



IN THE HIGH COURT OF MALAWI  
CRIMINAL DIVISION  
LILONGWE DISTRICT REGISTRY  
CRIMINAL CASE NUMBER 2 OF 2017

BETWEEN:

THE REPUBLIC

-v-

ULADI MUSSA.....1<sup>ST</sup> ACCUSED  
DAVID HENRY KWANJANA.....2<sup>ND</sup> ACCUSED  
ESILI KUBWIMANA.....3<sup>RD</sup> ACCUSED  
PETER KATASYA.....4<sup>TH</sup> ACCUSED  
PASCAL RWASA.....5<sup>TH</sup> ACCUSED

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**CORAM: Honourable Justice Dr. C.J. Kachale, Judge**

*Nyasulu & Phiri*, Public Prosecutors from the Anti-Corruption Bureau for the State

*Kadzakumanja & Maulidi*, of Counsel for the 1<sup>st</sup> Accused Person

*Salima*, of Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Accused Persons

*Nyanda*, of Counsel for the 4<sup>th</sup> Accused Person

*Goba-Chipeta*, of Counsel for the 5<sup>th</sup> Accused Person

*Namagonya*, Court Reporter

*Choso*, Court Clerk /Official Interpreter

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**JUDGEMENT**

**BACKGROUND AND BRIEF SUMMARY OF FACTS**

1. The five accused persons are answering various charges arising from the alleged wrongful grant of naturalization certificates to various foreign nationals at the time the first suspect *Uladi Mussa* was Minister of Home Affairs. Specifically, the first accused **Uladi Mussa** has two counts, namely neglect of official duty contrary to section 121 of the Penal Code as well as

- using public office for the advantage of another contrary to section 25B(1) of the Corrupt Practices Act.
2. The second accused **David Henry Kwanjana** faces two counts, namely neglect of official duty contrary to section 121 of the Penal code and using public office for the advantage of another contrary to section 25B(1) of the Corrupt Practices Act.
  3. Third accused **Esili Kubwimana** faces two counts namely uttering a false document contrary to section 360 as read with section 358 of the Penal Code and influencing public officer to use his office for the advantage of another contrary to section 25B(2) of the Corrupt Practices Act.
  4. Fourth accused **Peter Katasya** faces five counts of uttering a false document contrary to section 360 as read with section 358 of the Penal code as well as one count of influencing a public officer to use his office for the advantage of another contrary to section 25B(2) of the Corrupt Practices Act.
  5. Fifth accused **Pascal Rwasa** is facing two counts of uttering a false document contrary to section 360 as read with section 358 of the Penal Code as well as one count of influencing a public officer to use his office for the advantage of another contrary to section 25B(2) of the Corrupt Practices Act.
  6. The gist of the present proceedings is that the five suspects are facing different charges emanating from circumstances under which foreign nationals were allegedly naturalized as Malawian citizens in breach of the applicable laws. The first two accused persons (**Uladi Mussa** and **David Henry Kwanjana**) were Minister and Chief Citizenship Officer respectively at the relevant time; they are accused of having either negligently performed their duties in the processes under consideration. The other three suspects (**Kubwimana, Katasya** and **Rwasa**) are accused of presenting false documents for processing the affected applications and illicitly influencing the public officers to grant the same.
  7. The prosecution called seven witnesses; namely – **PW1** Dr. Hudson Mankhwala, Chief Immigration Officer at the material time; **PW2** Joseph Nene Ndimbo Bisiwiki, Passport Officer (2011 to 2013); **PW3** Sharon Machika, Assistant to Chief Citizenship Officer (2013 to 2015); **PW4** Justice Patrick Bernard Nkhoma, Head of Document Examination Unit, Police

Headquarters; **PW5** Zangazanga Devilius Chikhosi, Principal Secretary for Ministry of Home Affairs (May 2012 to February 2014); **PW6** Beston Chisamile Principal Secretary II for Ministry of Home Affairs (2012 to 2017); and **PW7** Exton Lyton Kefasi Kamkwete, Principal Investigations Officer, Anti-Corruption Bureau (ACB).

8. Each of the Accused persons testified in their Defence. Therefore, there were 5 witnesses for the Defence, namely- **DW1** Uladi Mussa (1<sup>st</sup> Accused Person); **DW2** David Henry Kwanjana (2<sup>nd</sup> Accused Person); **DW3** Esili Kubwimana (3<sup>rd</sup> Accused Person); **DW4** Peter Katasya (4<sup>th</sup> Accused Person); **DW5** Peter Rwaswa (5<sup>th</sup> Accused Person).
  
9. In total we have generated over 700 handwritten pages of oral evidence in the course of trial. In so far as documentary evidence is concerned we have received 919 pages of documents in the form of 252 exhibits comprising application forms, letters of submission in respect of the various applications, as well as the official correspondence and copies of permits and naturalization certificates under discussion in these proceedings. It has not been necessary to recite all that evidence verbatim in this decision: where necessary the Court will refer to those aspects of the evidence which are deemed relevant to resolution of various issues arising in the process of judgment.

## **COURT'S REASONED DETERMINATION**

### **1. COMMON CAUSE**

10. Although the Court has heard a lot of evidence from the Prosecution and the Defence, there is agreement from both sides concerning the procedure and processes involved in the grant of various visas, permits and the naturalization of foreign Nationals into Malawian Citizenship under the Law.  
1) A Visa: a Visa may be granted at the port of entry for three months subject to an extension of a further three months; 2) A Temporary Resident Permit (TRP): a TRP may be valid for twelve (12) months; 3) A Temporary Employment Permit (TEP); 4) A Business Resident Permit (BRP); 5) A

Permanent Resident Permit (BRP). Only a PRP Holder may be eligible for naturalization as a Malawian Citizen depending on whether he is from the Commonwealth or an Alien.

11. The Immigration Department is responsible for the administration of the various permits and has its Headquarters in Blantyre. At the material time it was Headed by the Chief Immigration Officer (who is currently called the Director General). It has three Technical Departments namely: 1) Permits Section headed by the Chief Permits Officer; 2) Passport Section headed by the Chief Passport Officer; 3) Citizenship Section headed by the Chief Citizenship Officer. In addition, there are two support functions, 4) Human Resource Section and 5) Accounts Section. The heads of the five Sections report to the Chief Immigration Officer, who in turn reports to the Minister of Home Affairs through the Secretary for Home Affairs.
12. In so far as the process for the grant of the various permits is concerned, only the Temporary Resident Permit (TRP) can be granted by the Chief Immigration Officer by virtue of a Ministerial arrangement to ensure timely processing of applications. It was in evidence that in the past due to the large volume of applications, it used to take longer than the validity period for the Permits for the applications to be processed by the Minister.
13. The Temporary Employment Permit (TEP) is the only One that is processed by Committees. Firstly, there is a Committee at the Immigration Department, which vets the application initially and submits it to the Ministry of Home Affairs through the Chief Immigration Officer (CIO). At the Ministry Headquarters, it is subject to the review of an Inter-Ministerial Committee, which makes the final recommendation to the Minister of Home Affairs.
14. Both the BRP and the PRP are subject to Ministerial approval. Furthermore, only the Minister can grant Naturalisation Certificates. When seeking a BRP, PRP, and Naturalisation, the relevant application documents are supposed to be submitted by the CIO, and at the Ministry headquarters the PS assigns the documents to the Immigration Desk Officer who has to undertake some due diligence processes by referring the application to be vetted by

institutions such as Financial Intelligence Unit (now Financial Intelligence Authority) (FIU), Malawi Police Service (MPS), National Intelligence Service (NIS) etc. Thereafter, the Desk Officer drafts a Memo on behalf of the Principal Secretary (PS) summarizing the relevant findings on the application and Applicant. The PS is supposed to vet and fair the Memo before submission to the Minister. The Minister may either reject or grant the application on the basis of the relevant law.<sup>1</sup> In the case of Naturalisation, where the Minister has granted the application, the Desk Officer is supposed to draft Naturalisation Certificates for the signature of the Minister.

15. The outcome of the Ministerial approval process (whether rejection or approval) is communicated to the Chief Immigration Officer. It is the Chief Immigration Officer who informs the Applicant of the outcome of the application process. If a Naturalisation application has been successful, the Applicant is required to pay the relevant fees before a Malawian Passport can be issued to the Naturalised Citizens.

16. To be eligible for Naturalisation in Malawi, one has to be resident continuously for a period of five (5) years, if from the Commonwealth, and seven (7) years for the rest (Aliens).

17. These procedures and processes are not contested in this court.

18. This Court will deal with what is being contested as it proceeds in the subsequent paragraphs.

## 2. THE APPLICABLE LAW

### The Burden and Standard of Proof

19. **Section 187 (1) of the Criminal Procedure and Evidence Code ('CP & EC')** is the relevant Section when it comes to burden of proof. The Section provides:-

The burden of proving any particular fact lies on the person who wishes the Court of the jury as the case may be to believe in its existence, unless it is

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<sup>1</sup> For example, Section 28 of the Citizenship Act.

provided by any written law that proof of such fact shall lie on any particular person.

Provided that subject to any express provision to the contrary in any written law the burden of proving that a person is guilty of an offence lies upon the prosecution.

20. Thus as correctly submitted by Counsels both for the State and the Defence, the Prosecution bears the burden to prove each and every element of the offence with which the accused is charged to the requisite standard of proof beyond reasonable doubt. This position is trite and has been pronounced in numerous case including **Namonde-v-Rep** [1993] 16 (2) MLR 657 which affirmed the position of **Woolmington-v-Director of Public Prosecution** [1935] AC 462, and **Mputahelo-v-Rep** [1999] MLR 222 (HC) 252.

In **Rep-v-Angella Katengeza**, Criminal Case No.26 of 2013 (unreported) *Mwale, J* citing **Chauya et. al.-v-Rep** Criminal Appeal No. 9 of 2007 affirmed the following proposition that

[in] Criminal Law, it should always be recalled, thrives on the noble principle that it is better to make an error in the sense of wrongly acquitting a hundred guilty men than to err by convicting and sending to an undeserved punishment one innocent soul.

In order to arrive at the decision whether the standard of proof has been discharged, the case of **Banda-v-Rep** 5 ALR (Mal) 86 (quoting the views of Lord Denning in **Miller-v-Minister of Pensions** [1947] 2 ALLER 373) states that

The degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with a sentence of 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.

21. Therefore, in the case before me, the State has to prove beyond reasonable doubt the charges against each and every Accused Person.

## **The Offences**

### *Neglect of Official Duty*

22. **Section 121 of the Penal Code** provides that:

Every person employed in the public service, who willfully neglects to perform any duty which he is bound to either by common law or by Act to perform, provided that the discharge of such duty is not attended with greater danger than a man of ordinary firmness and activity may be expected to encounter shall be guilty of a misdemeanor.

**Section 4 of the Penal Code** (Definition Section) provides that

“**person employed in the public service**” means any person holding any of the following offices or performing the duty thereof, whether as a deputy or otherwise, namely—

(a) any civil office including the office of President, the power of appointing a person to which or of removing from which is vested in the President or in a Minister or in any public Commission or Board; or

(b) any office to which a person is appointed or nominated by Act or by election; or

(c) any civil office, the power of appointing to which or removing from which is vested in any person or persons holding an office of any kind included in either paragraph (a) or (b); .....

23. There are thus three essential elements which must be proven in order to sustain a conviction for neglect of official duty, and these are:

- a. That the Accused person, is a ‘person employed in the public service’;
- b. That he willfully neglected to perform any duty;
- c. The duty is one which he is bound to perform either by authority of the common law or by statute.

24. The Particulars of the charges of neglect of official duty are that,

**Uladi Mussa and David Henry Kwanjana** between 1 April 2013 and 30 April 2014 at the Ministry of Home Affairs Headquarters in the City of Lilongwe, being persons employed in the public service as Minister and Senior Assistant Chief Immigration Officer respectively, in processing applications for Citizenship made by Joseph Kabagambe, a Ugandan national; Fulgence Nshimiyimana, a Burundian national; Esili Kubwimana, a Rwandese national; Peter Katasya, a Ugandan national; Pascal Rwasa, a Burundian National; and Egide Hakazimana, reputedly a Burundian national, under a duty imposed on them by Section 28 of the Citizenship Act as read with Section 22 of the Immigration; willfully; willfully neglected to perform their official duty to verify that the beneficiaries of applications satisfied the legal requirements for the grant of Malawi Citizenship.

25. Therefore, in order to prove the charge of neglect of official duty, the Prosecution must prove that the first two suspects:
- a. were persons employed in the public service (at the material time);
  - b. that each willfully neglected to perform any duty;
  - c. that such duty was imposed on them by statute.

***Uttering a False Document***

26. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Accused Persons are facing various counts of uttering a false document contrary to Section 360 as read with Section 358 of the Penal Code.

27. **Section 360 and 358 of the Penal Code** provides respectively that

(360)Any person who knowingly and fraudulently utters a false document shall be guilty of an offence of the same kind and shall be liable to the same punishment, as if he had forged the thing in question.

(358)Any person who forges any judicial or official document shall be liable to imprisonment for ten years.



28. The Penal Code contains provisions that inform the meaning of the terms used in Sections 358 and 360, namely **Sections 351, 352, 353 and 354 of the Penal Code**, which provide respectively that

351. Forgery is the making of a false document with intent to defraud or to deceive.

352. ...

353. Any person makes a false document who—

- (a) makes a document purporting to be what in fact it is not;
- (b) alters a document without authority in such a manner that if the alteration had been authorized it would have altered the effect of the document;
- (c) introduces into a document without authority whilst it is being drawn-up matter which if it had been authorized would have altered the effect of the document;
- (d) signs a document—

- (i) in the name of any person without his authority whether such name is or is not the same as that of the person signing;
- (ii) in the name of any fictitious person alleged to exist whether the fictitious person is or is not alleged to be of the same name as the person signing;
- (iii) in the name represented as being the name of a different person from that of the person signing it and intended to be mistaken for the name of that person;
- (iv) in the name of a person personated by the person signing the document, provided that the effect of the instrument depends upon the identity between the person signing the document and the person whom he professes to be.

354. An intent to defraud is presumed to exist if it appears that at the time when the false document was made there was in existence a specific person ascertained or unascertained capable of being defrauded thereby, and this presumption is not rebutted by proof that the offender took or intended to take measures to prevent such person

from being defrauded in fact, nor by the fact that he had or thought he had a right to the thing to be obtained by the false document.

29. **Section 4 of the Penal Code** (Definition Section) says that "Utter" means and includes using or dealing with and attempting to use or deal with and attempting to induce any person to use, deal with or act upon the thing in question.
30. The Defence have properly cited some of the local jurisprudence on Section 360 of the Penal Code. Thus in the case of **Lucius Chicco Banda-v-Rep** [2006] MLR 264, *Chimasula Phiri, J* made the following observations about section 360
- ... knowingly used in connection with any term denoting uttering or using implies knowledge of the character of the thing uttered or used. Therefore, the elements of the offence appear to have the *mens rea* of knowingly and fraudulently and *actus reus* of uttering a false document.
- Therefore in summary, the elements of this offence are:
- a. A person uttered a false document;
  - b. He did so knowingly and fraudulently.
31. Concerning the sometimes misunderstood concept of a false document to which Section 360 of the Penal Code applies, *Mwaungulu, J* (as he then was) provided the following guidance in **Malinga-v-Rep** Criminal Cause No. 22 of 2002 (unreported):
- ... [what] the defendant did was to enter false information in a document. This is not a forgery under statute or common law ... It is cardinal to the offence of forgery and hence uttering that the document must 'tell a lie' about its authorship, origins, or history...
32. Similarly, the Malawi Supreme Court of Appeal, in the case of **Esther Kathumba & 3 Others-v-Rep** MSCA Criminal Appeal No. 21 of 2006 cited with

approval the case of **R-v-Dodge and Harris** (1972) 1 QB 416, *Phillimore LJ* who in relation to the term 'making a false document' held that:

Now words 'making a false document' of course in plain simple language would be wide enough, I suppose, to cover a document which contains statements which are untrue, but it has always been interpreted in a restricted manner – the phrase that is used is that the document must tell a lie about itself.

33. The MSCA also cited with approval the following dictum from **Rep-v-Mkagula** [1971 – 72] ALR Mal 450 to the effect that:

The Draftsman of the charge presumably supposed that because the accused person prepared it intending to use it for dishonest purpose it was a false document; but a document is not a false document merely because it contains false information.

*Offences under Section 25B of the Corrupt Practices Act*

34. The other charges were brought under **Section 25B of the Corrupt Practices Act** ('CPA'). That provision stipulates that:

25B.—(1) Any public officer who uses, misuses or abuses his public office, or his position, status or authority as a public officer, for his personal advantage or for the advantage of another person or to obtain, directly or indirectly, for himself or for another person, any advantage, wealth, property, profit or business interest shall be guilty of an offence.

(2) Any person who uses his influence on, or induces or persuades, a public officer to use, misuse or abuse his public office, or his position, status or authority as a public officer, for such person's advantage or for the advantage of another person or to obtain, directly or indirectly, for such person or for another person any advantage, wealth, property, profit or business interest shall be guilty of an offence.

(3) Where in any proceedings for an offence under this section the prosecution proves that the accused did or directed to be done, or was in any way party to the doing of, any arbitrary act which resulted in the loss or damage of any property of the Government or of a public body, or the diversion of such property to or for purposes for which it was not intended, the accused shall, unless he gives proof to the contrary, be presumed to have committed the offence charged.

(4) For purposes of this section “arbitrary”, in relation to actions of a public officer concerning the duties of his office, includes the doing, or directing the doing, of anything contrary to—

(a) procedures prescribed by or under any written law; or

(b) established practice or any agreed rules or arrangement which is known or ought to be known to him or is, in relation to the matter under consideration, brought to his attention in writing or other sufficient means.

### **Influencing a Public Officer to Use his Public Office for Advantage**

35. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Accused persons stand charged of the offence of Influencing a Public Officer to Use his Public Office for Advantage contrary to **Section 25B (2) of the CPA**. The particulars read as follows (as originally filed before others were severed by the Prosecution):

Joseph Kabagambe, a Ugandan National; Fulegence Nshimiyimana, a Burundian National; **Esili Kubwimana**, a Rwandese national; **Peter Katasya**, a Ugandan National; **Pascal Rwas**a, a Burundi National; and Egide Hakizimana between 1 April 2013 and 30 April 2014 at the Ministry of Home Affairs Headquarters in the City of Lilongwe influenced Uladi Mussa, and David Henry Kwanjana being persons employed in the public service as Minister for Home Affairs, and Senior Assistant Chief Immigration to use their public office for the advantage of 50 foreign nationals, viz 22 Burundian nationals, 16 Rwandese nationals, 9 Ugandan nationals and 3 Tanzanian nationals by arbitrarily granting them Malawian Citizenship.

36. On 27<sup>th</sup> July, 2017, the Prosecution severed Joseph Kabagambe, Fulgence Nshimiyimana, and Egide Hakizimana from this case and the Court granted them leave to do so. However, where it relates to some of the applicants in court, the evidence pertaining to Joseph Kabagambe and Egide Hakizimana applications was still received at trial.

37. As rightly observed by the Defence, the offence under S. 25B (2) has three essential elements that must be proven beyond reasonable doubt in order to obtain a conviction:

- a. A person induced or persuaded or influenced a public officer to use his authority;
- b. The public officer to used/misused/abused his public office, position, status or authority as a public officer, in response to the inducement or persuasion;
- c. Such power was exercised for the benefit of the one inducing or persuading or another third party.
- d. The benefit might be an advantage, wealth, property, profit or business interest,

#### **Using Public Office for the Advantage of Another Person**

38. The 1<sup>st</sup>, and 2<sup>nd</sup> Accused persons stand charged of the offence of Using a Public Office for the Advantage of Another Person contrary to **Section 25B (1) of the CPA**. The particulars read as follows (as originally filed before others were severed by the Prosecution):

**Uladi Mussa and David Henry Kwanjana** between 1 April 2013 and 30 April 2014 at the Ministry of Home Affairs Headquarters in the City of Lilongwe, being persons employed in the public service as Minister for Home Affairs, and Senior Assistant Chief Immigration respectively, used their public office for the advantage of 50 foreign nationals, viz 22 Burundian nationals, 16 Rwandese nationals, 9 Ugandan nationals and 3 Tanzanian nationals by arbitrarily granting them Malawian Citizenship.

39. Similar to S. 25B (2), S. 25B (1) has three essential elements that must be proven beyond reasonable doubt in order to obtain a conviction:

- a. One must be a public officer,

- b. He either used, misused or abused his public office, or his position, status or authority as a public officer;
- c. He did so for personal advantage or for the advantage of another person or to obtain, directly or indirectly, for himself or for another person, any advantage, wealth, property, profit or business interest.

40. As defined by S. 25B (4), For purposes of this section “arbitrary”, in relation to actions of a public officer concerning the duties of his office, includes the doing, or directing the doing, of anything contrary to—

- (a) procedures prescribed by or under any written law; or
- (b) established practice or any agreed rules or arrangement which is known or ought to be known to him or is, in relation to the matter under consideration, brought to his attention in writing or other sufficient means.

**The Relevant Statutory Provisions for the Duty of the Public Officer when considering Naturalisation/Citizenship Application**

41. Among other provisions of relevance, **Section 28 of the Citizenship Act** provides that

Every application under this Act –

- (a) Shall be made to the Minister;
- (b) Shall be accompanied by the prescribed fee (if any);
- (c) **Where the form of any such application is prescribed, shall be made in such form**, with such variations as the circumstances require and the Minister accepts;
- (d) Shall be supported by such evidence of statements made therein as may be prescribed under this Act or as the Minister may require; and
- (e) Shall be verified by a declaration made before a magistrate or commissioner for Oaths.

42. Of relevance to this case as brought out in the evidence include **Sections 13 and 14 of the Citizenship Act ('CA')**, which provides for the Naturalisation of Commonwealth Citizens (S. 13) and Aliens (S. 14). Both sections 13 and 14 of the CA make specific reference to section 28 of the same statute.

43. The Minister under Section 34 is empowered to make Regulations, and indeed there are Regulations titled **Malawi Citizenship (Forms and Fees) Regulations**. Rule 3 of the Regulations provides that 'Every application shall be supported by such evidence of the statements made therein and as may be required on the application form or in the Malawi Citizenship Act. A study of the Form for Commonwealth Citizen (Form A) shows that under **paragraph 14**, the evidence required includes, 'evidence submitted of previous residences in Malawi' among other things.

#### **Rules of Statutory Interpretation**

44. The offences relating to naturalization as well as neglect of official duty which are being considered here have not been previously adjudicated upon, hence there is a lack of local jurisprudence. Consequently, it might be useful to mention the approach to statutory interpretation underlying the analysis of the pertinent legal provisions in issue in this case.

45. In that regard, much has been drawn from the wisdom of *Cram J.* in the case of **Rendall Day-v-Rep** (1966- 68) ALR Mal 155, who held that:

It is a settled principle of interpretation that a statute, once enacted, governs the decisions of the courts....[W]e must read the statute and ascertain its meaning. I protest against the idea that when an Act of Parliament is made as clear as words can make it, you are to cite as authorities to its construction, and as a guide to its interpretation, cases decided years and years before upon another statute.

46. Therefore, in ascertaining the meaning of a statute, the Malawi Supreme Court of Appeal (MSCA) has provided guidance by pronouncing in **Royal**

**International Insurance Holdings Ltd-v-Gemini Holdings Ltd [1998] MLR 318, 321, that –**

It is trite that the fundamental rule of statutory interpretation, to which all other rules are subordinate, is that where the words of the statute are in themselves plain and unambiguous, no more is necessary than to construe those words in their natural and ordinary sense. In such case, the intention of the legislature is best declared by the words themselves.

47. Nevertheless, Courts are to avoid interpretations that result in absurdity.

Thus in **Mudaliar-v-Kaisi** 3 ALR (Mal) 103 it was held that:

In interpretation of statutes there is a presumption against absurdity and where there is ambiguity a Court of law will endeavour to adopt an interpretation which is consistent with common sense.

48. Furthermore, it has been borne in mind by this Court, that a statute must be read as a whole. See **Malawi Law Society-v-Banda** 12 MLR 29.

## 2. ANALYSIS OF THE LAW AND FINDINGS

49. Although we received huge volumes of documentary evidence the Court approached it on the basis of the different applications by the three applicants who are before this court, namely, i. Esili Kubwimana, ii. Peter Katasya, iii. Pascal Rwsa.

### **The Case against Esili Kubwimana**

50. Having listened to the defence evidence in so far as Esili Kubwimana and Pascal Rwsa are concerned it is pertinent to observe that their defence testimonies were never subjected to any cross examination by the prosecution.

51. The credibility of a witness, whether Prosecution or Defence, is assessed by paying attention, among other things, to their 'demeanor, the coherence and consistency in his testimony' when subjected to cross-examination- see **Rep-v-Shabir Suleman**, Criminal Case No 114 of 2003 (unreported) The



Prosecution therefore, in deciding to not subject Esili Kubwimana to cross-examination, left his entire testimony in defence unchallenged. Therefore the testimony was received unchallenged.

52. It is also appropriate to indicate that the court found the following prosecution witnesses **PW1** Dr. Hudson Mankhwala, Chief Immigration Officer at the material time; **PW2** Joseph Nene Ndimbo Bisiwiki, Passport Officer (2011 to 2013); **PW3** Sharon Machika, Assistant to Chief Citizenship Officer (2013 to 2015); **PW4** Justice Patrick Bernard Nkhoma, Head of Document Examination Unit, Police Headquarters; **PW5** Zangazanga Devilius Chikhosi, Principal Secretary for Ministry of Home Affairs (May 2012 to February 2014); **PW6** Beston Chisamile Principal Secretary II for Ministry of Home Affairs (2012 to 2017); and **PW7** Exton Lyton Kefasi Kamkwete, Principal Investigations Officer, Anti-Corruption Bureau (ACB) entirely credible and reliable as witnesses of truth.

53. Although the defence tried to suggest that PW1 is an accomplice the evidence shows that he was acquitted after the state offered no evidence against him at his trial. Indeed the most critical aspects of his testimony regarding the procedures for processing permits applications and the deviations which were happening during the material time frame was amply corroborated by the Memo of December 2013 which he tendered in evidence.

54. In as far as Esili Kubwimana (**DW3**) is concerned (whose application was on file number 78946) his defence evidence was to the effect that he comes from Rwanda and he first came to Malawi in 2005 as an asylum seeker. He came back in 2006 and began to seek a BRP which he eventually obtained in 2009. Thereafter he sought naturalization as a citizen. All the while he lodged the applications to include his wife and children. He explained that the applications were lodged with advice from Immigration Department personnel. They had 11 children with his wife but lost 4 and only 7 are surviving. Thus any dependents' applications for his children were lodged

properly and he was granted the naturalization without any illicit act on his part. **DW3** stated under oath that apart from meeting them in the course of these proceedings, he had never interacted with either of the first two suspects i.e. Uladi Mussa and David Henry Kwanjana. As already indicated earlier, the state never challenged this version of events in cross examination; in the considered opinion of this court, this diminishes any suspicion attaching to **DW3** on account of the prosecution evidence.

55. Thus on the basis of the case of **Malinga-v-Rep** (above) even if some of those applications were not filled out correctly or might have contained inaccurate information, the fact that they were duly signed by the applicants means they cannot be properly described as false documents. The presentation of the same to Immigration Department by **DW3** would therefore not constitute the charge of uttering a false document as charged. In that regard, the Court finds that an essential element of the allegation has not been established; to that extent, the prosecution has failed to discharge its burden of proof against **DW3** with respect to uttering a false document contrary to section 360 as read with section 358 of the Penal Code.

56. Similarly, as regards the charge of influencing the first and second accused persons as public officers to his advantage or that of another: there was evidence given in defence to show that there was no contact or any interaction between Esili Kubwimana and those two. Similarly, the Prosecution has not adduced any evidence that satisfies the requirement of circumstantial evidence that leads to one conclusion and one conclusion only. Therefore this Court is unable to find any basis for sustaining the charge against Esili Kubwimana. There is a legal burden of proof placed upon the state in order to support a conclusion of guilt: the court has rather found that the same has not been discharged with regard to the said Esili Kubwimana. He has told this court and there is no reason to dispute or disregard his narrative that his application and those of his dependents were processed without any impropriety or illicit intervention on his part.

57. There were aspects of the various applications-this applies generally across the board-there was a lot of false or inaccurate information that were discussed in these proceedings: but for the majority of those on the basis of the jurisprudence discussed in the preceding paragraphs the court is unable to find that the presentation of false or inaccurate information to a public officer is necessarily equivalent to uttering a forged document and is therefore unable to sustain those aspects of the charges of uttering a forged or false document under section 360 as read with section 358 of the Penal Code in respect of Esili Kubwimana.

### **The Case against Pascal Rwaswa**

58. Similar sentiments could be made in respect of Pascal Rwaswa whose File Number (at the Immigration Offices) was 78782. There was evidence to the effect that a subsequent application for naturalization was lodged on the same file by someone using the name of Pascal Rwaswa's son (i.e. Egide Hakizimana) who at the time was supposed to be a minor. According to the evidence on the record the applicants' files at the Immigration Offices are retained in the exclusive custody of the Immigration Department and not in the hands of the applicants themselves. Thus these files were always in the custody of the state authorities and not the accused persons. It is in fact the 2<sup>nd</sup> accused person who submitted the second application by the 'fake' Egide Hakizimana with a memo suggesting that he was being directed (contrary to established practice) to do so.

59. In considering the defence of Pascal Rwaswa, it is pertinent to observe that when the news of these illicit naturalization applications first broke in the local media he lodged a formal complaint with a local newspaper to seek clarification on the publication. In the opinion of the court, such conduct would appear to corroborate his narrative to the effect that he played no part in the irregular use of his file to lodge the subsequent application. Here again it would be worth highlighting the point that a naturalization application can never come as the primary or isolated submission. Rather,

one needs to have a file at the Immigration Offices on which other permits had been granted before one can be eligible to present a naturalization request (that explains why other people's files were being sought for these other irregular submissions). In light of these observations, there does not appear to be any conclusive proof to suggest in this case that it was the accused person (Pascal Rwaswa) who lodged or submitted those secondary applications on file number 78782.

60. The Court therefore finds no legal basis to support the charges levelled against him. Pascal's case is similar to that of Mr. Polton whose file was being assigned to another applicant: the other file that is being referred to is number 96626 where Joseph Kabagambe was using the file of John Polton (a South African national). There was no evidence to establish any link between the original applicant and Joseph Kabagambe. Similarly, the Prosecution has not adduced evidence to satisfy the Court to the requisite standard sufficient to cause the court to oust the defence narrative from Pascal Rwaswa to the effect that he had no idea about the application of the 'fake' Egide Hakizimana.

61. As a result, it has been concluded that the prosecution has failed to discharge its burden of proof on both counts i.e. the court has found that there no proof that Pascal Rwaswa uttered any false documents to the Immigration Department as alleged. Neither is there any proof that he influenced the first two suspects to use their public office for the advantage of another. As far as Pascal Rwaswa's own applications are concerned, it has not been shown that these were granted illicitly.

### **The Case against Peter Katasya**

62. In so far as the applications of Peter Katasya (**DW4**) are concerned, the majority of those applications though they may have contained false information in so far as these were authored by the applicant the Court does not find a basis for the allegation of uttering a false document. Rather,

providing false information to a public official is a self-standing charge different from the offence of uttering a false document or a forgery.

63. However, in so far as the application concerning his minor children are concerned the Court finds it pertinent that the accused person acknowledged signing them. These were being presented as if the dependents were seeking to be naturalized on the basis of DW4's having been granted naturalization himself. On those specific applications there is sufficient evidence that Peter Katasya did utter documents that he knew to be false. In this regard the documents were being signed by DW5 in place of the actual applicants, his purported dependents – that makes the document, a document that tell a lie about its authorship amongst other things. Consequently, on the totality of the evidence, this Court finds that Peter Katasya did utter false documents. The Prosecution has therefore discharged its burden of proof to the requisite standard of proof beyond in respect of Counts 12 and 13.

64. As regards the charge of influencing a public officer contrary to section 25B(2) of the Corrupt Practices Act, the court has concluded that the circumstances under which DW2 was directed from the Ministry Headquarters by the Secretary for Home Affairs to process applications which even he (DW2) did not expect to be granted; coupled with the fact that in the end the Minister granted the naturalization applications in blatant disregard of the advice of the PS can only lead to conclude that Peter Katasya exercised some sinister influence to obtain this benefit for his purported beneficiaries. The record has established that even DW2 himself was aware of the level of political influence which Peter Katasya was capable of wielding over the permits application processes of the Ministry.

### **The Case against David Henry Kwanjana**

65. In so far as the charges facing the second accused person are concerned it might be useful to quote extensively the evidence of his boss (then) Dr.

Hudson Mankhwala in respect of the concerns which had arisen in the course of work:

This document is an Internal Memo from Chief Immigration Officer to the Chief Citizenship Officer headed 'Processing of Citizenship Applications and Issuance of Malawi Passport' dated 1<sup>st</sup> December 2013. I wrote the memo as CIO. I vividly recall that as CIO I had an oversight role over the operations of the various sections in the Department, one of which was the Citizenship Section. In that oversight capacity I had noted that there was a lapse the way Malawi Citizenship applications were being handled. One reason being that I noted a serious decrease in the number of applications that came to my office for authority. So this memo simply was trying to remind the Chief Citizenship Officer and his staff on the normal procedure that needed to be followed as outlined in the memo. Including processing of passports following ministerial approval and the processing of appeals in the event of rejections. The court may wish to know that in addition to this internal memorandum I personally interacted with the Chief Citizenship Officer on this matter and also personally visited his office where we discussed the work flow after I discovered that there were piles and piles of files pending and realized that there was no good reason for those files to be pended. I also noted that some files were evidently being processed and submitted to the Ministry of Home Affairs without going through my office. Sadly, one file that I got hold of the applicant was in Malawi for a period short of the prescribed time yet the file was submitted for approval in Lilongwe. The explanation I got for not passing files through my office and why such file was processed was that some of these files were submitted on the directive of the PS who was Mr. Zangazanga Chikhosi at that time. So in brief that necessitated the issuance of the internal memo. But let me place it on record that since the issuance of this memo on 1<sup>st</sup> December 2013 nothing improved. The Chief Citizenship Officer was Mr. David Kwanjana who is in the dock now. The PS was Mr. Zangazanga Chikhosi who allegedly directed submission of files to his office...

66. Thus there is evidence on the record whereby **DW2** is actually submitting documents to the office of the Minister in clear breach of the laid down procedures. The memo which had been issued by the CIO in December 2013 observing or recording their engagement on those matters has been presented in evidence. Under Section 25B (4) of the CPA, discharging one's functions in a manner that deviates from well established procedures or practice would evidence arbitrariness in that regard.

67. The court has noted in fact that there were applications which were submitted under 'pp' in the name of the CIO. Whenever these applications were granted, the mail from Ministry HQ was being intercepted so that the CIO never got to see those dubious applications. As a matter of illustration in Exhibit 160 the second accused wrote in the letter of submission 'I have been directed to present...' certain applications. In his own defence in court Mr. Kwanjana suggest or acknowledged that he was afraid of some political pressure especially in respect of the application by Peter Katasya whom he described as having political connections.

68. Mr. Kwanjana was quizzed on those issues by Defence Counsel and in his explanation he observed that there had been letters of recommendation written for Mr. Peter Katasya from Hon. Dr. Joyce Banda who was Minister of Foreign Affairs at the time and that particular letter was written by Hon. Prof Mphande. According to Mr. Kwanjana, he was concerned about what might have been going on behind his back because at the particular time these applications were being made the said Hon. Joyce Banda was the State President. The picture that emerges in so far as the totality of the evidence is concerned is that those applications are concerned and the Court finds as a fact beyond reasonable doubt that Mr. Kwanjana was submitting applications in breach of established procedures.

69. It needs special mention that reading the Citizenship Act as a whole, S. 28, S. 13 & 14, S. 34 and the Regulations therein together with the contents of the form, it would be an interpretation that leads to absurdity, to construe

the Act as only imposing obligations of ensuring that legal requirements are satisfied, on the Applicants and not the Public Servants who have the responsibility of considering the applications. Similarly, it would be interpreting the Act in absurdity to interpret the duty of verification as only to be on junior Officers and not the Senior Public Officers including the rank that David Kwanjana held at the material time. His responsibilities were not clerical in nature.

70. His explanation tried to suggest that there was no such procedural deviation and yet there are several applications on file to the contrary: there were many forms that were not properly filled out, same sponsor would sign several times in same submission, there were a lot of glaring anomalies on the face of the applications and according to his own evidence he did not even expect some of these applications to be granted. Which in the mind of the Court does satisfy the requirement of there having been a willful neglect of duty on his part, sufficient to prove guilt within the context; at the very least the said Mr. Kwanjana discharged his functions in a negligent manner, at worst he did so corruptly and in this case it is important to observe that there are two separate charges. In reaching these conclusions, the Court did not find DW2 to be a truthful witness; his defence testimony came across as a calculated attempt to explain away what was clearly an elaborate scam of circumventing statutory procedures to benefit certain foreigners seeking naturalization as Malawi citizens.

71. There is the charge under section 121 of the Penal Code which is neglect of official duty, which in this particular case somebody with the kind of experience of Mr. Kwanjana conducted himself in a manner that the Court is satisfied establishes the charges that he faces in that regard.

72. To that end, it is a finding of this Court that the Prosecution has discharged its burden of proof to the requisite standard of beyond reasonable doubt as regards the charges against David Kwanjana, namely: Neglect of Official duty, and Using Public Office for the Advantage of Another Person.



## **The Case against Uladi Mussa**

73. In so far as the first accused person is concerned the Court notes that in his defence statement, which was adopted in evidence he tried to depart from the caution statement which he had given at the time of arrest. What is very significant to note in so far as that statement according to the accused person himself is that the caution statement was recorded in the presence of his lawyer. The court is thus satisfied that the same was recorded without any pressure or coercion. The accused person tried to suggest that he was under pressure by virtue of spending a night in custody. He says the caution statement was taken from him when he was psychologically traumatized having been in custody overnight. Yet he also confirmed that his lawyer was with him at the time the statement was recorded. The court formed the opinion that DW1 was not telling the truth and has treated his testimony as a web of lies and an attempt to deflect the course of justice.

74. What is very significant from the caution statement is that Mr. Uladi Mussa confirmed that as Minister he used to receive the applications from the PS in form of a Memo accompanied by the supporting documents. It was the evidence of the first accused person that according to his understanding he had the authority to either grant or reject/refuse the application and he would not be subject to any question. Indeed in respect of the application of Peter Katasya it is significant to note that even though the Memo submitting the application recommended that the application should not be granted and that the applicant should continue using his PRP it was the view of the 1<sup>st</sup> accused that somehow because that was a lean period he could disregard any economic considerations.

75. This is part of what the first accused person's explanation when quizzed about his line of defence in court:

...I am not very familiar with section 19 of the Citizenship Act" (though he referred to it in his caution statement) "I was told my responsibility was to grant or reject. Not every application was subject to section 19 of the Citizenship Act. My concern was whether or not the applicant posed any security risk. So I was informed in the

Blue Paper whether a person has been vetted by FIU and that he had not engaged in money laundering. My understanding of section 19 of Citizenship Act was the power to grant or reject the application according to information given. The Memo can outline positive elements but as a Minister...for instance I rejected A Chinese applicant for citizenship. China is a very powerful country we could end up with a Chinese President. Is that good for Malawi? So as a political animal you make a decision that is good for Malawi despite the economic benefits. I do not check out the law on Immigration. No I never checked out the law on Citizenship. Besides the Constitution, as a Minister, I am not familiar with any other laws. My decision whether to grant or reject an application was solely based on the Memos. I did not personally check the file or supporting documents to the applications. I only made my decision based on the Blue Paper from the PS. Let me state that my main duties as regards citizenship as a Minister, I received application from PS, Memo in summary form for my consideration to approve as per section 19 of the Citizenship Act using my discretion. If the PS and the CIO knew that this one is breaking the law how come they brought it to the Minister? On these memos had the PS known that the law was being broken and he presented it to me I approved it as Minister even if he recommended that I decline. For me any African to request citizenship I saw no harm once he has no criminal record, cleared by MRA. I made that decision. Maybe one from overseas I would decline but an African I approved. Everybody presented to me for consideration I considered that he qualified. There was no one that presented the Memo that 'this one is illegal' so I granted them. I heard Zangazanga and Chisamile testifying that the only one who can grant an application is the Minister. There is no memo which says 'it is illegal to grant this application'. I am feeling uncomfortable because the Prosecutor is questioning the decision of the Minister. It is the Minister only who can reject or grant and it is a political decision. The Minister has power to say yes or no. there is a discretion in the law. Any memo given to me the Minister has power to say yes or no. There are two books that are followed, the Citizenship Act and the Immigration Act. The Immigration Act says I had discretion and the power to approve or reject is only with the Minister. The PS and the CIO had power to turn down an application. If you read the entire law you will find that the PS and CIO has power to decline the application. The Minister has full discretion, on my part to grant citizenship.

76. On the whole therefore the Court finds the approach that the first accused took in the performance of his functions in respect of the applications that were coming on files where double applications were being made on the

same file and he was being presented as the ultimate decision-maker with information for decision, there is a glaring misapplication of the law. He misses his responsibility as a state official in so far as the question who gets granted Malawian nationality is concerned. In one breath he claims to have absolute discretion, in another breath he claims to be guided by the Memo that comes from the PS, yet in the next breath he totally disregards the recommendation that comes from the PS and proceeds to grant the application where there is a clear recommendation to decline it.

77. The actions of the 1<sup>st</sup> Accused cannot be excused as ignorance of the law is no defence (**Section 7 of the Penal Code**). Similarly, the Court on the totality of the evidence and applying the law finds that the 1<sup>st</sup> Accused Persons actions or omissions cannot in all reasonableness be taken to be honest mistaken belief as the legal requirements that must be verified are both expressly and impliedly stipulated in the law. In our current constitutional dispensation, discretion is subject to the very law that grants it.

78. It is the view of the Court that the first accused person was neglectful in the way he discharged his office as Minister of Home Affairs. As a nation, the decision as to who gets to share our Malawian nationality has been repositied in the Minister of Home Affairs and it is quite disturbing to hear one occupying that office to approach that responsibility with the attitude that the evidence we have received in this Court displayed.

79. Just as it has been highlighted in relation to the obligations of the 2<sup>nd</sup> Accused; it would be an interpretation that leads to absurdity, to construe the Act as only imposing obligations of ensuring that legal requirements are satisfied, on the Applicants and not the Public Servants who have the responsibility of considering the applications. Similarly, it would be interpreting the Act in absurdity to interpret the duty of verification as only to be on the other Public Servants who submit the applications to the Minister, and not the Minister himself/herself. The responsibilities of the Minister as the final decision maker are not clerical in nature – the decision

of the Minister is the final seal of authority hence must be discharged with the seriousness it deserves.

80. Therefore, it is the conclusion of the Court therefore that in so far as the allegation of neglect of official duty contrary to section 121 of the Penal code is concerned in respect of the various applications that were submitted in evidence in this Court the State has adequately discharged that burden and it is the conclusion of the Court that in so far as the allegation is concerned the first accused is guilty as charged.

81. It also follows, since the evidence that establishes the element of willful neglect also demonstrates arbitrariness in the decision by the 1<sup>st</sup> Accused person in the grant of the applications in issue in this case. Consequently, this Court finds that the first accused person used his public office for the advantage of those persons whose applications were irregularly submitted. In other words, had the Minister applied the basic levels of attention to the laid down procedures in granting of such applications (by for example, verifying whether applications such as for Joseph Kabagambe or Egide Hakizimana were presented on 'borrowed' files) this charade of naturalization would not have arisen.

82. As with David Henry Kwanjana, so too for Uladi Mussa, as key public officers involved in the process of granting naturalisation to foreigners, they both acted without regard to any of the laid down procedures and processes. It would be remiss for this court to ignore their conduct; the callousness with which such discharge of sacrosanct state powers has been exercised removes any possibility that such incidents occurred in a context of genuine mistake of responsibilities. Based on the evidence of PW1 the Chief Immigration Officer at the material time, the Chief Citizenship Officer disregarded the procedures even after being confronted about the matter i.e. he facilitated these irregular application on behalf of Peter Katasya, and on the basis of section 21 of the Penal Code both can lawfully be convicted on the same facts.

## CONCLUSION

83. **IN THE FINAL ANALYSIS** this court therefore makes the following orders:

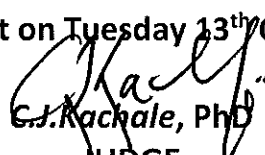
- a. **Esili Kubwimana** is found to be not guilty and is hereby **acquitted** on Count 2, uttering a false document contrary to section 360 as read with section 358 of the Penal Code.
- b. The Court further finds the said **Esili Kubwimana** not guilty and **acquits** him on Count 14 of influencing a public officer contrary to section 25B(2) of the Corrupt Practices Act.
- c. The Court further finds **Pascal Rwasa** not guilty on Counts 3 and 5 and **acquits** him on the charges of uttering a false document contrary to section 360 as read with section 358 of the Penal Code.
- d. The Court likewise finds **Pascal Rwasa** not guilty on Count 14 and **acquits** him of influencing a public officer contrary to section 25B(2) of the Corrupt Practices Act.
- e. The Court has found **Peter Katasya guilty** on Counts 12 and 13 for charges of uttering false documents contrary to section 360 as read with section 358 of the Penal Code and hereby **convicts** him accordingly.
- f. Likewise the Court finds **Peter Katasya guilty** on Count 14 and **convicts** him for influencing public officers to grant naturalization certificates in breach of the law contrary to section 25B(2) of the Corrupt Practices Act.
- g. The Court further finds **Uladi Mussa guilty** on Count of neglect of official duty contrary to section 121 of the Penal Code and **convicts** you accordingly.
- h. The Court also finds **David Henry Kwanjana guilty** on Count 1 of neglect of official duty contrary to section 121 of the Penal code and hereby **convicts** you accordingly.
- i. Furthermore the Court also finds **Uladi Mussa guilty** of using his public office for the advantage of another contrary to section 25B(10) of the Corrupt Practices Act and hereby **convicts** you accordingly.
- j. Similarly the court has found you **David Henry Kwanjana guilty** of using your public office for the advantage or benefit of another contrary to

section 25B(1) of the Corrupt Practices Act and hereby **convicts** you accordingly.

The final order in sentence will outline the naturalization certificates that have been affected by these convictions. **Meanwhile sentencing has been reserved to Thursday 22<sup>nd</sup> October 2020 at 11 am.** Esili Kubwimana and Pascal Rwaswa have been set at liberty following their convictions.

Peter Katasya, Uladi Mussa and David Henry Kwanjana shall be remanded in custody until the 22<sup>nd</sup> October 2020.

**Pronounced in Open Court on Tuesday 13<sup>th</sup> October 2020 at Lilongwe.**

  
C.J. Kachale, PhD  
JUDGE