

MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL APPEAL CASE NO. 78 OF 2004

THE STATE (THE ANTI-CORRUPTION BUREAU).....APPELLANT

Versus

RODRICK

MULONYA.....RESPONDENT

CORAM: THE HON. MR. JUSTICE F.E. KAPANDA

Mr. Mwenelupembe of Counsel for the Appellant

Messrs Mhone and Phiri of Counsel for the Respondent

Mr. Ngwale Court Clerk

Mrs. Sinalo Court Reporter

Date of hearing: 17th December 2004

Date of order: 17th December 2004

Kapanda, J.

JUDGMENT

Introduction

The matter before us is an appeal by the State (the Anti-Corruption Bureau “the ACB” to be specific). Indeed, Mr. Mwenelupembe had told this court that this appeal has been brought pursuant to Section 52A of the Corruption Practices Act, 2003(the CPA)¹. The said Section 52A provides as follows:

“ In any proceedings for an offence under this Act, the prosecution may appeal against any final judgment or order, including a finding of acquittal, of the trial court if, and only if, dissatisfied upon a point of law; but, save as so provided, no appeal shall lie by the prosecution against a finding of acquittal by the trial court.” (emphasis supplied by us)

The ACB is said to be aggrieved with the decision of the court a quo. This comes out clearly in the heading of the petition and grounds of appeal filed with the court dated the 6th day of December 2004 which we quote hereunder in extension:

**“IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL APPEAL NUMBER 78 OF 2004**

ANTI-CORRUPTION
.....APPELLANT

BUREAU.....

RODRICK
MULONYA.....
RESPONDENT

PETITION AND GROUNDS OF APPEAL

¹Act No. 17 of 2004

The humble petition of the Director of Anti-Corruption Bureau on behalf of the latter [the Anti-Corruption Bureau] showeth:

1. **THAT** the respondent was charged with the offence of failing to comply with a Restriction Notice contrary to Section 23(1) of the Corrupt Practices (Amended) Act 2004.
2. **THAT** the respondent raised preliminary objections at the trial and the Magistrate dismissed the charge against the respondent.
3. **THAT** your petitioner dissatisfied with the ruling of the First Grade Magistrate Court at Blantyre now appeals against the said ruling.

GROUNDS OF APPEAL

The First Grade Magistrate erred in his interpretation and application of the law in respect of the following:

1. Service of the Restriction Notice under Section 23 of the Corrupt Practices Act.
2. Institution of investigations under the Corrupt Practices Act.
3. The functions and duties of the Anti-Corruption Bureau and the powers of the Director under the Corrupt Practices Act.
4. The meaning of the word “*property*” and the Interpretation given by the High Court to it in the case of International Holdings Limited and Secucom, Civil Cause Number 225 of 2000 (Lilongwe Registry).
5. The effect of a defective charge under Section 151 of the Criminal Procedure and Evidence Code.
6. Consent from the Director of Public Prosecutions.
7. The *locus standi* of the Anti-Corruption Bureau, whether it was sitting as a tribunal.

Dated the 6th day of December, 2004

(signed)

G.W. MWENELUPEMBE

CHIEF LEGAL AID PROSECUTIONS OFFICER” (emphasis and underlining supplied by us)

Before we could proceed with the substantive appeal the respondent has raised a number of preliminary issues. The court has thought of dealing with these preliminary issues and disposing of them for, if the objections are sustained, they have a bearing on the substantive appeal.

The Preliminary Issues

The respondent has raised preliminary issues in the skeleton arguments filed with the court. The appellant did not file any skeleton arguments but proceeded to argue the appeal. The said skeleton arguments filed by the respondent, and the legal authorities in support are as follows:

1. The Director is not a person aggrieved in this matter as per Section 346(i) CP and EC as there is none at present **Lungu vs. Republic** (HC) 12 MLR 322 – **Blantyre Planning Limited vs. Mendes** 7 MLR.
2. The court cannot assume role of Prosecutor – **Republic vs. Salirana** 12 MLR 63.
3. The court cannot proceed where no sanctions or directive of Director of Public Prosecution (DPP) has been obtained: **Republic vs. Salirana** Supra.
4. Court has inherent jurisdiction to dismiss proceedings which are abuse of court process – **Bentley vs. Republic** 7 MLR 118.

5. The court has no jurisdiction to entertain the appeal since the ruling was not a final order or judgment – **Advanx (BT) Limited vs. Republic** 10 MLR 193 **Sand Thawi vs. Republic** 10 MLR 260.
6. The Director has no right of appeal against discharge of charges that go to the jurisdiction of the court as apposed to an acquittal or point of error of law – **CPP vs. Phiri** HC 10 MLR 202.
7. The grounds of appeal are vague as no particulars are given – **Nicco (1992) Crim. L.R. 420**.
8. The Magistrate having found that he has no jurisdiction in the matter the High Court cannot found jurisdiction for appeal as the matter did not arise in course of a trial – **Amalgamated Products Limited vs. Mkwanda** I ALR (M) 684.
9. The Appellants cannot appeal on points of fact in absence of trial.

Consideration of the Preliminary Issues

As we see it there are principally two issues that we need to consider as preliminaries in our view. First is whether the decision of the lower court can be appealed against and secondly that of capacity. In other words, whether the appellants are capable of bringing this appeal.

It is in our view trite knowledge that one can only appeal against a final decision of the court² but never an interlocutory decision. The question being was the decision of the lower court a final decision? In other words, did the decision of the lower court dispose of the issues therein to finality? The answer has to be in the negative. The lower court dealt with preliminary matters, inter alia, viz.:

- (a) whether there was service of the restriction notice
- (b) whether there had been an investigation before the restriction notice was issued
- (c) whether the particulars of offence in the charge sheet disclosed an offence
- (d) whether the lower court had jurisdiction over the matter in light of the fact that the ACB was supposed to act as a tribunal.

The court found in favour of the Respondent on the preliminary issues that were raised by the defence. Accordingly, the Magistrate dismissed the charge that was referred against the Respondent. In point of fact the lower court never acquitted the Respondent. What then was the effect of the Ruling of the court? In our judgment since there was no trial of the criminal action the Ruling of the court cannot, by any stretch of imagination, be said to have determined the rights of the parties. It is well to remember that it is trite law that a decision of the court can only be said to be final if it determines the rights of the parties. The lower court, as found above, never made a final decision. We say this because of the following reasons:

Firstly, the court's finding that there was no proper service of the restriction notice

²see also Section 52A of the Corrupt Practices Act, 2003 [Act No. 17 of 2004]

could have been easily remedied by effecting fresh service. Secondly, as regards the small matter of the court not disclosing an offence the State ought to have just gone back to redraft the charge so that it discloses an offence under the Corrupt Practices Act. Thirdly, the court advised the Anti-Corruption Bureau to deal with the matter administratively. Again this does not mean that the Anti-Corruption Bureau was stopped from dealing with the Respondent only that the former was told that there was no need to prosecute the Respondent for a criminal offence. Firstly, the Magistrate was of the view that at the time when the Restriction Notice was issued no investigations had yet commenced. This finding, in our view, was a finding of fact and therefore not amenable to appeal. Indeed, the lower court did not stop the Anti-Corruption Bureau from starting investigating the Respondent and prosecute him later on if there were facts disclosing the commission of an offence under the Corrupt Practices Act.

In sum the court never said it was acquitting the Respondent but rather just dismissing the charge before there was even a trial. As we understand it, the position at law is that dismissal of a charge does not amount to an acquittal where there is no trial of the criminal action. Accordingly, the lower court's decision was only interlocutory. The Anti-Corruption Bureau, if it was desirous of doing so, would have gone back to the drawing board and do the needful as advised by the Magistrate.

The decision of the Magistrate, in so far as we understand it, means that it was possible for the appellants to correct such irregularities as were found by the lower court and recommence the prosecution before even the same court. It is clear in our judgment that this appeal ought not have been brought. On that basis alone we would dismiss the appeal.

The question of capacity raises interesting issues in relation to this appeal to the extent that we feel duty bound to make a decision thereon.

In essence the respondent argues that the appellant (the ACB) has no Director, as the Public Appointments Committee has not confirmed the one appointed by the Head of State. And that because he has not been so confirmed he has no business issuing restriction notices and instructions to appeal herein the same being ultra vires to him. It became necessary during the hearing of Counsels' arguments to adjourn the hearing of the matter to facilitate the swearing of affidavits on this point. The idea was to allow both parties to show as a matter of fact whether or not the said Director was indeed confirmed.

Hlupekire Phiri of Counsel swore the affidavit from the respondent's side. For the purposes of this case we think that the relevant parts thereof are to the effect that the Mr. Kaliwo's confirmation was raised in the course of another matter involving the same parties pending judgment before Justice Mkandawire; that in response to a query that Mr. Kaliwo had not been confirmed the respondent produced a letter authored by the Chairperson of the Public Accounts Committee of the National Assembly inviting Mr. Kaliwo to a round table discussion relating to the conduct of corruption cases. The letter is dated October 29th 2004. The meeting was scheduled for November 12th 2004. As we understand the respondent, it is said that the said letter cannot be proof of Mr. Kaliwo's confirmation because firstly the letter comes from the Public Accounts Committee rather than the Public Appointments Committee. Secondly, that the letter is not to the effect that Mr. Kaliwo had been confirmed by the said Public Appointments Committee.

The appellant also filed an affidavit. Its effect, as we understand it, is firstly

to express a belief that the said Mr. Kaliwo was confirmed. In point of fact, see paragraphs 8 and 9 of the affidavit where Mr. Mwenelupembe states as follows:

“8. To the best of my knowledge his appointment has been confirmed by the Public Appointments Committee

9. I have been unable to get the relevant documents from the Director because he is traveling on duty”

Secondly, it is the argument of the appellant that if Mr. Kaliwo had not been confirmed he would not have been invited to appear before the Public Accounts Committee the reason being that this Committee being, just like the Public Appointments Committee, a creature of the Legislature must be taken to have invited Mr. Kaliwo because it knew that he had been confirmed by the Public Appointments Committee. Pausing here we wish to make the following observations i.e. firstly, that for all we know the letter is not personally addressed to Mr. Kaliwo Esq. but rather whoever is the Director of the Anti Corruption Bureau properly appointed. Further, the Public Accounts Committee could not be presumed to know that the “Director” has been confirmed in his appointment. As regards the issue of the contract of employment between the Malawi Government and Mr. Kaliwo we must say that the said contract of employment cannot be a substitute for the confirmation of his appointment by the Public Appointments Committee.

The Corrupt Practices Act, under which the respondent was charged, gave birth to a category of offences generally different from those under the Penal Code. It is clear in our view that the operation of the Corrupt Practices Act (the Act) presupposes the existence of an Anti Corruption Bureau and a Director thereto. It is also clear in our view that in respect of offences under the Act the said Director has powers to, inter alia, investigate and prosecute³ for offences under the CPA. In

³Section 10(1)(b) states, inter alia, that the functions of the Bureau shall be to receive and investigate complaints of alleged or suspected corrupt practices and, subject to the directions of the Director of Public Prosecution, prosecute for offences under this Act

respect of the latter the said Director is empowered to prosecute. Provided however that if the offence is one that falls under part IV of the Act she has to seek the consent of the Director of Public Prosecutions before he can commence a prosecution in terms of section 42 of the Act. The immediately notwithstanding it is obvious in our view that running through the Act though is the fact that prosecutions are under the general direction of the Director of Public Prosecutions. In the above scheme of things it will be noted that the said Director is to a large extent both the complainant and the prosecutor.

In so far as the offence charged herein is concerned the Director issued a restriction notice in terms of section 23 of the Act. The allegation against the respondent was that he disobeyed such a restriction notice. When the lower court ‘threw out’ the case against the respondent it is the Director’s complaint that he threw out. It is the Director who issued the Restriction Notice who could be said to be aggrieved by the decision of the court in throwing out his complaint. Accordingly, it is the Director who has the right of appeal. Indeed, the appeal cannot be from the air. The one vested with the responsibility to administer the CPA is the one to appeal. Actually, it was the Director’s decision to issue a restriction notice, among others, and the alleged non-compliance with his notice that was in issue in the criminal proceedings before the lower court. In the case before us, therefore, it is a truism to say that the Director of the Anti Corruption Bureau is purporting to act like the aggrieved person. In point of fact, the petition and grounds of appeal set out above clearly shows that the one petitioning is the Director of the ACB and that he is purportedly doing so on behalf of the ACB. It is a further axiom in our opinion that the Director envisaged has to be one who is/was appointed in terms of section 5 of the Act⁴. Indeed, as we understand it the position

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at law is that the scheme of things is supposed to be like this: the President suggests a person he wishes to appoint as the Director of Anti Corruption Bureau and the Public Appointments Committee should confirm such appointment. Until there is such a confirmation one cannot be a Director. If anything such person is only a Director designate who may be accepted or rejected by the Public Accounts Committee. Now a Director designate cannot start giving instructions to investigate, prosecute or indeed cannot be said to be aggrieved by a decision of a Court and appeal against such decision on behalf of the ACB as is obviously appearing in the petition and grounds of appeal. It is only such a Director who has a capacity to investigate prosecute or carry out such duties of the Anti Corruption Bureau as are listed in the Act who may take out a petition of appeal. In the context of this case it is only such a Director who had the power to issue the restriction notice in terms of section 23 abovementioned and prosecute any alleged breach thereof including any appeal arising thereby. The questions in respect of this case being are there in respect of this case or appeal such a Director? It is in our opinion a matter of fact who is a Director of the ACB.

It is a matter of fact that the notice herein was issued when Honourable Justice Mtegha SC JA was Director. Similarly, at the time of starting the prosecution the Director of the ACB was Honourable Justice Mtegha SC, J.A. However, at the time the case was dismissed in the lower court, and an appeal commenced in this court, Justice Mtegha had been relieved of his position. Advocate Gustave Kaliwo had been appointed. We want to believe that this was

The relevant parts of the said Section 5 of the Corrupt Practices Act stated that:

“5. (1) The President shall, on such terms and conditions as he thinks fit, appoint the Director, and the appointment of any person as Director shall be subject to confirmation by the Public Appointment Committee.”

done under the powers provided for in section 5 of the Act.

Several issues arise. Firstly, did the Public Appointments Committee confirm the removal of Honorable Mtegha JA SC? We ask this because of the provisions of Section 6(2) of the CPA⁵. Secondly has the appointment of Kaliwo esq. been confirmed by the Public Appointments Committee? It is well to note that the powers of appointment that are conferred on the President are required to be so made in accordance with the Constitution or an Act of Parliament. Section 89(1) (a) of the Republic of Malawi Constitution actually states, that inter alia, that the President shall have the power to make such appointments as may be necessary in accordance with powers conferred upon him or her by the Republic of Malawi Constitution or an Act of Parliament. Now the CPA has stipulated in Section 5(1) how the appointment of the Director of the Anti Corruption Bureau shall be made. The appointment is supposed to be confirmed by the Public Appointments Committee. The reason why the legislature wanted confirmation are, in our view, spelt out in Section 6(1) of the CPA. The said Section 6(1) of the CPA provides that no person shall qualify for appointment as Director unless he is of high integrity and possess qualification and training necessary for the performance of the duties of that office. We hasten to add that the legislature wanted to be vetting the appointee so that the President does not put in office a Director he could easily manipulate. Further, as we understand it the confirmation process is there to ensure that there are checks and balances in place so that only those properly qualified are given the important position of Director of the ACB.

We are mindful of the affidavits sworn by the parties herein. In particular we are alive to the fact that in his quest to establish that Mr. Kaliwo Esq. was

⁵Section 6(2) reads as follows:” A person holding the office of Director may be removed from office by the President, with the confirmation of the Public Appointments Committee, for inability to perform the functions of his office (whether arising from infirmity of body or mind or from any other cause) or for misbehaviour.

confirmed as required by the CPA Mr. Mwenelupembe of Counsel exhibited a written contract of employment between the said Mr. Kaliwo and the Malawi Government. Further, the other best evidence that the appellant could produce as proof of confirmation was a letter from the Chairperson of the Public Accounts Committee. Are these proof enough that the requirements of the CPA were satisfied? We have no doubt however that in both instances the answer has to be in the negative. The letter referred to by Mr. Mwenelupembe did not emanate from the Public Appointments Committee. It was from the Public Accounts Committee and it reads as follows:

“Ref No. NA/PC/10

The Director
Anti Corruption Bureau
Box 2437
LILONGWE

Dear Sir

**RE: PUBLIC ACCOUNTS COMMITTEE ROUNDTABLE DISCUSSION: 12th NOVEMBER
2004**

Following my letter, 2004, I have the honour to invite you to a Round Table Discussion to be held at Capital City Motel on 12th November at 9.00 a.m.

The Public Accounts Committee is very much concerned with delays in resolving high profile corruption cases and also acquittals by the courts of corruption cases due to lack of sufficient evidence.

The discussion will want to hear from you plans which may lead to gaining the necessary public confidence in your office and also saving Government funds.

Yours sincerely

(signed)

R.P. Danjalimodzi M.P.

CHAIRMAN”

In so far as the confirmation of Mr. Kaliwo is concerned we doubt whether this letter has any relevance at all. The letter was just an invitation to discuss plans that may lead to the office of Director of ACB gaining public confidence and saving government funds. Further, the letter however you read it does not say that Mr. Kaliwo had been confirmed in his office as Director of the ACB. Mr. Mwenelupembe argues that we should assume/infer that Mr. Kaliwo was confirmed from the fact that the Public Accounts Committee invited him in that capacity to attend a round table meeting. That is a dangerous thing to do in our view. Confirmations by their very nature are open and transparent. We would be doing everybody a disservice if we proceeded to regard Mr. Kaliwo was confirmed in his position on the basis that he was invited to a meeting. The correct position has to be that Mr. Kaliwo is not confirmed as required by section 5 abovementioned. Applying the above discussion to the present scenario the question is there a Director properly appointed who can be said to be the aggrieved person and therefore the appellant herein? The answer has to be in the negative. The Public Appointments Committee has not approved the ‘incumbent’ Director’s appointment. It is obvious in our view that any way you want to look at this appeal it is stillborn. The appellant has no capacity to bring it. If we may say so it seems to us that Justice Mtegha would probably stand a better chance of being an aggrieved person herein. His removal is yet to be approved by the Public Appointments Committee. Indeed, we wonder whether the Public Appointments Committee of Parliament confirmed Justice Mtegha’s removal. If his removal has not been confirmed then we are afraid to observe that what we have is a Director designate of the ACB and the Director of the ACB who is yet to be legally removed. In point

of fact, our reading of Section 6(2) of the CPA shows that it is permissible for the President to remove a Director of the ACB but such removal can only be valid and legal if the Public Appointments Committee of Parliament confirms it. In our judgment the need for confirmation is intended to ensure the independence of the Director in the execution of his duties. Again if we may so it appears to us that there may be two directors of the Bureau. One whose removal has not been confirmed by the Public Appointments Committee. Yet another one whose appointment has not been confirmed.

This appeal is not sustainable. It is dismissed on the preliminaries. It is not even necessary to go into its merits.

Pronounced in open court at Blantyre this December 17, 2004.

F.E. KAPANDA
JUDGE