

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NUMBER 4 OF 2007**

BETWEEN:

JUSTICE MANYEKA.....APPELLANT

- AND -

THE REPUBLICRESPONDENT

CORAM: HON. JUSTICE M L KAMWAMBE

M/S Ng'ong'ola and of Counsel for the Respondent

M/S Phillippo

Mr Mambulasa of Counsel for the Appellant

Mangisoni Official Interpreter

JUDGMENT

Kamwambe, J

The appellant appeals against both conviction and sentence. He was charged with three offences of forgery contrary to section 359(f) of the Penal Code, uttering a false document contrary to section 360 of the Penal Code and attempted theft contrary to section 401 of the said Code. The appellant pleaded guilty to the charges leveled against him and he was accordingly convicted and sentenced to 36 months 24 months and 6 months respectively. He now appeals only against conviction and sentence on the first count and against sentence on the second count.

The first ground of appeal is that the lower court erred in law in convicting the appellant of the offence of forgery under section 359(f) of the Penal Code as he pleaded guilty to an offence whose ingredients were not contained in the section and not supported by the facts of the case. It is contended that the proper charge should have been under section 356 of the Penal Code. Section 359 of the Code reads as follows:

“Any person who erases or otherwise either really or apparently removes from any stamped material any name, sum, date or other matter or thing whatsoever written thereon with intent that another use shall be made of the stamp upon such material...shall be liable to imprisonment for 7 years”.

The particulars of offence of the charge of forgery are as follows:-

“Justice Manyeka on or about the 28th day of December, 2006 at Mulanje NBS Bank at Chitakale Trading Centre in the District of Mulanje with intent to defraud or deceive forged NBS Bank withdrawal slip and a document (letter) by signing the said withdrawal slip and letter in the name of Robert Masamba without the authority of the said Robert Masamba”.

This is one of the rare cases in which one can appeal against conviction after a plea of guilty because it is clear that the appellant was charged under the wrong law. The facts and the law under which he was charged do not agree at all. The appellant never admitted to erasing any stamp, but rather he admitted to forging a withdrawal slip. The State conceded that indeed the appellant was charged under the wrong law which attracted a higher maximum sentence. I agree with them. The proper charge should have been under section 356 of the Penal Code which reads as follows:-

“Any person who forges any document shall be guilty of an offence which, unless otherwise stated, is a felony and he shall be

liable, owing to the circumstances of the forgery or the nature of the thing forged some other punishment is provided, to imprisonment for three years”.

Indeed the applicant should have been charged under section 356 which attracts a lesser maximum sentence of 3 years. He suffered injustice of being receiving wrong sentence.

The second ground of appeal is that the lower court erred in law in convicting the appellant of the offence of uttering a false document as he did not specifically admit all the elements of the offence. However when arguing this point counsel for the appellant merely emphasized that when sentencing the appellant under section 360 of the Penal Code the lower court had in mind the 7 years maximum sentence under the wrong charge of section 359(f) of the Penal Code. The State argued that for the uttering offence he was properly charged under section 360 of the Code and he admitted all the facts as narrated by the prosecutor. However they admitted that he might have received a higher sentence because of the wrong charge under section 359(f). I share the views of the State, but allow me to capture the section which reads as follows:-

“Any person who knowingly and fraudulently utters a false document shall be guilty of an offence of the same kind and shall be liable to the same punishment as if he had forged the thing in question”.

I have been prompted to consider two mitigatory factors, that he is a first offender and that he pleaded guilty. A plea of guilty reduces sentence between 1/5 and 1/3. The courts’ view is that such pleas should be encouraged. In the light of the foregoing and in line with section 353(2) (a) (ii) if the Criminal Procedure and Evidence Code I substitute the charge under section 359(f) with one under section 356 of the penal Code and uphold the conviction. I uphold conviction of the charge of uttering as well. In consequence thereof I substitute the sentences of 36 and 24 months respectively with a sentence of 9 months for each. It is so decided.

Made in Open Court this 19th day of March, 2007 at Blantyre.

M L Kamwambe
JUDGE