

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

REVIEW CASE NO. 1142 OF 2001

THE REPUBLIC

VERSUS

FRANK JELASI

From the Second Grade Magistrate's Court Sitting at Nchalo  
Being Civil Cause No. 19 of 2001

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

Mr Kamwambe, of Counsel for the State

Accused, Present and Unrepresented

Mr M. Kabvina, Official Interpreter

Mr Nthole, Recording Officer

Date of hearing: 31st August 2001

Date of order: 31st August 2001

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Kapanda, J

### ORDER ON REVIEW

#### Introduction

The defendant originally appeared before the Second Grade Magistrate in some divorce proceedings. The case against him later

changed. He had to answer a criminal action. The magistrate charged him with the offence of contempt of court.

The court in quo found the defendant guilty of the said offence of contempt of court. For this offence the offender was sentenced to a custodial term of imprisonment of three months. This matter has been referred to me so that I should review the decision of the court below.

### **Relevant facts on this review**

As stated earlier, the magistrate was dealing with a matrimonial matter. At a resumed sitting of the court, on 23rd August 2001, the magistrate formed the opinion that the defendant had committed the offence of contempt of court. A perusal of the record shows that the defendant supposedly committed the contempt in face of the court on the said 23rd day of August 2001. The court did not deal with him there and then. It adjourned the matter concerning the said contempt of court to the following day, the 24th of August 2001. The reason for this adjournment, as is appearing on record, was as follows:-

"Due to pressing need to settle ten other cases scheduled this day, whose witnesses some came from Blantyre. The case of the defendant now

charged with an offence of contempt of court under Section 113(1)(a)(c) and (d) of the Penal Code came before court the following day..."

We must say the court, in adjourning the contempt case, lost jurisdiction to deal with the contempt case summarily. I will come back to this later in this order.

On the 24th of August 2001 the court convened to deal with the question of contempt. The magistrate charged the defendant with contempt of court as provided for in Section 113(1)(a)(c) and (d) of the Malawi Penal Code. As put by the magistrate, the acts constituting contempt of the court were *viz* the defendant showed disrespect to the court by walking out of the courtroom without leave of the court; he behaved in an unruly manner and; that, without giving reasons, he demanded that the divorce case before the magistrate should be transferred to another court.

At the end of the hearing the court found the defendant guilty of the offence of contempt as charged under the said Section 113(1)(a) and (d) of the Penal Code. The defendant was then sentenced to an effective custodial term of imprisonment of three(3) months.

### **Procedural errors**

From the foregoing pertinent facts, it is clear to a legal mind that the magistrate committed serious and fatal mistakes. These are in relation to jurisdiction, framing of the charge and sentencing option.

### **Loss of jurisdiction**

As regards jurisdiction, this court has noted that the magistrate lost jurisdiction to deal with the issue of contempt summarily. He did lose jurisdiction because of what he did in adjourning the contempt matter to the following day. The position at law is that where a judicial officer does not act the instant the contempt is committed but waits until the end of trial or adjourns the case to another day such judicial officer loses his/her summary jurisdiction to try a defendant charged with contempt of court. In such a scenario the alleged contemnor must be given a normal trial before a different judicial officer: **Osman vs. Regina** [1964-1966]ALR Mal. 595.

### **Decision to charge and punish the defendant**

Further, it must be observed that in contempt cases the basic principles of justice require that the court should first warn a potential



contemnor of the danger he/she faces if he/she is unruly or conducts himself/herself improperly. The warning must be given before the court proceeds to charge and convict him/her of contempt of court. In this regard I can do no better than reproduce the following wise advice of Justice Brennan in **Illinois vs. Allen** [1970]397 US 337 at 350:-

"Of course, no action against an unruly defendant is permissible except after he has been fully and fairly informed that his conduct is wrong and intolerable, and warned of the possible consequences of continued misbehaviour..."

In the instant case the magistrate did not warn the defendant of the possible consequences of the way he had conducted himself on the said 23rd August 2001. The court instead adjourned the case to the following day so that he could deal with the defendant.

### **Need for a formal charge sheet**

As noted above the court lost its jurisdiction to deal with the case against the defendant summarily. Hence, there was need to afford the defendant a full trial before a different magistrate. **Osman**

**vs. Regina** supra. Further, a normal trial would have required the drafting of a formal charge. There was no such formal charge in this matter that had a statement and particulars of offence. Moreover, it is noted that the magistrate just cited the subsections of Section 113 of the Penal Code and presumably read them out to the defendant. I am saying presumably because there is nothing on record to show that the charges were read out nor indeed what response the defendant gave to the court. For all there is on record these subsections were not read out separately. Yet Section 113 of the Penal Code sets out many different and separate modes of committing the offence of contempt of court. There is no doubt in my mind that the charge preferred against the defendant infringed the rule against duplicity of counts.

It is the view of this court that the absence of a formal charge bordered on denying the defendant a fair trial: see Section 126 and 128 of the Criminal Procedure and Evidence Code as read with Section 42(2)(f)(ii) of the Republic of Malawi Constitution.

### **The sentence of an effective custodial imprisonment**

Regarding the punishment that was meted out on the defendant this court thinks that any comment on same is moot considering the

conclusions this court has made above. It will suffice though to put it here that same was manifestly excessive in view of the fact that the offender had no previous record. We indeed wonder if the court took into account the provisions of Section 339 and 340 of the Criminal Procedure and Evidence Code. This is so considering that no reasons were given for the non-suspension of the sentence of three months imprisonment with hard labour. As a matter of fact the court would have properly considered the imposition of a community service order as a condition for the suspension of the sentence of three months.

### **Conclusion**

The procedural errors that are obtaining in this matter could not be corrected. As seen above the magistrate had no jurisdiction to try the defendant for the offence of contempt of court. The proceedings of 24th August 2001 were therefore a nullity. Pursuant to the provisions of Section 362, as read with Section 353(2)(a)(i), of the Criminal Procedure and Evidence Code we reverse the finding of the court below and we acquit the defendant of the offence of contempt of court. For this reason the sentence that was imposed on the defendant can not stand and it is hereby quashed.

Made in Chambers this 31st day of August 2001, at the Principal  
Registry, Blantyre.



F.E. Kapanda

**JUDGE**