



**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION
CRIMINAL CAUSE NUMBER 117 OF 2016**

BETWEEN:

**DANIEL MAKWETE
NELSON KAPASULE NAMBAZO
GRACIOUS BINDULA
AND
CHARLES BADSON
-VS-
THE REPUBLIC**

Coram: Hon. Justice M L Kamwambe

M/s Munthali of counsel for the State

Mr Kamangira of counsel for the Applicant

Mr Amosi...Official Interpreter

RULING

Kamwambe J

CRIMINAL DIVISION



This is an application to declare conviction invalid in the absence of a court judgment. The application is made pursuant to section 140 of the Criminal Procedure and Evidence Code and section 16 (6) (a) (ii) of the Statute Law Miscellaneous Act as read together with section 42 (1) (f) (viii) of the Constitution.

Facts of the case are that the Applicants were arrested around 8th May, 2010 by Phalombe Police and were charged with unlawful wounding until the 15th May, 2010 when the wounded passed on when they were charged with murder. On 6th September, 2011 the High Court sitting at Mulanje convicted them of murder. On 8th May, 2012 Mambulasa & Co.as lawyers representing the Applicants wrote the High Court Registrar seeking the full record for the purposes of lodging an appeal. The matter was later taken over by Naphambo and Company who continued to search for the record. The record was made available by the High Court but it lacked a complete written judgment. It is alleged that the absence of a complete judgment has denied the Applicants the ability to appeal.

It is on record that judgment was delivered on 5th September, 2011 and on the following day sentencing proceedings were undertaken. The convicts were sentenced to life imprisonment, and on same day the Registrar issued a warrant of commitment or authority for detention to the prison authorities.

The issues raised by the Applicants are as follows:

1. Whether or not the statutory provision that a judgment of the court be in writing is mandatory or merely directory.
2. Whether or not failure to comply with the requirement that a judgment be in writing renders the same invalid and not enforceable.

3. Whether or not an accused person should be imprisoned on the basis of such invalid judgment.
4. Whether or not absence of the judgment is a violation of the right to fair trial entrenched in section 42 (1) (f) (viii) of the Constitution of the Republic of Malawi.

Section 42 (2) (f) (viii) of the Constitution grants one the right to ***'have recourse by way of appeal and review to a higher court than the court of first instance.'***

In section 41 (2) it provides that:

"Every person shall have the right of access to any court of law or any other tribunal with jurisdiction for final settlement of the legal issues."

Further, in section 41 (3) it states that:

"Every person shall have the right to an effective remedy by a court of law or tribunal for acts violating the rights and freedoms granted to him or her by this Constitution or any other law."

I should first consider section 140 of the Criminal Procedure and Evidence Code which states as follows:

"Every judgment shall, except as otherwise expressly provided by this Code, be in writing and shall contain the point or points for determination, the decision thereon and the reasons for the decision and shall be dated and signed by the presiding officer. "

The language of the above section clearly makes it mandatory to have a written judgment, after all, courts are places of record and so it is imperative to have written judgment. If there is no judgment in writing then problems like the one we are facing

now would always surface. A record for appeal purposes would not be there, for instance, thereby making appeals difficult to be prosecuted.

The consequence of failure to comply with section 140 of the CP&EC can be dire, but it should depend on how much of the record is missing. If a substantial part of it is missing then a retrial or discharge of the accused person may be ordered, again depending on how long the accused person has already spent in custody.

In view of what I have stated in the preceding paragraph, an accused person is not supposed to remain in prison unless a retrial is ordered and bail is not granted. If the accused has already spent in custody a substantial length of time or a substantial part of the sentence, a discharge is expected.

Obviously absence of a judgment is a violation of section 42 (1) (f) (viii) of the Constitution because the accused will have been deprived of the opportunity to appeal to a higher court if the appeal cannot be prosecuted without the missing part of the record.

In Andrew Morris Chalera, Aaron Makumba and Rajab Mpaka -v- The Republic MSCA Civil Appeal No. 5 of 2012 (unreported) the Supreme Court of Malawi had this to say:

“What we make of the scanty precedent that we have been able to scout is that a court of appeal will weigh the degree, extent and relevance of the part of the record that is missing and cannot be reconstructed. Where the missing part of the record is not substantial, immaterial and inconsequential as would not result in miscarriage of justice, the appeal shall be proceeded

with and finally determined. When 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.

Where the conviction is set aside it behoves the Court of Appeal to consider whether that be the end of the matter or, where the interests of justice so require, to order the appellant to be retried. Whether an order for retrial should be made will depend on the circumstances of the individual case. "

Counsel for the Appellants provided two cases which held that the failure of the judges to give reasons for their decisions violated provisions of section 245 of the CPS thereby vitiating conviction(see Nwaefulu and Another -v- The State (1981) 1 NCR229 and Alabe and Another -v- The State (1976) NNLR 184).

Our section 140 of the CP&EC does not categorically state the consequences of failure to give reasons or, missing record, but practice leads us to look at the circumstances of the individual case and elect such action that will result in more substantial justice being done.

In our present case, it is not the whole court record that is missing but merely a part of the judgment. Looking at the judgment in place I feel a substantial part of it is there. It cannot be said that it is impossible to bring about a court judgment. Upon request, the judge can be told or reminded to complete the judgment. In case the judge who was seized of the case is now deceased, another judge can be assigned to complete the judgment to fulfil the intentions of the deceased judge. This completed judgment will become the basis of any intended appeal. This move will be in the

interest of justice without creating unnecessary loopholes in the justice system.

We cannot explain what happened to the missing part of the judgment. What I do know from the record is that judgment was pronounced in court and consequently, the Registrar proceeded to prepare the warrant of commitment. This does not mean that reasons were not given by the court. In this regard, the case is assigned to another judge who will complete the missing part. Consequently, this appeal fails.

The defence counsel made a request that since the State in their submissions said that they have not proved the case against the 2nd and 3rd Appellants they be released on bail. It must be observed though that all four Appellants were convicted by the trial judge despite the opinions of the State. This will be considered by the judge who will be assigned this case to reconstruct the judgment.

Made in Chambers this 8th day of February, 2017 at Chichiri, Blantyre.


M.L. Kamwambe
JUDGE