IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CRIMINAL APPEAL NO. 42 OF 2000

BETWEEN

JAMITONI LEMANI ……. APPLICANT

AND

THE REPUBLIC ……. RESPONDENT

CORAM : HON. JUSTICE NYIRENDA

: Mwenelupembe, Counsel for the State
: Makono, Counsel for the Appellant

JUDGMENT

The appellant appeals against conviction on a charge of malicious damage to property contrary to section 344 of the Penal Code handed down by the Second Grade Magistrate Court at Mpenu in Lilongwe District. The appellant was sentenced to two and half years imprisonment with hard labour. He also appeals against the gravity of the sentence in the event that the conviction is upheld.

The Lower Court record shows that the appellant was convicted on his own plea of guilty and on admission as correct the facts stating the case as presented by the

State in Court. What has been revealed before this Court however may suggest a different story.

The Lower Court record shows that when the case was first called before Court the appellant pleaded not guilty and also made it clear to the Court that he had two witnesses to call in his defence. The case was adjourned to another date. Come this date the appellant is recorded to have changed his plea to a plea of guilty. The record does not show that on this day the charge was reintroduced to the appellant and that the elements of the offence were clearly set out for the appellant to fully appreciate what he was pleading to.

The case just started with the appellant admitting the charge. The other anomaly is that the Magistrate did not even enter a conviction after the plea. The record suggests that immediately after the appellant told the Court that he had changed his plea, the Court called upon the prosecutor to go into the facts of the case. I feared there was haste in the manner the Court dealt with the case. As it turns out my fears are confirmed not only by learned Counsel for the appellant but also by learned counsel for the State.

Counsel for the appellant has told the Court that he interviewed and started representing the appellant from the moment of his arrest and assisted the appellant to obtain police bail. He further told the police officers in charge of the case that he would be representing the appellant throughout until his case was concluded. To his frustration each time the police dragged the appellant to Court they gave the appellant very short notice. The appellant was not able to contact

counsel in view of that. The police themselves never contacted counsel despite counsel's notification.

Learned counsel for the State has been kind and honest enough to tell this Court that his office enquired into the matter and actually confirmed that the police officers who were responsible for the conduct of the appellant's case were well informed that the appellant was legally represented. For some unexplainable reasons they avoided alerting counsel or giving the appellant ample time to contact his counsel.

I have not found any reasons myself on record explaining the police officer's conduct. It has come from counsel for the appellant that the whole reason for such behavior by the men in uniform is that one of the officers, the investigator, is related to the complainant in the case. There is probably no legal basis for this allegation because the Lower Court record does not bear that fact but I am left to speculate if really there is no truth in this allegation in the absence of any explanation for the quire bear of the officers.

Be that as it may, what I know is that it is the fundamental right of every accused person to have recourse to legal representation at every stage of a criminal allegation against him or her. In the case of *Mhone v Attorney General*, *Misc. Civil Cause No. 115 of 1993* it was stressed that the right to counsel entails the right to access and to be accessed by counsel at all reasonable times. During trial it is the duty of every police officer and every magistrate responsible for an accused person to point out to the accused that it is an advantage to have the assistance of

counsel and that he or she is entitled to have counsel. This responsibility should have been very light for the officer and the magistrate to fulfill in the instant case where there was already counsel who had brought himself forward to assist the appellant. It is fundamental that arresting authorities, as much as it is for Courts, must refrain from attempting to elicit evidence from an accused or otherwise deal with his or her case until he or she has had a reasonable opportunity to instruct counsel, see the case of *Attorney General v Whiteman (1991) 2 AC 240 (PC)*.

The right to legal representation is a fundamental human right upheld by The Republic of Malawi Constitution in section 41. It is unfortunate that due to institutional and capacity constrains the right is not available to all accused persons. Nevertheless every accused person is entitled to be informed of whatever system of legal representation exists, including free legal advice. It is therefore rather disheartening to learn of a situation where a state agent takes deliberate steps to prevent an accused from accessing or being represented by counsel.

It is to me one thing to be unminded, and another thing, which I find intolerable, to be malicious. What has been revealed in this humble proceeding is a situation of malicious deprivation of a person's right and with impunity. My imagination, with due regard to the entire circumstances revealed in this case, is that the appellant, who suddenly dropped his defence and his witnesses, felt helpless, when he realized that the state system was hiding his trial from his legal counsel.

This trial was mistrial of a grave magnitude which no judicial system would wish to be identified with. In my judgment and in the interest of justice, I would not allow the conviction herein to stand. I set aside both the conviction and sentence. I have considered whether I should order a retrial, that neither seems appropriate for the sentiments I have expressed earlier coupled with the fact that the appellant has already been incarcerated as a result of this mistrial be it for a brief period.

My final verdict is that the appellant is acquitted of the charge herein. The appeal succeeds.

PRONOUNCED in Court this 2nd day of June, 2000.

A.K.C. Nyirenda`

J U D G E