IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION

CRIMINAL REVIEW NO. 43 OF 2018

CHRISTOPHER LIPENGA .....APPLICANT

-V-

THE REPUBLIC.....RESPONDENT

CORAM: Hon Justice M L Kamwambe

Chitsime counsel for the State

Domasi of counsel for the Applicant

Amos...Official Interpreter

ORDER IN REVIEW

Justice Kamwambe J

This summons is taken under sections 25 and 26 of the Courts Act and under the Inherent Jurisdiction of the Court. It also falls under section 360 of the Criminal Procedure and Evidence Code (CP&EC) which states the procedure. At the instance of the Applicant, this matter was commenced in this Court. Under section 360 of the Code the High Court may entertain by way of review any

matter which was before any subordinate court. This court therefore assumes jurisdiction over this matter.

I have noted that this matter has been referred to as Criminal Appeal Case No. 43 of 2018 and also as Criminal Review No. 43 of 2018. The mix up starts from the Summons for Review/Supervision which are registered as Criminal Appeal Cause Number 43 of 2018 as drawn by the Applicant. Counsel for the Applicant should have been vigilant to capture such errors at an early stage to avoid wastage of time. I was lenient enough to accept it pass but to my chagrin. Because the Summons were taken under section 25 of the Courts Act, I considered it as Summons for Review and I proceeded as such. Hence, the grounds of Appeal became the grounds of review. I should have loved it if the application was commenced as an appeal though. The State proceeded as if it was a criminal appeal matter yet the Applicant clearly outlined his grounds of review in his skeleton arguments. However, the interest of justice will not suffer in anyway which ever route we take. I warn counsel once again to be vigilant when preparing documentation so as to avoid such confusions.

The grounds of review as follows:

1) The conviction was made on a non-existent charge as the Appellant was convicted of robbery when the charges were theft, causing grievous harm and malicious damage.
2) There was no evidence that the Appellant stole a flash diski, a modulator and the sum of MK46, 000.
3) There was no evidence that Roy Makumbi was injured/suffered grievous harm, and that if he was, that the harm was caused by the Appellant.
4) There was no evidence that a motor vehicle registration number SA 4073 Toyota Surf Station Wagon was damaged, and if it was, that the damage was done by the Appellant.

The Appellant was arrested on 27th November, 2017 and was taken to court on 1st December, 2018 where the State asked for more time to investigate the case. It was adjourned to 11th December, 2018. I wish to register my concern over the one year long period of adjournment while the accused person was in

custody. In accordance with section 42 (2) (f) (ii) of the Constitution, this act of long militates against fair trial. The adjournment can therefore be said to be unconstitutional. The long delayed trial is not in the interest of the accused person and in any case the adjournment is unlawful under section 250 (3) (b) which provides that if the accused has been committed to prison, the adjournment under subsection (1) shall not be for more than fifteen days.

The crux of the matter without beating about the bush is that Appellant should not have been convicted of the offence of robbery which he was not charged with and did not plead to, when he was charged formally with theft, causing grievous harm and malicious damage. These offences and robbery are not kindred offences as provided for by sections 153 to 157 of the P4EC and, further, robbery is not a minor and cognate offence to theft, causing grievous harm and malicious damage, or vice versa, according to section 150 of the Penal Code which 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 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.*

The lower court erred to consider robbery a minor and cognate offence to the charges Appellant was initially charged with. The lower court should have read out the substituted charge of robbery to the Appellant so that the new charge of robbery is specially proved beyond reasonable doubt. Due to this error, section 42 (2) (f) (ii) of the Constitution was flouted as the Appellant did not enjoy a fair trial since he was not informed with sufficient

particularity of the charge of robbery, to which he should have been asked to plead.

Not least, I should also mention that the offence was not proved beyond reasonable doubt as the boy who reported to PW2, Roy Makumbi, about the theft in the car used by PW1 and PW2, was not called to testify. The Appellant was not found with any stolen item. Therefore, in the circumstances, any evidence in reference to the boy, who was supposed to be key witness, is obviously hearsay.

In view of what is stated above, I quash the conviction and set aside sentence.

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

M L Kamwambe
JUDGE