitution – by elected officials.

In *Reyes v The Queen* [2002] UKHL, the United Kingdom House of Lords, now the United Kingdom Supreme Court, said:

> In a modern liberal democracy it is ordinarily the task of the democratically elected legislature to decide what conduct should be treated as criminal, so as to attract penal consequences, and to decide what kind and measure of punishment such conduct should attract or be liable to attract … The ordinary task of the courts is to give full and fair effect to the penal laws which the legislature has enacted. This is sometimes described as deference shown by the

> courts to the will of the democratically-elected legislature. But it is perhaps more aptly described as the basic constitutional duty of the courts, which, in relation to enacted law, is to interpret and apply it.

In *R v Guiller* (1985), 48 C.R. (3d) 226 (Ont. Dist. Ct), the Ontario District Court said:

> It is not for the court to pass on the wisdom of Parliament with respect to the gravity of various offences and the range of penalties which may be imposed upon those found guilty of committing offences. Parliament has broad discretion in proscribing conduct as criminal and in determining proper punishment. While the final judgment as to whether a punishment exceeds constitutional limits set by the *Charter* is properly a judicial function, the court should be reluctant to interfere with the considered views of Parliament and then only in the clear cases.

On mandatory and discretionary sentences Mwaungulu, JA, in *Director of Public Prosecutions* said:

> All this discussion was for no other reason than that in this case, in the court below and in this court, it is suggested that the minimum and mandatory sentences in section 110 (b) of the National Parks and Wildlife Act and section 35 of the Money Laundering, Proceeds of Serious Crimes and Terrorist Financing Act of the Money Laundering are unconstitutional because, based on *Kafantayeni and others v Attorney General,* the sentences, being mandatory and minimal are unconstitutional. Mandatory and minimum sentences are not unconstitutional *per se* (*R v Bowen* Alta.CA., Doc No 10673, October 10, 1990; *R v Highfield*, Manitoba Provincial Court, December 23, 1994). Mandatory and minimum sentences are constitutional except, of course, where in the particular case or the hypothetical case, they offend section 19 (3) of the Constitution.

In *R v Smith* (1937), 31 C.R.R. 193, the Canadian court considered section 5 (2) of the Narcotic Control Act, R.S.C., 1970, which provided imprisonment for life but not less than seven years' for any person importing into or exporting from Canada narcotics. The judgment was unanimous that in the particular case the sentence actually imposed violated section 12 of the Charter which provided that, "Everyone has the right not to be subjected to any cruel and unusual punishment.' In the course of the judgment Lamer, J, said:

> A minimum mandatory term of imprisonment is obviously not in and of itself cruel and unusual. The legislature may, in my view, provide for a compulsory term of imprisonment upon conviction for certain offences without infringing the rights protected by s 12 of the *Charter.* For, example, a long term of penal servitude for he or she who has imported large amounts of heroin for the purpose of tracking would certainly not contravene section 12 of the *Charter* … We should be careful not to stigmatize every disproportionate or excessive sentence as being a constitutional violation.

A court's discretion is only within the discretion afforded it by the legislature. The legislature offends no constitutional provision in denying the judiciary discretion in sentencing. The legislature can deprive courts of discretion in a sentence.

The duty of the Court to test constitutionality of a sentence

Courts, however, have a constitutional responsibility to ensure that the particular sentence is constitutional – is not a violation of the right against inhumane, degrading treatment (*Pose v Republic* [1997] 2 MLR 95; *Keke v Republic* (2010) Confirmation Case No 404 (MWHC) (Bt) (unreported); [2013] MWHC 450; *Director of Public Prosecutions v Kaunda and others*). This duty pervades even where the sentence is fixed and a court has no discretion in the matter. This duty arises from the Constitution. There is a detailed discussion of the principle in *Keke v Republic.* Every sentence passed is on the face of it unconstitutional – it involves a restriction on, in case of a death sentence, the right to life, property or liberty. In considering constitutionality of a particular sentence, courts are not exercising discretion. They are testing constitutionality. That is not a discretion.

Mandatory is, therefore, not per se unconstitutional. Section 5, therefore, never applied to discretion or lack of it in sentencing. This is because there is no constitutional provision for mandatory or discretion on sentencing in the Constitution. The Court below, however, proceeded to consider mandatory in terms of violating other rights – the right to dignity (section 19 of the Constitution), access to justice (section 41 of the Constitution (fair hearing (section 42 (2) (f) of the Constitution without, of course, regarding that mandatory was a matter for the legislature. In doing so, however, the Court below, resorting, as it did, to a section 5 of the Constitution, did not subject, as it should, section 210 of the Penal Code to Part IV validation to which Part the substance and process or procedure of section 210 of the Penal Code was a limitation (section 44 of the Constitution), derogation (section 45 of the Constitution) or abridgment (section 46 of the Constitution.

Most certainly, if the Part IV invalidation was followed profusely, the Court below in *Kafantayeni and others v Attorney General* would have concluded that the introduction of the death penalty in sections 25 (a) and section 26 in prescribing death as one of the sentences and sections 38 (1) (for treason), 63 (1) (for piracy), 133 (for rape), 210 (for murder), 217A (2) (a) (for genocide), 301 (2) (for aggravated robbery) and 309 (1) and (2) (for housebreaking and burglary, respectively) of the Penal Code, was unconstitutional and invalid because of sections 44, 45 and 46 of the Constitution and, therefore, its mandatory was an unimportant and irrelevant consideration.

The Constitution is the fulcrum of Part IV rights

For the constitutional fulcrum or fundamental of Part IV rights is that laws, other than the Constitution itself, are subservient and catalytic to Part IV rights. The converse is not true. A Part IV right in the Constitution and, indeed, in international instruments to which we have

obligations under the Constitution, expresses in absolute and normative and as a minimum threshold of the right to influence and affect laws.

The Constitution itself is the legal basis of rights. For in the Constitution, citizens covenant with another and the Government citizens elect that the fundamental rights or freedoms the Constitution recognises, acknowledges or creates are foremost and will be protected and enhanced under the Constitution and laws and policies of Government. Consequently, the Constitution in sections 4, 5, 7, 8, 9, 10 (1) and (2), 11 (1), 11 (2) (b), 12 (1) (a) and (f), 12 (2), 14, 15, 44, 45 and 46 in underpinning the executive, legislative and judicial branches, organs of State and Government agencies and indeed all citizens to uphold the Constitution, underlines the urgency and importance of fundamental rights and freedoms which the Constitution is its source, foundation, radicle, preserver and protector. Specifically, the judiciary, responsible for applying and interpreting the Constitution and laws made under it, carries the special and unique responsibility and duty of punctiliously upholding the Constitution and thereby accentuate the august status and importance of the freedoms in and under the Constitution.

The judiciary's interpretive, enforcement and protective role is symbiotic to Part IV rights

The judiciary has to be foremost in applying the Constitution and laws made under it and, therefore, in adroitly interpreting the Constitution viz-a-viz the rights in Chapter IV and rights viz-a-viz the Constitution. In relation to interpreting the rights in Chapter IV viz-a-viz the Constitution, section 9, underlining the separate status, function and duty of the judiciary:

> The judiciary shall have the responsibility of interpreting, protecting and enforcing this Constitution and all laws and in accordance with this Constitution in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of law.

The Constitution conjoins and enjoins Courts to interpreting, protecting, and enforcing the Constitution and all laws under the Constitution "in accordance with this Constitution." Equally, the Constitution the Judiciary viz-a-viz the Constitution demands and the judiciary to perspicaciously invoke interpret the Constitution in the full countenance and purview of Part IV of the Constitution. Section 11 (2) (b) of the Constitution:

> In interpreting the provisions of this Constitution a court of law shall … take full account of the provisions of III and Chapter IV.

Laws that expand or protect the right are not unconstitutional and, therefore, pass the sections 5, 200 and Part IV of the Constitution IV tests. This would be most of laws that provide for criminal and civil liability for violation of Part IV of the Constitution. On the other extreme would be laws that actually and impact or affect Part IV rights; these have to pass the Part IV of the Constitution tests. These are provisions that limit rights (Section 44) derogate from rights (section 45) and abolish or abridge rights (section 46). The combination or fusion

of sections 9 and 11 (2) (b) of the Constitution creates a symbiosis and complementary, complimentarily and contiguity that at any point of validation of invalidation the two tests must be applied so that the court considers whether the legislation advances the right, where there is nothing to do. There will be something more to do if the legislation is a limitation, a derogation, abolition or abridgment of aright. Moreover section 11 (2) (b) requires that the interpretation of the Constitution regard the principles of national policy. Section 13 (m) of the Constitution the only relevant principle of National Policy, administration of justice, is irrelevant to matters under consideration. Section 14 of the Constitution, on National Policy:

> The principles of national policy contained in this Chapter shall be directory in nature but courts shall be entitled to have regard to them in interpreting and applying any of the provisions of this Constitution or of any law or in determining the validity of decisions of the executive and in the interpretation of the provisions of this Constitution.

Section 13 (m) of the Constitution provides:

> To promote law and order and respect for society through civic education, by honest practices in Government, adequate resourcing, and the humane application and enforcement of laws and policing standards."

The only connection, remotely, to the matter under consideration is probably is "humane application of laws as if the death penalty is humane application of the law.

In the Court below seminal application of the Part 1V tests for violation of rights emanates in *Malawi Congress Party and others v the Attorney General* [1996] MLR 244 and entrenched in *Republic v Jasi* ((Criminal Appeal Case No 6 (MWHC) (unreported) [2016] MWHC 478, Malawilii; and *Palitu and others v Republic* (2001) Criminal Appeal Case No 30 (MWHC) (Bt) (unreported). This Court, in *Attorney General v Malawi Congress Party and others v Attorney General* ((1996) Civil Appeal No 22 (MWSCA) (unreported) never applied the Part IV test in a matter that really turned on limitation, derogation or abridgment of rights under Part IV of the Constitution.

Part IV Invalidation

Is a Part IV right affected?

Under Part IV invalidation, the first question you ask is a Part IV right affected? If the right is not affected, there is no issue for a court to procced either on the section 5 or 200 of the Constitution, on the one hand, or a Part IV invalidation, on the other. If the answer is affirmative, the court proceeds to the next question.

How and why is a Part IV right affected?

How and why is it affected? The two questions investigate who has effected and how the effect has been made. In …., the President decided, contrary to a nationwide anti-third term lobby, that the strike should not occur and ordered the police and the armed forces against to

ensure the nationwide strikes never occurred at all. Mwaungulu, J, as he then was, determined that was a violation of section 35 of the Constitution by a decision. The right to strike under section 35 of the Constitution had, under section 44 (1), to be restricted by law. Moreover, section 35 of the Constitution could only, under section 195 be amended if Parliament – not alone by the President, who can only consent it to law – if the National Assembly passes the bill under section 196 of the Constitution. Section 195 of the Constitution:

> Parliament may amend this Constitution in accordance with this Chapter

Section 196 of the Constitution:

> (1) Subject to this section, Parliament may amend this Chapter and the sections of this Constitution listed in the Schedule only if—
>
> (a) the provision to be amended and the proposed amendment to it have been put to a referendum of the people of Malaŵi and the majority of those voting have voted for the amendment; and
>
> (b) the Electoral Commission has so certified to the Speaker of he National Assembly.
>
> (2) The Parliament may pass a Bill proposing an amendment to which the conditions set out in subsection (1) have been satisfied by a simple majority.
>
> (3) Notwithstanding subsection (1), Parliament may pass a Bill containing an amendment to the provisions referred to in that subsection without a referendum where—
>
> (a) the amendment would not affect the substance or the effect of the Constitution;
>
> (b) the Speaker has so certified; and
>
> (c) the Bill is supported by a majority of at least two-thirds of the total number of members of the National Assembly entitled to vote.

In *State v Speaker of the National Assembly and others* ex parte *Mlanjila* (2003) Miscellaneous Civil Cause No 141 (MWHC) (Bt) (unreported) the National Assembly, by resolution, required Television Malawi not to show a very diluted and censored portion of a popular reality television. The legislators watched the show full throttle, unabated and censored direct from the satellite television by Multi-choice on digital satellite television. Once again, Mwaungulu, J, as he then was, ruled for the citizen, that the resolution could not bind the citizen because the citizen's rights under section 26 of the constitution could not be limited by resolution but only by law vide section 44 (1) of the Constitution. The resolution by the house rose only to censure. Television Malawi was not bound by the legislation. Neither were the police – even if there was a law – restricting the right. The legislature is not the one to reinforce the laws it makes. Enforcement is a function given to the executive and judicial branches of government.

Is the Part IV right affected a derogable right

The next question is, if the limitation is by legislation and concerning a part IV right, in terms of section 196, is the law affecting a non-derogable right? Section 45 (1 and (2) of the Constitution make other rights non-derogable within or without a state of emergency. The only laws acceptable are those that enhance, enforce or promote non-derogable rights. Sections 25 (a) and section 26 in prescribing death as one of the sentences and sections 38 (1) (for treason), 63 (1) (for piracy), 133 (for rape), 210 (for murder), 217A (2) (a) (for genocide) and 309 (1) and (2) (for housebreaking and burglary, respectively) of the Penal Code, that derogate from the right are impermissible.

Does the law abolish a Part IV right?

Section 46 (1) of the Constitution invalidates any legislation and action by the executive and Government agencies that abolishes a Part IV right. It proscribes the legislature from making such law and prohibits the executive from taking action that abolishes a right. First, the Constitution, in relation to invalidity of the whole provision or statute, in section 46 (1) bars the Legislature from making or passing legislation that abolish or abridges rights and prohibits the Executive and all agencies of government from taking and all agencies from taking action on such legislation or directive. Section 46 (1) of the Constitution:

> Save in so far as it may be authorized to do so by this Constitution, the National Assembly or any subordinate legislative authority shall not make any law, and the executive and the agencies of Government shall not take any action, which abolishes or abridges the rights and freedoms enshrined in this Chapter, and any law or action in contravention thereof shall, to the extent of the contravention, be invalid.

The Constitution uses the expression "organ of state twice – in section 19 (2) in relation to the right to the human dignity and freedom of a person and 19 (5) of the Constitution in relation to the right against corporal punishment. The Constitution deploys the expression of the organ of the executive once in section in relation to the powers of the police in section 153 (1) of the Constitution. In section 46 (1) the Constitution refers to the executive and agencies of Government. The word "government," concerning continuation of rights of persons in property, is defined in section 209 (3) of the Constitution:

> For the purposes of this section "Government" shall mean the President, the Cabinet, the Ministries, other organs of the President and Cabinet and their agents, including individuals and bodies under the authority of the President, the Cabinet or the Ministries.

The definition does not in its wording, suggesting as it does, that the definition restricts only to that provision, oust section 2 (1) of the General Interpretation Act: 1. This Act may be cited as the General Interpretation Act.

> In this Act and, subject to section 57, in every other written law enacted, made or issued before or after the coming into operation of this Act, the following

> words and expressions shall have the meaning respectively assigned to them, unless there is something in the subject or context inconsistent with such construction or unless it is therein otherwise provided …

Section 2 (1) defines "government:" Government" means the Government of the Republic established under the Constitution. That is wide enough to include the judiciary as implementer and enforcer of the Constitution and laws – beyond its typical judicial functions in section 9 of the Constitution. Consequently, section 46 (1) prohibits the legislature and prohibits the executive as enforcer and implementer of the law and other government agencies – including the judiciary in its implementer role – from taking any action that abolishes or abridges rights in Chapter IV of the Constitution either by limitation or derogation.

Does the law abridge a Part IV right?

Section 46 (1) of the Constitution prohibits the legislature from making legislation that abridges rights and bans the executive and Government agencies from taking action that abridges rights.

Is the law limiting a Part V right?

The Constitution, save for non-derogable rights under sections 45 (1) and (2) and rights that cannot be abridged or abolished under section 46 (1) of the Constitution, allows limitation of rights following a certain process. Section 44 (1) of the Constitution:

> No restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society.

Under section 44 (1) of the Constitution, the process begins by asking is the limitation of a Part IV right by law? Rights can only be limited by law. Law, according to the General Interpretation Act, here means written law (the Constitution, Acts, subsidiary legislation) and common law, customary law and international law.

Is the limitation reasonable and necessary in a democratic society?

Limitation on Part IV rights, where permissible, can only be where they are necessary and reasonable. Necessity comports purpose dictated by immediate, urgent an exigent purpose that cannot be addressed in the immediate or long term by the limitation. Reasonable means that the limitation is proportionate and sensible to engender limiting an otherwise fundamental right.

Is the limitation of general application?

The limitation, just like for law, must, under section 44 (1) of the Constitution, be of general application. In *Malawi Congress Party and another v the Attorney General* Mwaungulu, J, as he then was, decided that the Press Trust Construction Act was unconstitutional in that was directed to a single charitable public trust – a trust for a public interest under the Trustee Registration Act. One principle of the Constitution extols and exults equality and equal treatment before the law. Section 13 of the Constitution:

> … [A]ll persons have equal status before the law, the only justifiable limitations to lawful rights are those necessary to ensure peaceful human interaction are entitled to equal treatment and capacity under the law, respectively, in sections 23 (1) and 24 (1) (a) (i), (ii), (iii) and (iv) of the Constitution.

Equality before the law is, under section 45 (2) of the Constitution a non-derogable right. Section 44 (1) of the Constitution does not apply to non-derogable rights.

Is the limitation recognized by international human rights standards?

International human right "standards" does not necessarily mean international human right "law." Not all standards are laws. All laws are standards. Section 44 (1) of the Constitution refers to both, laws and standards. They are not one and the same thing. The legislature does not employ or deploy in vain the words or diction it chooses to express its clear will or intention. The use of the word "standards,' when juxtaposed with the word "law" is condign and soigne. It presupposes that we can revert to international human rights standards other than those standards actually set by law.

In relation to the death penalty, the remarks, tracing the duality in section 16 of the Constitution – article 2 of the European Human Right Convention – by the European Court on Human Rights in *Boso v Italy* (App.No. 50490/99, Eur.Ct.H.R. 846 (2002) draws the distinction between standards and law:

> When the Convention was drafted, the death penalty was not considered to violate international standards. An exception was, therefore, included to the right to life, so that Article 2 (1) provides, "no one shall be deprived of his life intentionally save in the execution of a sentence of a court following the conviction of a crime for which this penalty is provided by law." However, there has subsequently been an evolution towards the complete de facto and de jure abolition within the member States of the Council of Europe … The Protocol No 6 to the Convention, which abolished the death penalty except in respect of "acts committed in time of war or imminent threat of war" was opened up for signature 28 April 1983 and came into force on 1 March 1985. All the member States of the Council of Europe have now signed Protocol 6 and all, save Russia, have ratified it … Protocol No 13, which abolishes the death penalty in all circumstances, was opened for signature on May 2002 and came into force on 1 July 2003. In 2010 all but two of the member States of the Council (Azerbaijan

> and Russia) had signed this Protocol and all but there states which had signed it have ratified it.

The most significant statement, however, followed:

> The aforementioned figures, together with consistent State practice in observing the moratorium on capital punishment, have been found by the Court to be strong indication that Article 2 has been amended so as to prohibit the death penalty in all circumstances.

In Malawi, Presidents have, since 1975, for one reason or another, never signed death warrants. Since 1994, there has been a moratorium on death penalty since 1994 ("Death Penalty in Malawi, A Country report," Ralph Kasambara. Other theoretical comments and works is against the death penalty (*Right to Life in the Constitutional Court of the Republic of South Africa,* James Kalaile, Kalaile ed., 1996). Public opinion is against abolition. This, however, is a right issue and, therefore, a legal matter not to be settled in corridors of public opinion.

The more illustrative decision, however, is *Al-Sadoon and Mufdhi v the United Kingdom* (Application No 61498/08 [2009] ECtHR). In it the European Court on Human Rights quotes these words of Protocol 13 of the European Convention on Human Rights:

> 1. The right to life, 'an inalienable attribute of human beings' and 'supreme value in the international hierarchy of human rights is unanimously guaranteed in legally binding standards at universal and regional levels.

The universality and inalienability and supremacy of the right to life has universal acclaim. In Europe, the death penalty approbated. There is a detailed history of the European development that need not be reproduced. There is, however, reference to the Parliamentary Assembly of the Council of Europe (PACE) Resolution 1560 which Europe "calls on all members and observer States of the Council of Europe to actively support the initiative for the abolition of the death penalty in the UN General Assembly …" The question of the practice of member states amending section 2 of the Convention – allowing the death penalty – was discussed at length in *Öcalan v Turkey* (No. 46221/99 ECHR 2005-IV). Article 2 (1) of the European Convention on Human Rights read:

> Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

The Grand Chamber of the European Court on Human Rights agreed with this long passage from the Chamber below:

> "... The Court reiterates that it must be mindful of the Convention's special character as a human rights treaty and that the Convention cannot be interpreted in a vacuum. It should so far as possible be interpreted in harmony with other rules of public international law of which it forms part (see, *mutatis*

mutandis, *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI, and *Loizidou v. Turkey*, judgment of 18 December 1996, *Reports* 1996-VI, p. 2231, § 43). It must, however, confine its primary attention to the issues of interpretation and application of the provisions of the Convention that arise in the present case.

... It is recalled that the Court accepted in *Soering* that an established practice within the member States could give rise to an amendment of the Convention. In that case the Court accepted that subsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Article 2 § 1 and hence remove a textual limit on the scope for evolutive interpretation of Article 3 (ibid., pp. 40-41, § 103). It was found, however, that Protocol No. 6 showed that the intention of the States was to adopt the normal method of amendment of the text in order to introduce a new obligation to abolish capital punishment in time of peace and to do so by an optional instrument allowing each State to choose the moment when to undertake such an engagement. The Court accordingly concluded that Article 3 could not be interpreted as generally prohibiting the death penalty (ibid., pp. 40-41, §§ 103-04).

... The applicant takes issue with the Court's approach in *Soering*. His principal submission was that the reasoning is flawed since Protocol No. 6 represents merely one yardstick by which the practice of the States may be measured and that the evidence shows that all member States of the Council of Europe have, either *de facto* or *de jure*, effected total abolition of the death penalty for all crimes and in all circumstances. He contended that as a matter of legal theory there was no reason why the States should not be capable of abolishing the death penalty both by abrogating the right to rely on the second sentence of Article 2 § 1 through their practice and by formal recognition of that process in the ratification of Protocol No. 6.

... The Court reiterates that the Convention is a living instrument which must be interpreted in the light of present-day conditions and that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies (see *Selmouni v. France* [GC], no. 25803/94, § 101, ECHR 1999-V).

... It reiterates that in assessing whether a given treatment or punishment is to be regarded as inhuman or degrading for the purposes of Article 3 it cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field (see *Soering*, cited above, p. 40, § 102). Moreover, the concepts of inhuman and degrading treatment and punishment have evolved considerably since the Convention came into force in 1953 and indeed since the Court's judgment in *Soering* in 1989.

... Equally the Court observes that the legal position as regards the death penalty has undergone a considerable evolution since *Soering* was decided. The *de facto* abolition noted in that case in respect of twenty-two Contracting States in 1989 has developed into a *de jure* abolition in forty-three of the forty-four Contracting States and a moratorium in the remaining State that has not yet

> abolished the penalty, namely Russia. This almost complete abandonment of the death penalty in times of peace in Europe is reflected in the fact that all the Contracting States have signed Protocol No. 6 and forty-one States have ratified it, that is to say, all except Turkey, Armenia and Russia[[1]]. It is further reflected in the policy of the Council of Europe, which requires that new member States undertake to abolish capital punishment as a condition of their admission into the organisation. As a result of these developments the territories encompassed by the member States of the Council of Europe have become a zone free of capital punishment.
>
> ... Such a marked development could now be taken as signalling the agreement of the Contracting States to abrogate, or at the very least to modify, the second sentence of Article 2 § 1, particularly when regard is had to the fact that all Contracting States have now signed Protocol No. 6 and that it has been ratified by forty-one States. It may be questioned whether it is necessary to await ratification of Protocol No. 6 by the three remaining States before concluding that the death penalty exception in Article 2 § 1 has been significantly modified. Against such a consistent background, it can be said that capital punishment in peacetime has come to be regarded as an unacceptable ... form of punishment that is no longer permissible under Article 2.

The Chamber of the European Court on Human Rights reiterates that section 2 of the European Convention on Human Rights – the equivalent of our section 16 of the Constitution – must be interpreted according to its wording. In this regard, Article 2 of the Convention is worded very differently from our section 16 of the Constitution. Under Article 2 (1) of the Convention the death penalty is expressed as an exception to intentional deprivation of life – which the State is under an obligation to protect. The State or a person cannot deprive life intentionally except in execution of a death penalty. The wording of section 16 however is a definition or a scope of arbitrary taking of life. It is not arbitrary taking of life to execute a death penalty authorized by law.

Yet, despite all this clarity in Article 2 (1) of the European Convention on Human Rights, international public law must underpin its interpretation. While of yore, international public international law recognised the death penalty as not violating the right; international public law does not do so any longer. Consequently, Article 2 (1) of the European Convention on Human Rights, just as our section 16 of the Constitution, must be interpreted not as to suggest that the death penalty is allowed under our Constitution. So much so that, even if section 16 was sanctioning the death penalty, the new standard, aids in interpreting section 16 as not to be a prescriptive section but a descriptive one only. International public law sets a new standard – to which limitation of law must abide. In accepting the statement of the Chamber, the Grand Chamber said:

> The Court notes that, by opening for signature Protocol No. 13 concerning the abolition of the death penalty in all circumstances, the Contracting States have chosen the traditional method of amendment of the text of the Convention in pursuit of their policy of abolition. At the date of this judgment, three member States have not signed this Protocol and sixteen have yet to ratify it. However, this final step towards complete abolition of the death penalty – that is to say both in times of peace and in times of war – can be seen as confirmation of the

abolitionist trend in the practice of the Contracting States. It does not necessarily run counter to the view that Article 2 has been amended in so far as it permits the death penalty in times of peace.

For the time being, the fact that there is still a large number of States who have yet to sign or ratify Protocol No. 13 may prevent the Court from finding that it is the established practice of the Contracting States to regard the implementation of the death penalty as inhuman and degrading treatment contrary to Article 3 of the Convention, since no derogation may be made from that provision, even in times of war. However, the Grand Chamber agrees with the Chamber that it is not necessary for the Court to reach any firm conclusion on these points since, for the following reasons, it would be contrary to the Convention, even if Article 2 were to be construed as still permitting the death penalty, to implement a death sentence following an unfair trial.

The Chamber followed *Öcalan v Turkey* in *Al-Sadoon and Mufdhi v the United Kingdom* and said:

It can be seen, therefore, that the Grand Chamber in *Öcalan* did not exclude that Article 2 had already been amended so as to remove the exception permitting the death penalty. Moreover, as noted above, the position has evolved since then. All but two of the member States have now signed Protocol No. 13 and all but three of the States which have signed it have ratified it. These figures, together with consistent State practice in observing the moratorium on capital punishment, are strongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances. Against this background, the Court does not consider that the wording of the second sentence of Article 2 § 1 continues to act as a bar to its interpreting the words "inhuman or degrading treatment or punishment" in Article 3 as including the death penalty (compare *Soering*, cited above, §§ 102-04).

The Chamber of the European Court on Human Rights states that the death penalty provision has to be considered in view of Article 3 of the European Convention on Human Rights – our section 19 (2) of the Constitution – about inhuman or degrading punishment. Concerning the death penalty, the Chamber remarks:

121. In accordance with its constant case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim. The Court has considered treatment to be "inhuman" because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering. It has deemed treatment to be "degrading" because it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them. In considering whether a punishment or treatment was "degrading" within the meaning of Article 3, the Court will have regard to whether its object was to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his

> or her personality in a manner incompatible with Article 3. However, the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3. In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment (see *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 127, ECHR 2009 and the authorities cited therein).
>
> 122. Article 3, which prohibits in absolute terms torture and inhuman or degrading treatment or punishment, enshrines one of the fundamental values of democratic societies. It makes no provision for exceptions and no derogation from it is permissible under Article 15, even in the event of a public emergency threatening the life of the nation. As the prohibition of torture and of inhuman or degrading treatment or punishment is absolute, irrespective of the victim's conduct, the nature of any offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3 (see *Saadi v. Italy* [GC], no. 37201/06, § 127, ECHR 2008).

Our sections 45 (1) and 2 of the Constitution does not only make the right against cruel, inhuman and degrading punishment; it makes the right to life a non-derogable right. Section 16 must be read in the context of these provisions. Section 16 must be constructed restrictively and, where there is doubt, in favour of the right. The Chamber of the European Court on Human Rights:

> The Court considers that, in respect of those States which are bound by it, the right under Article 1 of Protocol No. 13 not to be subjected to the death penalty, which admits of no derogation and applies in all circumstances, ranks along with the rights in Articles 2 and 3 as a fundamental right, enshrining one of the basic values of the democratic societies making up the Council of Europe. As such, its provisions must be strictly construed (see, *mutatis mutandis*, *Soering*, cited above, § 88, and *McCann and Others v. the United Kingdom*, 27 September 1995, § 147, Series A no. 324).

In an open and democratic society?

The question is, because of the principle of the Constitution in section 13 of the Constitution, is whether the limitation is necessary in an open and democratic society which we are. This is not an invitation to compare us with other democracies. It is an invitation to look at the democratic society which our unique Constitution gratuitously describes with clarity and alacrity in the preamble, in the interpretive section 11 (2) (a) of the section of the Constitution, constitutional principle in section 12 (1) (c) and (e) and 146 (2) (c) of the Constitution. The necessity is underlined by constitutional underlying principle in section 12 (e) of the Constitution

> This Constitution is founded upon the following underlying principles as
> all persons have equal status before the law, the only justifiable limitations to

> lawful rights are those necessary to ensure peaceful human interaction in an open and democratic society …

The necessity, however, only relates to where limitations are allowed. This necessity does not apply to non-derogable rights.

Does the limitation negate the essential content of the right or freedom?

Finally, the limitation must not be as to negate the essence of the right. Section 44 (3) of the Constitution:

> Laws prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question, and shall be of general application.

The essence of a right is what it is in the right that is the basis and substance of its nature and needs advancement, retention or preservation. Conversely, what is it in the right that forms the basis of or the substance of its nature that need not be retarded impeded or destroyed. As Ziad Imam in his article "Judicial review has an important role in protecting rights of Underprivileged," November 18, 2014:

> "'The essence of a right test' is different from a rights test. The argument that Part III is eliminated is incompatible with the implied limitation of power on Parliament. First the violation of rights of Part III is required to be determined, then its impact examined, and if shows that in effect and substance, it destroys the basic structure of the Constitution, the consequence of invalidation must follow.

Partial Invalidation

The other consequence of validation is where the substratum or substance of the right is partially affected. Section 11 (3) of the Constitution:

> Where a court of law declares an act of executive or a law to be invalid, that court may apply such interpretation of that act or law as is consistent with this Constitution.

The Constitution itself canvasses two effects of invalidity. Once a court, as here, concerning section 210 of the Penal Code, declares a law invalid, it is, unless the whole law has been declared unconstitutional, under a duty, under section 11 (3) to interpret the remnant provision that is consistent with the Constitution. Concerning section 210 of the Penal Code, the offending part, according to *Kafantayeni and others v Attorney General,* was the mandatory. The death penalty was a valid sentence and available to a court of law. The death penalty, therefore, on interpretation of section 210 of the remnant section was not, therefore, invalid and, at that, invalid *ab initio.*

The direct consequence of invalidating legislation or law under Part IV of the Constitution is violation of rights

Section 210 of the Penal Code, being a Part IV of the Constitution should have been invalidated under sections 44, 45 and 46 (2) – not section 5 – of the Constitution. Or, at least, section 5 should have been invoked because the validity of a Part IV validity was established. Section 46 of the constitution is a comprehensive scheme where any act of law, among other things, results, as here, in violation of the right enshrined in this Constitution.

It is salutary that, for the Court below, in *Kafantayeni and another v The Attorney General* the mandatory in the death penalty in section 210 of the Penal Code became unconstitutional because it violated the right to fair trial and the right against inhuman, degrading and cruel treatment or punishment. The unconstitutionality of section 210 of the Penal Code, therefore, hinged on or was itself violation of the rights in Part IV of the Constitution. Under section 46 (1) of the Constitution, the National Assembly or any subordinate legislative authority could not make any law, and the executive and the agencies of Government could not take any action, which abolishes or abridges the rights and freedoms enshrined in this Chapter and any law or action in contravention thereof shall, to the extent of the contravention, be invalid.

The invalidation of section 210 of the Penal Code was, therefore, based on this provision, rather section 5 of the Constitution. Section 46 (1) of the Constitution makes any law passed by the legislature or action of the Executive and Government Agencies which abolishes all abridges the rights and freedoms enshrined in this chapter. Once, therefore, a law, as happened here, contravenes the rights in chapter 4 of the Constitutions, a court, as happened here, can invalidate a law. An invalid law violates human rights.

Violation of a right creates the right in section 46 (2) of the Constitution – the right can only be reinforced by an application

Once a statute, like here, is invalidated for violation of a right, the right, a new and consequential right, to an application under section 46 (2) of the Constitution arises. Section 46 (2) of the Constitution provides:

> Any person who claims that a right of freedom guaranteed by this Constitution has been infringed or threatened shall be entitled –
>
> (a) To make application to a competent court to enforce or protect such a right or freedom; and
>
> (b) To make application to the ombudsman or the Human Rights Commission in order to secure such assistance or advise as he or she may reasonably require.

Section 46 (2) (a) then creates another right – a right to a citizen to apply to a competent court, the High Court.

This provision is significant because of the right it creates. In the Court below and in this Court, the right created by *Kafantayeni and others v Attorney General* has been touted as being the right to a re-sentencing hearing, a sentence re-hearing. This, as we see shortly, is the remedy. The right section 46 (2) provides is a right to an application to a competent court.

Kafantayeni and others v Attorney General, therefore, properly in my judgment, confined the remedy of a sentence re-hearing or re-sentencing hearing to the parties. In this regard, *Kafantayeni and others v Attorney General* was *in tandem* with the constitutional scheme. The remedy – adequate remedy – for mandatory in section 2(10) of the Penal Code that never afforded a hearing to a person convicted of murder was a re-hearing or re-sentencing. The right, however, was to an application for violation of rights.

The right to an adequate remedy

Section 46 (3) of the Constitution, consequently, provides for the remedy for violation of human rights:

> Where a court referred to subsection (2) (a) finds that rights or freedoms conferred by this Constitution have been unlawfully denied or violated, it shall have the power to make any orders that are necessary and appropriate to secure enjoyment of those rights or freedoms, and where a court finds that a threat exists to such rights or freedoms, it shall have the power to make any orders necessary and appropriate to prevent those rights and freedom from being unlawfully denied or violated.

Section 46 (3) of the Constitution, therefore empowers a court to make any orders that are necessary and appropriate to secure the enjoyment of those rights and freedoms and where a court finds that a threat exists to such right of freedom the court has powers to prevent or contain such violation. The section, therefore has a present and future application. For the future, a court must make an order that prevents future violation. For the present, a court must make an order that promotes the enjoyment of those rights.

Resentencing hearing was a remedy – not necessarily a right per se

Kafantayeni and others v Attorney General fulfilled requirement for the present violation. For indeed, if, as happened in *Kafantayeni and others v Attorney General*, there were others who because of the mandatory section 210 of the Penal Code, were not heard, the appropriate order in the present circumstances is a re-hearing or re-sentencing. This would be an "effective" remedy under section 41(3) of the Constitution. The Court below in *Kafantayeni and others v Attorney General,* therefore, said:

> 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.

Kafantayeni and others v Attorney General made no general statement about future violation or about others who, like Kafantayeni and others, were similarly placed. These and others in the future still retained the right to an application under section 46 (2) to a competent court for a necessary order which under section 41 (3) had to be an effective remedy. *Yasini v*

Republic, by this Court essayed to broaden the scope of *Kafantayeni and others v Attorney General.* This Court said:

> In the Kafantayeni case clearly ordered that the Plaintiffs were entitled to a sentence rehearing on the death sentence individually. The Courts decision on this point affected the rights of all prisoners who were sentenced to death under the mandatory provisions of section 210 of the Penal Code. The right to a sentence rehearing therefore accrued to all such prisoners. This default however, did not and does not take away his rights to appeal against the death sentence. We wish to observe that it is the duty of the Director of Public Prosecutions to bring before the High Court for sentence rehearing all prisoners sentenced to death under the mandatory provision of Section 210 of the Penal Code.

This Court was broadening those affected by *Kafantayeni and others v Attorney General*.

When the Court below decided *Kafantayeni and others v Attorney General* and this Court determined *Yasini v Republic,* there were in the criminal justice system prisoners and suspects – whose rights were violated by the defunct section 210 of the Penal Code – at different stages of the criminal process. The first, who are of little concern, are those who had not been convicted of murder or, having been convicted of murder, had not been sentenced. For these *Kafantayeni and others v Attorney General* applied as a matter of course, the mandatory provision having been invalidated by *Kafantayeni and others v Attorney General.* The second category were those who at the decision by the Court below in *Kafantayeni and others v Attorney General*, had been sentenced to the mandatory death penalty and had not appealed or, having appealed, this Court had not determined their appeal either against conviction and sentence or against sentence only. There was a further category of cases where this court had determined the appeals and dismissed the appeals either against conviction and sentence or sentence only. There was a further group whose appeals against conviction and sentence or sentence only, decided after *Kafantayeni and others v Attorney General*, were dismissed by this Court. *Yasini v Republic* tried to address these cases – of course, with a modicum of ambiguity.

The right to an application under section 46 (2) of the Constitution was unaffected by Yasini v Republic

First, *Yasini v Republic* never, as it should have done, accentuated the right in section 44 (2) of the Constitution discussed earlier. The right to an application in section 44 (2) remained the right of every prisoner whose right to be heard or to the right against cruel, inhuman and degrading treatment or punishment was truncated or completely abolished by a law that violated rights under Part IV of the Constitution. Neither the Court below nor this Court would, without violating Part IV of the Constitution, deprive or limit the right. The prisoners so affected could, therefore, like plaintiffs in *Kafantayeni and others v Attorney General,* apply in respect of own sentences which violated their rights.

Secondly, *Yasini v Republic* actually narrowed the potency of the right in section 44 (2) of the Constitution by stressing the remedy – to re-hearing or re-sentencing – and overlooking the right to such an application. *Yasini v Republic* therefore, ordered a re-sentencing or re-hearing. The right to apply and the right to a remedy are distinct. The substantive right from *Kafantayeni and others v Attorney General* and *Yasini v Republic* was the right to apply to the High Court for violation of the right; the right to an effective remedy – a resentencing hearing, depended on it.

The right to appeal in Yasini v Republic

In the same vent, *Yasini v Republic* suggested an alternate right – the right to appeal. There is uncertainty about the right of appeal *Yasini v Republic* preserves. In one sense *Yasini v Republic* probably refers just to the general right to appeal under section 42 (2) (f) (viii) of the Constitution. If that is the case, the statement is tautological. In its plainness, however, it points to difficulties.

Jacob v Republic, delivered on 18 July, 2007, essentially affirmed *Kafantayeni and others v Attorney General*. It was, therefore, decided after *Kafantayeni and others v Attorney General* but before *Yasini v Republic*. In *Jacob v Republic* there was an appeal to this Court against sentence only – the Court below passed the mandatory death sentence before *Kafantayeni and others v Attorney General*. This Court determined the appeal after *Kafantayeni and others v Attorney General*. On the death penalty, *Jacob v Republic* confirmed *Kafantayeni and others v Attorney General*. This Court in *Jacob v Republic*, however, rejected the order for resentencing. This Court accepted *Kafantayeni and others v Attorney General* "to the extent only that the mandatory requirement of the death penalty for the offence of murder as stipulated in section 210 of the Penal Code is a violation of ss. 19 (1), (2) and 3, 41 (2) and 42 (2) (f) of the Constitution of the Republic of Malawi, and to that extent s. 210 is hereby invalid under s. 5 of the Constitution." This Court, therefore, neither considered nor ordered a sentence rehearing or a resentencing hearing:

> The facts in the present appeal showed that the deceased person was the appellant's second wife on suspicion that she bewitched him so that he was unable to have sexual intercourse with his wife. It does not seem to us on the facts of this case that it can be said that it is a proper matter for a lesser sentence than the one the High Court passed. We are saying here that the sentence of death which the High Court passed appears to us to have been well merited. Besides, we have been informed that the sentence has now been commuted to life imprisonment by the appropriate authority. Therefore, notwithstanding the fact that the points raised in the appeal have been decided in favour of the appellant, we dismiss the appeal because we consider that no substantial miscarriage of justice has actually occurred thereby.

I have not read the next case in this Court of *Alumeta v Republic* (2006) Criminal Appeal No 31 (MSCA) (unreported). Counsel's quote, however, indicates that it reiterates the point, just discussed, in *Jacob v Republic*. Up to *Jacob v Republic*, therefore, it is unclear

whether all sentenced to death on the mandatory provision could, like their counterparts in *Kafantayeni and others v Attorney General,* appeal or apply so much so that the next significant case is *Yasini v Republic.*

Yasini v Republic, however, reiterated that the right of appeal exists. That right could not exist for those who had appealed to the Supreme Court and their matters were either pending or determined. They could not appeal to anybody beyond this Court. Those whose appeals pended could not appeal but could probably add the principle in *Kafantayeni and others v Attorney General* and *Jacob v Republic* as an additional ground of appeal. Most certainly, those whose matters had already been determined by this Court could not appeal anywhere. The alternative route was, for these, therefore, to proceed under section 108 (2) of the Constitution.

Section 108 (2) of the Constitution

Section 108 (2) of the Constitution alters aspects of *stare decis* some. Section 108 (2) of the Constitution, read together with section 108 (1), empowers the High Court to review any law – legislative, precedent or customary law – for constitutionality. This Court's decisions, in so long as they never considered constitutionality, are amenable to review by the High Court. When the High Court is exercising the section 108 (2) of the Constitution power, *stare decis* does not apply. The High Court's determination on the constitutionality of a decision of this Court, however, can be appealed from. The High Court is bound, by *stare decis,* by a decision of this Court on the constitutionality of its reviewed decision.

When the High Court exercises its powers under section 108 (2) of the Constitution, it is not sitting on appeal. This Court, therefore, in *Yasini v Republic,* when stating that prisoners could appeal, could not, in relation to those whose appeals this Court determined, have been referring to an application to the High Court under section 108 (2) of the Constitution. Proceeding under section 108 (2) of the Constitution, therefore, could only have been by an application – much like in *Kafantayeni and others v Attorney General.*

In *Kafantayeni and others v Attorney General* there was no appeal, going by the decision, to the Supreme Court. Kafantayeni, who was the only applicant, made an application to the High Court in a constitutional manner under section 108 (2) of the Constitution. The Court below in *Kafantayeni and others v Attorney General* and this Court in *Jacob v Republic* and *Alumeta v Republic* invalidated section 210 of the Penal Code under section 5 of the Constitution. It should not have.

In *Kafantayeni and others v Attorney General, Jacob v Republic* and *Alumeta v Republic* section 210 of the Penal code was impugned for violation of Part IV of the Constitution. Legislation violating Part IV provisions cannot be impugned under section 5 but sections 44 (1), 44 (2), 45 (1), 45 (2) and 46 (1) of the Constitution. Whatever the case, applications are made because of section 108 (2) of the Constitution and under section 46 (2) of the Constitution and this Court, for any violation, must proffer an effective remedy because of section 41 (3) of the Constitution.

Those whose appeals were determined by this Court would have had no remedy

Yasini v Republic should have stressed that the parties – including those that had appealed to this Court and had their matters determined or pending – had a right to apply to the High court for constitutionality of the death penalty. It is not, as the appellant submits, correct, therefore, that *Kafantayeni and others v Attorney General* never provided a procedure for those who wanted to impugn the death penalty. First, *Kafantayeni and others v Attorney General* did not have to set the procedure – it was in sections 108 (2) and 46 (2) of the Constitution. Secondly, *Kafantayeni and others v Attorney General* actually laid the procedure – an application under sections 46 (2) and 108 (2) of the Constitution. *Yasini v Republic* was right that an appeal lay and should have stressed that the right to appeal only applied to those who had not yet appealed or never appealed. *Yasini v Republic* should have stressed that those who had not appealed and wanted to raise *Kafantayeni and others v Attorney General* as a ground for not imposing a death penalty would have to apply for extension of time. Perhaps, for those whose appeals pended in this Court, the appeals could have been withdrawn to allow for applications under sections 46 (2) and 108 (2) of the Constitution. *Yasini v Republic*, therefore, overlooked that, for those whose appeals were already decided by this Court, no appeal could lie to another court from a decision of the Supreme Court before or after *Yasini v Republic*. They would, therefore, be without remedy, but for an application to challenge this Court's decision for constitutionality. That right cannot be removed by this Court.

Violation of a right entitles one and gives locus standi under section 44 (2) of the Constitution (*St Kitts & Nevis AG v Lawrence.* In *Minister of Justice v Borowski* 1 ([1981] 2 SCR 265, the Court said:

> … [T]o establish status as a plaintiff seeking declaration that the legislation is invalid, if there is a very serious issue of invalidity, a person only show that he is affected by it directly or that he has genuine interest as a citizen in the invalidity of the legislation and there is no effective manner in which the issue may be brought before the court.

Moreover, without an obvious alternate, a challenge could support standing (*R v Secretary of State for Foreign Affairs* ex parte *World Development Movement Ltd* [1995] 1 WLR 386; *R v Her Majesty's Inspectorate of Pollution and Ministry of Agriculture, Fisheries and Food* ex parte *Child poverty Action Group and others* [1989] 1 All ER 1047.

The pervasiveness of Yasini v Republic

Of course this Court, rather than leave it to prisoner's to apply wanted to have all prisoners under the death penalty to be brought to Court. It is unclear, however, why it was the duty of the Director of Public Prosecutions to bring the prisoners to what this Court renamed as a sentencing rehearing. After conviction, without an appeal, the Director of Public Prosecution is *functus officio*. The matter was properly commenced against the Attorney General.

It was never the duty of the Director of Public Prosecution – but other Government agencies – to execute the sentence and, therefore, by extension, the sentencing rehearing order. Maybe the assumption was that *Yasini v Republic* made all such sentences invalid. It did not. It stated that the decision affected many prisoners. It was, therefore, incumbent on the prisoners, just like those in *Kafantayeni and others v republic,* to make appropriate applications.

This Court was probably under section 44 (2) of the Constitution making a necessary order in ordering the Director of Public Prosecution to bring prisoners to court. If anything the order should have been to the Attorney General. The order against the Director of public Prosecution, however, did not emanate from any duty of the Director of Public Prosecution. If anything, the duty arose from that order.

If all prisoners had made applications under section 108 (2) or 46 (2), the effective remedy, irrespective of the stage of appeal, would have been a rehearing only on the sentence. This Court decided for a short-cut – a sentencing rehearing for all who were under a death penalty and charged – with the powers available to the Director – the Director of Public Prosecutions to bring all such for a rehearing. This Court in *Yasini* acted under section 46 (2) and made an order that it felt was necessary to address the violation

The sentencing rehearing was the adequate remedy for a mandatory sentence required by section 210 of the Penal Code as it was then. Such a remedy cannot be subject of the principles of *stare decisis*. The remedy conceives precisely because any sentence passed under the defunct section 210 of the Penal Code is unconstitutional or, if subject of appeal to this Court, tainted with unconstitutionality. The remedy addresses the illegality *de novo* and completely.

Applying these principles to this case, it is quite clear that the appellant was sentenced to death by the Court below based on the mandatory sentence. The appeal against sentence was dismissed by this Court after *Kafantayeni and others v Attorney General.* It is also true that the appeal itself was made before *Kafantayeni and others v Attorney General* although the decision of this Court was made after *Kafantayeni and others v Attorney General.* At the time of the appeal, therefore, the appellant could not elect between an application which was only made possible by *Kafantayeni and others v Attorney General* and affirmed in this Court in *Jacob v Republic* and *Alumeta v Republic.* At the hearing of the appeal, this Court was aware of two of its own decisions in *Jacob v Republic* and *Alumeta v Republic* confirming *Kafantayeni and others v Attorney General.* Of course, the appellant was represented. This Court was aware, based on these cases, that there was a violation of the appellant's rights in the mandatory sentence passed by the Court below. This Court proceeded to hear the appeal in disregard of these decisions.

This Court, before proceeding to determine the appeal on sentence should have informed the appellant of his right to apply for violation of those rights and the right to be accorded an adequate remedy – a sentencing rehearing. In failing to do so, this Court was not, as is suggested, acting *per incuriam.* It overlooked to inform and give the appellant the opportunity to elect between the right to appeal or make an application under the Constitution.

In any case, *Yasini v Republic* applied *Kafantayeni and others v Attorney General* to all sentenced to death – by the High Court – under the defunct section 210 of the Penal Code. Judges' statements are not supposed to be interpreted with the rigour of the rules applicable to legislation or private legal instruments. The clarity with which this Court expressed itself in *Yasini v Republic* gives no necessity of interpretation in any event and leaves no uncertainty and ambiguity for who a resentencing hearing is ordered:

> The Court's decision, on this point, affected the rights of all prisoners who were sentenced to death under the mandatory provisions of section 210 of the Penal Code. The right to a sentencing hearing, therefore, accrued to all such prisoners

The test is clear: was the prisoner sentenced to the death penalty under the mandatory provision of section 210 of the Penal Code? If the answer is no, there will be no rehearing. This will be the case of many cases decided in cognizance of *Kafantayeni and others v Attorney General* and *Yasini v Republic* and the amendment to section 210 of the Penal Code. If the answer is yes, it is irrelevant, in my judgment, that on appeal this Court minded *Kafantayeni and others v Attorney General* and nevertheless determined that the sentence was appropriate.

First, the death penalty, passed based on the defunct section 210 of the Penal Code, is tainted by the unconstitutionality discussed. Secondly, as happened in this case, there was no evidence proffered in mitigation. Thirdly, this Court never received any evidence in mitigation. The Court below is presumptuous in suggesting that Counsel for the appellant provided such evidence or that such evidence could be mesmerized from the judgment.

One tenet effusing from *Kafantayeni and others v Attorney General* is one requiring that evidence must be received in mitigation. That evidence must, as it must be, include any post-conviction evidence, at least for those who are applying after being sentenced to death. Moreover, the contamination of the mandatory sentence cannot be atoned by this Court conducting a re-sentencing hearing itself.

Of course, I am loathsome to think that, ordering that prisoners should be brought in the Court below for resentencing, this Court divested itself of the power to do so. This Court never said so. Neither can this be inferred from just that the Court said resentencing hearing should be in the Court below. It is a matter of principle. If the question is, as would be in all these cases, that the death penalty and mandatory death penalty in section 210 of the Constitution is unconstitutional, the first port of call, should, as it must be under sections 108 (1) and 108 (2), the High Court.

To the extent that the remedy sought, a resentencing hearing, arises from the constitutionality of a law, this Court cannot be the first to deal with it. Were constitutionality of a hearing, for some reason, to arise here, this Court would all the same have to proffer an adequate remedy – a rehearing. That rehearing can only be in the court below. The nature of a rehearing is that it cannot be subjected to *stare decis or res judicata.* All issues are open for reconsideration without the issue estoppel arising. Moreover, commencing proceedings under section 108 (2) of the Constitution gives the applicant a chance to exercise the right to appeal

under section 42 (2) (f) (viii) of the Constitution from a decision of a court of first instance to a review or appeal court.

Disposal

I would, therefore, allow the appeal and order a rehearing in the Court below. In view of difficulties discussed, in so far as this and others waiting for this decision are continuing cases, it might be necessary to make further directions for the better management of this case and the other cases. Section 8 (a) of the Supreme Court of Appeal Act provides the practice and law in the Criminal Division of the Court of Appeals for England and Wales Court of Appeal apply on points not covered by the Supreme Court Act or the Supreme Court of Appeal Rules. Beyond laws, the Criminal Procedure Rules, 2020 apply to this Court in criminal matters.

Under Part 1.1(1) of the Criminal Procedure Rules, there is a duty on the Court to "deal with cases justly" – the overriding objective. Part 1.1(2) defines the expression:

Dealing with a criminal case justly includes –

(a) Acquitting the innocent and convicting the guilty;
(b) Dealing with the prosecution and defence fairly;
(c) Recognizing the rights of the defendant, particularly those under Article 6 of the European Convention on Human Rights;
(d) Respecting the interests of witnesses, victims, jurors and keeping them informed of the progress of the case;
(e) Dealing with the case efficiently and expeditiously;
(f) Ensuring that appropriate information is available to the court when bail and sentence are considered; and
(g) Dealing with the case in ways that take into account
    i. The gravity of the offence,
    ii. The complexity of what is at issue,
    iii. The severity of the consequences for the defendant and others affected, and
    iv. The needs of other cases

Part 1. 2 (1) of the Criminal Procedure Rules, 2020 describes the role of participants in a criminal case:

Each participant. In the conduct of each case, must –

(a) Prepare and conduct the case in accordance with the overriding objective;
(b) Comply with these Rules, practice directions and directions made by the court; and
(c) At once inform the court and all parties of any significant failure (whether or not that participant is responsible for that failure) to take any procedural step required by these Rules, any practice direction or any

direction of the court. A failure is significant if it might hinder the court in furthering the overriding objective

Part 3.2 (1) of the Criminal Procedure Rules stresses the duty of the court to give effect to the overriding objective in applying and interpreting the rules:

The court must further the overriding objective by actively managing the case.

Part 3.2 (2) of the Criminal Procedure Rules describe active management in a criminal case:

Active case management includes –

(a) The early identification of real issues;
(b) The early identifications of the needs of witnesses;
(c) Achieving certainty as what must be done, by whom, and when, in particular by the early setting of a time table for the progress of the case;
(d) Monitoring the progress of the case and compliance with directions
(e) Ensuring that evidence, whether disputed or not, is presented in the shortest and clearest way;
(f) Discouraging delay, dealing with as many aspects of the case as possible on the same occasion, and avoid unnecessary hearings; and
(g) making use of technology

Part 3.2 (3) of the Criminal Procedure Rules provides for the duty on the court to give directions in the case:

The court must actively manage the case by giving any direction appropriate to the needs of that case as early as possible

This Court in *Malawi Telecommunications Ltd v Kabathi and others* ((2013) Civil Appeal Case No 51 (MWSCA) (unreported stresses the importance of the Court to give management orders or conditions.

This Court under section 23 of the Legal Aid Act recommends to the Director of the Legal Aid Bureau that legal aid be granted to all who were ordered for a sentence re-hearing. Ultimately, the right in section 44 (2) of the Constitution inures to them. Rather than wait for the Attorney General or the Director of Public Prosecutions take up their cases, those affected, must, if they want to, in their own right, make an application to the High Court and challenge the constitutionality of the death penalty and be afforded a sentence re-hearing.

The legal aid must include an urgent and immediate application to be released on bail with or without a bond. The death penalty is unconstitutional. Sections 25 (a) and section 26 in prescribing death as one of the sentences and sections 38 (1) (for treason), 63 (1) (for piracy), 133 (for rape), 210 (for murder), 217A (2) (a) (for genocide) and 309 (1) and (2) (for housebreaking and burglary, respectively) of the Penal Code must be read as meaning the

maximum prison sentence – life imprisonment. If life imprisonment becomes the maximum sentence, where it is not mandatory, by fiction, it cannot be imposed, reserved as it were for the worst instance of a crime. Courts are, therefore, likely, to pass a prison term of years. Those who have served long periods of their life or long sentences are likely to get shorter terms or immediate release.

The circumstances will be so variegated that a blanket release on bail is improper. Each case, therefore, must be individuated. Mr. Khoviwas's case is well known. On balance, on a resentencing hearing, there will be a reduction or release for the reasons advanced. All post-conviction evidence, victim's evidence etc., is in situ. The Registrar of the Court below should set a sentence rehearing within 21 days of this order. The rest should apply for bail within the next 21 days.

The Director of Public Prosecutions and the Attorney General will continue to act according to the directions in *Yasini v Republic.* During or before a sentence rehearing, the Director of Public Prosecutions and the Attorney General can apply for bail if the prisoners are willing to make bail.

The Court below can act suo motu and consider granting bail in appropriate circumstances.

There will be no order as to costs. Each party has to bear its own costs.

Twea, JA *(dissenting)*

On 13th January, 2017, Kamwambe J. pronounced a judgment against the appellant in the following terms:

> *"With the remarks made above, my view is that where there is a determination on appeal by the Supreme Court of Appeal on a sentence as the case herein, the matter should not come back to the High Court for sentence re-hearing whether the sentence of death penalty is upheld maintained or reduced to term years. The decision on sentence by the Supreme Court of Appeal is final".*

The appellant was aggrieved by this decision and appealed.

The appellant filed four grounds of appeal. I will reproduce the grounds of appeal because I shall specifically refer to each ground in the course of my judgment. They were as follows:

> *"1. The court below erred in not according to the appellant a sentence re-hearing since it was duty bound to accord him a sentence re-hearing based*

on the Supreme Court of Appeal judgment of Maclemonce Yasin v. Republic MSCA Criminal Appeal No. 25 of 2005 and the judgment of the High court sitting at Constitutional Court in Kafantayeni and Others v. The Attorney General Constitutional Case No. 12 of 2007.

2. The court below erred in equating an appeal on sentence to a sentence re-hearing and deciding that the two are alternatives as the two are different legal processes and an appeal cannot be a substitute or alternative for sentence re-hearing.

3. The Court below erred in not according the appellant a sentence re-hearing on the basis that the appellant had earlier appealed to the Supreme Court of Appeal as the decision of the Supreme Court of Appeal on the death sentence was decided per incuriam since at the time of entertainment the appeal on death penalty there was no valid death penalty at all against the appellant the same having be declared unconstitutional and hence void ab initio.

4. Not according the appellant a sentence re-hearing is both discriminatory and arbitrary".

The facts of this case are that the appellant and another, who was not brought to trial, were charged with the offence of murder. He was convicted on 16th September, 2003 and sentenced, under section 210 of the Penal Code then, to a mandatory sentence of death. The sentence of death was commuted, by the President, to a sentence of imprisonment for life on 9th April, 2004. In 2007 the appellant appealed against the conviction and death sentence to the Supreme Court of Appeal. The ground of appeal, against the conviction, was that the trial court did not fully explain the possible defence of provocation to the Jury. The ground of appeal against the death sentence was based on the decision in the case of Kafantayeni and Others vs The Attorney General, Constitutional Case Number 12 of 2007; that the mandatory sentence of death for murder, was unconstitutional. The Supreme Court of Appeal fully considered the grounds of appeal and found that the trial Judge did not err when directing the Jury on the defence of provocation and indeed confirmed that the defence was not applicable. The Court found that the appellant pursued the deceased, who was unarmed and running away from a fight, and fatally stabbed him. For the said reasons the Court found that the conduct of the appellant and his colleague was inexcusable and confirmed of the death sentence. There was no reference, in that judgment, to the fear that the President commuted the sentence of death to imprisonment for life on 9th April 2004. It can be concluded therefore, that the Court was not made aware that the appellant's sentence of death had been commuted by the President.

The appellant then brought the case again before the High Court seeking a sentencing re-hearing on the basis of the decision of this Court in the case of Maclemonce Yasin vs The Republic MSCA Criminal Appeal No. 25 of 2005. The Court below refused to grant him a sentence rehearing on the ground stated herein before. The present appeal is against the said decision of the Court below.

Let me state, from the onset, that unlike my brother Justices, I would dismiss the appeal and confirm the judgment of the Court below that the decision of the Supreme Court of Appeal is final, and, further, that the case was not amenable to adjudication, after the President had exercised his prerogative of mercy.

Let me begin from a point of convergence with my colleagues; First we are agreed that, at the hearing of the earlier appeal, this Court was not made aware that the appellant's sentence of death had been commuted to "imprisonment for life by the President." The majority judgment affirms that:-

> *"On 9th April 2004 the President commuted the death sentence to life imprisonment. This Court however, never determined the appeal until 1st July 2010 and dismissed the appeal against conviction and sentence. Consequently, the death penalty remained as the actual punishment although, practically the appellant because of commutation, was on a sentence for life".*

What we had therefore was a conflict: the Supreme Court of Appeal exercising judicial authority over the President's exercise of his discretion on Prerogative of Mercy under section 89(2) of the Constitution.

Secondly, my colleagues acknowledge that the practice of not pleading in mitigation of sentence, in murder cases, that had developed before the decision in Kafantayeni and others (supra), had no legal basis:

> *"It must be understood that there was no law that prohibited receiving evidence in mitigation, even if the death penalty is mandatory. It is only by practice, because it was not going to count, that such evidence was never received. In principle there was no reason why it was not received". (sic)*

I will point out presently, that The legal position on this was not really appreciated by the bar, and, sometimes, the Court below, hence the practice developed to the determent of the convicted.

Third, I agree with the position taken by my colleagues on what the case of Kafantayeni and others (supra) actually decided:

> *"The issue before the Court was constitutionality of the mandatory death penalty sentence, not the constitutionality of the death penalty. Therefore, the constitutionality of the death penalty must be left for future consideration…. Kafantayeni and others v The Attorney General concludes that the manner in which legislation prescribed the application of this unique punishment was unconstitutional". (sic)*

I will not comment on the suggestion of revisit the decision in Kafantayeni and Others (Supra). I will restrict myself to the decision of the Court below, and why it should be confirmed.

In addressing the grounds of appeal it is prudent to reflect on the position of the applicants in the constitutional determination of Kafantayeni and others (Supra).

The applicants in the Kafantayeni and others (Supra) were persons convicted of the offence of murder, sentenced to the penalty of death which, then, was mandatory. Their application challenged the mandatory application of the sentence, which took away the judge's discretion to consider each convict on the merits of the case. The applicants did not take issue with their conviction at all. After the determination, that the mandatory application of the penalty of death was not constitutional, the Court below made a consequential order, in the following terms;

> *"We make a consequential order or 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 submission as may be presented or made to the judge in regard to the individual offender and the circumstances of the offence".*

The consequential order or remedy was based on section 46 (3) of the Constitution which provides that:-

> *"(3) Where a Court referred to in subsection (2) (a) finds that the rights or freedom conferred by this Constitution have been unlawfully denied or violated, it shall have the power to make any orders that are necessary and appropriate to secure the enjoyment of the rights and freedoms and where a Court finds that a threat exists to such rights and freedoms, it shall have the power to make any orders necessary and appropriate to prevent the rights and freedoms from being unlawfully denied or violated".*

The constitutional determination, determined the rights and freedoms of all convicts in a like or same position as the applicants in the Kafantayeni and Others (Supra) case.

It opened the remedy to every other convict in a like or the same position. However, it would have required each such convict to apply, individually, to enjoy the same rights and freedoms that the Court below had determined for the applicants in the Kafantayeni and others (Supra) case. This approach was remedied by this Court, in Maclemonce Yasini v The Republic (supra). This Court did not create a new right. It is of no consequence, in my view, that the Director of Public Prosecution (DPP), the bar and the Court below, at times, interpreted it, to cover convicts who appealed before, were pardoned or had their sentences remitted or commuted. I would not wish to speculate on the reasons for such an extended interpretation. One thing remains clear though, the decision in the Kafantayeni case was of limited application.

The decision in Kafantayeni and Others (Supra) does not apply to other categories of convicts. First and foremost, convicts dissatisfied with their conviction; secondly, those dissatisfied with their conviction and sentence; third, those who appealed, were pardoned, or had their sentences reduced or commuted. Only convicts who did not challenge their conviction qualified.

Consequently, convicts dissatisfied with their conviction and sentence have the option to appeal the conviction and sentence. This is what happened in the first appeal, in present case, and in the case of Maclemonce Yasini (supra). In both cases the appeals against conviction and sentence were dismissed. The Appeals against sentence were dismissed because the appellants did not offer any arguments in mitigation of the sentence. They just cited the decision in the Kafantayeni and Others and or Maclemonce Yasini (Supra) and sought a sentence re-hearing. Both did not succeed. It was open to the appellants to offer submissions or apply to call evidence, in mitigation of sentence. None of this was done. In both cases therefore, the Kafantayeni and others (Supra) scenario did not apply. Notwithstanding that this Court has powers to remit a case to the Court below for further hearing, under Section 16 (d) of the Supreme Court of Appeal Act; there must be proper arguments and justification for such an order.

I therefore, find no merit in the ground that the Court below was bound to grant a sentence re-hearing. The cases cited do not support the said position.

Secondly, a convict's right to appeal is alternative to a right to re-hearing in the sense that an appeal to the Supreme Court of Appeal is by way of re-hearing. The appellant may call evidence in mitigation of sentence. This right may be subject to restrictions for failure to call witnesses at the trial stage. However, after the decision in Kafantayeni and other (Supra), the law changed. The Court was duty bound to take this into consideration. The appellant did not exercise this option.

The third ground, that this Court acted per incuriam is most unfortunate. The decision of this Court was not per incuriam at all. The death penalty is not unconstitutional. The directive to the DPP, in the case of Maclemonce Yasin (Supra), to call up cases of convicts who were sentenced to death under the mandatory provision was to ensure that convicts, who qualified for a sentence re-hearing, should be heard. This was deemed equitable than to place the onus on such convicts to apply for sentence rehearing individually.

The last ground was that the decision of the Court below was discriminatory and arbitrary. The presumption at law is that a litigant is properly advised, by Counsel, of the legal choices available and makes an informed decision on how to conduct the case. The conduct of the case is therefore directed by the litigant on advise of his or her Counsel. The Court cannot be held responsible for the action taken on the advise of Counsel.

Before concluding, let me allude to the practice that developed: not to plead in mitigation of sentence in murder cases. It has been accepted that this practice had no legal basis. More so it was in derogation of the law: Section 323 to 326 of the Criminal Procedure and Evidence Code (CPEC). The law in Section 326 provides as follows:-

"(1) As soon as conveniently maybe after sentence of death has been pronounced if no appeal from sentence has been preferred, or if such appeal is preferred and the sentence is confirmed, then as soon as conveniently maybe after such confirmation, the Presiding Judge shall forward to the President a copy of notes of evidence taken on the trial, with a report in writing signed by him containing any recommendation or observation on the case he may think fit to make.

(2) The President shall communicate to the said Judge, or his successor in office, the terms of any decision which he may have reached in the matter, and such Judge cause the tenor and substance thereof to be entered in the records of the court.

(3) Subject to Section 89 of the constitution, the President shall under his hand in accordance with section 89 (2) of the Constitution issue –

(a) a death warrant

(b) an order for the sentence of death to be commuted;

or

(c) a pardon,

To give effect of his decision.

(5) Where the sentence of death is commuted for any other punishment, the order shall specify that other punishment.

(6) Where the person sentenced is pardoned, the pardon shall state whether the pardon is free, or to what condition, if any, it is subject.

(7) The warrant, or order, or pardon of the President shall be sufficient authority in law to all persons to whom the same is directed, to carry out the direction there-in given in accordance with the terms thereof".

Further, regard must be had to Order IV Rule 18 of the Supreme Court of Appeal Rules, which state that:

"18. In any case of an appeal in relation to a conviction involving sentence of death, the Registrar shall, on receiving notice of appeal, send copies thereof to the Secretary for Justice for the information of the committee on the Prerogative of Mercy. He shall also notify the said Secretary of the final determination of the appeal".

Clearly, evidence in mitigation was anticipated under the statute. The liaison between the Judiciary, the office of the President, the Secretary for Justice and the Committee on the Prerogative of Mercy is testimony that it was the intention of the law that the execution of the

death penalty would only be had where all stakeholders are satisfied that there are no exculpating factors. The exercise of the prerogative of mercy should therefore be seen in the light of the above provisions. This confirms the position that failure to plead in mitigation of sentence, in murder cases, did not have statutory or legal backing.

The question still remains: is there room for judicial scrutiny after the exercise, by the President, of his prerogative of mercy. In my view, the answer is in the negative. The presumption is that the judge would have examined the aggravating or mitigation factors of the offender and the offence and would have made recommendations to the President: and thereby, the Prerogative of Mercy Committee. The Judiciary does not have inherit right to re-open the exercise of Presidential discretion. In accordance with Section 326 (7) of the CPEC, the act by the President is sufficient authority to all persons to carry out the directive given. This was made clear in the case of Honourable Dr. George Chaponda, The State President of Malawi EX Parte Mr Charles Kajoloweka and others, MSCA Civil Appeal 5 of 2017, this Court said:-

> *"…. It cannot therefore be correct to say that the courts in Malawi have unlimited power to judicially review every exercise of Presidential power derived from royal prerogative. Judicial review of exercise of Presidential power will depend on the subject matter and justifiability of the matter"*

In the present case the President exercised his prerogative of mercy within the confines of his mandate: to commute a lawful sentence of death to life imprisonment. The courts have no inherent power to review the Presidential discretion.

It is my view therefore, that after the President had exercised the prerogative of mercy on 9th April, 2004, it is not open to this Court or the Court below, in the absence of any valid cause, to re-open the case. The result of re-opening the case, as we had seen, was that this Court's judgment of 1st July, 2010 confirmed the death sentence when, in fact, the appellant's sentence had been commuted to imprisonment for life by the President on 9th April 2004. Does the confirmation of the death penalty by this Court override the commutation of sentence to imprisonment for life by the President? The answer should be in the negative. The Presidential order is sufficient authority to any person as per S. 326 (7) of the CPEC. The order of sentence by this Court, than, which in any case, was per incuriam, was null and void.

After all has been said and done, could the appellant reopen the decision of the Supreme Court of Appeal? The answer again is in the negative. After a decision by the Supreme Court of Appeal, the appellant could not re-open the case. The decision was final as found by the Court below. In this case, the final position therefore, is that the President, having exercised his prerogative of mercy, within the law, it was not open to the appellant or any Court to re-open it. The sentence of death which was confirmed by this Court on 1st July, 2010 is hereby set aside. The convict will serve the commuted sentence of life imprisonment.

I dismiss the appeal.

Delivered at Blantyre this 28th day of April 2021

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Hon. The Chief Justice A.K.C Nyirenda SC

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Hon. Justice E.B. Twea SC, JA

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Hon. Justice R.R. Mzikamanda SC, JA

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Hon. Justice A.C. Chipeta SC, JA

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Hon. Justice L.P. Chikopa SC, JA

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Hon. Justice F.E. Kapanda SC, JA

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Hon. Justice D.F. Mwaungulu SC, JA