



**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION
CRIMINAL CASE NO. 1 OF 2009**

THE REPUBLIC

-V-

BAKILI MULUZI

&

VIOLET WHISKY

Coram: Hon. Justice M L Kamwambe

Mr Mwala of counsel for the State

Messrs Chokotho & Banda of counsel for the Defence

Mr Phiri...Official Interpreter

RULING

Kamwambe J

On short notice the court summoned counsel from both sides to meet in chambers on Thursday the 1st of September, 2016. When we met the court explained to both sides that since date of trial is near we remove any uncertainties as to how we proceed on Monday the 5th September, 2016. Prior to all this the State had requested more time to review counts due mainly to unavailability of some witnesses. To our surprise Mr Mwala upon being asked to brief the court on the review, stated that the State has decided to proceed with the case on 5th September, 2016 with the original



standing charge sheet. This meant that they had made no changes to the counts.

The Defence was shocked with this revelation. They wondered whether the State was taking court seriously noting from the trend of events in this matter. The Defence recalled that it was at the State's instance that an application was made in open court to adjourn the matter to allow the State to review the counts due to unavailability of certain witnesses and evidence adduced in cross-examination. The Defence wanted to know which witnesses would not be available so as to allow time to prepare for trial, but there has been no communication from the State. They showed displeasure that at about three occasions the State had sought adjournment of the matter under the pretext that they are reviewing the matter and they were going to amend the counts, and now after three months they say that they will not make any changes. Further, the Defence wondered why amounts shown to be drawn from 1st accused businesses the State says they will retain them even after being given three months to make amendments.

The Defence felt that what has happened is an abuse of court process warranting the discharge of the accused persons and that they were going to make an application accordingly. They asked the court if meanwhile the proceedings can be stayed.

The State was also surprised with the expectations of the Defence as the result of the review could go either way, either to maintain the charge sheet as it has always been or to amend it. They explained that the fact that the State has decided that nothing should change does not mean that there was no review and that the Defence should not force the State to do amendments to the charge sheet. They advised that PW1 is just 1st witness and that it is not proper to start commenting on other witnesses to come later who shall justify the retaining of the charge sheet. The State proceeded to say that if PW1 was the only witness

may be the suggestion by the Defence would have made sense. Mr Mwala pointed out that the first time the matter was adjourned was when State counsel, Mr Matemba, recused himself and it was necessary for the State to put its house in order. Second time was when he was re-appointed when it was felt that the review would be appropriate. That review has brought us to this point that we can proceed as matters stand. He put it that this does not amount to abuse. He advocated that the sought for application can be made while proceedings are underway and that depending on the outcome of those proceedings, the court would give its directions. He warned not to be in haste as more witnesses are coming and not good to focus only on evidence of PW1. On list of witnesses he said that it remains the same as earlier provided.

After having heard from both sides the court started giving its verbal ruling. It explained that in its view there is no enough ground for holding that there is abuse of court process as it lies upon the State to decide how it wants to conduct its case. If after review and reconsideration of the counts it feels it should not change any counts, it is up to them. That the State has not made the expected changes should indeed not mean that the State has failed to review the counts in the light of the cross- examination since PW1 is just one of the witnesses and he is not a key witness. After all, it was already ruled that his evidence by way of the report is only there to show what he did and does not represent the truth of the statements. The court is of the view that any stay would delay the matter further and would therefore not be in the interest of justice.

When the court said that trial will proceed on 5th September, 2016 the Defence through Mr Chokotho intervened and retorted that it would appear that the court is bent to proceed with the case at all cost and asked the court if it would recuse itself. Mr Banda agreed with his colleague even if he did not have the floor.

The court was shocked at this request and referred counsel to the full record of the matter since inception. The court record, the court said, would show how this court tried to protect the rights of the 1st accused person against the office of the Chief Secretary and the State as a whole when there was open animosity, in that at diverse occasions the court gave 1st accused person leave to go for medication abroad at Government expense. Almost at all times the court tried to be sympathetic with the accused persons so that a fair trial is achieved. The court pointed out that counsel was just emotional about the case. However the court realises that counsel was not there in the early days as he has just taken over the case. Fortunately, counsel sobered up and apologised for his hasty request for the judge's recusal.

It was unbecoming of counsel to intervene while the court was in the midst of delivering its ruling. This is the first time it has happened in my court. I am certain that counsel did not mean to offend the court but merely over reacted to safeguard the interests of his clients. Let him be assured that the court will take care of the interests of the accused persons as the law dictates. It is the court's duty to balance the interests of all parties without favour.

It was ordered that trial shall nevertheless proceed on the 5th September, 2016 at 9:00 am.

Come Tuesday the 6th September, 2016, trial commenced with the court giving the Defence opportunity to come out with their plea or grievance. The Defence wants the court to compel the State to amend counts which it views to be obviously unprovable, such as, where clear that the 1st accused obtained the money when he was out of office as president of the Republic of Malawi, and where it is admitted that the moneys in issue were not corruptly received. The Defence is afraid that the image created is that the accused is a bad offender.

The prosecution indicates in its reply that it is not refusing to amend, but that it is premature to do so as the evidence is mostly in respect of 1st count which concerns the sum of MK1.7 billion, after all, we are in the middle of cross-examination of PW1 and re-examination is yet to come. The State further wondered how many amendments they were going to make in the event that they amend now in the middle of evidence of PW1 and some factors arise which necessity another amendment. The State restated the fact that what they are doing will in no way prejudice the accused persons.

The court observes that the State is desirous to proceed with the prosecution of this case despite that they have not amended the charge sheet as expected. After consideration of the matter whether to amend, in their wisdom they have thought it prudent not to amend now when we have tackled in the main, first count and only the 1st witness is testifying. I find that the State is not refusing to amend but it is taking cautious steps in the way they are conducting the prosecution of the case. This is reasonable. The Defence should not be seen to be influencing the conduct of the prosecution case. It is enough that the Defence is securing admissions from PW1 which means seemingly the case is to their favour. They should sit back and expect that the State will not secure a conviction, and not press for immediate amendment. The court is happy at the progress being made so far and I fail to see any persecution or prejudice. Let us ensure a speedy trial in the interest of justice. This is the normal course of case process. It is enough and reassuring that the State says that it is following the proceedings and are taking note of all areas that require its consideration. At their right time the State will consider amending the count or counts.

The court is keenly interested to see what the State will do to its counts in view of the available documents and evidence of PW1, but I am cautious not to interfere with the State's case at this early stage. I take it that the State has a mature and seasoned counsel

who knows what is happening and what he is doing. I have advised myself to exercise restraint and patience. If the Defence can do the same. Let us not be in haste. Facts will eventually speak more loudly for themselves and determine the way forward. The court is alert and will maintain to be objective at all times and it will ensure that the accused are not prejudiced or persecuted. Fortunately, you will agree with me that a contrary image is now created, that is to say, that 1st Accused did not corruptly obtain the alleged MK1.7bn.

The court expects Counsel to respect one another and to use proper language in court that is not derogatory.

Pronounced in open court this 7th day of September, 2016 at Chichiri, Blantyre, Principal Registry.



M L Kamwambe

JUDGE