IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CONFIRMATION CASE NO 988 OF 2007

THE REPUBLIC

V

KENNETH ZIKHALE NG'OMA

CORAM : **CHOMBO, J**
: Nita, Counsel for the State
: Maulidi and Chimkango Counsel for the Respondent
: Kabaghe, Court Reporter
: Gonaulinji, Court Interpreter

RULING

The matter came before the High Court by way of review. The facts of the matter were that the accused was charged with criminal trespass contrary to

Section 314(a) of the Penal Code of the Laws of Malawi. He pleaded not guilty to the charge but after full trial he was found guilty and was discharged under 5337 of the Criminal Procedure and Evidence Code without a conviction being entered nor a sentence being passed. The State not satisfied with the state of affairs applied for a review of the same under Section 361 of the Criminal Procedure and Evidence Code. The respondent then applied for and was granted leave cross appeal against the court's finding of guilt. The application to cross appeal, made out of time was granted by court after the respondent ably demonstrated to court the grounds for the delay. The case therefore comes to court as both a review and an appeal bu the matter of review will be discussed first.

The State submitted that after the court found the accused guilty a lower court did not record the guilty finding and did not pass a sentence as required by the law.

The State is now asking the court to enter the conviction and pass sentence accordingly. The respondent opposes this submitting that there is no requirement under Section 337(a) of the Criminal Procedure and Evidence Code that in matters of discharge the Court must enter a conviction and pass a sentence. At this point I think it will be necessary to quote the particular provision in full. Section 337(a) of the Criminal Procedure and Evidence Code provides as follows:

(1) Where in any trial for an offence other than an offence the sentence for which is fixed by law, the Court thinks that the charge is proved but is of the opinion that having regard to the youth, old, age character, antecedents, home surroundings, health or mental condition of the accused, or to the fact that the offender has not previously committed an offence, or to the nature of the offence, or to the extenuaiting

circumstances in which the offence was committed, it is inexpedient to inflict any punishment, the Court may:

(a) Without proceeding to conviction, make an order dismissing the charge, after such admonition or caution to the offender as to the Court seems fit (underlining supplied)

The argument of the State is that whilst the Magistrate was exercising his discretion in discharging the accused the law required him to do further – to admonition or caution the accused as he saw fit. The applicant, on the other hand, submits that in discharging the accused the Magistrate was not obligated to do anything further.

In considering the argument between the two parties it is necessary to look at the natural interpretation of

the word in the said provision. The provision states that "…after such admonition" the words do not leave room for any Court to choose to adominis, caution or not. It is imperative that the discharge if followed by an admonition or caution. The Court is only given a leeway on what kind of admonition or caution it deems fit. The record of the lower Court does not indicate what admonition or caution or any was given to the accused, now the respondent. The rationale behind such admonition or caution, I believe, lies in the fact that the Court will have found that "the Court thinks that the charge is proved" (as provided in Section 337(1) it would not be prudent to merely allow the offender to walk off as if he/she had done nothing wrong. I find therefore that any Court that decides to discharge an accused person under Section 337(1)(a) must of necessity record the admonition or caution given to the accused.

The applicant argued that having found that the charge had been proved beyond reasonable doubt

the lower Court should have entered a conviction and passed sentence accordingly. But reading of Section 337(1)(a) does not extend that far. It should be born in mind that the Court has the discretion to exercise its discretion in applying any one of the three options contained in (a) (b) or (c). The lower court close to apply Section 337 (1) (a) which provides that the court does not have to enter a conviction and consequently passing of a sentence falls away.

In the grounds of appeal the respondent submits that the (1) Magistrate erred in making a finding that the prosecution had proved the case to the requisite standard of proof beyond reasonable doubt.

(2) lower court, having found the complainant was an illegal occupant of the house, erred in finding the accused guilty of criminal trespass.

(3) lower court having found as a fact that the accused was the rightful tenant in the said house and was right to demand the vacant

possession of the house from the complainant, erred in finding the accused guilty of criminal trespass when in fact it was the complainant who had trespassed on the said property.

(4) lower court erred in law not taking into the material contradictions in the prosecution's case.

(5) lower court erred in law in proceeding to find the respondent guilty, despite having found that the prosecutions case had so many in consistencies and contradictions.

(6) lower court erred in law in disregarding the defence that had been put forward by the defendant when the defence stated that the accused, had not at any point gone to the complainant's house.

(7) in all the circumstances, the evidence adduced in court was not enough to prove the charge of criminal trespass and as such the finding of guilt occasioned a failure of justice.

The State opposes all the grounds of appeal. In considering the appeal grounds four (4) and five (5), because of their close similarity will be dealt with together. After full trial of the case the lower court found that the prosecution's case had been proved beyond reasonable doubt.

In considering the issues before me it will be necessary to consider the evidence before the lower court. The evidence before the court was that the respondent had offered employment to the complainant. He then decided to surrender his house allocated to him by Malawi Housing Corporation to the complainant. The relationship for one reason or another was short lived and it meant sour. Shortly after the respondent asked the complainant to vacate the house because Malawi Housing had issued notice of termination. On 6th March, 2006 a group of people went to the complainant's house with some household property that they forced into the house.

The wife of the complainant stated that one day in February, 2006 around 6:00 pm the respondent, in the company of four other people went to the house of the complainant. The respondent entered the house of the complainant and introduced himself as Ken Zikhale Ng'oma and the respondent shouted at PW2 and threatened to kill her husband PW1 and a Mr. Mbeleka of Malawi Housing Corporation. Her husband was not home then. The respondent told them he would do that through witchcraft and as a Chairman of the vendors he was capable of doing that. The following some other people visited the house looking for PW1 but he was not home. The respondent forced her to write a letter of apology to him. Three weeks later the respondent not finding PW1 home collected PW2 from her house to his office which was also being used as an office. Then a Mr. Msonda and a group of people brought house hold property to the house of the complainant and forced it into the house. In the process they broke some

flower pots. The respondent had the water and electricity disconnected.

Veronica Mzembe, the daughter of the complainant testified that on 6th March about 7:00 p.m. the respondent, with three (3) other men were at their house. He introduced himself by his full names and stated that he wanted to meet her father. Not finding the complainant the respondent started shouting at PW2, the wife of the complainant. The respondent threatened death to her father whom the respondent called so poor as only deserving to stay in Chinsapo; and that he would bring 400 venders to share the house. True to the respondent's words, on 3rd March a group of men led by a Mr. Mzonda who came with furniture that the pushed into the house. PW4 was held by the neck and pushed to the floor, flower pots were broken PW5, brother of the complainant, testified that in March, 2006, he went to his brother's house to find a three tonner with some furniture and six men led by a Mr. Mzonda who told him that Mr.

Ng'oma had sent him to deliver the said furniture to the said house. The other people who had come with Mr. Mzonda were uncooperative and breaking flower pots. PW5 tried to reason with them as the complainant and his wife were not home but to no avail. He phoned his brother about the situation at the house.

PW6, sergent Jailosi of Lilongwe Station testified that on 21st March, 2006 he recorded caution statement from the respondent who not only denied a charge of criminal trespass but actually denied visiting the house of the complainant on 6th March and intimidated the complainant. This briefly is the evidence of prosecution on file. The respondent on appeal submits that the evidence on record is contradictory and the court should not have used it to make a guilt finding. The duty of the court therefore is to examine the evidence on record and consider whether it was consistent, as the applicant submits, or

it was so contradictory that a finding of guilt is not justified as submitted by the respondent.

One of the points raised by the respondent is that the prosecution testimonies mention various dates it cannot be said with certainty when actually the trespass is said to have taken place. The charge states of the events of 6th March and the respondent denies being at the house of the complainant on the day. Even the evidence of PWs 4 and 5, who were present at the house state that the respondent was not one of those at the house at that time. However to look at the events of 6th March in isolation would be the same as picking all the fruits of the tree with the conviction that in so doing you have uprooted the tree. Matter one needs to look at the genesis of the matter; as evidenced by the various documentary evidence submitted in court. There is a thread that runs through all the evidence right from the day that the complainant to the said date of 6th March, 2006. This states from the time that the respondent after

offering a job to the complainant also offered him a house. The said house was registered in the name of the respondent, and it is a house belonging to Malawi Housing Corporation as evidenced by Exhibit P4, tenancy agreement between the respondent and Malawi Housing Corporation. The relationship between the two did not work out well, the respondent wanted to have his house back. A letter of 26th January, 2006 gives background to the frustrations of the respondent at the complainant's failure to vacate the house of the respondent. In the said letter the respondent states;

> *" I write to remind you the arrangement I have been sending Wakuda Kamanga my assistant to ask you to vacate the house you are currently occupying. It is now almost three weeks by we are not getting any concrete answer from you …… It is in this context I have decided to write you and give you some days up to 30th of this month of January to find another house for I will be coming to occupy the house on 1st February …… once again I will need the house by 30th January, 2006."*

Come 30th January, 2006 the complainant had not vacated the house and, according to the evidence of PW2, the respondent went to the house of the complainant in February, 2006 around 6:00 p.m with some other people but only three men and the respondent went into the house. The respondent introduced himself as Ken Ng'oma and he did not meet the complainant. After he gave notice to the complainant to vacate the house, Malawi housing Corporation, in turn gave the respondent notice to vacate the house, letter dated 6th February, 2006, shown in court as exhibit P5. This would explain why the respondent stormed into the complainant's house and threatened that he would kill both the complainant and one Mbeleka, the author of exhibit, Regional Manager of Malawi Housing Corporation. Following this notice would seem the complainant wrote to Malawi Housing Corporation asking for extension of time. In response Malawi Housing Corporation acknowledge receipt of that letter and in their letter of 16th February, 2006 extended the time of stay for the

complainant to 31st March, 2006. When the respondent visited the house of the complainant in February the respondent shouted threats of PW2, he even threatened to use witchcraft and that as chairman of the vendors he could hire vendors to kill them.

The complainant and his family did not vacate the house as warned and on 25th February, 2006 the respondent panned what he called *"final warning"* in this letter there is no doubt that the respondent wanted to communicate his exasperation with the complainant's failure to vacate the house as promised and he states as follows:

> *"I fee enough is enough.*
> *You now owe me K74,000 for the two months you have been in the house BW/56. I just want to warn you that the month end you said you will be vacating the house around the corner and I might behave abnormally. Please make sure this is done or you will face total embarrancement . I hope my message is*

clear and straight forward. Please ensure that we do not reach that far". The respondent signed "Ken Ng'oma".

On 5th March, 2006 the complainant decided to open the respondent and express some of his concerns as shown by Exhibit P2. One of things he said in that letter was that Malawi Housing Corporation had allowed him to extend the occupancy of the house to March-end.

It is on record that the respondent applied for and was granted an injunction restraining the Malawi Housing Corporation from terminating the tenancy and interfering with the respondent's quiet possession of the said property. The same is dated 14th March, 2006.

Then came the events of 6th March which were witnessed by PW4 and PW5. This took place in the absence of PW1, PW2 and the respondent. The evidence on record by PW4 and 5 is that when Mr.

Mzonda came with the property in the truck he did say that he was sent by the respondent to bring that property to the house of the complainant and deposit it in the said house. As a general rule after a witness has given evidence the opponent or his lawyer is allowed to cross examine the witness. The purpose of cross examination is, as much as possible, where the person so accused wants to disassociate himself/ herself from the testimony being given in court, to try and discredit the evidence given or a particular point stated the purpose of cross-examination is to weaken disqualify or destroy case of the opponent whilst at the same time to establish the party's own case by using his opponent's witnesses. It can only be assumed by court therefore, as did the lower court, that prosecution evidence was not challenged by the defence and therefore accepted for what it was worth. Thus when the court made a ruling that prosecution had proved its case beyond reasonable doubt one cannot facilitate the court. The respondent did not even at that point out that there were inconsistencies

in the evidence of prosecution nor did he use where, therefore no questions have been asked or the evidence of the witness left, more or less, in fact , it is generally accepted that the witnesses account is the correct version of the matter. The respondent, either by himself or his counsel, did not challenge the substantive evidence of all the prosecution witnesses before the lower court. There was some cross-examination but it did not in any way so that although the respondent sought to deny some of the evidence prosecution witnesses had stated in court one wonders why the respondent now in defence, sought to deny some of the points raised by prosecution witnesses when the respondent did not use cross-examination for what it is worth. I do take cognizance of the fact that the respondent was ably represented by counsel who is well aware of these rules on evidence. If the omission was probably on one point or just with one witness, the court would have assumed that this was an inadvertent omission. But the style of cross-examining on less substantive

issues was true with all witnesses. Cross examination to discredit or disqualify the evidence of then. One can only assume that the respondent and his counsel had thrown all caution to the wind. Having found that there is a direct link between what happened on 6th March, 2006 and the initial action of the respondent I find also that the charge of trespass had been proved beyond reasonable doubt. In any event, even if the respondent had not accompanied his friends on 6th March, 2006, what happened in February when he went to the house of the complainant, and shouted at the wife of the complainant, threatened to kill the complainant and threatened to hire vendors who would do as he bid them to including putting property in the house of the complainant did and does constitute trespass. After he made the threats the group led by Mzonda that behaved like things did bring property and forced it into the house of the complainant and the process harassed the complainant's daughter and damaged some property. I need to settle now is whether the

said trespass was criminal. At this point it will be important to consider the definition of criminal trespass in full. Section 314 of the Penal Code provides as follows:

Any person who –

(a) enters into or upon property in possession of another with an intention to commit an offence or to intimidate, insult or annoy any person lawfully in occupation of such property;

(b) Having lawfully entered into or such property unlawfully remains there with intent thereby to intimidate, insult or annoy any such person or with intent to commit any offence, shall be guilty of the misdemeanor termed a criminal trespass" and shall be liable to imprisonment for three months.

If the property upon which the offence is committed is any building, tent or vessel used as human dwelling

or any building used as a place of worship or as a place for the custody of property, the offender shall be liable to imprisonment for twelve months."

Was the complainant a lawful occupant of the said house? According to the history of the house in dispute the landlord had rented out the house to the respondent. When the respondent sublet the house to the complainant he was actually in breach of the conditions of tenancy as testified by PW3 which state of affairs is confirmed by Exhibit P4, particularly paragraph 3(7).

Since the respondent had breached his terms of tenancy he had no claim to the house. It followed therefore that the complainant was also staying in the house illegally. However, at the time that the acts complained of occurred Malawi Housing Corporation had, as landlord exercised its discretion to allow the complainant to temporarily regularize his occupany in the said house, this is evidenced by Exhibit P6, dated

16th February, 2006. Part of the said letter reads as follows:

> "we refer to your letter of 10th February, 2006 in which you requested us to consider giving you some more time to organize an alternative home for your family.
>
> We write to advise that we shall only allow you to stay in the house up to 31st March, 2006, beyond which, the Corporation shall expect you to voluntarily vacate the said house number BW/56"

The complainant's tenancy was therefore, for the period in question a lawful occupant in the said house. The order of injunction that the respondent had obtained was successfully vacated by Malawi Housing Corporation, thus giving Malawi Housing Corporation the full and unfettered authority to do with the house as pleasing to them. The next question to settle is whether the respondent had the requisite

intention to meet the requirements of criminal trespass. As it has been pointed out there is a thread running through the acts of the respondent up to the material date of 6th March. Some of the acts done by the respondent included threats, as evidenced by the testimony of PW2 which clearly states that the respondent went to her house, started shouting at her and issuing death threats for her husband including use of witchcraft and hiring of vendors to forcibly posses the said house. As already found by the court, this evidence was unchallenged by the respondent and it is therefore material evidence in this court. The respondent visited the house of the complainant in the company of three other men, no doubt to create a presence. Further the respondent, through his agents, colleagues or friends, forced PW2 to sign a letter of apology. After three weeks property was brought to the house of the complainant which was forcibly deposited in the house. Flower pots were broken and the complaint's daughter was man handled. The respondent went further to have the

electricity and water to the house disconnected. Would somebody do all these acts and allege thereafter that the had no intention to intimidate, insult or annoy? In my view these acts do constitute acts whose intention was to intimidate, insult or annoy the complainant and his family. I find therefore that the charge of criminal trespass was proved to the requisite standard.

It was submitted by the respondent that the court exercised its discretion correctly in discharging the respondent in the circumstances.

Discretion has an elusive meaning which only the person exercising it can best tell. Other people will however, depending on the circumstances tell whether or not the said discretion was exercised correctly.

Section 337(1) provides that:

> "… the court thinks that the charge is proved but is of the opinion that having regard to the youth old age, character antecedents home surroundings, health or mental condition of the accused….."

This may seem to say a lot but it does not really such as to what can or cannot be done; because it is left, what "the court thinks." I would therefore not want to stretch the issue of exercising discretion any further suffice to say if I was faced with similar circumstances I would be hesitant to apply the provision. In my view there mere aggravating circumstances that would not place the case within the ambits of that provision such as:

(1) there was a deliberate and collated intention to intimidate, annoy and insult the complained.

(2) the said insults were not limited to the complainant alone but his whole family.

(3) the intention to intimidate annoy and insult was worsened by the complainant going to the house of the complainant in the company of other people when the issue did not have anything to do with them other than to instill a presence upon the complainants' family.

(4) at the time that the respondent was doing at this he had the advantage of using his position as a highly placed employee in Government.

(5) at the time of commission of the offence the respondent had was not in lawful possession of the house.

Lastly the respondent submitted that the lower court did not give hid defence any credit. The lower court

had the benefit of examining the demeanour of all the witnesses and at the end of the day decided that the prosecution evidence was more credible than the respondent. I would hold the same view although on different grounds – that the evidence of prosecution is unchallenged, this leaving the court with only option, that the said evidence is credible.

I must therefore, having said all that there was to say that the lower court erred in not implementing Section 337(1) (a) in full by failing to caution the respondent whilst discharging him. After considering all the evidence on record and I find that the appeal must fail in its entirely therefore must have it clearly recorded that the respondent is guilty as charged and I convict him accordingly. And must proceed to record any mitigating factors.

MADE in court this 18th June, 2008.

CHOMBO, J