

The Abolition of the Mandatory Death Penalty in Africa and the Resentencing of the Innocent

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Abstract

The abolition of the mandatory death penalty in Africa has triggered resentencing processes for offenders on death row. Resentencing courts proceed on the basis that an offender is guilty; they are trial courts thus are not empowered to revisit the verdict. What should happen when a resentencing court opines that an offender is innocent of murder? Drawing from the experience in Malawi, this paper argues that a resentencing court has no more jurisdiction to impose a sentence on an offender than a trial court has to sentence an accused it acquits. Therefore, African nations that strike down the mandatory death penalty must provide for a procedure to provide exceptional circumstances in which a resentencing court can reconsider the conviction of the offender. The resentencing process calls for courts a proactive approach in achieving justice and upholding the rights of prisoners previously sentenced to the mandatory death penalty. At the very least, a court which realises that the accused is in fact innocent must not impose any further punishment on them because it then has no legal basis for knowingly sentencing an 'innocent offender'. It is never justifiable to knowingly punish the innocent.

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1. Introduction

The mandatory death penalty in Africa is on a decline. Kenya,² Uganda³ and Malawi⁴ have abandoned this archaic punishment while still retaining the death penalty itself at the discretion of a court. The African Court on Human and Peoples' Rights added impetus to this movement when in *Ally Rajabu and Others v United Republic of Tanzania* when it found that the mandatory death sentence imposed on the applicants violated the fair trial rights because it excluded the consideration of mitigating factors.⁵ Inevitably, striking down the mandatory death penalty entitles offenders on death row to a resentencing process where they can have a sentence hearing that includes submission of mitigation factors to persuade a court in the determination of its sentence. It is important for lessons to be drawn from the experiences of other countries that have undertaken similar resentencing processes. Malawi undertook this process after the Constitutional Court ruled in *Kafantayeni* that the mandatory death penalty for murder was unconstitutional. Resentencing is a reconsideration of the sentence and thus technically a continuation of the initial trial in the trial court. Resentencing often happens before a different judge than the trial judge.

A recurring issue that arises is whether a court in resentencing an offender in this context has the jurisdiction to question their guilt where the evidence indicates that the conviction was wrongful or the court must restrict itself to reconsidering the sentence only. Put differently, is it ever justifiable to knowingly punish the innocent? This paper considers the approach of the Malawi High Court in

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² *Francis Karioko Muruatetu v Republic*. Petition No. 15 & 16 of 2015, Kenya Supreme Court of Appeal (14 December 2017).

³ *Kigula v Attorney General* Constitutional Petition No. 6 of 2003, ILDC 923 (Uganda Supreme Court of Appeal).

⁴ *Kafantayeni v Attorney General* Constitutional Case No. 12 of 2005 (MWHC).

⁵ *Ally Rajabu and Others v United Republic of Tanzania* Application No. 007 of 2015, African Court on Human and Peoples' Rights (28 November 2019).

*Rep v Payenda*⁶ it had to resentence an offender whom it was not fully, if at all, convinced was guilty yet at the same time it had no clear jurisdiction to revisit the conviction since it was basically sitting as a trial court. In this unenviable position, the court opted for what might seem to be an easy way out: sentencing the accused while acknowledging the lack of evidence implicating him in the crime but stressing that its only duty was to sentence the accused and not question his conviction. It is this course of action that forms the basis of this paper. The article argues that the court adopted a legally untenable and constitutionally offensive approach in sentencing the accused. The absence of the mandatory death penalty makes imprisonment a likely substitute. Imprisonment is a competent penalty only if the accused is indeed guilty and it is strictly necessary⁷.

2. Consensus on limiting punishment to the guilty

The commission of an offence is the reason for subjecting an offender to punishment. Subsequently, only the guilty must be punished. This truth means that retribution is rightly touted as the only true theory of punishment. Central to retribution is the principle of blameworthiness or wilful wrongdoing. This principle is based on the notion of individual autonomy which recognises that human beings are rational moral agents. It holds that the justification for punishment is the blameworthiness of an offender who willingly commits an offence. Therefore, guilt is a prerequisite for punishment: offenders deserve to be punished for their wrongdoing.⁸ By implication, the innocent should not be punished. Even Hart⁹ and Jacobs,¹⁰ who argue that retribution does not provide a general justifying aim for punishment but only its distributive principles, state that this means that only the guilty should be punished, and only in proportion to the gravity of their crime. When relegated to a distributive principle of punishment, retribution it acts as a guide on the quantum of punishment, requiring at the least reflect the gravity of an offence and the circumstances of an offender. As Morris tells us, this is based on an understanding that perceives the principle of proportionality as a limiting principle which provides an upper limit on punishment while leaving room for judicial discretion in determining the actual sentence imposed in each case.¹¹ Moreover, the principle of proportionality, which lies at the heart of retribution and sentencing in modern constitutional democracies, is impossible to uphold if the accused is innocent. This is because, however understood, proportionality demands that punishment must be commensurate with to the offence *committed by the accused*. Where the guilt of an offender is indiscernible, there is no offence to which punishment must be proportional.

Subsequently, punishment is a limitation of human rights, justified by the criminal conduct of an offender. It is the commission of an offence that saves punishment from being inherently arbitrary and unconstitutional.

3. Imprisonment as a limitation of human rights

In modern democracies, the punishment of the innocent is not only objectionable on principle but is also a human rights violation. Specifically, if it is recalled that punishment is inherently a limitation of rights,¹² an offender's guilt becomes the legal justification for punishment which, depending on the form and extent of the sentence imposed makes any attendant limitation of rights

⁶ *Rep v Payenda* Homicide (Sentence Hearing) Cause No. 18 of 2015 (MWHC).

⁷ See some considerations in Andrew Novak (2014). *The Operation of the Modern Death Penalty in Africa*. In: Andrew Novak, *The Death Penalty in Africa: Foundations and Future Prospects*. Palgrave Pivot, New York, pp. 75-89 . https://doi.org/10.1057/9781137438775_6. Also see Lilian Chenwi. "The Downfall of the Mandatory Death Penalty in Kenya." *Journal of African Law* 63, no. 1 (2019): 25–51. <https://doi.org/10.1017/S0021855318000281>.

⁸ Tella, M.J.F., and Tella, F.F., *Punishment and Culture: A Right to Punish?* Martinus Nijhoff: Leiden 2006: 115.

⁹ Hart, H.L.A., 'Prolegomenon to the Principles of Punishment' in Tonry, M. (ed) *Why Punish? How Much? A Reader on Punishment*, Oxford University Press: Oxford, 2010: 195 at 202 – 203.

¹⁰ Jacobs, J., 'Luck and retribution', *Philosophy*, Volume 74, Issue 4, 1999, p. 535.

¹¹ See Morris, N. 'Desert as a limiting principle' in von Hirsch, A., and Ashworth, A., (eds) *Principled Sentencing: Readings on Theory and Policy*, Bloomsbury Academic: London, 1998: 180.

¹² *Makwanyane* 1995 (6) BCLR 665 (CC) at paras 135, 145 – 146.

justifiable. Absent guilt, the principle of proportionality forever eludes the court. This truth should be understood against the backdrop that punishment must be limited to reduce state power.

From a human rights perspective, imprisonment is a severe form of punishment as it restricts the liberty of an offender.¹³ The prohibition of arbitrary detention is an important feature of the right to liberty, a right that enjoys protection in all democratic constitutions. The right to liberty is ‘one of the pillars of freedom in a democratic society’¹⁴ and cannot be deprived without justifiable cause. A sentencing court is therefore at large to seriously consider whether curtailing an offender’s liberty is called for by the circumstances of the case. In a penal context, the objectives to be achieved by the limitation of any rights consequent upon punishment as required by the limitations clause. There must be a rational connection between the declared rationale for the sentence and the means chosen to achieve it. A sentence of imprisonment is in essence a deprivation of liberty, a decision to imprison an offender must comply with principles applicable to the lawful deprivation of liberty.

The right to liberty is protected in all major human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR)¹⁵, the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)¹⁶, American Convention on Human Rights (American Convention)¹⁷ and the African Charter on Human and Peoples’ Rights (African Charter).¹⁸ International human rights law posits several standards on the appropriate reasons for the deprivations of liberty. For instance, the Human Rights Committee (HRC), which monitors the implementation of the ICCPR, has noted that the prohibition of arbitrary detention subsisting in article 9(1) of the ICCPR applies to all forms of detention including imprisonment pursuant to a criminal conviction. Thus, the concept of non-arbitrariness applies to judicial decisions including the imposition of imprisonment. This requires that imprisonment pursuant to a conviction must also be justified. The right to liberty and the prohibition of the arbitrary deprivation of liberty requires that a court must give adequate reasons for sentences involving deprivation of liberty. Arbitrary deprivation of liberty consists not only where deprivation is against the law but also where it is inappropriate and unjust.¹⁹ Imprisonment will also be arbitrary if not necessary to safeguard public interest.²⁰ The United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules)²¹ declares that ‘the restriction of liberty is justifiable only from the viewpoints of public safety, just retribution and deterrence’. They also urge sentencing courts to strike a proper balance ‘between the rights of individual offenders, the rights of victims, and the concern of society for public safety and crime prevention’.

4. The Decision in *Payenda*

4.1. Facts

In 2004, the accused and four others were sentenced to the mandatory death penalty for murder. Payenda was sentenced to a mandatory death sentence applicable at the time to murder and to 25 years for the robbery.²² After *Kafantayeni*,²³ the accused appeared before a different judge of the High Court, Kapindu J. The victim was shot dead in front of her children during a house robbery by a gang of 20 armed with panga knives and stones. She had fired two warning shots to scare the perpetrators away.

¹³ D. Van Zyl Smit and S. Snacken, *Principles of European Prison Law and Policy: Penology and Human Rights*, Oxford University Press: Oxford, 2009: 94.

¹⁴ Gumboh, Esther. (2012). „DM Chirwa: Human rights under the Malawian Constitution”. *African Human Rights Law Journal*, 12(1), 295-300. http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1996-20962012000100013&lng=en&t lng=en.

¹⁵ International Covenant on Civil and Political Rights, GA Res 217A (III), UN Doc A/6316 (1966).

¹⁶ Article 5 of the ECHR, Strasbourg, 26.XI.1987 (1987).

¹⁷ Article 7 of the American Convention on Human Rights, OAS Treaty Series No. 36, 1978.

¹⁸ Article 5 of African Charter on Human and Peoples’ Rights, OAU Doc CAB/LEG/67/3 Rev 5, 21 (1986).

¹⁹ *A v Australia* Communication No. 560/1993 (HRC).

²⁰ *Saadi v United Kingdom* Application No. 13229/03 (2008), para 70 (ECtHR).

²¹ United Nations Standard Minimum Rules for Non-custodial Measures UN Doc A/45/49 (1990).

²² See *Rep v Eleneliyo* Criminal Case No. 141 of 2003 (MWHC).

²³ See *Kafantayeni v Attorney General* Constitutional Case No. 12 of 2005 (MWHC).

The defence argued for a sentence of not more than 14 years, the maximum sentence for receiving stolen property. They submitted that the accused had been wrongly convicted of murder and that his possession of items stolen from the deceased's home was the only reason for his prosecution.²⁴ With the cooperation of the accused, the persons who had sold him the items were later arrested and convicted of theft but they were never charged with the murder of the deceased and they did not implicate the accused in the crime but denied knowing him at all. The State did not dispute this claim of innocence.²⁵

Alternatively, the defence argued that the death penalty was inappropriate because the accused had played a minor role in the offence in that he was not present at the crime scene and had now reformed.²⁶ The state did not address the issue of the accused's innocence. Instead, it conceded that while the murder was 'considerably brutal', the accused did not fall into the 'rarest of the rare' category of offenders which is the test for the imposition of maximum sentences including the death penalty.²⁷ It also agreed that his youthful age at the material time was mitigating.

4.2. Holding

The court would have none of what were essentially pleas of innocence because the accused had been 'convicted ... all the same'. Thus, it fell back on the fact that it had no jurisdiction to revisit the accused person's conviction. The court stressed that the state had not disputed the defence's claim that the persons convicted of stealing the deceased's property on that night were not charged with her murder and that none of them mentioned his name in connection with the events of the material night.²⁸ However, Kapindu J outrightly rejected the prayer for sentencing on the basis of receiving stolen property,²⁹ holding that the resentencing was not an appeal against conviction.³⁰

The court accepted that the accused played a minor role in the crime³¹ but also found 'no indication as to the defendant's actual [involvement] or participation in the crime, apart from evidence that he was found in possession of goods that were stolen from the [victim's] home'.³² Further, the accused had not been implicated by the other accused. The court noted that the evidence of the accused's direct participation in the crime was 'rather cloudy', but cautioned that it did not 'wish to indirectly pronounce him not guilty ... as he remain[ed] a murder convict'. However, continued the court, 'this [was] a factor that [it] should take into account when passing sentence'.

The court then questions: 'what, then is the appropriate sentence for the defendant herein for the murder that he committed on 11 April 2002?'³³ It reminded that the sentence must be sufficient to achieve the purposes of punishment.³⁴ While recalling the horridness of the murder and 'the highly aggravated circumstances' surrounding it, Kapindu J found it opportune to again hint at the innocence of the accused by admitting the lack of evidence against the accused.³⁵ It further observed that 'considering [the] lack of evidence of the defendant's direct participation in the actual execution of the crime', the accused did not deserve the death penalty reserved for 'worst of murderers'.³⁶ He also did not deserve life imprisonment reserved for 'an offender who only marginally fails to reach the threshold of the category of the "worst of murderers"'.³⁷ Noting that the accused had 'so many mitigating factors in his favour', the court was also wary of the seriousness of murder and the need

²⁴ *Payenda* para 12.

²⁵ *Payenda* para 14.

²⁶ *Payenda* para 26.

²⁷ *Payenda* para 34.

²⁸ *Payenda* para 14.

²⁹ *Payenda* para 17.

³⁰ *Payenda* para 17.

³¹ *Payenda* para 33(a).

³² *Payenda* para 33(a).

³³ *Payenda* para 66.

³⁴ *Payenda* para 66.

³⁵ *Payenda* para 67.

³⁶ *Payenda* para 69.

³⁷ *Payenda* para 69.

to pass appropriate sentences so that ‘members of the public could start asking themselves whether “something has gone wrong with the administration of justice”’.³⁸ Payenda was thus resentenced to 20 years imprisonment with hard labour antedated to the date of his arrest.

4.3. Analysis

Many can identify with the abhorrence of the crime that the court expressed. There is no doubt that the murder in this case was particularly gruesome and that the armed robbery that followed only showed the callousness of the criminals involved. This was surely a case that called for stiff sentences and perhaps even slightly missing the criteria for maximum sentences. However, there was a precarious glitch in *Payenda* which the court should have handled better: the record did not reveal that the accused was involved in the commission of this horrible crime.

4.3.1. An indirect finding of not guilty?

The lack of evidence against the accused greatly exercised the court’s mind. The court comes back to this fact at least thrice in its ruling, each time acknowledging the missing link between the accused to the murder. Noticeably, the court carefully selected its words when referring to the guilt of the accused in relation to the murder. This is understandable given the obvious ramifications of a finding that the accused was in fact innocent. The court begins with disassociating itself from the convictions by rightly stating that ‘the verdict was a jury verdict’ and that since this was a resentencing exercise, it was not within the court’s mandate to ‘fault or uphold the finding of the jury’. Despite this, he was not at liberty to steer clear of the conviction altogether. This is because sentencing is wholly predicated on the guilt of an offender. Indeed, as Kapindu J eloquently lays out the pertinent sentencing principles and responds to the defence submissions on sentence, he is soon, and repeatedly thereafter, confronted with the lack of evidence against the accused and makes astounding remarks.

The evidence implicating the accused was not merely ‘rather cloudy’ but totally absent, the record revealing neither direct nor indirect evidence. As such, one should be baffled when the court concludes that ‘the convict played a minor role’. The judgment does not elaborate on this ‘minor role’ and gets even more thought-provoking when, after acknowledging the lack of ‘direct’ evidence against the accused, it states that ‘this is a factor’ to be considered in sentencing. One is left in a serious dilemma as to the identity of ‘this’ factor. Logically, in the court’s mind, ‘this’ factor must refer to the fact ‘[t]hat the convict played a minor role in the offence’. The insurmountable problem, then, is that the judgment does reveal what this minor role is. If anything, it tells us that the accused played no role at all.

Similarly, the judgment is irreconcilable when the court moves to determine the sentence appropriate for the accused regarding ‘the murder he committed’. This statement is ironic since the court itself found no evidence that the accused committed murder. The court does not tell us what evidence, whether indirect or otherwise, there was against the accused. This is a glaring omission in a sentencing judgment. The only reasonable conclusion from this omission is that the court found no evidence at all. The court finds credence in the accused person’s version of events when it stresses that the state never charged the persons who sold him the deceased’s property with murder and that they did not connect him to the murder or events of that fateful night.

Importantly, the judge does not give the slightest suggestion that the accused knowingly received the stolen property. It might as well be tempting to argue in defence of the court by simply asking: if there was no shred of evidence against the accused, why then did the defence argue that the accused played a minor role in the offence? The answer is in the judgment. Paradoxically, while it is true that the defence indicated that the accused had not played a major role in the murder, it is also true that the defence arguments in court clearly point to a wrongful conviction for murder, and even

³⁸ Citing *Rep v Masula* Criminal Case No. 65 of 2008 (MWHC).

armed robbery, based on a lack of evidence against the accused. However, it is unmistakable that before the court it argued for no role at all in the commission. It did not elaborate on the minor role the accused is said to have played in the murder of the deceased. Curiously, the court also does not refer to actual role of the accused in the murder of the deceased although it cited 'lesser participation in the crime' as a mitigating factor.

By the time it gets to the sentencing stage, a trial court cannot revisit the verdict. The unique nature of the *Kafantayeni* resentencing process is that the High Court is revisiting its own sentences in its capacity as a trial court years after it was imposed. The court in *Payenda* was therefore not at liberty to alter the convictions. However, the unique feature of *Payenda* is that the court acknowledges the innocence of the accused. This precluded Kapindu J from punishing Payenda as the court now had no legal for punishing the accused.

Finding no evidence of participation, the court had no jurisdictional facts to sentence the accused. A guilty verdict is not a sentencing factor.

4.3.2. Application of sentencing principles

One should not be convicted in the absence of evidence linking one to a crime. Definitely, one should not be punished for a crime when there is neither directly nor indirectly connected to, more so where the sentencing court admits this fact? It is utterly unanticipated then that, after repeatedly pointing out the lack of evidence against the accused, the court deems imprisonment for 20 years as the 'appropriate [sentence] in the instant case'. There are many problems with this conclusion primarily because once the court found no evidence linking the accused to the crime, it became impossible for it to meaningfully apply any of the applicable sentencing principles.

4.3.2.1. Justification for imprisonment

Firstly, the court excludes the death penalty and life imprisonment because the accused did not qualify for them. However, it does not tell us, as it should, why or how the accused person qualifies for imprisonment. What sort of offender deserves imprisonment? No matter the criteria, the starting point is that only a guilty person can be imprisoned. This principle cannot find application in *Payenda* as it impossible to characterise the accused person's participation in the offence. Devoid of this jurisdictional fact, the sentence of imprisonment imposed on the accused amounts to an arbitrary deprivation of liberty.

4.3.2.2. Severity of punishment

Proportionality entails that a sentence must be neither too lenient nor excessive. On this score, the court appears to invoke retribution as it singles out the need for courts to impose sentences of sufficient severity that do not bring the judiciary into disrepute. Sentences must resonate with 'right-thinking members of the public'. Lest we fathom about who qualifies as a 'right-thinking member of the public, Chombo J graciously emphasises that such people are those 'with *full* knowledge of the relevant facts and circumstances'. Similar sentiments were expressed in *Rep v Jafali* where the High Court warned that sentences do not reflect the seriousness of the crime are 'likely to lead *any reasonable man* to the conclusion that something grossly amiss has befallen the criminal justice system'.³⁹ Here again, the court refers to a 'reasonable man' who arguably should be as informed as the 'right-thinking' member of the public.

Coming to *Payenda*, the principle in *Masula* must mean that the court was under a duty to impose a sentence that would withstand scrutiny by members of the public who were cognisant of not only the murder conviction but also the downright lack of both direct and indirect evidence against the accused. With due respect, surely such members of the public would conclude that 'something

³⁹ *Rep v Jafali* Confirmation Case No. 534 of 1995 (MWHC).

has gone wrong with the administration of justice' upon learning that an innocent man is to suffer 20 years for a murder which the sentencing court effectively found he had not committed? Undeniably, they would find this even more unsettling upon realising that the emerging jurisprudence from the resentencing hearings suggests that 20 years is the average sentence for serious forms of murder, with *Rep v Mtambo*⁴⁰ and *Rep v Thobowa*⁴¹ telling that it should in fact be the new 'minimum threshold' for murder sentences in Malawi. The perplexity of the right-thinking members of the public would be even more aggravated if they were to come across cases such as where offenders manifestly guilty of gruesome murders also received 20 years or less. Even more worrying is the fact that the 20-year sentence effectively added seven years to the 13 he had already spent in prison in deplorable conditions which the court itself acknowledged amount to cruel and degrading punishment.⁴²

4.3.2.3. Purposes of punishment and the principle of proportionality

The sentence imposed in *Payenda* is theoretically unjustifiable regardless of which philosophical underpinning of punishment one sympathises with. This is because it is irreconcilable with any goals of punishment. For starters, even in its literal or most crude form, retribution can never justify the punishment of the innocent. There is no just desert for an innocent person to pay as the trigger for such a debt arising from guilt is lacking. More significantly, the retributive principle of proportionality completely eludes a court attempting to sentence an offender it effectively declares innocent. There can be no proportionality of punishment in the absence of evidence that the offender being sentenced committed a crime. If anything, the punishment deserved by an innocent person is none at all. Subsequently, any punishment imposed on an offender in such circumstances is unjustifiable, disproportional and inconsistent with the prohibition against cruel and inhuman punishment.

In the case of imprisonment, such punishment would also wholly violate the right to liberty. Liberty can only be lawfully deprived on a justifiable cause. As the South African Constitution Court ruled in *S v Dodo*, '[t]he "cause" justifying penal incarceration and thus the deprivation of [an] offender's freedom, is the offence committed [by such an offender]'.⁴³ Commission of an offence is the cause that makes imprisonment of an offender justifiable.⁴⁴

The 20-year sentence imposed on *Payenda* also fails justification on the rehabilitation front. Firstly, rehabilitation is not based on the criminal action but the ability of an offender to rehabilitate. This necessarily means that there must be a need for an offender to reform or change his ways to steer away from criminal behaviour like he committed. Accordingly, where there is no evidence that the offender in fact committed or is linked to the offence he is being for, it cannot tenably be held that any subsequent punishment is aimed at his reformation. Reformation from what to what?

The remaining utilitarian theories of punishment similarly fail to find application in *Payenda*. Specific deterrence falls on the wayside when there is no crime committed to begin with since it presupposes the commission of an offence.⁴⁵ One cannot say that the offender will learn a lesson from his punishment when there is no evidence as to what it is punishment will dissuade him from doing. General deterrence is an inherently constitutionally suspect goal of punishment whose incertitude only reaches untold proportions when an innocent offender is concerned. Be that as it may, in the instant case, there was no lesson for others to learn from the punishment of the accused save perhaps for the fact that the criminal justice system is not infallible and may at times end up punishing the innocent. Incapacitation also shies away since an 'innocent offender' cannot be said to be a threat to society such that public safety demands that he be removed from society. Without a palpable aim, the

⁴⁰ *Rep v Mtambo* Sentence Re-hearing Cause No. 2 of 2015 (MWHC) 3 – 4.

⁴¹ *Rep v Thobowa* Homicide No. 13 of 2015 (MWHC) 11.

⁴² *Payenda* para 33(e).

⁴³ *S v Dodo* 2001 (1) SACR 594 (CC) para 37.

⁴⁴ See *S v Dodo* 2001 (1) SACR 594 (CC) para 37.

⁴⁵ See Mujuzi, J.D., 'Don't send them to prison because they can't rehabilitate them! South Africa's judiciary doubts the executive's ability to rehabilitate offenders: A note on *S v Shilubane* 2008 (1) SACR 295(T)' (2008) 24 *South African Journal on Human Rights* 331.

punishment of the Payenda is hopelessly unconstitutional.

4.3.2.4. The circumstances of the offender ‘at the time of committing the crime’

The lack of evidence associating the accused to the offence in *Payenda* ultimately made it impossible for the High Court to meaningfully consider any of the factors usually deemed relevant to an offender during sentencing. Successively, even the factors which the court itself identified as relevant to capital sentencing were rendered inapplicable and indeed were not such.

In his judgment, Kapindu J asserts, as he deals with each submission of the defence, that he would take account of some of the mitigating factors. However, this could only be done fictitiously in the absence of an offender’s guilt, more poignantly in relation to the role of the offender in the crime. In the ultimate, it cannot be said that the court duly considered ‘the circumstances of the offender at the time of committing the offence’ when the court repeatedly hints at his innocence in such a way that one is left with no doubt that the court believed that the accused had not committed the offence. It is mystifying that a court can simultaneously examine the offender’s circumstances at the time of committing the offence, on the one hand, and yet on the other hold that there is no evidence that the offender committed the offence in the first place⁴⁶.

4.3.2.5. The circumstances of the offender ‘at the time of sentencing’

It is a good thing that the court realised that the accused was in fact innocent of murder (and even armed robbery for that matter). Since a trial court becomes *functus officio* on the guilt of an offender after entering a conviction, Kapindu J rightly declared that despite the pleas of innocence from the accused, the court had to ‘reckon with the fact that the jury convicted him for both armed robbery and murder all the same’. How then should the court have reckoned with the convictions of the accused which it had no jurisdiction to alter? To its credit, the court dwelt extensively on the need to consider the circumstances of an offender ‘at the time of sentencing’, devoting over a third of its judgment on showing that the principle of proportionality entailed that a court is at large to consider the post-conviction circumstances of the offender or in other words, the circumstances of the offender ‘at the time of sentencing’. Therefore, the answer to how Kapindu J should have reckoned with the convictions is again in the judgment: by taking seriously the circumstances of the offender ‘at the time of sentencing’. By this is meant the fact that the court should have concluded that at the time of sentencing, it had become clear that there was no evidence that accused had participated in the gruesome murder of the deceased. If the court found it justifiable to consider the accused person’s reform since conviction, there is no lawful reason that prevented it from considering that fact that it found no evidence against that the accused was among the gang that killed the victim.

This does not mean that the court should have acquitted the accused, a power it did not have. Short of glossing over the innocence of the accused altogether as the court did, the lesser evil would have been for the court to fictitiously sentence him on the basis that he had not participated in the crime. The lack of evidence against the accused should have been the major mitigating factor since the degree and manner of participation of an offender in a crime is always a relevant factor to consider in sentencing as it encapsulates the culpability and level of criminality of an offender and ultimately aggravates or mitigates the seriousness of an offence. If one ignores the absurdity of taking lack of evidence as a mitigating factor, the court would not have found a 20-year sentence, let alone any punishment, appropriate. Alternatively, the court could have opted for the oft-imposed sentence ‘that would result in the immediate release of the offender unless held for other lawful cause’. Surely, the 12 years the accused had spent in custody were more than enough punishment for a murder he had not committed? The accused would then have had to deal with the 25 years he got for armed robbery.

One might even go further to state that it would have been in the interests of justice for the

⁴⁶ For a comparative view see A. M. Karimunda, (2014). *The Death Penalty in Africa: The Path Towards Abolition* (1st ed.). Routledge. <https://doi.org/10.4324/9781315615332>. Also see Carsten Anckar and Thomas Denk. 2024. “Diffusion and the Abolition of the Death Penalty: A Global Comparison.” *Nordic Journal of Human Rights* 42 (2): 195–214. doi:10.1080/18918131.2024.2325254.

court to acquit the accused person of both murder and armed robbery then leave it to the state to appeal. In any case, it is unlikely that the state could have appealed. Alternatively, the court would have refrained from imposing any further imprisonment on the accused and, on its own accord, granted him bail pending appeal regarding the conviction.

This option, though clearly outside the jurisdiction of the court, would have nevertheless been most appropriate given the suffering that offenders now entitled to resentencing have had to endure including the death row phenomenon.

4.3.2.6. Consideration of the victim and public interest

It is clear from the outset that the court took a victim-centred approach. It stressed the resentencing process as an opportunity ‘to reflect on the tragedy that befell the deceased and the entire Mphepo family on that night because of violent criminal conduct, and for this court to make a pronouncement on the consequences of that criminal conduct. Criminal justice means as much, if not more, to the victim as it does to the suspect or the proven perpetrator’. The primacy of victims’ rights in sentencing aside, *Payenda* was not really about the getting justice for the victim because the actual role of the offender in the events of the material night remained a mystery throughout the ruling.

It can never be in the public interest that an offender whose participation in a crime is not evident from the record should be punished. The element of public interest in sentencing relates to primarily to the purposes of punishment.⁴⁷ Ultimately, the element of public interest requires that a sentencer must regard the need to prevent crime through punishment. Public interest also requires that sentencing principles such as consistency and proportionality are upheld.⁴⁸ Accordingly, the punishment of the innocent can be no more in the public interest than it is justifiable by the purposes of punishment.

4.3.2.7. The possibility of sentencing based on receiving stolen property

The defence advanced a compelling and less radical suggestion on how the court should have reckoned with the conviction; the accused should be sentenced as though he had been convicted of receiving stolen property which carries 14 years. Sadly, Kapindu J would have none of it. The court should have resolved the problem in favour of the offender and limited his culpability to mere reception of stolen goods.⁴⁹ This would not have required the court to ignore the murder charge. In fact, this would have allowed the court to technically tailor the sentence to the crime in that the purported role of the offender in the crime as indicated on the record was that he was found in possession of the stolen goods. Indeed, it would only have been fair that if this fact was sufficient for the jury to return a guilty verdict on the murder charge, it should also be the sole basis for sentencing the offender. Of course, this would not make legal sense in terms of criminal liability of an accomplice since he would then be liable to the same punishment as a principal perpetrator. However, it is the only logical conclusion that makes sense in view of sound sentencing principles. After all, strictly speaking, the record showed that this was the role of the offender in the murder and armed robbery. It would be a gross injustice to hold otherwise.

Thus, if the court had proceeded on the basis that the role of the offender was to receive the stolen property, it should have been informed by this truth in arriving at an appropriate sentence. Hence, the question of whether he was capable of reform etc should have been viewed in this light. This would not have raised any problems in weighing up the seriousness of the offence of murder of which he was convicted. Illogical as it is, the court should have borne in mind that the role he had played

⁴⁷ See *Rep v Somanje* Confirmation Case No. 346 of 2003 (MWHC) (incapacitation); *Rep v Chikuli* Confirmation Case No. 174 of 2005 (MWHC) (retribution); *Rep v Mvalume* Confirmation Case No. 278 of 2000 (MWHC) (reformation); *Sipiliyano v Rep* Criminal Appeal No. 59 of 1998 (MWHC) (reformation).

⁴⁸ See *Rep v Masula* Criminal Case No. 65 of 2008 (MWHC) at 2; *Rep v Steshi* Criminal Appeal No. 7 of 2001 (MWHC); *Phiri v S* Criminal Appeal No. 63 of 2009 (MWHC); *Kwalala v Rep* Criminal Appeal No. 88 of 2005 (MWHC).

⁴⁹ See, for instance, *Musa v R* Criminal Appeal No. 16 of 2008 (MWHC).

in bringing about this death was to receive the stolen property. It was to this extent that he should have been held accountable through punishment for the murder.

It is doubtful that a case for receiving stolen property would have been made out by the state against beyond reasonable doubt. The defence's 'offer' of a 14-year sentence was nothing more than a desperate plea for mercy within the confines of what it thought would be realistic given the fact the fact that this was a resentencing process and not an appeal. The defence was simply trying to make the most of the resentencing process as a full-blown plea for innocence would have gotten it nowhere. This conclusion is also supported by the judgment since even after his own examination of the evidence, Kapindu J found 'no indication as to the defendant's actual [involvement] or participation in the crime, apart from evidence that he was found in possession of goods that were stolen from the [victim's] home'. Importantly, the judge does not give the slightest suggestion that the accused knowingly received the stolen property.

5. Conclusion and lessons for resentencing processes

Payenda is an unfortunate decision. Despite effectively acknowledging that the offender was not one of the despicable criminals who cruelly cut short the life of the deceased, the court went ahead to sentence him to 20 years imprisonment. *Payenda* must make us cogitate on a couple of things as lessons for Malawi and other countries as they engage not only in resentencing but sentencing generally. First, it is imperative that courts adopt a more innovative approach in cases where technicalities only serve to hinder it from arriving at a fair and just conclusion. Second, courts should in every case more practically and concretely determine what role punishment in whatever form plays in a constitutional democracy. For the resentencing process specifically, African countries must provide for exceptional instances where a court may revisit the verdict if the evidence does not support it⁵⁰. This is particularly important for jury trials where the reasons for a verdict are absent. In the finale, the lingering question is: why exactly was *Payenda* sentenced to 20 years? One comes to the distressing conclusion that *Payenda* was basically sentenced because of the intrinsic seriousness of murder and not that he had committed it.

Bibliography

1. Anckar, Carsten and Thomas Denk. 2024. "Diffusion and the Abolition of the Death Penalty: A Global Comparison." *Nordic Journal of Human Rights* 42 (2): 195–214. doi:10.1080/18918131.2024.2325254.
2. Chenwi, Lilian, "The Downfall of the Mandatory Death Penalty in Kenya." *Journal of African Law* 63, no. 1 (2019): 25–51. <https://doi.org/10.1017/S0021855318000281>.
3. Gumbo, Esther. (2012). 'DM Chirwa: Human rights under the Malawian Constitution'. *African Human Rights Law Journal*, 12(1), 295-300, http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1996-20962012000100013&lng=en&lng=en.
4. Hart, H.L.A., 'Prolegomenon to the Principles of Punishment' in Tonry, M. (ed) *Why Punish? How Much? A Reader on Punishment*, Oxford University Press: Oxford, 2010.
5. Jacobs, J., 'Luck and retribution', *Philosophy*, Volume 74, Issue 4, 1999.
6. Karimunda, A. M. (2014). *The Death Penalty in Africa: The Path Towards Abolition* (1st ed.). Routledge. <https://doi.org/10.9781315615332>.
7. Morris, N. 'Desert as a limiting principle' in von Hirsch, A. and Ashworth, A. (eds) *Principled Sentencing: Readings on Theory and Policy*, Bloomsbury Academic: London, 1998.
8. Mujuzi, J.D., (2008), 'Don't send them to prison because they can't rehabilitate them! South Africa's judiciary doubts the executive's ability to rehabilitate offenders: A note on *S v Shilubane* 2008 (1) SACR 295(T)', 24 *South African Journal on Human Rights* 331.
9. Novak, Andrew (2014). *The Operation of the Modern Death Penalty in Africa*. In: Novak, Andrew, *The Death Penalty in Africa: Foundations and Future Prospects*. Palgrave Pivot, New York, pp. 75-89. https://doi.org/10.1057/9781137438775_6.
10. Tella, M.J.F. and Tella, F.F., *Punishment and Culture: A Right to Punish?* Martinus Nijhoff: Leiden 2006.
11. Van Zyl, Smit D. and S. Snacken, *Principles of European Prison Law and Policy: Penology and Human Rights* Oxford University Press: Oxford, 2009.

⁵⁰ Anckar, Carsten, and Thomas Denk. 2024. "Diffusion and the Abolition of the Death Penalty: A Global Comparison." *Nordic Journal of Human Rights* 42 (2): 195–214. doi:10.1080/18918131.2024.2325254.