



REPUBLIC OF MALAWI

IN THE SUPREME COURT OF APPEAL

SITTING IN BLANTYRE

MSCA CRIMINAL APPEAL NO. 04 of 2021

Being Zomba District Registry High Court Criminal Appeal Number 13 of 2020

BETWEEN:

FABIANO MARIKO.....APPELLANT

AND

THE STATE..... RESPONDENT

CORAM: HON. CHIEF JUSTICE R.R. MZIKAMANDA SC
HON. DEPUTY CHIEF JUSTICE L.P. CHIKOPA SC
HON. JUSTICE F.E. KAPANDA SC, JA
HON. JUSTICE H.S.B. POTANI, SC, JA
HON. JUSTICE J..N. KATSALA, SC, JA
HON. JUSTICE I.C. KAMANGA SC, JA
HON. JUSTICE M.C.C. MKANDAWIRE, SC, JA

Mr. Twea, for the Appellant

Mr. Msume, for the Respondent

Mr. Minikwa, Official Interpreter

Date of Hearing: Thursday, 10 March 2022

Date of Extempore Judgment: 10 March 2022

Date of *Judicium curia advisari vult* (Reserved judgment): 20 July 2026

JUDGEMENT

Hon Justice F. E. Kapanda SC, JA:

INTRODUCTION

1. This is an appeal by the appellant, Fabiano Mariko, against the decision of the High Court sitting at Zomba, which enhanced his sentence from fourteen (14) years to forty (40) years' imprisonment with hard labour. The appeal raises issues of procedural fairness and compliance with the constitutional right to a fair hearing under section 42(2) of the Constitution.

FACTUAL BACKGROUND

2. The Appellant, Mr. Fabiano Mariko, was convicted on his own plea on 17th March 2020 by the Senior Resident Magistrate Court in Zomba for the offence of defilement, contrary to Section 138(1) of the Penal Code. The victim was a 10-year-old girl, and the Appellant, a 43-year-old man, was a family friend of her father, a relationship that placed him in a position of trust as the victim referred to him as "uncle."

3. The Senior Resident Magistrate, after considering the mitigation and aggravating circumstances, sentenced the Appellant to fourteen (14) years imprisonment with hard labour. The Appellant appealed to the High Court against this sentence, arguing it was manifestly excessive. The Respondent (the State), through its counsel, initially agreed that the 14-year sentence was excessive and suggested a reduction to approximately 10 years imprisonment.

4. However, in a judgment dated 8th January 2021, the High Court dismissed the Appellant's appeal. Instead of reducing the sentence, the Court *enhanced* it significantly, setting aside the 14-year term and

replacing it with a sentence of forty (40) years imprisonment with hard labour. The Appellant now appeals to the Malawi Supreme Court of Appeal against this enhancement of his sentence by the High Court.

GROUND OF APPEAL

5. The Appellant appeals against the decision of the High Court on the following grounds, which are contended to constitute errors in law:

6. The Court below erred in law by enhancing the sentence on its own motion, considering that the Respondent did not file a cross-appeal seeking such enhancement and, indeed, had initially concurred with the Appellant that the original sentence was excessive.

7. The Court a quo further erred in law by proceeding to enhance the sentence without first affording the Appellant notice and a meaningful opportunity to be heard on the specific issue of enhancement, thereby violating the principles of natural justice and the right to a fair trial as enshrined in the Constitution.

8. It is also contended that the Court below misdirected itself by approaching the sentencing exercise with a spirit of severity and moral outrage, as evidenced by the language and tenor of the judgment, rather than with the dispassionate and impartial temper required of a judicial officer.

9. The learned Judge is also alleged to have erred in law by over-emphasizing the gravity of the offence to the exclusion of a proper consideration of the circumstances of the offender and the interests of society, thereby failing to strike a balance in the classic triad of sentencing considerations.

10. A further ground of appeal is that the Court a quo erred by imposing a sentence that is strikingly disparate from and disproportionate to sentences imposed in previous cases with similar or more aggravated facts, resulting in an arbitrary and unjustified departure from established sentencing precedent.

11. The Appellant also contends that the Court below misdirected itself by taking into account extraneous considerations, such as public sentiment and opinion, contrary to the constitutional injunction to have regard only to legally relevant facts and prescriptions of law.

12. The learned Judge is further alleged to have erred by imposing a sentence devoid of any measurable element of mercy or compassion, and in so doing, failed to ensure the humane application of the law as mandated by the Constitution, resulting in a punishment that is cruel, inhuman, and degrading.

13. It is also submitted that the Court below erred in law in categorising the Appellant's offence as among the worst instances of defilement, and thus warranting a sentence approaching the statutory maximum, without identifying any special or extreme aggravating features beyond the inherent elements of the offence itself to justify such a finding.

14. Finally, the Appellant contends that, in all the circumstances of the case, and having regard to the Appellant's plea of guilt, his status as a first offender, his expression of remorse, and his prospects of reformation, the ultimate sentence of forty years' imprisonment is manifestly excessive and induces a sense of shock.

ISSUES FOR DETERMINATION

15. Having carefully examined the Notice of Appeal, the entirety of the record of proceedings, and the comprehensive submissions advanced by learned counsel for the parties, this Court identifies and formulates the following principal issues for determination:

1. Whether the High Court, in the exercise of its appellate jurisdiction, committed a procedural irregularity by enhancing the sentence imposed upon the appellant without first providing explicit notice of its intention to do so, and without affording the appellant a full and meaningful opportunity to be heard in relation thereto, thereby contravening the principles of natural justice and the constitutional guarantee of a fair hearing.
2. Whether, on the facts and circumstances of the present case, the enhanced custodial sentence of forty (40) years' imprisonment imposed upon the appellant is lawful, just, and proportionate, having regard to established sentencing principles, relevant statutory provisions, and comparative jurisprudence.
3. Whether the State, in the conduct of the appeal, failed to comply with appellate procedural protocols by neglecting to file skeleton

arguments as required, and, if so, what legal consequence, if any, such procedural default had upon the integrity and fairness of the appellate proceedings.

16. In delineating the foregoing issues, this Court has endeavoured to extract and articulate the fundamental questions arising from the procedural chronology, the articulated grounds of appeal, and the comprehensive submissions advanced by counsel. These issues encapsulate both the constitutional and procedural aspects of the appellant's grievances—most notably, the asserted violation of the right to be heard—as well as the substantive inquiry into whether the sentence ultimately imposed conforms to the requirements of legality, proportionality, and consistency with established judicial precedent. Furthermore, these issues underscore the Court's obligation to rigorously examine the conduct of the proceedings before the lower court, including adherence to the mandatory procedural directives governing criminal appeals.

17. Having thus identified and settled the issues for determination, the Court proceeds to address each in turn. In the ensuing analysis, the Court will assess each issue in the context of the relevant statutory provisions, constitutional mandates, binding authorities, and persuasive jurisprudence. The objective of this inquiry is to ascertain whether the impugned decision is sustainable in law, and to determine whether any procedural or substantive irregularities disclosed warrant intervention by this appellate tribunal. The Court's findings and conclusions in respect of each issue are set out hereunder.

ANALYSIS OF THE APPLICABLE LAW (FINDINGS AND CONCLUSIONS OF THE COURT)

On Procedural Fairness in Sentence Enhancement

18. In Malawi, the exercise of judicial power in criminal matters—whether at first instance, on review, or on appeal—must conform to the dictates of natural justice and the constitutional guarantee of a fair hearing under section 42 of the Constitution. Where a court considers the imposition of a sentence more severe than that originally passed, it must do so with heightened circumspection, for such an order directly engages the

accused's fundamental right to be heard on any matter adverse to his or her liberty.

19. This Court has consistently affirmed that sentence enhancement cannot lawfully be undertaken unless the affected person is put on clear notice of the court's intention and afforded a meaningful opportunity to address the proposed increase.

20. In considering the propriety of the enhanced sentence imposed by the court below, it is necessary to restate the fundamental principles that govern the exercise of judicial discretion where a more severe penalty is contemplated. The administration of criminal justice is anchored in procedural fairness, and any departure from this norm risks undermining both the legitimacy of the process and the substantive justice of the outcome. Sentence enhancement, by its very nature, carries the potential to adversely affect an accused person's rights and interests. Accordingly, the law demands that such a step be taken only in strict observance of the *audi alteram partem* rule.

21. It is now well-established that before a court enhances a sentence—whether on review, appeal, or otherwise—it must afford the affected party a reasonable opportunity to be heard on the proposed increase and on any factors relevant to mitigation or proportionality. This requirement is not a mere formality; it is a constitutional safeguard designed to ensure that the accused is neither ambushed nor prejudiced by an order that exceeds the sentence originally imposed. The principles of fairness, transparency, and judicial restraint thus converge to circumscribe the circumstances under which an enhanced sentence may lawfully be ordered.

22. In the present matter, the Court must therefore assess whether the procedural safeguards were duly observed, and whether the enhanced sentence can withstand scrutiny in light of the established jurisprudence on natural justice and the protection of the accused's right to be heard.

23. In **Raja v R** (Criminal Appeal 2 of 2021) [2024] MWHC 68 (23 July 2024) this Court instructively observed thus:

"With regard to the aforementioned sentences we are of the firm view that the sentencing court should have granted the appellant the opportunity to be heard before enhancing the sentences. It is a well-established principle within criminal procedure that the making of an order adverse to the defendant should not occur without notifying them

or affording them a chance to present their case. In Rep v Muhamed

Abdul Ibrahim [2010] MLR 311 (HC), the High Court, while acknowledging its power to reverse the sentencing orders of the lower court, remarked that in instances where an adverse order is contemplated against convicts, it is imperative to hear them before making such an order. The court noted that: "proceeding to sentence them now in a manner at variance with the trial court's sentiments would be to take undue advantage of the review process and allow the State to get through the back door that which they could not get via the front door namely a stiffer sentence" at p314. the above principle is applicable to the present case, in that the court should have duly informed the appellant of its intention to enhance the sentences. The appellant would therefore have been at liberty to show cause as to why the court should refrain from enhancing the sentences.

It is only after this process that the sentencing court ought to have been in a position to exercise its discretion regarding the enhancement of the sentences herein. The record indicates that no such procedural exercise occurred. The appellant was not informed of his right to argue against any intended sentence enhancement. To that extent, the sentencing court erred in law."

24. The Court essentially held that the court below had acted improperly by increasing the appellant's sentence without first informing him or giving him an opportunity to be heard. In criminal procedure, a court must not make an order that adversely affects an accused person—such as imposing a harsher sentence—without notifying them and allowing them to argue against it. The Court cites *Rep v Muhamed Abdul Ibrahim* as authority for the principle that when a stiffer sentence is being considered, the convict must first be heard; otherwise, the court would be unfairly using the process to impose a harsher sentence "through the back door."

25. In this case, the sentencing court never informed the appellant that it intended to enhance the sentence, nor did it give him an opportunity to explain why the sentence should not be increased. Because this procedural safeguard was ignored, the court's decision to enhance the sentence was legally flawed and amounted to an error of law.

26. Having carefully scrutinised the entirety of the case record, alongside the comprehensive submissions advanced by both parties, this Court reaches the following determinations:

Procedural Notification Requirement

27. It is an established principle of appellate procedure that, where a court contemplates the enhancement of a sentence on appeal, it is incumbent upon that court to issue explicit and advance notice to the appellant of its intention to do so. The appellant must be afforded a genuine and meaningful opportunity to present arguments and evidence in mitigation, or otherwise to show cause why the proposed increase in sentence ought not to be imposed. This requirement is not merely procedural, but is a substantive safeguard, rooted in the doctrine of natural justice.

Failure of Notification and Opportunity to be Heard

28. The record before this Court discloses no evidence that the appellant was ever apprised of the appellate court's intention to enhance the sentence previously imposed. There is an absence of any notification, either oral or written, and no indication that the appellant was afforded an opportunity to contest or address the proposed enhancement. This omission constitutes a fundamental procedural irregularity, directly infringing upon the appellant's constitutional right to be heard before the imposition of a more severe penalty.

Prejudicial Effect and Procedural Irregularity

29. In consequence of the aforementioned failures, the enhancement of the appellant's sentence was effected in a manner that was procedurally irregular and prejudicial to the appellant. The denial of notification and the opportunity for representation operated to the appellant's manifest disadvantage, resulting in a sentence that was imposed without the safeguards required by law and constitutional principle. Such a breach of natural justice cannot be cured by subsequent proceedings and must be regarded as vitiating the validity of the sentence enhancement.

30. Accordingly, this Court formally determines that the enhancement of the appellant's sentence was procedurally flawed, in violation of the

principles of natural justice and the constitutional guarantee of a fair hearing. The matter must therefore be remitted to the High Court for sentencing to be conducted in strict compliance with the requirements of law and fairness.

31. The Court is compelled to observe, as a matter of fundamental procedural law, that the sentencing court erred in failing to apprise the appellant of its intention to enhance the sentence imposed, and in neglecting to afford the appellant an adequate opportunity to be heard in opposition thereto. This omission constitutes a grave breach of the tenets of natural justice, most notably the inviolable right to be heard—a cornerstone of fair judicial process. The principle is firmly rooted in precedent, as articulated in **Ridge v Baldwin** [1954] AC 40, wherein the House of Lords affirmed that the right to a fair hearing is indispensable and must be scrupulously upheld in all proceedings of a judicial nature.

32. The doctrine of *audi alteram partem*, which demands that no individual be condemned without first being granted a genuine opportunity to contest the case against them, is not a mere procedural formality but a substantive safeguard essential to the integrity of any adjudicative process. The failure to adhere to this doctrine in the present matter cannot be countenanced, as it strikes at the very heart of procedural fairness and judicial legitimacy.

33. This Court further emphasises, as established in **Entick v Carrington** [1765] EWHC J98, that strict compliance with procedural justice is imperative for the protection of individual rights and liberties. Any deviation from these requirements not only undermines the fairness of the trial but also casts doubt upon the reliability and acceptability of judicial outcomes. The procedural lapse herein is not a trivial or technical defect but a substantial infringement that warrants judicial redress.

34. Accordingly, this Court finds that the sentencing court's failure to notify the appellant and to provide an opportunity for representation before enhancing the sentence constitutes a material irregularity in the proceedings. Such irregularity vitiates the sentence enhancement and necessitates that the matter be returned to the High Court for proper sentencing in accordance with the law and the principles of natural justice.

On Compliance with Protocols

35. Moreover, the Court observes that, in the present appeal, the appellant duly complied with the requirements of appellate procedure by filing skeleton arguments as mandated. In contrast, the State failed to submit corresponding skeleton arguments. While it is acknowledged that criminal proceedings may, in certain respects, permit a degree of procedural latitude, this flexibility does not abrogate the fundamental imperative that the requirements of fairness must be scrupulously observed by all parties. The principle of equality of arms, which is central to the guarantees of a fair trial, demands that both the prosecution and the defence adhere to established procedural protocols.

36. The Court further notes that the State's non-compliance, although not fatal to the proceedings in this instance, is nevertheless a matter of considerable concern. Such a lapse undermines the integrity of the appellate process and reflects adversely upon the commitment to fair trial guarantees and sound case management within the criminal justice system. It is incumbent upon the State, as much as upon the appellant, to ensure that procedural obligations are met in the conduct of appeals. Failure to do so risks eroding public confidence in the administration of justice and may, in more egregious cases, give rise to procedural unfairness warranting remedial action by the Court.

On Substantive Justification of the Sentence

37. Upon careful review of the record and submissions, this Court finds as a matter of fact that, while the High Court possessed the lawful authority to enhance the sentence in circumstances where the original sentence was demonstrably inadequate, the exercise of such discretion is strictly contingent upon adherence to the prescribed procedural safeguards. It is a settled principle that the augmentation of a sentence constitutes an adverse judicial order and, as such, must be preceded by notice to the appellant and an opportunity to be heard in opposition thereto.

38. In the instant proceedings, the requisite procedural steps were not observed: the appellant was neither apprised of the court's intention to reconsider and potentially increase the sentence, nor afforded a meaningful opportunity to make representations against such enhancement. This omission constitutes a material irregularity and a breach of natural justice,

depriving the appellant of the right to be heard prior to the imposition of a more severe penalty.

39. Accordingly, it is the finding of this Court that, in the absence of procedural compliance, the merits or proportionality of the forty-year sentence imposed by the High Court do not properly fall for determination at this juncture. The Court therefore refrains from adjudicating upon the substantive justification of the sentence pending the rectification of the procedural defect. The matter stands remitted for rehearing in accordance with law and the principles of fair process.

FINDINGS AND DETERMINATION OF THE COURT

Finding of Fact and Formal Disposition

40. Upon thorough examination of the record and the submissions made by both parties, this Court finds, as a matter of fact, that a material procedural irregularity occurred in the conduct of the sentencing proceedings before the High Court. Specifically, the appellant was neither notified of the court's intention to reconsider and potentially enhance the sentence, nor granted a meaningful opportunity to present arguments in opposition thereto. This omission constitutes a substantial infringement upon the principles of natural justice and procedural fairness, thereby vitiating the validity of the sentence enhancement.

41. In consequence thereof, it is the determination of this Court that the order enhancing the appellant's sentence cannot be sustained and must be set aside. For the avoidance of doubt, the Court further finds that the conviction of the appellant remains unaffected and undisturbed by this procedural defect. The matter is accordingly remitted to the High Court, to be reheard and determined in strict accordance with the law and the requirements of fair process.

DISPOSITION AND ORDER

Order of the court

42. Having considered the entirety of the record, the submissions of counsel, and the findings set out above, it is the formal order of this Court as follows:

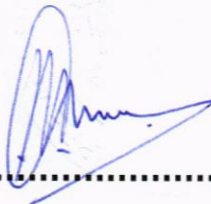
1. The appeal is hereby allowed, but solely on the ground of procedural irregularity in the sentencing proceedings before the High Court. The

merits of the sentence imposed are not adjudicated upon at this juncture, pending rectification of the identified procedural defect.

2. The matter is remitted to the High Court for the conduct of sentencing proceedings afresh, in accordance with law and the requirements of fair process. The rehearing shall be presided over by the same judge who imposed the original sentence, or by another judge as the Chief Justice may deem appropriate and so direct.
3. The High Court is directed to rehear the sentencing and to render its decision within a period not exceeding ninety (90) days from the date of this order.
4. For the avoidance of doubt, the conviction of the appellant stands affirmed and remains unaffected by the procedural irregularity found in the sentencing process. The appellant shall remain convicted of the offence pending determination of the appropriate sentence upon rehearing.

It is so ordered by the Court.

**Delivered in open Court at the Supreme Court of Appeal, Blantyre
this 20 day of July, 2026.**



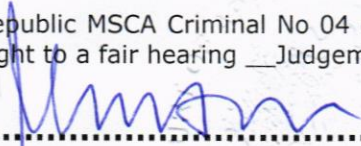
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Hon the Chief Justice R.R. Justice Mzikamanda SC



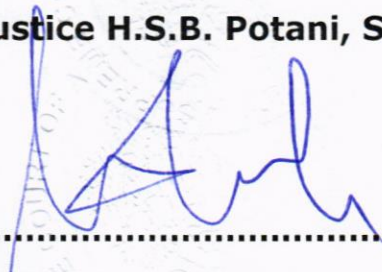
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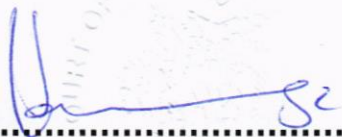
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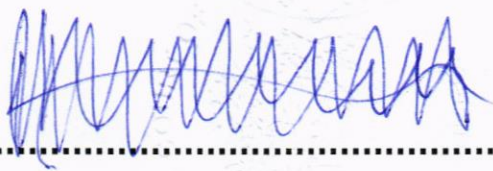
Hon Justice H.S.B. Potani, SC, JA


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Hon Justice J.N. Katsala JA


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Hon Justice I.C. Kamanga JA


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Hon Justice M.C.C. Mkandawire JA