

# COMMUNITY SERVICE SENTENCES IN MALAWI: MANAGEMENT CHALLENGES AND POSSIBLE SOLUTIONS

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## I. INTRODUCTION

Rule 8 of the United Nations Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules) states in part that a judicial authority, having at its disposal a range of non-custodial measures, should take into consideration in its decision the rehabilitative needs of the offender; the protection of society; and the interests of the victim. The victim should be consulted whenever appropriate. The rule lists a number of alternatives to custodial sentences which include community service, admonition, suspended or deferred sentence, conditional discharge, and restitution or a compensation order to the victim.

Malawi has in its section 25 of the Penal Code<sup>1</sup> a number of punishments that can be inflicted by a court. There are several non-custodial punishments, including fine; compensation; finding security to keep the peace and be of good behaviour, or to come up for sentence; liability to police supervision; forfeiture; suspended sentence; public work; community service; probation; weekend or public holiday; and attendance centre orders. Among the various non-custodial measures in Malawi, I am of the opinion that community service is the one that has elaborate rules and structures to ensure its smooth implementation.<sup>2</sup>

It is worth noting that in Malawi, community service is not completely a new form of punishment. Prior to the introduction of community service in 1999, there was in effect a form of community sentence called public work. Section 3(1) of the Convicted Persons (Employment on Public Work) Act<sup>3</sup> states that when a person is convicted of any offence by a court and such court is of the opinion that the offence would be adequately punished by a sentence of imprisonment not exceeding six months, the court may, instead of imposing a sentence of imprisonment, order such person to perform public work for a period not exceeding six months. Over the years, however, presiding magistrates and judges have neglected meting out this form of punishment to offenders for reasons I cannot readily outline since I may need to actually talk to some of them to find out if they are aware of this provision and, if they are, why they do not make use of it. No matter what the reason is for abandoning public work, the punishment is still in the statutes and it can still be imposed as a valid sentence.

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<sup>1</sup> Chapter 7:01 of the Laws of Malawi.

<sup>2</sup> Community Service (General) Rules made under section 364A of the Criminal Procedure and Evidence Code, Chapter 8:01 of the Laws of Malawi.

<sup>3</sup> Chapter 9:03 of the Laws of Malawi (enacted on 28<sup>th</sup> May 1958).

## II. IMPLEMENTATION OF COMMUNITY SERVICE

A sentencing court will have to take into account three major factors when deciding whether to impose a community service sentence or not. The factors are: the maximum term of the applicable sentence; the nature of the offence committed; and the eligibility of the offender for such sentence. Other factors to consider include: personal attributes and antecedents of the offender; whether the offender has a fixed place of abode; whether the offender has a family, dependants or other responsibilities in the community; whether the accused is employed; whether the offender is engaged in academic or other educational pursuits; distance to the placement institution; and age and capacity of the offender.

Before a community sentence is imposed, it is important that the offender should consent to that sentence. The court is obliged to explain to the offender what community service entails and should also point out other alternatives available to the offender. Where the offender withholds consent, community service may not be imposed,<sup>4</sup> but other non-custodial sentences would apply.

An offender is expected to perform forty hours of community service in a month.<sup>5</sup> Therefore, the maximum number of hours that can be imposed in a community service sentence is four hundred and eighty hours.

It is important to place an offender at a public institution (a placement institution) that is appropriate for the offender's skills, talents and other attributes for the benefit of both the community and the offender.

A placement institution must confirm that it is willing to receive and supervise an offender on community service. Where there is no placement institution close to the offender's home, or where no placement institution is willing to receive an offender, the offender may be placed at a courthouse or at a police formation. Even though courts and the police are public institutions, it is usually discouraged to place offenders on community service at these institutions.

## III. MANAGEMENT CHALLENGES OF COMMUNITY SERVICE IN MALAWI

The main purpose for introducing community service in Malawi was to assist in reducing congestion in prisons and rehabilitate offenders who had committed minor offences. However, opponents and sceptics argued that, at a time when serious offences such as robbery and burglary were on the increase and the public was crying out for even stiffer custodial sentences against offenders, community service would be seen as offering a soft option for offenders.<sup>6</sup> It is very likely that there is still a significant number of persons, including judicial officers, who still hold the opinion that community service is no punishment at all.

There seems to be a misconception among magistrates that community service has replaced all other non-custodial sentences. During the opening ceremony for a series of

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<sup>4</sup> Malawi Government, *Community Service Revised Handbook* (2017).

<sup>5</sup> Form CS/6 under the Community Service (General) Rules.

<sup>6</sup> Malawi Government, *Community Service Revised Handbook* (2017).

workshops<sup>7</sup> in the month of March 2003, Chief Justice Leonard Unyolo<sup>8</sup> lamented that with the advent of community service as an alternative to custody the courts were tending to overlook the application of other forms of suspended sentences even where they might be appropriate. It was the Chief Justice's advice that just because an offender fails to meet the criteria for community service it should not follow automatically that he or she must, therefore, be imprisoned. Under section 25 of the Penal Code (the so-called basket of penalties) there are many non-custodial options that can be used if community service is not appropriate.<sup>9</sup> Once a court entertains the idea of sentencing an offender to community service, it should be safely assumed that the court never intended to send the offender to prison in any event.

Community service stands out from the other forms of punishment due to the fact that offenders on community service are made to repay the community that they have offended, and the community directly benefits from the unpaid work done by the offenders. Even though public work is similar to community service, section 5(b) of the Convicted Persons (Employment on Public Work) Act provides that offenders can reside in labour camps and the District Commissioner is obliged to feed them while offenders on community service fend for themselves and their families. It is assumed that this arrangement allows for offenders who are employed to keep their jobs.<sup>10</sup> There is, however, no guarantee that an offender cannot be dismissed from his or her employment on the basis that he or she was not sent to prison. Certain offences that involve dishonesty, like theft, might warrant instant dismissal or other disciplinary measures in some workplaces.

Section 364A of the Criminal Procedure and Evidence Code empowers the Chief Justice to make rules relating to the imposition of and performance of community service. Community Service (General) Rules 2000 govern, among other things, the procedure before, during and after the imposition of a community service order and the appointment of national coordinators and regional coordinators of community service. The coordinators and community service officers are responsible for investigating the suitability of offenders for community service. They are also responsible for monitoring offenders when they are placed on community service. Supervision of offenders is done by heads of institutions where community service is being performed. The supervisors are expected to file a report to the court when the sentence is completed or when the offender defaults.

Community service supervisors already have several other responsibilities as public officers. Therefore, they may not consider it their responsibility to monitor offenders on community service, especially when they do not get any monetary compensation for their extra responsibilities.

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<sup>7</sup> The theme for the workshops was "Alternatives to Custodial Penalties: Judicial Role in Promoting Rights of Offenders".

<sup>8</sup> Chief Justice Leonard Unyolo retired in or around 2006.

<sup>9</sup> The Chief Justice's speech was reported in a magazine called *The Reformer*. Malawi National Committee on Community Service, *The Reformer* (Lilongwe, 2004).

<sup>10</sup> Malawi. Malawi National Committee on Community Service, *A Hand-book on Community Service in Malawi*. (Undated).

#### IV. RECOMMENDATIONS

Community service is aimed at rehabilitating the offender. By continuing to stay in the community, the understanding is that the offender will be treated by the community as a person who just made a mistake and not as a criminal. There is need for a massive awareness campaign by organs of State to sensitize the general public on the importance of accepting and supporting community service. We do not want a situation where an offender completes a community service sentence but he or she is still labelled by his or her community as a criminal.

According to the Malawi Magistrates' Handbook,<sup>11</sup> rehabilitation is a sentence imposed for purposes of aiding an offender to reform so that he or she does not offend again. What does not come out clearly is whether an offender can reform by simply being outside of prison. I believe that there is need for extra interventions like counselling and skills training for the rehabilitation to succeed.

In my view, it is an anomaly for the Malawi judiciary to set up a department to specifically monitor one form of punishment when all the other punishments are administered by the executive arm of government. It is very likely that, in areas where there are no court-appointed community service officers, community service orders will seldom be imposed. In my view, therefore, under the current decentralized form of local government, offenders who receive community service sentences should be supervised by the district social welfare officer or any other officer appointed by the District Commissioner.

The recent statistics<sup>12</sup> released by the Judiciary's Directorate of Community Service show that, despite the sentence's good intentions, there is a high rate of defaulters. Out of 843 offenders placed on community service, 174 offenders defaulted on their sentences. A majority of the defaulters are in urban areas. They live on rented premises and do not hold permanent jobs. It is recommended that there should be specific officers assigned to individual offenders who can monitor the offenders' movements even when the offenders are not at the placement institution. There is also need to revise the way community service officers conduct background checks on offenders before sentencing. It is very likely that community service sentences are being imposed without due regard to the suitability of the offender for community service.

According to the recent Malawi Inspectorate of Prisons report,<sup>13</sup> Malawi prisons are holding 14,788 inmates against an occupancy of 5,000. The Malawi Human Rights Commission recommended that some prisoners be released and community service be introduced for petty offenders. The report acknowledges that the current capacity of prisons does not match the country's population. While waiting for the construction of more prisons, courts keep sending offenders to the already congested prisons. There is a limit as to how far community service can go in reducing congestion in prisons. The danger of concentrating too much on congestion in prisons is that the courts and other key

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<sup>11</sup> Malawi. Judiciary. (2005). *Handbook for Magistrates* (revised edition) at page 5.

<sup>12</sup> Accessed on 11 September 2019 through monthly and quarterly reports.

<sup>13</sup> As reported in the *The Nation* newspaper on 29 September 2019, available at <https://mwnation.com/malawi-prisons-not-fit-for-occupancy-inspectorate/>.

stakeholders in the criminal justice system might lose focus on rehabilitation of offenders, the major aim of community service and other non-custodial sentences.

The success of community service in Malawi is measured by the number of completed orders against those registered regardless of the circumstances under which they were completed. The fact that an offender has completed a community service sentence might not in itself be an effective tool for measuring whether an offender has been rehabilitated or not. Whichever department will take over the administration of community service must come up with tools for measuring the extent to which an offender placed on community service is reformed.

## V. CONCLUSION

Section 339 and section 340 of the Criminal Evidence and Procedure Code implore a sentencing court to always consider a non-custodial sentence when dealing with first-time offenders. The framers of this provision must have had very good intentions towards the people they represent. First-time offenders should be given a second chance in life. There is no doubt that cases will arise that deserve tough penalties, but each case must be dealt with based on its unique facts. Well established sentencing principles must be followed.

While it is generally accepted that community service is a very useful tool in rehabilitating offenders, there is no concrete evidence to show that offenders placed on community service really get rehabilitated. There is no way of measuring the extent of the rehabilitation.

Major players in the criminal justice sector should look at ways of reforming the practice and procedure in criminal proceedings so that rehabilitation of offenders comes out clearly as a major consideration when dealing with offenders at any stage of the criminal proceedings. Consideration of alternatives to imprisonment should start even at the pre-trial stage. Alternatives like diversion, mediation and reconciliation can be introduced to cater for adult offenders in deserving cases.

Apart from pre-sentencing reports from the judiciary's Community Service Officers, other reports can be received from the victims of the offence, community leaders and non-governmental organizations, among others, to determine the best way of dealing with an offender without causing public outrage.

Since most of the criminal cases are heard in the subordinate (magistrates') courts, superior courts of record like the Supreme Court of Appeal and the High Court must endeavour to regularly issue sentencing guidelines to ensure a uniformity of approach in cases of a similar nature.

During the process of reviewing sentences imposed by subordinate courts, the High Court should be able to impose a community service sentence or any other non-custodial sentence even on offenders who have served part of their sentences in prison.

Community service should be managed by a specialized department (preferably a department of correctional services) that will be charged with supervising or designing

rehabilitative programmes for offenders. This development would take the burden of monitoring sentences after they have been imposed by the courts.

There should be a deliberate effort by the state to sensitize the general public and key stakeholders in the criminal justice system on the importance of rehabilitating and accepting back into the community persons who for some reason or the other have broken the law. This is particularly important now that mob justice has become common place.