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Research Article

Justice In Limbo: Missing Court Records In Malawi

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Abstract. The right to a fair trial includes the right to be tried within a reasonable time and to appeal. Missing court records delay the criminal process and create significant challenges for offenders who wish to exercise their right to appeal. Through case analysis, this contribution argues that Malawi's response to missing court records translates into an incoherent and inconsistent approach that undermines the right to a fair trial, often leaving accused persons in limbo. While the Judiciary has made some headway in responding to missing court records, the existing jurisprudence does not adequately protect the rights of accused persons. A legislative response is recommended to ensure consistency and certainty. In the meantime, the Judiciary must proactively develop guidelines to govern the handling of cases with missing files.

Keywords: Missing Records, Resentencing, Appeal, Fair Trial, Kafantayeni.

INTRODUCTION

The missing of court records is a common phenomenon in African countries. Courts in Lesotho, Namibia, Ghana, Eswatini, and South Africa, to mention a few, have grappled with this problem. A missing record frustrates the criminal process and limits offenders' right to a fair trial. A court record is integral to the trial, review and appeal phases; it is the official proof or primary evidence of how the trial was conducted and is vital for the framing grounds of appeal. Its availability and accuracy are indispensable to the enjoyment of the right to a fair trial. The loss of records leads to delays in the criminal process, compromising the right to be tried within a reasonable time. It also makes it difficult for an offender to appeal or have their case reviewed. Further, the absence of a court record handicaps the state in defending matters. Access to the record is, therefore, an essential part of the right to a fair trial. This leads to a violation of the right to an effective remedy in sections 41 and 46 of the Constitution. This remains true where the record is merely incomplete.

Regrettably, the missing of records 'is not an unusual experience' in Malawi. It mostly impacts suspects on remand. This contribution argues that Malawi's response to missing court records undermines the right to a fair trial and fails to provide an effective remedy, often leaving accused persons in limbo. The paper begins with a summary of the factors that account for missing court records in Malawi. Adopting a case analysis methodology, it then evaluates the various solutions adopted by the courts in response to the challenge. The paper proposes a constitutional approach that strikes a balance between the rights of suspects, victims of crime and the public.

THE DUTY TO KEEP RECORDS

The Judiciary is responsible for keeping court records. Courts must record the evidence during the trial and 'keep written records'. Once an appellant has lodged a notice of appeal, the trial court must prepare and supply them with the record of appeal. It is only upon receipt of the record that an appellant is required to prepare the grounds of appeal within 14 days. Thereafter, the trial court must prepare and transmit the record of appeal to the High Court. The Registrar must then furnish the respondent with a copy. A similar duty is placed on the High Court in appeals before the Supreme Court of Appeal (MSCA). Given this framework, the Judiciary 'should take ownership for the missing of the file rather than try to evade responsibility'.

A VICIOUS CYCLE

1. Missing records can result in a vicious cycle where accused persons are unable to lodge or prosecute their appeal. In *Mahere v R*, the applicants were faced with an impossible dilemma. The record went missing before they could lodge an appeal against their eight-year sentences for robbery. In an application for special directions or retrial, the applicants argued that the missing file was hampering the preparation of the petition which must set out grounds of appeal. Dismissing the application as premature, Kalembera J reasoned that there was no appeal before the High Court since there was no notice and petition of appeal. This technical ruling is disappointing and curtails the right to appeal. The intention to appeal was clear and the court missed an opportunity to give guidance in dealing with missing court

records. It also avoids an obvious issue: the petition could not be filed because the record was missing. Anyhow, the grounds need only be filed after receipt of the record. Importantly, the accused were seeking directions, an intervention independent of the substantive appeal. Mahere also ignores the plight of incarcerated offenders whose records are missing, especially where they are unrepresented.

2. There are four distinct approaches that emerge from jurisprudence on missing court records in Malawi: proceeding on a defective record, reconstruction of the record, release of the accused pending appeal, acquittal, and immediate or unconditional release.

PROCEEDING ON A DEFECTIVE RECORD

The earliest reported case on missing trial records is *Mandoloma v Rep*. The accused appealed his conviction of theft by servant. Some exhibits like payment vouchers signed by the accused were missing. At trial, the accused had admitted to signing the vouchers and receiving the money. He had also raised no issues on appeal regarding the missing vouchers. The court proceeded with the defective record since it was common cause that the parties had no issues with the incomplete record.

In *Jailosi v R*, save for the judgment, the record had gone missing ‘under mysterious circumstances’. The court found that the judgment was authentic and sufficient for the appeal. It also introduced the possibility of record reconstruction.

RECONSTRUCTION OF THE COURT RECORD

Guidance in Jailosi

Jailosi was the first case in which the High Court provided guidelines on the reconstruction of a record. Kumange J stressed that the duty lies with an appellant to bring the evidence to the notice of the trial court. Relying on the 1999 Rules of the Supreme Court of England It outlined the following procedure:

1. An appellate court can proceed with an incomplete record by looking at ‘any other evidence or statement of what occurred in those proceedings as to the court may appear sufficient’ such as ‘a recording of the court proceedings made by a person other than the magistrate’ or ‘the evidence of Counsel for either party who records the evidence viva voce in open court’.
2. In the absence of such recordings, an appellate court can rely on an affidavit of ‘any other evidence by any other person’ certified by the trial court.
3. The appellant must apply to the trial magistrate for certification of such evidence as similar to the one that he recorded over that case and if so, whether it is safe for the Appeal Court to proceed on it.
4. If certification is declined, an appellate court may give alternative directions considering the reasons for the refusal.
5. The appellant must then apply to the High Court to proceed on the reconstructed evidence.
6. The Court has a discretionary power to proceed on the reconstructed record.

The court was aware that this was but a suggested procedure: 'Rules for procedural matters ... are often made by the Chief Justice, and what I have said above should be looked at as obiter dictum'.

The approach in Jailosi runs into difficulties. For instance, the 1999 Rules of the Supreme Court on which the court relied were inapplicable since the Courts Act governs the provision of the trial record to the High Court on appeal. Second, while a court is not expected to 'hunt for evidence', an appellate or review court does not, strictly speaking, require evidence to be supplied by the accused as it relies on the trial record. It is only when new evidence seeks to be admitted that the duty to supply it falls on the accused or the state.

The third problem is that the suggested approach in Jailosi is not supported by law because the duty to supply a trial record lies with the trial court and not the litigants. It is unjust to require an appellant to scavenge for affidavits from persons present at the trial and applying for certification from the magistrate as suggested in Jailosi. The time and expense involved is unjustifiable. The process will be even more taxing or outright impossible where the accused is in custody. Consequently, Jailosi does not provide 'an effective remedy' as required by section 41(3) of the Constitution. As explained in Msomera:

It would be unfair and unjust to entertain bureaucratic or institutional systems' lapses as an excuse ... We should look at the convict as a vulnerable person who needs protection of the law and not ... perpetuate his or her suffering ... The judiciary should take ownership for the missing of the file rather than try to evade responsibility.

Reconstruction of the record must be a collaboration of all parties: the state, the defence and the court. Proper guidelines must be developed to for reconstruction. Reconstruction must always be the first option. It balances the rights of the accused, the interests of justice, including the rights of victims. As demonstrated below, courts do not consider reconstruction as the first or concurrent step when dealing with missing court records.

Is a Reconstructed Record an Official Court Record?

Ordinarily, a reconstructed record must be accepted as an official court record. However, case law suggests that otherwise. This discrepancy stems from the absence of binding guidelines on the reconstruction process. A further complexity arises when a court disowns a reconstructed record yet relies on the facts so established for sentencing. In *R v James* the state and defence reconstructed a record for murder through the testimony of the defendants and other witnesses including the relatives of the deceased. Kapindu J remarked that while the reconstructed facts were 'certainly helpful' for purposes of sentencing, 'they can by no means be treated as a 'proper replacement' of the trial evidence. This view is wanting. Sentencing is based on trial evidence. Surely then a record insufficient for trial evidence cannot be sufficient for sentencing? What is good for the goose should be good for the gander.

RELEASE PENDING APPEAL

Inconsistent Approach

The courts have not developed a consistent effective approach in dealing with applications for release where the record is missing. One would expect that if a delay in making the record ready where it is available is ‘good reason’ for granting bail, the fact that the record is in fact missing should be an even greater reason for releasing an accused person on bail. This is not the case.

The difficulty arises because there is a presumption against release after conviction. Release pending appeal is therefore an exception rather than a norm; an applicant must demonstrate that there are ‘exceptional and unusual circumstances’ in their favour. The trial court’s decision is assumed right until set aside. On this strength, the High Court has cautioned that courts are ‘not supposed to be too eager ... to release a [sentenced] prisoner’ based on a missing record.

In earlier cases, courts were unempathetic to the plight of offenders. In *Kaliati v Rep, Chipeta J* was wary of setting a ‘bad and dangerous precedent’ where bail is granted on the ‘pretext’ of a missing record, despite finding that a missing record is a ‘compelling reason’ to grant bail. The court reasoned that such release would simultaneously undermine the interests of justice ‘by indiscriminately, on this ground, letting loose on an unsuspecting society people who the law has already decreed to be locked up behind bars, so as to serve their due punishment, for their proven earlier invasions on the same society’. It thus held that ‘a lesser evil’ was to deny bail in such cases.

Applicants are sometimes caught in a vicious cycle where courts demand evidence to assess the prospects of success on appeal, an impossibility where a record is missing. The applicant in *Denja v R* argued that the absence of the record and the resulting uncertainty of the appeal constituted exceptional circumstances warranting release. The state effectively argued that the fact that a missing record was not sufficient reason to grant bail to the accused. The court observed that ‘the state just fell short of making a heavy accusation and generally just hinted that convicts will be solely tempted to cause files to miss in order to attain such bail’. *Chipeta J* found no precedence that a missing court record and resulting uncertainty of the date of appeal was an exceptional circumstance to warrant bail. He further admitted that without the record, the court could not assess whether the appeal had a prospect of success to warrant release. While admitting that the loss of the record was due to the judiciary’s ‘administrative laxity’, the court denied bail and instead urged the registrar to trace the record. No time limit for finding the record was ordered.

In *Mila v R*, *Manyungwa J* also sided with the state to remand the appellant because it was difficult to assess the prospects of success in the absence of the record. *Chitapa v R* expresses similar sentiments. There, the absence of the court record did not ‘impress [the court] as a special reason to warrant bail’. The court agreed with the state that ‘if on its own [the fact that the record is missing] became acceptable as a sufficient reason for granting bail, the chances are that more and more appeal files will go missing and ... a good number of them would so miss at the instance of the appellants themselves’. While recognising that it was unfortunate that the record was missing and hence ‘badly’ delaying the appeal process, the court stated that it was ‘by

virtue of the same absence of the file [that it] was in no position to evaluate the chances of success of [the] appeal' hence the applicant's assertion that the appeal is likely to be successful could not be substantiated. In an unexpected turn, the court held that bail 'ought not to be granted just to spite the court for being careless in its manner of handling records although [the court] would be the last to condone such conduct'. Neither could the court 'grant bail by way of apology for the misplacement of the ... record by the court system'. The court 'seriously urged' the Registrar to intensify efforts to find the file, giving no consideration to the fact that the accused had already served almost 10 years for armed robbery. The possibility of reconstruction was not considered at all nor any time limits prescribed.

These decisions reveal that the courts are unwillingly to view lost records as an exceptional circumstance warranting release pending appeal. It is disturbing that this is sometimes based on the unsubstantiated perception that this will increase incidents of lost records at the hands of accused persons. In effect, the courts leave the appellants without remedy and conclude that the trial court's findings were final. This infringes the right to access justice and to have a determination made by higher court.

The reasoning in Denja and Chitapa leaves the accused in limbo because he cannot make a proper case on the likelihood of success without the record. It also fails to realise that the list of exceptional circumstances that can justify release pending appeal is not exhaustive. The absence of precedent does not bar a court from creating one.

Denja and Chitapa effectively dismiss the appeal. The courts in both cases could have called for the record to be made available within a specific time. The orders given to the Registrar did not carry any sense of urgency. A court can order that the record be made available within a specified period, failing which the accused will automatically be released pending appeal or even acquitted. Ordinarily, this period should not exceed 30 days since this is the period within which grounds for appeal must be lodged. Otherwise, the accused person's right to appeal will be frustrated.

The court in Chitapa refrains from directly dealing with the innuendo from the state's submissions that applicants would engineer the missing of court records to secure bail. It tacitly shares the view without justification. In any case, the possibility of accused persons taking advantage of lost files to be released pending appeal is not a matter that can be resolved by denying release. An offender is bound to leverage any situation to get released. A court should not be distracted by this fact but be guided by principle. It must objectively assess the circumstances and apply the appropriate test.

The view that the accused can somehow lead to the loss of court files is not farfetched. However, short of breaking into the court premises, this cannot be done without inside help from judicial officers and court clerks. The solution is thus to modernise record keeping and to punish any officers involved in such practices which will almost always be rooted in corruption. Ironically, the precedent set in Denja and Chitapa could also encourage the disappearance of files, albeit at the hands of judicial officers or court clerks who seek to ensure judgments are not reviewed or heard on appeal. The possibility of this scenario bearing out in practice is made more likely by

the lack of an efficient way of dealing with lost files. This seriously impairs the right to access justice.

Changing Attitudes to Release when the Record is Missing

The strict approach against release is fading. For instance, release pending appeal was granted in *Mponda v Rep*. However, the basis was unfairness of continued when the co-accused were already on bail. Manyungwa J attempted to distinguish his earlier reasoning in *Mila* on the basis that in *casu* the co-accused persons had already been released on bail. This distinction becomes quite weak when one considers that the granting of bail depends on factors specific to the accused. Therefore, the fact that a co-accused was granted bail is irrelevant.

There is growing jurisprudence demonstrating a more balanced judicial stance alive to missing records as a human rights issue skewed against an offender. In *Kumbatira v R*, the court decided to release the applicant unconditionally pending review of his case. The record was missing and the applicant claimed that he did not commit the offence he was convicted of. The court had 'great doubt' that the applicant was wrongly convicted because though likely, 'the chances [were] very slim'. Hence, it was wary to let the applicant 'enjoy the benefit of doubt because of great unlikelihood'. Kamwambe J acknowledged that the missing record limited the applicant's right to an effective remedy via review or appeal. However, this violation was not a sufficient ground to release the applicant despite him not being complicit in the disappearance of the record. The court then decided to release the applicant on bail pending review, noting that his right to an effective remedy through appeal or review and that he should not be blamed for the missing record, had been violated. However, the continued imprisonment of an offender in the absence of a court record is not automatically unlawful or unconstitutional. An offender must show 'some positive demonstration' that their rights have been compromised by the missing record. For instance, a violation would result where the missing record causes an inordinate delay in the prosecution of an appeal.

ACQUITTAL

A further remedy emerging from at least 2005 is acquittal. This will be the case where the conviction is deemed unsafe due to missing information. The appellant in *Kasunda v R* alleged that his trial had been 'total persecution', a farce to shield the person responsible who was the son of a magistrate stationed at the same registry as the trial magistrate. Only the judgment was available on appeal. Nyirenda J (as he then was) drew an adverse inference in favour of the accused from the fact that the record was incomplete. He found himself 'bound to speculate that there [was] some degree of impropriety in the manner this matter was handled ... by the [trial] court'. Holding that the conviction was unsafe as the court was unable to get a clear picture of the trial, the court acquitted the accused and ordered an investigation into the circumstances in which the file was lost.

Another acquittal is seen in *Ntumpanje v R* where the accused had robbery convictions. The record was permanently lost in a fire. The question before the court was whether the applicants should be acquitted and retried or acquitted without

retrial. It held that the fact that the applicants had served more than two years of their sentences ‘tip[ped] the scales in favour of’ their acquittal and immediate release. The court did not assess the propriety of a retrial even though the defence had specifically argued for a retrial to accompany the acquittal. The reasoning of the court is unclear. It appears to have been persuaded by the sentence already served. Indeed, the defence submitted that they had served almost six months while the court concluded that almost two and half years had been served already.

Unfortunately, these decisions on acquittal fall short of establishing concrete guidance of the circumstances in which it would be appropriate. However, the effect of such acquittals is that the accused leave with a clean slate. This is a positive outcome in the absence of means to challenge their convictions on appeal. It can thus be said that acquittals are an effective remedy in such instances. The problem is that their guilt remains a possibility and thus victims may be revictimised.

IMMEDIATE OR UNCONDITIONAL RELEASE

Courts have crafted a hanging remedy which orders the unconditional release of the accused without quashing the conviction or sentence. In *Msomera*, the accused was unable to challenge his conviction and sentence for housebreaking because the record was missing. He had served two years of 7-and-a-half-year sentence. The court ruled that the right to an effective remedy is violated where an offender is unable to have their case reviewed by a higher court. The court then ordered the unconditional release of the applicant. It was fortified in that he had been in custody for two years, that the court file had not been reviewed, and that the application for bail pending appeal was unlikely to be heard because of the missing file.

The order in *Msomera* is curious. While release is better than continued remand in the face of missing records, it is itself not an effective remedy. Release is not an acquittal; it appears to be an indirect suspension or alteration of the sentence. Immediate release does not assist the accused beyond their release from detention; the conviction and sentence remain intact. This leaves the offender with a criminal record that has not withstood the rigour of the appellate process. This has significant implications for the accused, particularly in a country like Malawi without a comprehensive spent convictions regime.

A further worry with immediate release is that it is an evasive order. It is distinguishable from orders where courts impose a sentence ‘as would result in the immediate release’ of an offender. This is a clear reduction of a sentence since whatever portion of the sentence the offender has already served becomes the new sentence.

Third, immediate release is likely to be granted only where the accused has served a substantial part of this sentence. In essence, courts find solace in the justice of the sentence. As warned in *Msomera*, ‘[t]o allow the applicant to be released because he has served a substantial term of his sentence is strictly speaking, diversion of justice and blatantly punishing the applicant for the missing of the file’. Ironically, in *Msomera* itself, the unconditional release of the offender was partly rationalised by the sentence served.

In Mponda the court ordered the immediate release of the applicant whose appeal had stalled for 15 years due to a missing record. The court opined that such release was an effective remedy for the violation of the right to appeal. Kapindu J stated that ‘having considered all the mitigating and aggravating factors, I would still have imposed such a sentence as would have led to the immediate release of the defendant, considering that he has already spent about 21 years in custody’. This statement is confusing since the court had not had an opportunity to read the record. Further, it had conflicting versions from the state and the defence on how the offence was committed. Immediate release cannot be an effective remedy for a violation of the right to appeal where such right is completely and most likely permanently negated. An effective remedy must relate to the purpose of the right. Appeals are a way of checking the correctness of a lower court’s decision. Where such cannot be done, it stands to reason that an effective remedy should not let an untested conviction stand.

INTERVENTION BY THE SUPREME COURT OF APPEAL (MSCA)

A more coherent approach to the treatment of missing records began to emerge in 2014 with the intervention of the MSCA in *Mtambo v Rep* and later *Chalera v Rep*.

Mtambo

In *Mtambo*, the three applicants sought to challenge the mandatory death sentence for murder imposed on them following their conviction for murder on the basis that the offences were committed while they were under the age of 18 years. After they filed notice of appeal, it was discovered that the trial records had been missing for over 10 years. The court now had to decide whether to allow a matter to be heard by a full bench in the absence of court records. The question that preoccupied the court was whether it had jurisdiction to decide this issue without it first being put the High Court except in its administrative capacity. Chipeta JA explained that in the event of a failure by the High Court to provide records of appeal, an applicant should first ask the High Court to ‘judicially confess’ its failure and provide directions on the way forward before the MSCA is approached on the issue. Despite its misgivings on the procedural aspects, the court granted the application on the understanding that the appeal only related to the question of whether the applicants were entitled to be sentenced as juveniles on account of their ages at the time of the commission of the offence regardless of their ages during trial and sentencing. This question, according to the court, did not ‘overly depend’ on the record of appeal.

Mtambo reflects at least four principles. First, the absence of a court record is not an automatic hindrance to consideration of the matter by a higher court. Second, applicants whose records are missing must first approach the lower court to ‘judicially confess’ its failure and provide further directions before an appeal. This slightly mirrors the proposal in *Jailosi*. However, *Mtambo* makes no mention of the possibility of reconstructing the record, let alone require an offender to reconstruct the record.

A concern here is that it leaves the High Court with unbridled discretion in determining the procedure. Mtambo misses the opportunity to provide general guidance in the face of incoherent jurisprudence from the lower court. This has undesirable implications for offenders. Given its record at the time, the High Court would, in all possibility, have left the applicants waiting indefinitely.

The third principle in Mtambo is that where chances of finding the record are remote, such as where it has been missing for a long time and efforts to trace it have been unsuccessful, a court must consider entertaining the appeal. Fourth, where the scope of the appeal is narrow and issues determinable without recourse to the record, a court must rule in favour of proceeding with the matter. This last principle is commendable. However, courts must be cautious in deciding which matters are not 'overly dependent' on the court record. Mtambo erroneously assumes that age at the time of the offence can easily be determined without the trial record. Indeed, the record would be crucial in determining the age of the applicants at the time of committing the offences since this would require recourse to evidence admitted at trial. As shown further below, the High Court in *Rep v Dzimbiri* fell into the same pitfall when, faced with an essentially inexistent record, it attempted to apply this rationale.

It is interesting that the MSCA makes no mention of the possibility of reconstruction of the record. It is also interesting that the court held that the applicants should have first made an application to the High Court on the missing records. It is not difficult to imagine what directions the High Court would have given in this regard. Given its record at the time, the court would, in all possibility, have left the applicants waiting indefinitely.

Chalera

The second opportunity for the MSCA to consider missing records arose in Chalera. The appellants challenged their conviction for murder and subsequent sentencing to the mandatory death sentence applicable at the time. The trial record was incomplete, missing the summing up to the jury. Writing for a unanimous court, Nyirenda JA, Msosa and Chinanagwa JJA concurring, observed that the absence of the summary deprives an appellate court of an important aspect of the trial because the court would be unable to make any conclusive analysis. The court opined that Jailosi did not offer any reliable guidance since it dealt with an appeal from a magistrate sitting alone and with a question of law. It noted that in such a scenario, the judgment 'would include a comprehensive account and analysis of the facts and evidence, where necessary commenting on the demeanour and credibility of witnesses'. The MSCA enunciated some general principles on the proper approach to missing records:

1. An appellate must weigh the degree, extent and relevance of the missing part of the record and that which cannot be reconstructed.
2. A court must proceed with an appeal if the missing part of the record is not substantial, immaterial and inconsequential as would not result in a miscarriage of justice.
3. There was a great risk of the miscarriage of justice where the record of the summing up of evidence to the jury was missing.

4. Where 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.

5. Where the conviction is set aside, a court must consider whether the interests of justice so require a retrial. This is a factual inquiry.

On the facts, the court ruled that reconstruction was impossible because of the time lapse. Hence, the accused was acquitted. The court further found that a retrial would be improper given that the accused had spent over 15 years in custody.

There are several points from Chalera. For instance, it stresses that a court must consider whether the missing part of the record renders the record inadequate for appeal. This will depend on the nature of the missing information and the subject of the appeal. Chalera also suggests that the consent of both parties on the adequacy of the available record is important and that no hard rule can be established that the presence of a particular part of the record will always be enough to proceed with on appeal. The ultimate test is whether proceeding with the appeal will occasion a miscarriage of justice. Second, a court must consider the feasibility of a proper and accurate reconstruction of the record. The time lapse since the trial is an important factor in determining the feasibility of reconstruction; the greater the lapse, the less likely the possibility of proper reconstruction. Further, where proper reconstruction is impossible, the conviction and sentence must be set aside. Lastly, if the conviction and sentence is quashed, a court must consider if the interests of justice require a retrial. If the accused has spent considerable time in custody, a retrial must be excluded. Ultimately, Chalera provides much needed guidance on the response to missing records in criminal records.

A major flaw in Chalera is the absence of guidance on the reconstruction process. This left the incoherent jurisprudence intact. This significance of this gap is seen in how Malawi handled the reconstruction process of missing records when resentencing capital offenders.

THE KAFANTAYENI RESENTENCING PROJECT

The cases examined so far relate to instances where the file goes missing in the post-trial phase, that is, on review or appeal. Their premise is a trial record missing after sentencing in a lower court. What happens if the record is untraceable between conviction and sentence? The High Court had to confront this issue in the resentencing of almost 200 murder offenders. The Kafantayeni Resentencing Project has created additional precedents on how courts must respond to missing records when reconsidering a sentence. The Project emerged from the striking down of the mandatory death penalty for murder in *Kafantayeni v Attorney General*. There, the MSCA ruled that this sentence was unconstitutional and ordered the resentencing of all affected offenders. The impact of Kafantayeni was to set aside all mandatory death sentences imposed for murder, rendering all affected offenders unsentenced prisoners. The High Court had to resentence offenders in 190 cases, of which 112 had missing files. The courts therefore had to grapple with how to sentence offenders in the absence of court records. Indeed, 60% of court files for offenders eligible for resentencing following the striking down of the mandatory death penalty in

Kafantanyeni were missing or incomplete. The state, defence lawyers and courts had to be innovative in crafting an approach that would serve the interests of justice when dealing with offenders' whose records were missing. This experience has rejuvenated the focus on judicial record keeping.

A full consideration of the reconstruction of court records during the resentencing project is beyond the scope of this paper. It is sufficient to note that the courts continue to follow Mtambo and Chalera. Thus, the nature of the missing parts of the record are weighed against the interests of justice. Several principles have developed from the resentencing cases in the context of missing records. For instance, the cases also settle that sections 260 and 321J of the CPEC are avenues for record reconstruction. As noted earlier, this approach is incompatible with the purpose of these provisions. Further, the Judiciary did not play an active role in reconstruction. Positively, the jurisprudence firmly establishes that where the record is missing, any doubt should be resolved in the offender's favour; maximum sentences cannot be imposed; neither the death penalty nor life imprisonment may be imposed in the absence of a court record aggravating factors must not be assumed; the missing of a record cannot be considered against the offender unless they are responsible for its disappearance; offenders should benefit out of the absence of the record unless they are complicit in its disappearance; it is safer to completely ignore sentencing matters that cannot be verified due to missing records, such as level of participation in the crime; and courts can rely on known and uncontroversial factors to sentence an offender although the circumstances of the offence are uncertain.

CONCLUSION

Jurisprudence on the approach to missing records in Malawi is underwhelming. It demonstrates that courts have adopted an approach that undermines the right to a fair trial. Despite the instruction in Chalera, the reaction to lost files remains unsatisfactory. There is no clear guidance on the reconstruction procedure. The resentencing process underlines the need for the judiciary to develop comprehensive guidelines on missing court records. This problem is not unique to Malawi; several jurisdictions experience missing records. Guided by the interests of justice, the right to appeal should be jealously guarded by giving it meaning even where there is no record of appeal. This principle was well articulated in Chalera. However, Malawian courts must work on other areas such as the methods of reconstructing records.

Another area which needs reconsideration is the weight placed on missing records in release applications. In line with the presumption of innocence, courts should be slow to implicate offenders in the loss of record and instead adopt a more generous approach in release applications. However, release pending appeal in lieu of setting aside the conviction or sentence should only be granted where there is a reasonable prospect that the record may be found or reconstructed. In such situations, a court should be careful to not hold an offender in perpetual bail bondage. Hence, with time, if the record remains missing and is beyond reconstruction, setting aside the conviction may be the best option. A court should advisedly set the release conditions to automatically expire after the lapsing of a prescribed time and acquittal

to follow. One might argue that releasing such an offender from the bail conditions is also a viable alternative short of setting aside the conviction. However, this does not sit well with the right to appeal since an offender is deprived of the right to challenge his conviction and reassert a clean criminal record. In view of the far-reaching effects of a criminal record on the life of an accused person, this would be an undesirable situation.

The immediate release of an offender is not tantamount to an acquittal. Unless the court orders an acquittal, the state retains its right to prosecute the accused on the same charges in the future. Undoubtedly, it is undesirable to have a situation where an accused perpetually lives in the shadow of their possible criminal wrong. It is, therefore, in the interest of finality, for a court to prescribe reasonable time limits for prosecution of the accused failing which an acquittal would result. Here, section of the CPEC is insightful as it imposes a six-month limit within which the state can resuscitate a previously withdrawn matter.

One should not forget the victims of crime. The release or acquittal of an offender on the sole basis of a lost record can only be viewed as an injustice. It is important then that the Judiciary should work on improving its record management systems. Practical measures such as computerisation of records and other modern technologies should be adopted to reduce the incidence of missing files. Such measures can indeed reduce the incidence of lost files, but only 'innocent' incidences such as misplaced files. Otherwise, an electronic record can go missing as easily as a hard copy. Other effective means such as the use of CCTV cameras may be too expensive for the Malawian Judiciary. There are indications that raise suspicion on the circumstances in which records are lost. This reveals a bigger problem within the Judiciary where judicial officers do not want their actions scrutinised in the higher courts. Case law suggests that the incidence of records is higher in magistrate courts than the High Court and the MSCA. The Malawi Judiciary is aware of this problem but has failed to address it adequately.

The loss of records is evidence of administrative inefficiency by the Judiciary and an accountability issue that negatively impacts on the credibility of the Judiciary. Incidences of missing court files should therefore be fully investigated. Implicated judicial officers and staff should be dealt with internally and through the criminal process where warranted. The stern words of Ramodibedi P of the Court of Appeal of Lesotho are as relevant in Malawi:

The phenomenon of records which conveniently go missing in the courts of this country is cause for concern. The insidious effect of this cancerous practice on the proper administration of justice is self-evident. There can be no doubt that if this problem is not addressed decisively and as a matter of urgency our whole justice system will fall into disrepute, if it has not done so already ... [I]t behoves the courts and all those entrusted with the safety of records to step up their resolve to fight this scourge. Those who are guilty of this sordid practice, which bears all the hallmarks of an orchestrated racket, must not be allowed to get away with defeating the course of justice.

Lastly, legislation should be introduced to govern all aspects of lost or incomplete records. Alternatively, as suggested in Jailosi, the Chief Justice should issue practice directions.

BIBLIOGRAPHY

- Armah v The Republic [2022] GHACA 10
Bonuah v The Republic (2020) CLRG 40.
Centre for International Crime Prevention, Office of Drug Control and Crime Prevention, Report of the First Meeting of the Judicial Group on Strengthening Judicial Integrity, 2000.
Chalera v Rep Criminal Appeal No. 5 of 2012 (MSCA).
Chikwewa v R [1995] 1 MLR 65 (HC) 69.
Chitapa v R Miscellaneous Criminal Application No. 190 of 2001 (HC)
Courts Act, Chapter 3:02 of the Laws of Malawi.
Criminal Procedure and Evidence Code, Chapter 8:01 of the Laws of Malawi.
Denja v R [2001] MWHC 44.
E Carreau, Emile, “Malawi’s Missing Court Files and the Kafantayeni Resentencing Project” Journal of African Law, vol. 62, no, 3, 2020.
Jailosi v R [1995] 1 MLR 102 (HC) 104.
Kafantayeni v Attorney General Constitutional Case No. 12 of 2005 (HC).
Kaliati v Rep Miscellaneous Criminal Application No. 236 of 2006 (HC).
Kanyongolo, Fidelis Edge Malawi: Justice Sector and the Rule of Law: A Review by AfriMAP and Open Society Initiative for Southern Africa, Open Society Initiative for Southern Africa, 2006.
Kasunda v R Criminal Appeal No. 103 of 2005 (HC).
Kumbatira v R Criminal Application [2018] MWHC 80.
Kumuwa v R Bail Application Case No. 107 of 2012 (HC).
Mahere v R Miscellaneous Criminal Case No. 78 of 2009 (HC).
Malawi Judiciary Strategic Plan (undated, Blantyre)
Mila v R Criminal Appeal No. 16 of 2005 (HC).
Miscellaneous Criminal Application No. 236 of 2006 (HC).
Mkula v R Miscellaneous Civil Cause No. 15 of 2011 (HC).
Mokhotho v Learned Magistrate [2008] LSCA 22.
Mponda v Rep [2008] MWHC 22.
Msisha, M., “Judicial Accountability and the Right of Access to Justice”, in Judges Conference on Independence, Accountability and Transparency, ed. by Malawi Judiciary, 2007.
Msomera v R [2018] MWHC 874
Mtambo v Rep Criminal Appeal No. 1 of 2012 (MSCA).
Muravha v Minister of Police [2024] ZASCA 1
Myeza v Rex [2014] SZSC 46; Dlamini v Rex [2014] SZSC 9.
Nampota, A., “Transparency and Accountability in the Judiciary” in Judges Conference on Independence, Accountability and Transparency, ed. by Malawi Judiciary, 2007.
Ntumpanje and Bwanali v R [2018] MWHC 1109.

R v Chimwala Homicide Sentence Re-Hearing Cause No. 56 of 2015 (HC).
R v Chunga Homicide Sentence Re-Hearing Cause No. 15 of 2016 (HC).
R v Elias Homicide Sentence Re-Hearing Cause No. 45 of 2015 (HC).
R v Galeta Homicide Sentence Re-Hearing Cause No. 47 of 2015 (HC).
R v James Homicide Sentence Re-Hearing Cause No. 69 of 2015 (HC).
R v John Homicide Sentence Re-Hearing Cause No. 15 of 2015 (HC).
R v Khonje Homicide Sentence Re-Hearing Cause No. 28 of 2016 (HC).
R v Khwalala, Homicide Sentence Re-Hearing Cause No. 70 of 2015 (HC).
R v Makasu Homicide Sentence Re-Hearing Cause No. 7 of 2017 (HC).
R v Mponda [2016] MWHC 660.
R v Ngwira Homicide Sentence Re-Hearing Cause No. 22 of 2016 (HC).
R v Ngwira Homicide Sentence Re-Hearing Cause No. 22 of 2016 (HC).
R v Nomale [2008] MWHC 158.
R v Payne 56 Cr App R 9.
R v Zonke Homicide Sentence Re-Hearing Cause No. 7 of 2016 (HC).
Redpath, J., "Case Flow Management Research' in Pre-trial Detention in Malawi:
Understanding Caseflow Management and Conditions of Incarceration, ed. by
Community Law Centre, Open Society in Southern Africa, 2011.
Rep v Dzimbiri Homicide Sentence Re-Hearing Cause No. 4 of 2015 (HC).
S v Mbangu and Others [2022] NAHCMD 174.
S v Siblewana [2012] ZAWCHC 150.
Sijila v S [2024] ZAECGHC 33.
Subordinate Court Rules.
Supreme Court of Appeal Rules.