

**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY**

CRIMINAL APPEAL NO. 166 OF 2008

BETWEEN

POTIPHER HONORE JERE APPLICANT

AND

THE STATE RESPONDENT

CORAM : **HON. JUSTICE MZIKAMANDA**
: Kadzakumanja, Counsel for the Applicant
:, Counsel for the State
: Ms. Mthunzi, Court Reporter
: Mr.Kaferaanthu, Court Interpreter

JUDGMENT

MZIKAMANDA, J.

This is an appeal against the decision of the First Grade Magistrate sitting at Mchinji convicting the appellant on two counts of corruption and sentencing him to two years imprisonment with hard labour on each count but order to run

concurrently. The Appellant was acquitted on two other counts of abuse of office. There are four grounds of appeal, namely that:

1. The learned magistrate erred in law in convicting the appellant in that there was no evidence to support the appeal.
2. The learned magistrate failed to adequately consider alternative non-custodial sentence before imposing a sentence of imprisonment on the Appellant, who has not previously been convicted of any offence and the Learned Magistrate thereby failed to comply with Section 339 and 340 of the Criminal Procedure and Evidence Code.
3. The learned magistrate failed to give sufficient consideration to the Appellant's mitigating factors when he imposed a sentence of 2 years of imprisonment with hard labour
4. In all the circumstances of the case the sentence of 2 years imprisonment with hard labour was manifestly excessive.

Counsel for the Appellant filed skeletal arguments in support of the appeal. The State did not file any opposition to the appeal, not even skeletal arguments. The appeal was first set down for hearing on 17th March, 2009. On that date the State came to court unprepared and sought an adjournment. My sister Judge Chombo granted the adjournment to a date to be fixed by the Registrar. The matter was set down for 16th April, 2009. On that date the State who had been duly served

with notice of adjournment did not turn up for court. I ordered that the appeal proceeds in the absence of the State. It is to be noted that notice of appeal was filed on 16th October, 2008. Since then the State have not indicated any opposition to the appeal.

The background to the matter is that the Appellant is Traditional Authority Mlonyeni. He is empowered by the Chiefs Act to appoint Group Village headmen to assist him administer his area of jurisdiction. He was charged on counts 1 and 2 with corrupt practices by a public officer contrary to Section 24 (1) of the Corrupt Practices Act. He was also charged with abuse of office C/S 25 B (1) of the Corrupt Practices Act on counts 3 and 4 in relation to the same transaction. He was acquitted on count 3 and 4. The particulars on the first count alleged that the Appellant between 30th December, 2002 and 1st June, 2005 at Namitolo CCAP in Mchinji District corruptly received K10,000.00 from Eneya Phiri (Group Village Headman Chimkoka) in order to elevate him from Village Headman to Group Village Headman, the said transaction being the concern of the Malawi Government. On the Second count it was alleged that the Appellant being a public officer employed as a Traditional Authority (Mlonyeni) between the 30th day of April, 2004 and the 1st day of June 2005 at Honde in Mchinji District corruptly received K2,000.00 from Selestino Mtachi (Group Village Headman Nkhonde) in order to elevate him from Village Headman to Group Village Headman, the said transaction being a concern of the Malawi Government.

The evidence of PW 1 Vincent Doom was that on 6th September, 2005 Group Village Headman Mtsukunya sent him to lodge a complainant at the Anti-

Corruption Bureau that the T/A Mlonyeni was elevating Chiefs and had obtained K 10,000.00. Group Village Headman Mtsukunya is a brother to the witness. It was only during re-examination that he said the Appellant elevated Village Headmen Chinkoka and Mkhonde.

PW 2 Group Village Headman Nkhonde said in 2004 he was made Group Village Headman by the Appellant. After the installation he gave the Appellant K2,000.00 instead of a goat to thank him. During cross-examination he said that it is a custom for a Group Village Headman to pay money as a “*thank you*” for being elevated. The Appellant did not tell the witness to pay the money, but he gave the money on his own accord.

PW 3 Eneya Phiri is Group Village Headman Chinkoka. He said that the Appellant elevated him to Group Village Headman in 2004 on the recommendation of a Senior Group Village Headman. For that elevation he was to give three goats. Instead he gave money amounting to K10,000.00. He had been told that it was a custom to give such goats for such an elevation as a token of appreciation.

PW 4 Morris Fabiyano is a Senior Group Village Headman. He said Nkhonde paid K2,000.00 while Chimkoka paid K10,000.00 for them to be elevated. He said what the Appellant did was breaking the law. The witness had been told that there was a circular prohibiting the elevation of Village Headman but he only knew of the ban in 2005 after the two had already been elevated.

In cross-examination he said that the Appellant had told him that there was need to elevate some Village Headmen because the area was big. When the two were elevated the Appellant did not mention a figure to be given to him.

PW 5 Bruno Jeke said that he received a letter from the District Commissioner as Group Village Headman Mtsukunya. It prohibited Chief Mlonyeni to dismiss or elevate any Chief. The letter referred to is Exhibit P 1 from The Secretary for Local Government to all District Commissioners dated 6th June, 2003 on “*suspension of Appointment of Village Headmen and Group Village Headmen.*” It is copied to the Secretary to the President and Cabinet. It was neither addressed to PW 5, as suggested by him nor to the Appellant.

During cross-examination he stated that he was standing in as Group Village Headman Mtsukunya in place of his late uncle who died in 2006. He stated that the Appellant never helped him to quell some agreements. He said him and Vincent Doom Banda both executed the job of Group Village Headman Mtsukunya and that it was their custom that 2 people can hold one office. He himself is nephew to Vincent Doom Banda. He said he is a Chewa. He has never known a custom that says there should be payment in respect of an elevation.

PW 6 Makwinja Sikalioti Phiri said that the Appellant went to Chinkoka Village in the company of Senior Group Village Headman Pinda to collect K10,000.00 as customary payment. Present during the payment were witnesses invited and these included the witness, Harrison Yeneya, Senior Group Village Headman Pinda and Chinkoka who gave the money.

During cross-examination he said corruption is done in secret but custom is done openly.

PW 7 Harrison Yeneya Chinkoka Village said that the Appellant came to their village to collect customary payment of three goats or K10,000.00. He witnessed the transaction which was done at a Church.

During cross-examination he said that he was invited to witness the payment and there were few other people present. He said that he did not know how tradition performed during the installation of a Chief.

PW 8 Stephen Freza Chikapa a clerk in the District Commissioner's Office at Mchinji at the material time said that when his office received directive that no chief should elevate any village headman he wrote a letter to inform all Traditional Authorities, Ex P 3. He said he wrote to the Appellant after he received complaints from village headmen and wanted to remind the Appellant about it. He learnt that the Appellant had installed five other Group Village Headmen and he passed the information to the Anti-corruption Bureau. He established that the Appellant had deposed Village Headman Mtsukunya without following customary procedures contrary to a 1977 ban.

PW 9 Belli Msiska, an investigator for the Anti-Corruption Bureau testified that on 6th September, 2005 the Bureau received information that the Appellant had deposed Group Village Headman Mtsukunya and abused his powers by installing Group Village Headman Mselera, Mtukwa, Khungwa Chinkoka and Nkhonde

without following customary procedures and contrary to 1977 ban on elevation of Village headmen to Group Village Headmen. He then received K2,000.00 from Selesitino Mtachi in order to reinstate him in a position of Group Village Headman, when he was not supposed to depose him in the first place. He also received from Eneya K10,000.00 to promote him to Group Village Headman Chinkoka. She said he acted in a matter of corruption.

The Appellant told her that at custom a wife of the one to be installed as Chief takes a chicken and a basin of flour to the wife of the Traditional Authority.

The Appellant who broke down in tears at a ruling of a case to answer opted to remain silent but called witnesses in his defence. The first witness for the defence was Village Headman Mlonyeni who testified that Group Village Headman Pinda complained that his jurisdiction was large and wanted other Village Headmen to assist him and he proposed Nkhonde and Chinkoka. The Appellant accepted the proposal. Chinkoka gave K10,000.00 as per tradition or custom. Nkhonde also paid something and the two were installed Group Village Headmen.

In cross-examination he said there was a difference between custom and corruption.

DW 2 said he knew nothing about the case. So too did DW 3. However DW 3 said during cross-examination that the Appellant received payment from Chinkoka as custom. According to him the custom is that people go to the Chief's

Headquarters with gifts but the chief does not go for the gifts. Gifts remain gifts whether the Chief goes for them or not.

DW 4 said he knew nothing about the case just as did DW 5 although the latter said that custom and corruption are different.

DW 6 Floriano Kaphinde was a 72 year old teacher who has been in Malawi all his life and who claimed to know the custom or tradition of the society. According to him a Traditional Authority or any Chief installing a new Chief receives a goat or cattle as a gift from the new Chief. What the Appellant received was a customary gift called "*Mphangwe*" and was received in accordance with custom. It is no abuse of office for a Chief to hold discussions anywhere around the area of his jurisdiction.

During cross-examination he said he could not describe himself as an expert of custom. He did not know of the Chief's Act. He was aware of the law on corruption and he would not support corruption. He conceded that it was wrong for a public officer to receive something for his advantage in order to carry out his duties.

The learned magistrate no doubt put in a lot of effort in the preparation of the judgment in the present matter. In that judgment the lower court found that the accused person was not guilty of the offences of misuse of a public office contrary to Section 25 B (1) of the Corrupt Practices Act and acquitted him on the third and fourth count of the originating charges. The court however found that the

Appellant received the sum of K10,000.00 and K2,000.00 on the 1st and 2nd counts respectively not in accordance with custom but corruptly. It thus found him guilty of corrupt practices by a public officer contrary to Section 24 (1) of the Corrupt Practices Act on the first and second count. The court sentenced the Appellant to 2 years imprisonment with hard labour on each count and ordered them to run concurrently. It is interesting that in sentencing the Prisoner the court observed this:

“I have considered that he is a young man. The people or village headmen who lured him to receive the improper gifts are older than himself.”

This point is significant even as this court analyses the convictions.

This being an appeal from a subordinate court to the High Court, it is by way of rehearing. This means that the appellate court is entitled to subject the evidence on record to fresh scrutiny. The High Court is entitled to make its own findings and it will not shrink from overturning the findings of the lower court if it is satisfied that they are not supported by the evidence and the law.

The lower court did correctly address its mind to the burden and standard of proof in criminal matters. It is the duty of the prosecution to prove every essential element of the alleged offence beyond reasonable doubt. An accused person has no duty whatsoever to prove that he is innocent. In fact under Section 42 (2)(f)(iii) of the Constitution the accused has the right to remain silent during plea

proceedings, trial and not to testify during trial. Now where there is reasonable doubt in the prosecution evidence, that reasonable doubt must as a matter of law be resolved in favour of the accused. An accused person who prefers defence evidence need not prove in it that he or she is innocent. It will be sufficient that such evidence has the effect of casting reasonable doubt on the case for the prosecution for him or her to be acquitted. Section 24 (1) of the Corrupt Practices Act provides as follows:

“Any public officer who by himself, or by or in conjunction with any other person, corruptly solicits, accepts or obtains, or agrees to accept or attempts to receive or obtain, from any person for himself or for any other person, any advantage as an inducement or reward for doing or for bearing to do, or for having done or for borne to do, anything in relation to any matter or transaction actual or proposed, with which any public body is or may be concerned shall be guilty of an offence.”

Corruption is an act done with an intent to give some advantage inconsistent with official duty and the rights of others. It is the act of an official or judiciary person who unlawfully uses his station or character to procure some benefit for himself or for another person, contrary to duty and the rights of others. The word corruptly when used in a statute generally imports a wrongful design to acquire some pecuniary or other advantage. It means the doing of, or the engaging in, any corrupt practices. The Corrupt Practices Act define the term corrupt practice in Section 3 as:

- (a) *The offering, giving, receiving, obtaining or soliciting of any advantage to influence the action of any public officer or any official or any other person in the discharge of the duties of that public officer, official or other person;*
- (b) *Influence peddling*
- (c) *The extortion of any advantage.”*

In its judgment the lower court found that the Appellant was a public official and had received the two sums of money of K2,000.00 and K10,000.00 from PW 2 and PW 3 respectively. The lower court then observed at page 23 of the judgment that it had two main issues to determine. The first was whether the Appellant corruptly received the money. The second was whether the Appellant did abuse his office of Traditional Authority when he elevated the two village headmen Nkhonde and Chinkoka. On the second issue it found that the Appellant did not abuse his office and it acquitted him on the relevant charges in counts 3 and 4.

As regards the first issue whether the Appellant corruptly received the money the court began by observing at page 23 of the judgment thus:

“This court would wish to make it clear that until fairly recently corruption was a rather foreign phenomenon in the Malawian legal system.”

The court observed at page 24 of the judgment that corruption is often even more difficult to prove because of its secretive nature and the idea of a satisfied customer. On this point let me hasten to observe that in the present case the giving of the money said to be in place of goats were made in full view of witnesses specially limited to witness the transaction. Some of those witnesses testified in the case as prosecution witnesses. A question may be raised that considering that corruption is inherently secretive in nature, did the conduct of giving and receiving the money or gifts as the lower court put it, in the presence of and in full view of a number of witnesses who were mostly village headmen, bear the inherent characteristic of corruption of being secretive. The answer to this question is important in order to determine whether corruption was proved beyond reasonable doubt. This will become clear later.

It is an essential element of the offences of corruption charged under both count 1 and count 2 that the act in question must be done as an inducement or with intent to give some advantage inconsistent with official duty and rights of others. It must be a wrongful act operating as an inducement or reward. PW 2 said in his evidence at Page 6 of the record that:

“After installation, I gave the accused K2,000.00 instead of a goat to thank him.”

During cross-examination he said:

“I gave you K2,000.00 cash instead of a goat. I gave you in the presence of Group Village Headman Pinda. It is a custom for a group to pay the money. I gave you to thank you for being elevated. You did not tell me to pay the money, it was my own accord.”

During re-examination he said:

“A goat is given as a token of appreciation. It is to thank the Chief.”

It is this testimony that the State heavily relied on to prove the first count. It is to be observed that the payment was made after the witness was already installed as Group Village Headman. It is also to be observed that the payment was not solicited by the Appellant as PW 2 gave it on his “own accord” after the event. It cannot be said in those circumstances that the payment was intended to influence the elevation of PW 2. Further PW 2 was emphatic that what he did was the custom of the area. Then the evidence of PW 3, the key witness in count 2 who was elevated to position of Group Village Headman Chinkoka is that:

“Senior Group Village Headman told me that I would be elevated to the position of Group Village Headman. He told me to pay 3 goats. Instead I paid K10,000.00 to Group Village Headman Pinda at C.C.A.P. Church, Namiloto C.C.A.P., Senior Pinda, Scariot and Harrison. Group Village Headman Pinda gave the money to T.A. Mlonyeni. I saw him receiving it.”

In re-examination he stated thus at page 9:

“I gave K10,000.00 as a token of appreciation because of being elevated from Village Headman Chinkoka to Group Village Headman Chinkoka. T.A. Mlonyeni elevated me. I gave him at Namitolo.”

It is very clear that the K10,000.00 was given as an appreciation to the elevation. It must have been after the event not before the event. Again it was given at a Church in the presence of Senior Group Village Headman Pinda, Scariot and Harrison as witnesses. Yet again the evidence shows that this was a token of appreciation in accordance with the custom of the area.

PW 4 who said he witnessed the transaction stated that:

“For Village Headman Chinkoka and Nkhonde to be elevated Nkhonde paid K2,000.00 saying it was customary payment for him to be elevated.”

This contradicts the position that the money was paid as a thank you, after the event. PW 4 suggests that the payment was an inducement for the Appellant to elevate but this is not supported by the other prosecution evidence. What is observable however is that even Pw 4, a Senior Group Village Headman, referred to the payment as customary. Again what is notable from the evidence of PW 4 is that the Appellant never stated the amount of money to be given to him.

PW 5 alleged that he is Group Village Headman Mtsukunya who shared that position with PW 1 and that in his Chewa custom that is in order. He is a Chewa who lives among the Ngonis but he had no knowledge that there was a Ngoni custom of payment as a “*thank you*” for being elevated as a Chief. PW 5 and PW 1 are the persons who reported the alleged corruption to the Anti-Corruption Bureau when PW 5 sent PW 5 to do so. It is clear throughout the prosecution evidence that PW 5 and PW 1, had an axe to grind with the Appellant. I will allude to this fact later.

PW 6 witnessed the payment of the K10,000.00. He stated at page 30 of the record that:

“Yes you got the money. You said it was a custom. Corruption is done in secret but custom is done openly..”

Also PW 7 witnessed the payment.

The evidence of PW 8 a clerk in the office of the District Commissioner at Mchinji at the material time indicated that he reacted to complaints from certain village headmen against the Appellant. It included an allegation that the Appellant had deposed Pw 5 without following customary procedures and had installed five others without following customary procedures. He passed on the information to the Anti-Corruption Bureau although he never stated whether there were allegations of corruption. What is clear however is that his office recognized that installing or elevating as well as removing of Village Headmen by Chiefs must be

done in accordance with customary procedures? In other words he and his office recognized the existence of customary procedures in the installation or removal of village headmen although he did not say what those procedures were.

Again PW 9 the investigator of the Anti-Corruption Bureau stated among other things that the report she got was that the Appellant had deposed PW 5 without following customary procedures and had also installed five other village headmen without following customary procedures and had therefore abused his position as Chief. He investigation related to that information as well as an allegation of receiving money in order for the Appellant to install Group Village headmen. What this also shows is a recognition that there are customary procedures in connection with the installation and removal of Chiefs even by the Anti-Corruption Bureau.

Now one thing is clear in the evidence of the prosecution. It is that the prosecution evidence is contradictory. In one breath the prosecution is saying that the money paid was a token of appreciation after the two persons the subjects of Courts 1 and 2 had been elevated to the position of Group Village Headmen and that this was according to custom. In another breath the prosecution is saying this is corruption, which is different from customary way of conducting chieftaincy matters. The effect of such contradiction is to create a reasonable doubt whether what we are dealing with here is corruption or a customary act. It is really PW 1, PW 5 and Pw 9 who argue that this was corruption. PW 2 and PW 3 were firm that what they did was a customary way of demonstrating appreciating for their having been elevated. The rest of the

prosecution witness either confirmed that the act was customary after the event or had doubts about the customary nature of the act.

PW 5 is a Group Village Headman of Chewa tribe living among the Ngoni. He cannot be expected to confirm the Ngoni custom being alluded to by PW 2 and Pw 3 and the others. There are two reasons for him not to be expected to do so. The first is that he is Chewa not Ngoni. The second is that he has an axe to grind with the Appellant, it being alleged that the said Appellant removed him from the position of Group Village Headman.

What is to be observed in this case is that there is ample evidence on the customary nature of the act that the Appellant did. To begin with there is no evidence to suggest in the least that the Appellant solicited the payment. In fact PW 2 said he did it on his "*own accord.*" Then there is the evidence of DW 6 Mr. Kaphinde, a 72 year old teacher who testified as to the customary nature of the act the Appellant was charged with. In Malawi proof of customary law is done by adducing evidence to establish the existence of the custom. Custom is a question of fact to be established through evidence. No witness contradicted the evidence of Mr. Kaphinde. What that evidence did was to reinforce the reasonable doubt in the prosecution evidence that the acts complained of amounted to corruption.

Further it seems that the lower court recognized the existence of the said custom but simply concerned itself with the validity of it. The lower court went to great length with some scholarly discussion of the tests to be satisfied for a custom to be regarded as valid and enforceable. The discussion is to be found on pages 29

to 33 of the handwritten judgment. The magistrate used the tests expoused in the English Legal System Text book by K.J. Eddy 2nd edn which gives the five tests that:

1. Custom must have existed from time immemorial which by the statute of Westminster 1295 fixed the first year of the reign of Richard I 1189 as the year of time immemorial. The court also recognized that because of some difficulties' courts will accept as custom if it existed throughout the life time of the oldest inhabitant in the locality.
2. That the custom must be certain as to exactly what limits of its subject matter and person to whom it applies. It must be obligatory. The court felt that the value was uncertain. That view is untenable because the custom in the present case is Ngoni and items given are either chicken, goats or cattle value whose value in monetary terms keep changing in our society.
3. The custom must be reasonable, judged from the stand point of the law. If not reasonable the law can put it to disuse. The court found the custom of giving gifts to express an appreciation to a Chief for his having elevated a Group Village Headman is not reasonable in the light of Section 24 (1) of the Corrupt Practices Act. With respect I wish to say that the Corrupt Practices Act was not designed to abolish certain customs for if that was the case it would have expressly stated so. The real test of custom is the Constitution of Malawi which recognizes custom so long as that custom is not inconsistent with the Constitution. The invalidity of a custom will only be to the extent of its inconsistency with the Constitution.

4. Custom must not apply "*nec per vim, nec clam, nec precario*" not by force not secretly and not with special request.

Going by the evidence in this case there was no force or special request used for Appellant to get the gift as PW 2 stated he did it on his "own accord." Again it was not done secretly for persons were invited to witness the transaction. In one case it was done at a Church.

5. Custom must be consistent with existing law. It was observed by the lower court that the custom alleged in this case was not consistent with the Section 24 of the Corrupt Practices Act. I am unable to appreciate the area of inconsistency in the light of all the circumstances of this case. I do not think that the Corrupt Practices Act is there to outlaw gifts. The Corrupt Practices Act has improper gifts intended to influence a conduct to the advantage of another and against the rights of others as its legitimate area of concern. The giving of gifts is an every day occurrence in the activities of human persons. I think that the lower court fell into error in its observation on this point. The point must be emphasized that it is only where custom is inconsistent with the Constitution and to the extent of the inconsistency that it will be invalid. It has not been shown that the alleged custom is so inconsistent with the Constitution such as it should be held invalid. The short of it is that the evidence on record given about the existence of the custom, regardless of whether it is valid or not, is so strong as to raise reasonable doubt about the guilt of the Appellant on both the 1st and the 2nd count. As a matter of law, that doubt must be resolved in favour of the Appellant.

Indeed if the lower court found that the Appellant did not misuse his position in elevating the two Group Village Headmen, it is rather difficult to hold that he corruptly received “*improper gifts*” in order for him to elevate the Chiefs or as a reward for his having done so.

In all the circumstances of the case I find the conviction of the Appellant on the 1st and 2nd counts unsafe. I accordingly quash them. This means that the Appellant be set at liberty unless held for some other lawful reasons.

PRONOUNCED in Open Court this 23rd day of July, 2009 at Lilongwe.

R.R. Mzikamanda

J U D G E

