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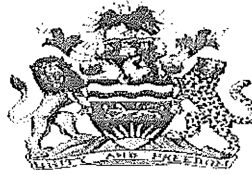

JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL REVIEW NO. 03 OF 2021

BETWEEN:

THE REPUBLIC

AND

CHARLES GONDWE

CHISOMO MALIKEBU

NELSON MILONDE

CORAM: THE HONOURABLE JUSTICE J. CHIRWA

Mr. Msume, Senior State Advocate for the State.

Mr. Mickeus, Counsel for the Applicants.

R. Chanonga, Official Court Interpreter.

Miss Chiusiwa, Court Reporter.

JUDGMENT

1. Introduction:-

Before this Court is an application by **Charles Gondwe, Chisomo Malikebu and Nelson Milonde** ("the Applicants") for the review of the lower court's finding that the Applicants have a case to answer.

2. Background:-

The Applicants were charged in the Senior Resident Magistrate's Court sitting at Blantyre with the offence of theft by servant contrary to Section 271 as read with Section 286 of the Penal Code. The particulars of the offence being that the Applicants between the months of May and August, 2018 at Blantyre Malaria Project in the City of Blantyre being servants employed by the said Project as Administrative Assistant, Accounts Support Officer and Accounts Officer, respectively, stole **MK8,300,000.00,** the property of the said Project.

At the close of the prosecution's case the court below made a finding that the Applicants had a case to answer. Dissatisfied with the said finding the Applicants have made the present application.

3. Grounds for the application:-

(a) Whether the Court below needed to give reasons for its finding of a case to answer;

(b) The lower court erred in law in finding the Applicants with a case to answer when there was no evidence before the lower court proving the essential elements of the offence to warrant such a finding.

4. Issues for determination:-

(a) Whether or not the lower court was obligated to give reasons for its finding that the Applicants had a case to answer.

(b) Whether or not the lower court erred in holding that the Applicants had a case to answer.

5. Determination:-

Section 254 of the Criminal Procedure and Evidence Code (Cap. 8:01) ("the CP & EC) deals with the procedure on the close of a case for the prosecution. This Court

finds subsections (1) and (2) of this section material for purposes of determining the present application. The subsections provide as follows:

> *"(1) If, upon taking all the evidence referred to in section 253 and any evidence which the court may decide to call at that stage of the trial under section 201, the court is of the opinion that no case is made out against the accused sufficiently to require him to make a defence, the court shall deliver a judgment in the manner provided for in sections 139 and 140 acquitting the accused.*
>
> *(2) If, when the evidence referred to in subsection (1) has been taken, the court is of the opinion that a case is made out against the accused sufficiently to require him to make a defence in respect of the offence charged or some other offence which such court is competent to try and in its opinion, it ought to try, it shall consider the charge recorded against the accused and decide whether it is sufficient and, if necessary, shall amend the same, subject to section 151."*

From the wording of the above-quoted provisions it should be evident that the obligation on the court to deliver a judgment in the manner provided for in sections 139 and 140 of the CP and E.C arises only when the court has found the accused with no case to answer and thus proceeds to acquit him. There is, however, no such an obligation when the court finds an accused with a case to answer (vide Section 254 (2) of the CP and EC). This Court is fortified in its view by the words of the Supreme Court of Appeal in the case of **Namata v Republic**, MSCA Criminal Appeal No. 13 of 2015 (unreported), cited by the Respondent, where the Court at page 20 had this to say:

> *"Fourthly, we should reiterate that section 254 only obligates a trial court to make a finding whether or not a prima facie case has been made out. It does not specify a fashion in which this should be done. Except where the court is acquitting in which case sections 139 and 140 of the CP and EC must be complied with. The foregoing is not to say that it is wrong to give reasons for such opinion or to analyse the evidence leading to such conclusion. Just that it is not by itself an error to fail to give a detailed analysis of the evidence leading to a finding of a case to answer. Or reasons therefor."*

In the premises, this Court would be inclined to find that the lower court was thus under no obligation to set out its analysis for its finding that a *prima facie* case had been established against the Applicants to require them to make their defence.

Now, given that the lower court was under no obligation to give reasons for its finding that the Applicants had a case to answer, it would thus be premature for this Court to delve into whether or not any element of the offence had not been proved. It is the view of this Court that proceeding to do so would be tantamount to holding that the lower court was under an obligation to make an analysis of the evidence leading to the finding that the Applicants had a case to answer. The Supreme Court of Appeal in the **Namata** case (*supra*) emphatically stated that "*it is not by itself an error to fail to give a detailed analysis of the evidence leading to a finding of a case to answer or reasons therefor*."

Kapindu J in the case of **Paul Norman Chisale v Republic**, Miscellaneous Criminal Application No. 4 of 2021 (unreported) had this to say:

> *"The Court is of the opinion that this Court should be very slow to interfere with ongoing proceedings in subordinate courts through the exercise of its supervisory and review powers over subordinate courts as provided for under the Courts Act and the Criminal Procedure and Evidence Code. It should be under very compelling circumstances that such jurisdiction and powers of this Court are invoked so as to stop an ongoing proceeding and review the same."*

This Court fully subscribes to the foregoing sentiments of **Kapindu J.** and hastens to say that the proper course of action to be taken by the Applicants is to enter upon their defence and raise the issue of failure by the prosecution to prove any element of the offence in their final submissions than to halt the ongoing proceedings before the lower court.

6. Conclusion:-

Having come to the conclusion that the lower court was under no obligation to give reasons for making its finding that the Applicants had a case to answer and further that the said court did not thus err in law in making such a finding, this Court now proceeds to dismiss the Applicants' application for the review of the lower court's finding that the Applicants have a case to answer with costs to the Respondent.

Consequently, it is the order of this Court that the proceedings in the lower court should proceed with the defence case as per the finding of the said court.

Dated this Fifteenth day of June, 2021.

CHIRWA J.
JUDGE