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Malawi's Missing Court Files and the Kafantayeni Resentencing Project

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Abstract

Missing court files pose a serious issue regarding access to justice for illiterate and indigent prisoners, especially if the files go missing after the prisoner has been convicted and sentenced. Malawi's High Court recently grappled with the issue of missing court files post-conviction in the course of a large resentencing process, known to the legal community as the Kafantayeni Project. The Kafantayeni Project resentenced over 150 prisoners whose mandatory death sentences for murder were deemed unconstitutional, despite the majority of them missing court files. This article outlines the state of judicial record keeping in sub-Saharan Africa, the origins of the Kafantayeni Project, the extent of the record keeping problem it uncovered, how the judiciary resolved those issues while adding to the jurisprudence on missing court files, and the future implications for Malawi and elsewhere.

Keywords

Sentencing, court files, criminal justice, appeals, Malawi

INTRODUCTION

Economically developed countries typically have the criminal justice infrastructure necessary to ensure that individuals have access to justice and that their right to a fair trial is protected. In less developed countries, however, criminal justice systems are constrained by limited resources and this frequently results in imperfect adherence to procedures and a corresponding miscarriage of justice for the most vulnerable: the illiterate and indigent. This is the case in the African state of Malawi where, among a range of issues facing the criminal justice system, it is common for homicide remandees to wait several years for their trial.[1] In extreme cases, remandees wait up to seven years for the prosecution to bring their case to trial,[2]

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1 K Kamiyala "1400 on remand for murder" (12 April 2015) *Nation on Sunday* (Malawi) at 3.

2 K Kamiyala "Not guilty after 7 years in prison" (12 April 2015) *Nation on Sunday* (Malawi) at 4.

while others die in chronically overcrowded prisons before they have their day in court.[3]

Such a situation is the result of several intersecting factors. In a country of over 18 million people,[4] there are approximately two dozen legal aid lawyers,[5] who must divide their time between criminal and civil matters, and a similarly insufficient number of state prosecutors and judges.[6] In addition, the long and frequent strikes by judicial support staff invariably result in the total shutdown of the judiciary.[7] The development of an overwhelming backlog of homicide trials is a natural outcome of these fundamentally challenging conditions. Critically, a lack of resources available to the director of public prosecutions, the Legal Aid Bureau and the judiciary to institute effective record keeping systems further exacerbates the problem.[8]

One little studied aspect of criminal justice in low-resource jurisdictions is the impact of missing files on people charged with or convicted of serious violent crimes, such as murder. The gravity of missing files differs depending on whether the files are lost pre- or post-trial. Typically, at the pre-trial stage, it is when state prosecutors lose track of files that the process stalls and an accused person experiences a protracted period on remand awaiting trial.[9] In theory, however, missing files should never result in a remandee being detained indefinitely. Malawi's Constitution[10] and Criminal Procedure and Evidence Code (CPE Code)[11] provide for the swift prosecution of an accused at trial and, as such, a long-term remandee would have strong grounds to apply for bail,[12] or discharge if the state is absent, unwilling or unable to

3 "Malawi prison conditions still worse: 79 inmates die due to crowding, police brutality: Report" (30 April 2013) *Nyasa Times*, available at: <https://www.nyasatimes.com/malawi-prison-conditions-still-worse-79-inmates-die-due-to-crowding-police-brutality-report/> (last accessed 16 September 2020).

4 The World Bank "Malawi: Data", available at: <https://data.worldbank.org/country/malawi> (last accessed 16 September 2020).

5 K Kamiyala "Lack of resources cripple [sic] Legal Aid Bureau" (12 April 2015) *Nation on Sunday* (Malawi) at 7.

6 Personal email from C Chithope-Mwale (3 October 2019).

7 N Mlangeni "Malawi's judiciary supporting staff on nationalwide strike over poor condition of service" (23 July 2019) *The Maravi Post*, available at: <http://www.maravipost.com/malawis-judiciary-supporting-staff-on-nationalwide-strike-over-poor-condition-of-service/> (last accessed 16 September 2020).

8 Kamiyala "1400 on remand", above at note 1 at 4.

9 Trial delays at the Magistrate Court are not as extreme as at the High Court, as there are magistrates in every district of Malawi.

10 Under the Republic of Malawi (Constitution) Act 1994, sec 42(2)(b), an arrested person must be charged or released within 48 hours after arrest.

11 Under the Criminal Procedure and Evidence Code 1968, sec 161(D)–(G), the maximum time a person can be held in lawful custody pending trial is between 30 and 90 days depending on the severity of the offence and the court in which the trial will take place.

12 *Amon Zgambo v Republic* [1999] MSCA criminal appeal no 11 of 1998. Prosecutors would have difficulty persuading the court that it is not in the "interests of justice" to release an accused on bail if the file is missing and the accused has already endured being held on

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prosecute.[13] The bail and discharge processes are thus clear legal avenues for lawyers to provide relief to their clients at the pre-trial stage.

A more complicated situation arises when a court file is missing after an individual has been convicted at trial and is serving a custodial sentence. Courts are understandably loath to release a prisoner who has been convicted of a serious offence such as murder, especially when the precise details of the offence(s) are unknown. Malawi's High Court recently grappled with the issue of missing court files post-conviction in the course of a large resentencing process, known to the legal community as the Kafantayeni Project. The Kafantayeni Project facilitated the resentencing of over 150 prisoners after the mandatory death sentence they each received for murder was deemed unconstitutional. This article outlines the state of record keeping in sub-Saharan Africa, the origins of the Kafantayeni Project, the extent of the record keeping problem it uncovered in Malawi, how the judiciary resolved those issues while adding to the jurisprudence on missing court files, and its future implications for Malawi and elsewhere.[14]

JUDICIAL RECORD KEEPING IN SUB-SAHARAN AFRICA

Poor public administration continues to plague sub-Saharan states since the independence era of the mid-20th century.[15] This is partially explained by the steady collapse of record keeping and archives management systems in the region, attributable, in part, to the colonial administrators who took responsibility for record keeping during their rule but provided little training to local people before ceding control.[16] Peter Mazikana attributes current record keeping and archives management problems to: "malfunctioning or outdated registry systems; antique or inappropriate file classification; no training for staff; problems of missing files; inadequate records centre facilities; non-existent record appraisal and transfers; backlogs in archives processing; poor physical wellbeing of collections and equipment breakdowns".[17]

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contd
remand for a protracted period. In those circumstances, a principled court would grant bail until the state has found the file or reconstructed it through supplementary investigation so that a trial can commence.

13 CPE Code, sec 247.

14 The author worked with many of the stakeholders in the Kafantayeni Project and relies on a range of sources for information, including case law, personal correspondence and his own knowledge of the project.

15 M Meredith *The State of Africa: A History of the Continent Since Independence* (2013, Simon & Schuster). Meredith provides a chronological account of the failings of post-colonial administrations to apply the rule of law and govern effectively.

16 S Katuu "The development of archives and records management education and training in Africa: Challenges and opportunities" (2015) 43/2 *Archives and Manuscripts* 96 at 99.

17 See C Nengomasha "The past, present and future of records and archives management in sub-Saharan Africa" (2013) 46 *Journal of the South African Society of Archivists* 1 at 2, where Mazikana's assessment is summarized.

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As it pertains to the judiciary, the inability of sub-Saharan states to record trial proceedings properly or securely store the records for retrieval at a later date, is well documented. In her recent examination of the region, Catherine Namakula notes that Kenya, Nigeria, South Africa and Zambia struggle to maintain a reliable record keeping system in the context of budgetary constraints that force them to operate a largely paper-based system (sometimes constituting only of handwritten records) that are exposed to risks such as fire and theft.[18] These systems are difficult to manage, but also result in significant losses of records. Kenya's chief justice recently reported over 500 missing files in one year alone.[19] In Nigeria, as in other sub-Saharan states, the management of paper-based files by non-professional record managers in combination with poor storage facilities has resulted in reports of records being "dumped" on the floor.[20] The paper-based system in Botswana has seen court records lost because personnel with access to these files are not compelled by the court to return them within a prescribed period, or records are accessed and removed by unauthorized persons and never returned.[21] Even for those files that are not lost, improper filing remains a cause of delays, while others are "inadequate" for their intended purpose due to the handwritten records being illegible or because parts of the record are missing.[22]

As the court record is the comprehensive account of trial proceedings, these shortcomings place those convicted of crimes at serious risk of a miscarriage of justice. The contents of a court file in a criminal case will differ depending on the jurisdiction, although the file will usually contain a transcript of proceedings (ideally verbatim), witness evidence and exhibits, judicial instructions and judgment, as well as correspondence between the parties such as affidavits of service, and important details such as names of the parties and key dates. A court record is important during a criminal trial,[23] but vital at the post-conviction stage, as it is typically required to initiate an appeal or any other post-conviction process, and forms the record on which lawyers must basis their submissions. The ability of the criminal justice system to ensure access to justice and a fair hearing is compromised when the court record is missing or inadequate.

The digitalization of court records is an obvious solution to missing court files, as an electronic version should remain accessible if the hard copy file

18 C Namakula "The court record and the right to a fair trial: Botswana and Uganda" (2016) 16 *African Human Rights Law Journal* 175 at 176–77.

19 Nengomasha "The past, present and future", above at note 17 at 5.

20 A Ladan "Management and utilisation of judicial records in Federal High Courts in northwestern states of Nigeria" (2014) 147 *Procedia - Social and Behavioral Sciences* 32 at 37.

21 Namakula "The court record", above at note 18 at 186.

22 Id at 188–89.

23 A complete court record allows the defence and prosecution to make detailed submissions to the trier of fact and the trier of law, and facilitates the delivery of a detailed judgment.

(or parts thereof) becomes missing. Unfortunately, a lack of internet and communications technology facilities and inconsistent power supplies make the digitalization of court records in the sub-Saharan region difficult.[24] Nevertheless, despite the structural issues facing the region, some jurisdictions have moved toward the digitalization of court records. According to the Zambian judiciary, as of December 2015, 113,831 court files, representing over 1.9 million individual documents, had been scanned in Lusaka, Kitwe and Ndola, which resulted in "significantly reduced complaints of missing case records" in those jurisdictions.[25] Similarly, in 2005, Botswana implemented the Court Record Management System (CRMS) to manage case file records at the High Courts and Magistrates' Courts. A recent study has shown improved records management at the Gaborone Magisterial District with CRMS successfully capturing court records, allowing missing court files to be retrieved from the system, which "resulted in speedy finalization of litigations".[26] Advocates of CRMS are now pushing for the necessary legislation and policy reforms to allow the judiciary to share case files with other criminal justice system stakeholders, such as the Department of Public Prosecutions, Police Service and Department of Prisons and Rehabilitation, to benefit from additional efficiencies.[27]

Malawi's criminal justice system is yet to benefit from the digitalization of court records as it continues its wholly paper-based system. The following account of the Kafantayeni Project highlights the inability of the judiciary to archive court files securely upon completion of a trial.

THE ORIGINS OF THE KAFANTAYENI PROJECT

Malawi's criminal law is a legacy of colonial occupation. Britain, the country's former colonial power, enacted the mandatory death penalty for murder, as had been part of English common law at the time. From the time when Malawi's Penal Code[28] came into effect in 1930 and long past the country's independence in 1964, the law provided that "[a]ny person convicted of murder shall be sentenced to death",[29] thereby removing all judicial discretion in sentencing. Put another way, the judges' hands were tied.

The principal effect of this provision was that any person convicted of murder would be sentenced to death, irrespective of their level of moral

24 Ladan "Management and utilisation", above at note 20 at 37.

25 Judiciary of Zambia "Computerization project", available at: <https://www.judiciaryzambia.com/computerization-project/> (last accessed 16 September 2020).

26 T Mosweu "Does the adoption of electronic records systems improve access to information? A Gaborone magisterial district, Botswana case study" (paper presented at 24th ESARBICA Conference on Public Sector Reforms: Transparency and Accountability, Lilongwe, Malawi, 7–11 August 2017) at 5.

27 Id at 7–8.

28 The Penal Code 1930.

29 Id, sec 210, as enacted.

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culpability. Take the following two scenarios as an illustration. In the first scenario, after meticulous planning a contracted killer shoots dead a family of three for his own self-enrichment. In the second scenario, an intoxicated man slams a barstool into the ribcage of a belligerent patron who mocked him about his wife sleeping with other men. The assault caused broken ribs, internal bleeding and eventually death. In both scenarios the result is the same: the defendants will be found guilty of murder and sentenced to death, notwithstanding their vastly different levels of moral culpability. The judge has to sentence the man in the bar to death, despite his lack of premeditation, the provocative actions of the deceased, that he was recklessly indifferent to the probability of causing grievous bodily harm (as opposed to having an intention to kill), and his intoxication at the time of the offence.

International anti-death penalty advocates strongly criticized Malawi's uniform application of the death penalty on constitutional grounds, as they had done in other former British colonies that maintained the mandatory death penalty.[30] They argued that it denied access to justice and the right to a fair trial, both of which are guaranteed under Malawi's Constitution.[31] This criticism resonated with some members of Malawi's legal community who partnered with international advocates to push for law reform in this area.[32] This desire for discretionary sentencing appears in the trial record of some cases. In 2005, a lawyer's plea to the judge after his client was pronounced guilty of murder is extracted as follows: "[a]lthough the conviction of murder carries a mandatory [death] sentence the convict is a first offender. He has already languished in prison since February 1999. The convict is a very young person aged 24 and can be reformed. It is my prayer to consider his age when passing sentence My Lord."[33] Further, in a case decided in 2002, the judge noted:

> "I have taken down the accused plea in mitigation and indeed there exist a few factors in his favour. His age is a youngful [sic] one. The offence is said to be his first and it appears at the time there were some doubts as to his mental stability, although the jury has felt that his mind was not so affected as to make him not know what he was doing or not to appreciate that his actions were wrong. All these points I am certain will have their role to play … at the prerogative of mercy stage. For now the accused having been duly convicted of Murder I must pass sentence on him as referred in the law. I accordingly sentence him to suffer death in the manner the law prescribes."[34]

30 A Novak "The abolition of the mandatory death penalty in Africa: A comparative constitutional analysis" 22/2 *Indiana International and Comparative Law Review* 267 at 268.

31 Id at 279. Malawi's Constitution, arts 41 and 42.

32 The Death Penalty Project, a UK based anti-death penalty advocacy organization, partnered with human rights advocates from Malawi to challenge the mandatory death penalty.

33 *Republic v Kenneth Langanyiwa and Others* [2005] MWHC criminal case no 135 of 2005.

34 *Republic v Paul Jasi* [2002] MWHC criminal case no 10 of 2002.

Discretion in sentencing was finally achieved in 2007 when the High Court of Malawi, sitting as the Constitutional Court, abolished the mandatory death penalty for murder in the landmark ruling in *Kafantayeni and Others v Attorney General* (*Kafantayeni*).[35] In doing so, the court granted judges unfettered discretion to sentence convicted murderers to a determinate sentence, life imprisonment or death, thereby placing a duty on lawyers to adduce comprehensive mitigating and aggravating evidence to aid judges in making their decision.

Most significant for this article, however, was that the judgment contained a consequential order requiring that the lead plaintiff in the challenge, Francis Kafantayeni, and his five co-plaintiffs, all of whom were mandatorily sentenced to death, be brought before the High Court to receive an individualized sentence in place of the mandatory death penalty that had been in place until that point.[36] This newly individualized sentence was to take into account the unique circumstances of each offence and the unique circumstances of each offender. Three years later, in 2010, the Malawi Supreme Court of Appeal (Supreme Court) went further and ordered that it was "the duty of the Director of Public Prosecutions to bring before the High Court for re-sentence hearing all prisoners sentenced to death under the mandatory provision of Section 210 of the Penal Code".[37]

The resentencing project that these seminal judgments put in train was colossal, especially for Malawi's under-resourced justice system. At the time, Malawi's maximum-security prison housed over 192 individuals[38] sentenced to the mandatory death penalty, with each requiring additional investigation into his or her case because, at the time of trial, neither defence nor prosecuting lawyers were required to adduce comprehensive mitigating or aggravating evidence. Defence lawyers did not provide mitigating evidence beyond that which would provide a complete or partial defence to murder. There was, for example, no reason for a defence lawyer to inform the court of her client's history of childhood abuse or neglect, because the judge could not take it into account at sentencing. Similarly, a prosecutor did not need to provide the court with aggravating factors such as a convict's criminal antecedents or the effect the offence had on the victim's family and the wider community, as it would be superfluous information for a hamstrung judge.

It is worth noting that other jurisdictions have faced major resentencing projects after abolishing the mandatory death penalty. In Uganda, there were over 500 prisoners eligible for resentencing after the successful

35 [2007] MWHC constitutional case no 12 of 2005.
36 Ibid.
37 *Mclemonce Yasini v Republic* [2010] MSCA criminal appeal no 29 of 2005 at 12.
38 Center for International Human Rights, Northwestern University School of Law "Concept note: Kafantayeni resentencing project" (30 March 2013). The 192 Kafantayeni beneficiaries comprised 23 prisoners on death row, and 165 men and four women whose mandatory death sentences were commuted to life in prison by executive fiat.

constitutional challenge in *Kigula and Others v Attorney General*[39] abolished that country's mandatory death penalty regime.[40] Missing court files, as in Malawi, were a vexed issue in the Ugandan resentencing process, as locating files and the additional investigation efforts required in the cases caused significant delay for some beneficiaries.[41] There follows an account of the meticulous file search undertaken in the Kafantayeni Project, which exposed the serious record keeping and archival management issues facing the criminal justice system.

THE SEARCH FOR COURT FILES

Court files were vital to the resentencing process. Mitigating and aggravating factors could now be taken into account in arriving at a fair, individualized sentence and the evidence for these factors would potentially be found in the relevant court files. At the conclusion of the first instance jury trial for each of the Kafantayeni beneficiaries, a court file typically contained: a trial transcript, being a handwritten verbatim record of the trial's proceedings, including all the witness evidence, the judge's summing up to the jury, the jury's verdict and the judge's conviction and sentence; marked exhibits that usually included a post-mortem report stating the cause of death, a statement given by the convict to police under caution (a caution statement) and statements from police and other prosecution witnesses; the prosecution's summary of the known facts and a précis of the (prosecution) witnesses' evidence, detailing facts to which each of the prosecution witnesses can attest; and any number of court orders, such as a warrant of commitment. In addition, some of the Kafantayeni beneficiaries appealed their conviction (and sometimes their sentence), meaning that the court file would normally contain the appellant's and prosecution's skeleton appeal submissions as well as the appeal judgment.

Court files, therefore, contain a wealth of information for a resentencing project. Armed with a complete court file, defence and prosecuting lawyers are able to add substance to the mitigating and aggravating factors that arose during the trial, such as the existence or not of elements of provocation or self-defence. Information in the court files might indicate that the person suffered from a mental illness or intellectual disability that was operating in some form at the time of the offence. The files may even contain evidence of significant post-offence behaviour, such as going to the police or in some way assisting with the investigation. Furthermore, they are a helpful means of locating witnesses to the offence and other witnesses for further investigation.

39 [2005] UGCC 8.

40 The Death Penalty Project "Pathways to justice: Implementing a fair and effective remedy following abolition of the mandatory death penalty in Kenya" (January 2019) at 22.

41 Id at 26.

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For these reasons, in 2012, in the lead up to the resentencing hearings, a meticulous search was undertaken for the court files of each of the 192 prisoners. With permission from the judiciary,[42] a small team[43] of law students, court clerks and paralegals searched the High Court criminal registries in Blantyre, Lilongwe and Mzuzu, the Supreme Court Registry, and the Judicial Archives Room of the National Archives of Malawi in Zomba: every possible location where the court files might be archived. Over several months, the team cross-referenced each criminal file that was located with the names and case numbers of those eligible to be resentenced.[44]

A memorandum documented the extensive search for the court files, describing the management of the files in each of the locations searched.[45] In most locations, the archived files were stored in dusty, damp, unventilated rooms, and in most cases rodents and other small animals and insects were clearly present, as they had gnawed at the files and excrement was smeared on the files and their contents. Cockroaches and silverfish were frequently found squashed into the documents contained within. Many had pages missing and often the handwritten documents within were illegible.

At the two largest criminal registries, Blantyre and Lilongwe, archived criminal files were mixed with civil and commercial files in no discernible order, which forced the team to look at every one of the files in these locations. In Blantyre, one of the rooms doubled as a space where lunch was cooked, resulting in a grimy black film covering the files. There are unconfirmed reports that older files were occasionally burned to ignite the charcoal cookers. While, in Lilongwe, files and physical exhibits were crammed into an abandoned toilet cubicle and spilled into the hallway. Only two files were located in Lilongwe, of which only one was complete.[46]

The criminal registry of the High Court of Mzuzu and the Judicial Archives Room of the National Archives of Malawi were more organized than the other locations. In Mzuzu, all archived files were stored in one cool dry room, and clearly separated into civil and criminal piles. There was little evidence of

42 See letter from S Mdeza, assistant registrar of the High Court of Malawi (11 May 2012) granting the team unrestricted access to the National Archives of Malawi and the country's criminal registries.

43 The author of this article led the team in the file search.

44 It was important to cross-reference each prisoner's name with their case number as Malawians spell names phonetically. For example, a person who spells his name Aaron John may have his name recorded as Aron Jon on his prison file, Aaron Jon on his court file and Aran John on his committal warrant.

45 E Carreau "File search for those sentenced to the mandatory death penalty" (memorandum, 23 August 2012).

46 Files were classified as complete if they contained a trial transcript with the accompanying exhibits (which typically included the post-mortem report and caution statement). Incomplete court files were missing one or more of these documents and included those files that contained none of these documents but did have some other document(s), such as the prosecutor's précis of evidence, an appeal judgment and / or a bail application.

rodent or insect infestation and little damage to the files. The team was able to complete its search in a few days and located most of the files from that region. Similarly, the Judicial Archives Room was clean and the filing system was logical and consistent, which greatly facilitated the search.

Overall, the results of the search were underwhelming and confirmation that the judiciary's "files, registers and case records are neither accurate nor secure".[47] Of the 190 court files that the team expected to find, only 78 complete and 19 incomplete files were located. In the absence of the complete court file, the Kafantayeni Project stakeholders hoped that the shorthand notebooks of the court reporters could be transcribed. However, as noted in the file search memorandum, the shorthand notebooks could not be located, as most court reporters threw out their notebooks once their employment was finished, and those that remained were eventually thrown out after they were damaged by water from a leaking ceiling.

Ultimately, for nearly half of the Kafantayeni beneficiaries, the only useable information came from prison files, which contained a committal warrant stating the prisoner's name, village and tribe, and noted that they had been convicted of murder contrary to section 209 of the Penal Code and sentenced to death. The lack of other, more detailed information posed a real challenge to the resentencing process, as there were no detailed accounts of the offence(s) from which defence and prosecution lawyers could develop case theories and guide their investigation. The lack of information had the potential severely to disadvantage those Kafantayeni beneficiaries who were facing resentencing, for which the outcome may be resentencing to death.

THE KAFANTAYENI SOLUTION

The Supreme Court had already considered the issue of missing court files in murder cases before the Kafantayeni rehearings. In 2012, the court ruled in *Andrew Chalera and Others v Republic* (*Chalera*): "[w]here the missing part of the record is substantial, material and consequential, such that proceeding with the appeal would result in injustice, the conviction should be set aside without the full appeal being heard … Whether an order for retrial should be made will depend on the circumstances of the case".[48] In that case, the

47 F Kanyongolo "Malawi: Justice sector and the rule of law" (Open Society Initiative for Southern Africa discussion paper, 2006) at 11.

48 [2014] MSCA civil appeal no 5 of 2012 at 8. This test is similar to the one used in a United States case in which the court reporter's notes were lost. See *People v Morales* (1979) 88 Cal App 3d 259 (Cal Ct App 1979): "The test is whether in light of all the circumstances it appears that the lost portion is 'substantial' in that it affects the ability of the reviewing court to conduct a meaningful review and the ability of the defendant to properly perfect his appeal. It is not every loss of any part of the reporter's notes that requires vacating of the judgment." See Opinion of Compton J, available at: <https://www.casemine.com/judgement/us/5914939badd7b049345ad656?utm_source=amp&target=amp_impara#> (last accessed 25 September 2020).

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court considered the missing summing-up to the jury by the trial judge a "vital component" of the record and, because the appellants had already been imprisoned for more than 15 years, it was considered "inappropriate" in the circumstances to order a retrial.

The *Chalera* ruling followed a case six years earlier in which the appellant's lower court record, except for the judgment, was entirely missing. In that case the High Court noted: "what is true is that one does not get a clear picture of the whole story. Coupled with the complaints by the appellant it is difficult for this court to protect the conviction against the appellant. It would be very unsafe to do so. The appellant's conviction is therefore quashed".[49]

These two rulings show that, in the context of appeals against conviction, Malawi's High Court and Supreme Court will provide the appellant relief in the circumstances where the missing part(s) of the record could result in a miscarriage of justice for the appellant.

Notwithstanding the principled approach taken by the Supreme Court in *Chalera*, the High Court was not bound to it in the Kafantayeni resentencing process. The Kafantayeni rehearings were not appeals. Rather, they were unique court-ordered remedies for those sentenced under an unconstitutional sentencing regime. As such, these hearings did not challenge the propriety of the conviction, but proceeded as if the accused had just been convicted at trial and the court was now passing sentence, albeit with a significant time delay between the two phases.[50] The High Court created Guidelines on Sentence Rehearings (the Guidelines)[51] that, among other things, stressed that, where possible, cases should be set-down before the original trial judge and that the normal adversarial process should be followed as established by the CPE Code.[52] The Guidelines specifically noted that section 260 of the CPE Code applied, so the court may "receive such evidence as it thinks fit in order to inform itself of the sentence proper to be passed",[53] allowing for evidence outside the court record.

The Guidelines laid the groundwork for a resentencing process focused on ensuring, as far as possible, a just outcome for all the Kafantayeni beneficiaries. A notable level of cooperation existed between defence lawyers and prosecutors, particularly in cases with limited or no information available from the court record. Both parties set out to reconstruct the court file as best they could, while maintaining the fundamental tenets of a fair trial. Prosecutors accepted that they would not approach the Kafantayeni beneficiaries for information to reconstruct the court file, as doing so would undermine their right

49 *Kasunda v Republic* [2006] MWHC criminal appeal no 103 of 2005 at 3.

50 As *Kafantayeni* abolished the mandatory death penalty in 2007 and sentence rehearings began in 2015, the delay between conviction and receiving a constitutionally valid sentence was at least eight years.

51 Special Committee "Guidelines on sentence re-hearing" (17 February 2015).

52 Id at 3–4.

53 Id at 2.

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to silence and could result in self-incrimination. Meanwhile defence lawyers understood that, at a minimum, the name of the victim and the location of the offence should be provided to prosecutors, as they would always have that information at the guilt and innocence phase of a trial, and it would ultimately speed up the process for their clients by allowing the prosecution to conduct its investigation in a timely manner.

Resentencing courts were similarly flexible in their approach, most notably in accepting affidavit evidence from witnesses rather than requiring them to give their evidence in court,[54] thereby removing cross-examination from the sentence rehearings. This judicial innovation took into account the logistical impracticalities of bringing witnesses to court, as well as the reliability of evidence from witnesses whose memories had necessarily faded with the passing of time. It would seem the courts sought a general understanding of what transpired at the time of the offence from both sides without getting bogged down in the minutia that might arise from cross-examination, which, in any case, could not be relied upon with great certainty. This reasoning extended to the convicts who were allowed to provide their evidence in affidavit form, and was tacitly accepted by prosecution and defence lawyers. In this context, most of the convicts whose court files were missing volunteered to provide sworn affidavit evidence regarding the facts of the offence as part of their sentencing submissions, although there was no obligation placed on them to do so.

The *Chalera* judgement further guided the practice in this area. It acted as a form of persuasive precedent for the resentencing courts in those cases where the court files were completely or partially lost. It was especially persuasive given that the Kafantayeni beneficiaries, like the appellant in *Chalera*, had already served lengthy terms of imprisonment. In line with the Supreme Court's ruling, resentencing courts showed compassion to those whose court records were missing or incomplete through no fault of their own. In a string of judgements, the High Court affirmed, inter alia, that: missing court files would not preclude the prisoner from their court-ordered remedy;[55] any ambiguity that arose from an incomplete record would be resolved in the convict's favour;[56] due weight would be given to the convict's own reasonable account of the facts, with the burden on the prosecution to disprove it;[57]

54 S Babcock "Navigating the moral minefields of human rights advocacy in the global south" 17/1 *Northwestern Journal of Human Rights* 47 at 70.

55 *Republic v Lackson Dzimbiri* MWHC sentence rehearing cause no 4 of 2015; *Republic v Geoffrey Mponda* MWHC sentence rehearing cause no 68 of 2015.

56 *Republic v Thom Pofera Phiri* MWHC sentence rehearing cause no 25 of 2016; *Republic v Stoneki Kachala* MWHC sentence rehearing cause no 30 of 2016; *Republic v Clement Master* MWHC sentence rehearing cause no 33 of 2015; *Republic v Funsani Payenda* MWHC sentence rehearing cause no 18 of 2015; *Republic v Gift Ngwira* MWHC sentence rehearing cause no 22 of 2016.

57 *Lackson Dzimbiri*, above at note 55. In his reasoned judgment, Nyirenda J adopted these principles, which had been established in the "Newton hearings" (*R v Hawkins* [1985] 7 Cr App R [S] 351; and *R v Kerr* [1980] 2 Cr App R [S] 54).

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and, ultimately, if the record was missing, the murder could not be considered the worst or the rarest of its kind.[58]

The resentencing court's position on dealing with missing court files had a profound impact on the resentencing of the Kafantayeni beneficiaries. By accepting that, in the absence of a clear account of the facts, the convict could not be considered to have committed the worst murder of its kind, a necessary condition for a death sentence in Malawi,[59] the court had in effect prevented itself from resentencing an offender to death. One resentencing judge, Justice Nyirenda, neatly captured this in his ruling in the case of *Lackson Dzimbiri*: "where the trial record is wholly or partially missing such that there is uncertainty as regards the circumstances of the commission of the offence *it would be completely inappropriate to impose a death sentence*".[60]

The resentencing court's position in relation to appropriate sentences for the most heinous murders was tested in a case where a convict's entire trial record was missing, but his pre-Kafantayeni appeal judgment was located. In that case the appeal judgment briefly summarized the graphic facts established at the trial. It noted that the prisoner was convicted of killing six women (each of whom was either strangled or stabbed), mutilating their bodies and selling their body parts; in some cases, genitalia, breasts or intestines were removed, in others abdomens were opened and / or eyes were gouged out.[61] Had the trial record been located and the full facts been known, it is likely the convict would have been sentenced to death because the circumstances of the offence satisfied the requirements set out in prior case law.[62] However, in the absence of the trial record, the convict was sentenced to life imprisonment.

For at least one of the resentencing judges, life imprisonment was also ruled out as a sentencing option when the court record is missing. In *Republic v Patson Mtepa* Justice Kamwambe reasoned:

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58 *Republic v Aaron John and Tonny Thobowa* MWHC sentence rehearing cause no 13 of 2015.

59 See *Republic v Anderson Mabvuto* [2009] MWHC criminal case no 66 of 2009, where the convict was spared death because (at 12) the "[o]ffence [was] not the worst of its type and the convict [was] not the worst offender".

60 Above at note 55 at 11 (emphasis added). Reaffirmed in *Republic v Richard Maulidi and Julius Khanawa* MWHC sentence rehearing cause no 65 of 2015; *Republic v Patson Mtepa* MWHC sentence rehearing cause no 9 of 2017.

61 *Republic v Thomson Fuleya Bokhoboko* MWHC sentence rehearing cause no 33 of 2017.

62 *Republic v Jamuson White* MWHC criminal case no 74 of 2008 (unreported). According to this judgment (at 2): "The offence must have been occasioned in very decrepit and gruesome circumstances meticulously intentioned and planned and that the convict is highly likely to offend again to justify his total removal from associating with other persons even in prison. He must be a threat to society so much so that society would without thinking twice approve of his elimination from planet earth. The motive for the killing must be extremely heinous so as to cause a deep sense of society abhorrence and condemnation that such human being does not qualify to live. I may put deliberate mass murders and serial killers in this category."

> "The court record is missing, as a result, it is difficult to meaningfully consider the circumstances surrounding the crime in mitigation and aggravation of the sentence. Such situation should work to the advantage of the convict in that imposition of a death sentence is excluded and so too life imprisonment. Where the record is missing it would be difficult for the State to justify the imposition of a death sentence, let alone, life."[63]

Adding weight to this judge's decision to exclude the imposition of a life sentence in this case were the facts, which were reconstructed from the prison file, interviews with members of the convict's community and a mental health assessment,[64] that showed the victim was killed when the convict and another committed a robbery armed with a gun. After taking into account the mitigating factors, such as his youthfulness at the time of the offence, the convict was sentenced to 25 years' imprisonment.

Aside from the effect of excluding the imposition of the death penalty (and, for at least one resentencing judge, life imprisonment), it is difficult to quantify the specific sentence discount that a missing court record had on each sentence imposed in the Kafantayeni Project. A missing court record is but one of an inexhaustible list of mitigating factors that a judge can take into account when determining a just sentence. In addition to the mitigating factors arising from the facts of the case and the individual's personal circumstances, the unconstitutional death sentence, protracted time on remand, poor conditions of detention and missing court files were accepted as mitigators in these proceedings. Ultimately, the average length of the determinate sentences handed down in cases with and without court files was virtually identical at 24.18 years and 24.10 years respectively.[65] This may point to the expert work of the defence and prosecution in reconstructing missing court files and providing judges with comprehensive submissions on sentence.

Interestingly, however, a separate effect was that convicts with missing court files were nearly twice as likely to be immediately released from prison upon being resentenced. Of the 84 cases where the convict was resentenced with the trial record entirely missing, 33 (ie 39 per cent) resulted in the court ordering the immediate release of the prisoner, whereas, of the 63 cases where the convict was resentenced with a complete trial record, only 14 (ie 20 per cent) resulted in the court ordering the immediate release of the prisoner.[66] This difference may be explained, in part, by the fact that the reconstruction of

63 Above at note 60 at 2.

64 Mental health experts from the United States and South Africa assessed over 25 prisoners who seemed to be mentally ill or intellectually disabled. The mental health experts produced reports from their assessment findings for the court. See Babcock "Navigating the moral minefields", above at note 54 at 69.

65 Malawi Human Rights Commission "Project progress: Detailed, Kafantayeni sentence rehearing project" (working document, on file with the author). Calculations are based on this project progress document.

66 Ibid.

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some missing court files resulted in a limited or unclear account of the facts,[67] or there was a material difference between the facts proffered by the defence and the prosecution.[68] In these circumstances the resentencing court would resolve the ambiguity in the convict's favour, thereby increasing the likelihood of an immediate release order being an appropriate remedy. This may have been especially true if the known facts did not point to it being among the worst murders or if there were additional, powerful mitigating factors.

KAFANTAYENI APPEALS

The Kafantayeni beneficiaries who are yet to be released have the right to appeal their new sentences and, in most cases, their convictions.[69] To do so, the Supreme Court requires them to give notice of their intention to appeal within 30 days after the date of judgment.[70] This poses a real problem for prisoners who are largely illiterate and lack the resources required to source legal assistance.[71]

Fortunately, the Supreme Court has the power to extend the time for giving notice of an intention to appeal,[72] and typically does so in criminal cases, in recognition of the difficulties prisoners have obtaining legal assistance and because "substantial justice should be done without undue regard for technicality".[73] It is highly likely then that the Supreme Court will allow the Kafantayeni beneficiaries to appeal their convictions and / or sentences out of time, especially considering they were subject to constitutional violations by virtue of being mandatorily sentenced to death.

The Kafantayeni beneficiaries who decide to appeal their new sentences must proceed with caution. While the Supreme Court has the power to substitute the sentence with a less severe one, it may also issue a more severe one,[74] which in the case of murder may be life imprisonment or death. Those with complete court records are at a higher risk of a harsher sentence. The Supreme Court's position in *Chalera* makes it less likely that a prisoner whose missing court file had been reconstructed would have their determinate sentences

67 *Republic v Bisket Kumitumbu* MWHC sentence rehearing cause no 59 of 2015; *Republic v Clitus Chimwala* MWHC sentence rehearing cause no 56 of 2015; *Republic v Richard N'dala* MWHC sentence rehearing cause no 42 of 2015; *Lackson Dzimbiri*, above at note 55.

68 *Geoffrey Mponda*, above at note 55.

69 Some Kafantayeni beneficiaries are unable to appeal their convictions as the Supreme Court upheld their convictions (and confirmed their death sentences) on appeal before they were resentenced.

70 Supreme Court of Appeal Act 1964 (Malawi), sec 17(1).

71 This is evidenced by the fact that the located court records and prison files showed very few of the 192 Kafantayeni beneficiaries managed to file a notice of their intention to appeal, or launched appeals within the prescribed period after their initial trial. The majority of those without legal assistance did not do so.

72 Supreme Court of Appeal Act, sec 17(3).

73 CPE Code, sec 3.

74 Supreme Court of Appeal Act, sec 12(3).

substituted with life imprisonment or death. Nevertheless, the Supreme Court is not bound by its own rulings nor by the High Court's ruling that it would be "completely inappropriate to impose a death sentence" where there is uncertainty around the facts of the offence.[75]

Kafantayeni appeals provide the Supreme Court with the opportunity to affirm or reject the components of sentencing law that were established by the High Court in the resentencing project. In light of the Supreme Court's position in *Chalera* regarding the safety of conviction where the record is incomplete, it seems likely that the principle established in *Lackson Dzimbiri* (that the convict cannot be sentenced to death "where the trial record is wholly or partially missing such that there is uncertainty as regards the circumstances of the commission of the offence")[76] would be affirmed and extended to sentencing on appeal. It is less clear, however, whether the principle established in *Patson Mtepa*,[77] preventing the imposition of life imprisonment in cases where the court record is missing, will be affirmed, as it was only adopted by a solitary resentencing judge and one Kafantayeni beneficiary was sentenced to life imprisonment, despite his missing trial record.[78]

CONCLUSION

As a resentencing judge correctly noted, "Malawi's courts are plagued with missing court records and trial transcripts. This affects defendants' right to a fair trial, the right of appeal. It is a significant human rights issue."[79]

The way in which the issue of missing court files was resolved following the Kafantayeni judgment will be instructive for other legal systems facing similar problems now and in the future. For example, the Kenyan judiciary, which, like the Malawi judiciary, abolished the mandatory death penalty on constitutional grounds in December 2017, is now facing a major resentencing project

75 *Lackson Dzimbiri*, above at note 55 at 11. Those Kafantayeni beneficiaries whose court files are entirely missing could challenge their conviction and rely on the *Chalera* ruling to argue for their release. Although the court file in each case has been reconstructed through additional investigation by defence lawyers and prosecutors, they all have "vital" components of the record missing, such as the trial judge's summing up to the jury (as in *Chalera*), which could lead to an injustice on appeal. Moreover, as with Mr Chalera, all the Kafantayeni beneficiaries who are yet to file an appeal have been imprisoned for eight years or more; as such, a retrial would be "inappropriate". In these circumstances, the Supreme Court may be persuaded to set aside their conviction without the full appeal being heard or, alternatively, grant them bail pending appeal.

76 Ibid.

77 Above at note 60.

78 *Republic v Thomson Bokhobokho* MWHC sentence rehearing cause no 33 of 2017. The Supreme Court's affirmation of these sentencing principles would be binding on the High Court.

79 *Republic v John Nthara and Jamu Banda* MWHC sentence rehearing cause no 15 of 2015; see D Lourtau et al *Justice Denied: A Global Study of Wrongful Death Row Convictions* (2018, The Cornell Center on the Death Penalty Worldwide) at 39.

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of its own.[80] In Kenya, there may also be missing court files and other process issues that the resentencing court's interpretation in the Kafantayeni Project and the *Chalera* findings will assist in resolving.[81]

At this stage, Kenya has not undertaken a comprehensive court file search, although it is likely that, among the estimated 7,000–8,000 beneficiaries,[82] many will be missing court files, as was the case in Malawi and Uganda. In those cases, the Kenyan resentencing court may wish to adopt a similar approach to that of Malawi, whereby the defence and prosecution work together to reconstruct the files, while accepting that it is an adversarial process, the prisoner has a right to silence, the burden of proof regarding the facts of the offence remains on the prosecution, and all other fundamental tenets of the criminal law are respected. As a general rule, prisoners must not be adversely affected by missing court files and any ambiguities regarding the facts of the offence or the circumstances of the offender should be resolved in the prisoner's favour, with the usual procedural rules that are in place to protect the rights of prisoners respected.

The Kafantayeni Project highlights the importance of taking record keeping seriously. This is especially important in low-resource settings such as Malawi where judiciary, public prosecution and legal aid files are paper-based and hence have a tendency to stack up and go missing.[83] A missing trial transcript, post-mortem examination, or any other key document is enough to create a potential miscarriage of justice for the prisoner and in doing so weaken society's confidence in the criminal justice system. To avoid this, Malawi must follow other sub-Saharan states in moving towards the digitalization of court records and provide additional training to judicial support staff to ensure this innovation is effective. Digitalizing the entire paper-based file at the conclusion of each criminal trial and storing it securely will significantly reduce the scope for court files to go missing. If limited resources or structural issues mean the judiciary is unable to digitalize every criminal court file, it

80 *Francis Karioko Muruatetu and Another v Republic* [2017] Supreme Court of Kenya petition no 15 of 2015.

81 African courts may be influenced by the sentencing principles arising from the Kafantayeni Project. See Cornell Law School "Cornell Center on the Death Penalty Worldwide wins world justice challenge" (17 July 2019), available at: <https://www.lawschool.cornell.edu/spotlights/Cornell-Center-on-the-Death-Penalty-Worldwide-Wins-World-Justice-Challenge.cfm> (last accessed 16 September 2020), in which Prof S Babcock (Cornell Law School) states: "We are urging the African Court to consider the positive jurisprudence generated by our project, in the hope that the principles adopted by the Malawian courts may ultimately affect the application of the death penalty across the continent."

82 The Death Penalty Project "Pathways to justice", above at note 40 at 38.

83 It would be a mistake for well-resourced jurisdictions that rarely, if ever, lose court files to become complacent. As courts and lawyers move increasingly towards filing documents online, the system is exposing itself to new risks. Despite improved online security, the possibility that files are digitally misfiled or intentionally deleted will always remain.

should prioritize the most serious offences, such as murder, which attract the harshest punishments. Improvements in judicial recording keeping and the management of judicial archives will promote access to justice for Malawi's vulnerable prisoners: an end towards which all stakeholders are undoubtedly eager to work.

CONFLICTS OF INTEREST

None

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