IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION

CRIMINAL REVIEW NO. 9 OF 2018

JAMSON CHAGOMERANA.....1ST APPLICANT

AND

CHIKUMBUTSO MADERA.....2ND APPLICANT

-V-

THE REPUBLIC

CORAM: Hon. Justice M L Kamwambe

Chitsime of counsel for the State

Maele of counsel for the Applicants

Amos...Official Interpreter

JUDGMENT

Kamwambe J

This matter is before this court for review under section 42(2) (f) (viii) of the Constitution of the Republic of Malawi, under section 25 and 26 of the Courts Act, and under section 360 and 361 of the Criminal Procedure and Evidence Code.

The convicts, Jamson Chagomerana of Ntambalika village T/AKapeni, Blantyre district and Chikumbutso Madera of Gogodo village T/A Mabuka, Mulanje district appeared before the Blantyre Central First Grade Magistrate Court on the 29th March, 2018 charged with the offence of Acts intended to cause grievous harm to Felisha Mkandawire contrary to section 235(a) of the Penal Code. The particulars of the charge averred that the convicts on the evening of 15th March, 2018 at Ndirande Market in the district of Blantyre with intent to maim, disfigure or disable caused grievous harm to Felisha Mkandawire and unlawfully wounded the said Felisha Mkandawire. The convicts pleaded guilty and were subsequently convicted for causing grievous harm under section 235(a) of the Penal Code. Being dissatisfied with the conviction and sentence, the convicts move this court to review the propriety of the conviction and sentence.

The grounds of review are as follows:

1. The lower court erred in law in convicting the convicts of an offence which they were not charged with and had not pleaded to.
2. There was no evidence before the lower court that the convicts had committed the offence of acts intended to cause grievous harm.
3. The trial was a nullity as the prosecutor was a sergeant and hence not authorised by law to prosecute criminal cases.

Considering the first ground of review, there is nothing to show that the court convicted the Applicants of an offence other than the one they were charged with and pleaded to. The court record does not mention of any substitution of charge nor does it refer in any manner to any other charge so that we can say without doubt that another charge has been introduced. All this court finds to have happened is that the lower court quoted the wrong sentence for the offence in issue for reasons known to himself. May be the lower court misguided itself to believe that maximum sentence is 14 years imprisonment because section 238 of the Penal Code which is the most used offence for causing grievous harm, carries 14 years as maximum sentence. I do not

think that the lower court, in the circumstances, had intended to substitute the charge. If the lower court was meticulous enough, it would not have made the mistake it made. In his/her mind, the magistrate was sentencing the convicts under section 235(a) with which they were charged but oblivious or unaware that he was using a wrong sentence or a sentence of another offence. Whatever mistake was made by the lower court in the manner explained above, did not occasion any miscarriage of justice since the maximum sentence for the offence the Applicants were charged with is life imprisoned. May be this court should be considering enhancing sentence befitting the offence they pleaded to.

On the second ground of review that there is no evidence that the Applicants committed the offence of acts intended to cause grievous harm under section 235(a) of the Penal Code, counsel for the Applicants argues that the facts of the case do not show that the Applicants intended to maim, disfigure or disable the complainant. The pleas went like this:

1st convict: I understand the charge and admit that I grievously harmed the complainant.

2nd convict: I understand the charge and I admit that I wounded the complainant

Medical report: Exh 1- multiple cuts on the head and face. Fracture of the right ulna. Rapture of the collateral ligaments with severe head injuries. Suturing knee brace (POP).

In my analysis, these injuries were really serious befitting the offence charged. There is no doubt about this. However, the lower court did not focus on the *mens rea* but was contented with the *actus reus* only being fulfilled. To prove a charge under section 235(a) of the Penal Code it must be proved that the accused unlawfully wounded or did grievous harm to the complainant with an intention to maim, disfigure or disable. It is true that the facts on record do not show the element of *'intent'* to maim etc.as such, the Applicants could not have been convicted under that said section 235(a). This is a situation where the lower

court could have employed section 150(1) of the Criminal Procedure and Evidence Code (the code) to substitute the charge with a minor and cognate offence which does not require proof of intent to maim or disfigure. It provides as follows:

> 1) *When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete a minor and cognate offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor and cognate offence although he was not charged with it.*
> 2) *When a person is charged with an offence and facts are proved which reduce it to a minor and cognate offence, he may be convicted of the minor and cognate offence although he was not charged with it.*

An alternative verdict in compliance with section 150(1) should be entered where no injustice will be occasioned against the accused especially. There is, however, nothing unconstitutional with making an alternative verdict under sections 153 to 157 of the Criminal Procedure and Evidence Code since the alternative offence will have been proved, and this should raise nothing contentious.

I have perused through the case of **The Republic v Raphael Banda** Criminal Review Case No. 7 of 2017 where the lower court convicted the convicts of the offence of attempted burglary when they were originally charged with attempted robbery in disregard of section 151(2)(b) and 151(5). The two offences do not fall under section 150 of the Code so as to call the latter case minor and cognate. They are distinct offences and therefore you cannot substitute attempted burglary for attempted robbery. Further, they do not fall under sections 153 to 157 of the Code so as to regard them as alternative offences. As such, the substitution required the new charge to be read out for the accused person to take plea.

The third ground of review is in respect of jurisdiction of sergeant to prosecute criminal cases. The State agrees that a sergeant does not carry lawful authority to prosecute criminal matters in a court of law. Section 79 of the Criminal Procedure and Evidence Code

provides for the appointment of prosecutors by the Director of Public Prosecutions as follows:

1) *The Director of Public Prosecutions may, by writing under his hand, appoint generally, or in any case or any class of cases, any person employed in the public service to be a public prosecutor.*
2) *Every prosecutor shall be subject to the express directions of the Director of Public Prosecutions.*

I was expecting counsel for the Applicants to provide me with G.N. 85/1962 which is deemed to say that only police officers above the rank of sub-inspector are authorised to prosecute under section 79 of the Code. I am not able to make a nexus between the said Notice and section 79 of the Code. I have looked at the case of **Kondwani Hambeyani –v- The Republic Criminal Appeal No. 19 of 2018,** and even if I found that the prosecutor had no jurisdiction to prosecute the case in the lower court, I would take matters of jurisdiction very seriously and not be persuaded to employ sections 3 and 5 of the Code so as to ignore the irregularity. If one is by law excluded from exercising powers of prosecution and happens to prosecute, his actions will be null and void as he is in the wrong bedroom. I would wish to know what the Police Act says about this issue.

In exercise of the powers of review bestowed upon me under section 25 of the Courts Act I substitute the conviction with one of wounding as a minor and cognate offence and reduce sentence to 12 months imprisonment,

Pronounced in open court this 10th day of January, 2019 at Chichiri, Blanytre.

M L Kamwambe

JUDGE