REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY

MISCELLANEOUS CRIMINAL APPLICATION NUMBER 49 OF 2022
(Being Criminal Case No. 589 of 2021 before the SRM sitting at Mangochi)

BETWEEN

ALUBI KASALE AND 7 OTHERS ..... APPLICANTS

AND

THE REPUBLIC ..... RESPONDENT

Coram: *Honourable Justice Violet Palikena-Chipao*
Mr. A. Kapoto, of Counsel for the Applicants
Ms. L. Kulesi, of Counsel for the Respondent
Ms. A. Kazambwe, Official Interpreter and Court Clerk
Ms. L. Mboga, Court Reporter

JUDGMENT ON APPEAL

Chipao J,

The Applicants Alubi Kasale, Pias Ellioti, Patuma Amadu, Patuma James, Jika M'bawa, Jawadu James and Hawa Alick were convicted of the offence of harmful cultural practices contrary to section 80 as read with section 83 of the Child Care, Protection and Justice Act and were sentenced to 2 years imprisonment with hard labour. They have all filed an appeal against both their conviction and sentence.

The background of the appeal is that the Appellants were arrested on or about the 8th of November 2021on allegations of having committed the offence of harmful cultural practices. On 10th November, 2021 they appeared in court and they were charged and convicted of the offence of harmful cultural practices contrary to section 80 as read with section 83 of the Child Care,

Protection and Justice Act and sentenced to 2 years imprisonment on the same day. They were convicted on pleas of guilty. The record of the lower court indicate 8 Accused persons but the appeal is in respect of 7 Appellants as the 8th Suspect did not attend trial having escaped from police.

The Appellants filed a notice of appeal against their convictions and the sentence imposed. The grounds of the appeal are as follows;

1. That the learned magistrate erred in law and fact in convicting the Appellants on a charge with insufficient particulars.
2. That the learned magistrate erred in law and fact in entering a plea of guilty when the Appellants pleaded not guilty/and or their plea was equivocal.
3. That the learned magistrate erred in law in convicting the Appellants when both particulars of the offence and facts did not constitute the offence of harmful cultural practices.
4. That the learned magistrate erred in law and fact in failing to satisfy himself that the Appellants understood and admitted to the ingredients of the offence of harmful cultural practices.
5. That the learned magistrate erred in law and fact in meting out a custodial sentence to the Appellants without first considering the provisions of sections 339 and 340 of the CP & EC.
6. That the learned magistrate erred in law and fact in meting out a custodial sentence without considering the Appellants individual mitigating factors
7. That the custodial sentence of 2 years imprisonment with hard labour was manifestly excessive and unfair.

The appeal is against both conviction and sentence.

Appeal against Conviction

The grounds of appeal against conviction will be categories into three; sufficiency of particulars, regularity of plea of guilty and adequacy of facts. Regularity of plea covers grounds 2 and 4 of appeal.

In determining the appeal, this court is mindful of the principles guiding it in exercise of its powers on appeal. As was held by the Supreme Court of Appeal in the case of ***Pryce v. Republic, [1971-76] 6 ALR (Mal) 6*** that this court as an appellate court, is entitled to undertake a fresh review of the evidence and arrive at its own conclusions, independent of those at trial. This court is further mindful that whilst it is called upon not to disregard the decision of the trial court; at the same time, it is called upon to carefully consider the decision without shrinking from overruling it where the court comes to the conclusion that the judgment was wrong.

The offence which the Appellants were convicted of is one of harmful cultural practices which is provided for in section 80 as read with section 83 of the Child Care, Protection and Justice Act (CCPJA). Sections 80 and 83 of the CCPJA provides as follows;

Section 80 No person shall subject a child to a social or customary practice that is harmful to the health or general development of the child.

Section 83 A person who contravenes sections 80, 81 and 82 commits an offence and shall be liable to imprisonment tor ten (10) years.

For the offence to be established, there must be a practice whether social or cultural. Such a practice must be harmful to health or general development of a child.

From the charging section, a harmful cultural practice is either a social or cultural practice that is harmful to health or general development. The court has considered Mirriam-Webster Dictionary of law's definition of harm which connotes loss or damage to a person's right, property, or physical or mental well-being. It has also considered the definition of harm advanced by the Appellants as according to the Black Laws Dictionary. The Court will therefore proceed on the understanding that harmful cultural practice is that which would cause detriment to a person's rights, physical or mental well-being.

Sufficiency of Particulars of the charge

On sufficiency of particulars, this court has in mind sections 126 and 128 of the Criminal Procedure and Evidence Code (the CP & EC) which provide guidance on drafting charges and section 42(2)(f)(ii) of the Constitution. Section 126 of the CP & EC provides that:

> *"Every charge shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."*

And Section 128(a) (ii) and (iii) of the CP and EC stipulates, inter alia, that:

> *"The statement of offence shall describe the offence shortly in ordinary language, avoiding so far as possible the use of technical terms.*
>
> *After the statement of offence, particulars of such offence shall be set out in ordinary language in which use of technical terms shall not be necessary."*

Most importantly, Section 42 (2) (f) (ii) of the Republic of Malawi Constitution says that one of the rights of an accused person is a fair trial, which includes the right: to be informed with sufficient particularity of the charge preferred against him. An accused person must be informed of the charge against him with sufficient particularity so that he knows the charges against him and also to enable him prepare for to be able to prepare for his defence. The first ground of appeal in this

case is that the charge was defective in that it did not contain sufficient particulars. The Appellant argued that the particulars of the offence as indicated in the charge sheet were insufficient and did not disclose the offence of harmful cultural practices. It was argued on this ground that the charge sheet indicated that confining children for initiation was a harmful cultural practice and that the court itself noted that confinement of children for initiation is not a harmful practice and that without indicating how harmful the cultural practice is, the particulars were insufficient. The State on its part argued that the court did have enough information regarding the offence the Appellants were convicted of and that the record demonstrates why the Appellants were arrested.

The particulars of the offence which the Appellants were convicted of were as follows;

> *Alubi Kasale, Pius Eliot, Patuma Amdu, Patuma James, Jika Mb'awa, James Jawadu, Hawa Alick and Amadu Mustafa, on the 3rd of November, 2021 at Manjombe in the district of Mangochi forced children into a harmful practice by putting them in confinement for initiation.*

The particulars suggest that the harmful practice in this case is the putting of the children in confinement for initiation. Putting children in confinement for initiation *perse* is not a cultural practice. Perhaps the cultural practice is the initiation itself and not the fact of confinement for the same. Assuming that confinement is a cultural practice, the particulars however do not show how harmful is the act of putting children in confinement for initiation. Neither do the particulars show how or why initiation as a cultural practice is harmful to health or development of the children. In other words, there is no suggestion as to the resultant harm that will flow from the initiation. Initiations are part of cultural practices and there are benefits that are derived from initiations. It is important that perhaps a specific practice or aspect associated with initiation which makes it harmful should have been referred to in the charge sheet and its actual or perceived harm to the participants. Perhaps as suggested from some of the responses, which seems to be raising the element of timing of the initiation as the problem, then the particulars of the offence should have referred to the timing of the practice and its harm to the health or development of the children. Impropriety of the timing needs to be understood in the light of the elements of the offence, namely that the cultural practice has to be harmful to health or development of the children. The manner in which the charge was drawn did not provide sufficient particulars as to what harm the practice was associated with to make it harmful therefore the court finds that the particulars of the charge insufficient.

Regularity plea of guilty

It was argued on behalf of the Appellants that the court erred in entering a plea of guilty when in fact the Appellants' plea was equivocal. The State on the other hand argued that the plea of guilty was regular as the record contains responses of each person and that each Appellant indicated that they understood the charge and agreed to it. The State further argued that the lower court explained the circumstances surrounding the offence as required by law and asked the Appellants if they

heard the facts narrated in support of the charge. The State also argued that as required by the law, the lower court warned the Appellants of the consequences of pleading guilty before entering a plea of guilty.

Section 251 of the CP & EC provides for the procedure on plea taking. The section provides as follows;

> *(1) When an accused appears or is brought before a court, a charge containing the particulars of the offence of which he is accused shall be read and explained to him and he shall be asked whether he admits or denies the truth of the charge.*
> *(2) If the accused admits the truth of the charge his admission shall be recorded as nearly as possible in the words used by him and he may be convicted and sentenced thereon:*
> *Provided that before a plea of guilty is recorded, the court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit without qualification the truth of the charge against him.*

The court upon reading the charge to the Accused, will enter a plea of guilty if the Accused person admits the charge. Once the accused person says he admits the charge, the magistrate has to put to the accused each element of the offence charged. Every response must be recorded and if the accused agrees to each element put to him without qualification, then a plea of guilty can be entered. In the case of ***Republic v Benito*** [1978-80] 9 MLR 211, 213, Chatsika, J (as he then was) said -

> *"It is trite law which has been emphasized many times in this court that before a plea of guilty is entered all the ingredients of the offence must be put to the accused person and he must admit each and every one of those ingredients. It is only when this has been done that a plea of guilty may properly be entered. If the accused person in making his replies to the charge modifies his admission by stating some justification, a plea of guilty should not be entered."*

Reading through the responses of the First to Seventh Accused Persons, it is only with respect to 4th Appellant that the issue of harm was raised. In his response he *said* ***"I put my child in the camp which is hazardous for his growth at this time.*** For the First Appellant, the issue of harm was not put to him. For 2nd and 3rd Appellants, it appears the issue was more to do with the timing. They all said 'it was bad to do it now' and others went further to say that schools were in session. As for 5th and 6th Appellants, they admitted confining their children and that they did so because they wanted their children to be initiated. From their responses, there is no suggestion that it was put to them whether they knew that the 'cultural practice was harmful to their children's health or development. If the lower court was mindful of the elements of the offence before it and the responses given by the 6 Appellants following their reply '*I admit,*' it could not have entered a plea of guilty. This is inevitable where like in the present case, the charge is poorly done without capturing the necessary ingredients of the offence. The court therefore finds the plea in respect of

the 1st to the 6th Appellant to be defective. It is important for prosecuting authorities to have a clear understanding of what elements establish an offence as they draw up the charge. Poorly drafted charge can affect the nature of the evidence. The trial court must also ensure that all elements of the offence are put to the accused person because that would help it to ascertain that in admitting the offence, the Accused person understands what offence he is admitting to. It may as well be that the accused person is simply acknowledging that he confined the children for initiation without really admitting that he knew that the initiation was harmful for his health or development.

Unlike the first 6 accused persons who said '*I admit,* ' the 7th Accused person in her response clearly denied the charge. Interestingly, the lower court proceeded to enter a plea of guilty even in his respect. The response of the 7th Appellant was as follows;

> *I understand the charge. I am village headwoman Manjombe. I denied them to put children in the camp. I did not report to any authority. This is not a proper time for these camps. Children are writing exams.*

Nowhere did 7th Appellant suggested that he admitted the charge and yet the court proceeded to enter a plea of guilty. Even in her caution statement, she clearly denied any involvement in the initiation process. Entering a plea of guilty in such circumstances was clearly irregular.

It is also noted that under section 251 of the CP & EC, the trial court was also mandated to ascertain that the Appellants not only understood the offence charged but also understood the nature and consequences of pleading guilty. An Accused person must understand that by pleading guilty, he may be convicted without the matter going for full trial and he may be sentenced there and then (See ***Republic v. Pempho Banda & Others [2016] MWHC 589***). Failure to adhere to the proviso in section 251 of the CP & EC has been held to be an irregularity which cannot be cured under sections 3 and 5 of the CP & EC. In view of the foregoing, the court finds the pleas of guilty entered in respect of the 7 Appellants defective.

Facts in supporting the offence

The Appellants argued that the Appellants were wrongly convicted as the particulars of the offence as well as the facts narrated by the State did not support an offence of harmful cultural practice. It has been argued by the State that the confinement of children in a camp for purposes of initiation during school time was a violation of the right to education and that as such the ritual constituted a harmful cultural practice more so that the time the alleged offence happened, children were writing examinations. It was the State's argument that if the ritual was conducted without interfering with education of the children, no crime would have been committed. The State further argued that the fact that parents of the children consent to their children being initiated did not exonerate the Appellants as consent is not an element of the offence.

It is the prosecution's duty to prove the charge against an accused person and so even where an accused pleads guilty, the prosecution has the obligation to provide facts that prove the offence charged. This is why in recording the verdict the court states;

> *On your own plea of guilty and on your own admission of the facts as narrated by the prosecution and* ***upon the court being satisfied that the facts disclose the offence charged*** /Emphasis added].

In respect of a plea of guilty, a conviction is not entered simply because there is a plea of guilty and an admission of facts narrated. The court must be satisfied that the facts disclose the offence charged.

The facts narrated by the prosecution were to the effect that the Police got a report from GVH Pongolani that Village headwoman Manjombe had confined children in a camp for initiation and that he reported to the Police because this was not the proper time for initiation. The Prosecution further said that following the report they stormed the camp and found children 7 of whom were school going. They arrested the suspects with the help of the GVH but one suspect ran away. The impropriety of the timing was not explained in the facts. It appears it was left to the court to deduce from the fact that some children were school going and that therefore this time must have been improper because it was school time. It is from the particulars that one gets to note that the initiation camp was set in November but the facts are silent on the same. The Prosecution and the lower court made remarks which were crucial to the question of harm and the fact that the timing was during time that the children were not only supposed to be in school but were writing their examinations. It is from these remarks that one gets to hear that the timing of the initiation camp infringed upon the right to education of the children which is also crucial to their development. The Constitution guarantees the right to culture under section 26. Enjoyment of such a right however must not be forced upon the children and must not be at the expense of their other rights such as the right to education. These crucial remarks were however made after the Appellants had already been convicted and during sentencing. They out to have been reflected in the particulars of the charge and the facts in support of the same. Considering the manner in which the particulars of the charge were done, the nature of the response in plea taking we cannot conclude that the facts narrated though acknowledged by the Appellants sufficiently proved the offence of harmful cultural practices.

It must be recalled that the offence is about cultural or social practices that are harmful to children's health or development. The offence is not about the timing of a particular practice. It is about the harm that a particular practice occasions or may occasion to a child. If the timing is a relevant fact of that harm (which is the case in the present case), then relationship between the harm and the timing must have been shown. Otherwise, in the absence of the correlation between a cultural

practice, its timing and harm, the offence cannot be said to have been established. In the case at hand, the facts did not show this relationship. It appears it was an assumed fact. It was assumed that it is a known fact that conducting initiations during school time is detrimental to children's education yet in the particulars nothing was mentioned about the children being school going and that the confinement was done during school time. Proof of an offence requires evidence on paper and not in the mind. The facts narrated in this case were not sufficient to support the offence charged.

This court is mindful of the fundamental principles enunciated in sections 3 & 5 of the CP & EC. The two sections provide as follows;

Section 3	The principle that substantial justice should be done without undue regard for technicality shall at all times be adhered to in applying this Code.
Section 5	(1) Subject to section 3 and to the other provisions of this Code, no finding arrived at, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal of complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code unless such error, omission or irregularity has in fact occasioned a failure of justice. (2) In determining whether any error, omission or irregularity has occasioned a failure of justice the court shall consider the question whether the objection could and should have been raised at an earlier stage in the proceedings.

Section 3 of the CP & EC provides for an overriding principle of the Code which is that substantial justice should be done without undue regard to technicalities in application of the Code (CP & EC). While bearing in mind the principle in section 3, section 5 provides that no finding of the court is to be altered or reversed on grounds of an error unless the error, omission or irregularity occasioned a failure of justice. This view was taken in the case of ***Republic v. Chapondera & 2 Others Confirmation Case No. 451 of 2000*** where the court held as follows;

> *A court on review or appeal, unless the defendant is not prejudiced in any way either on how he understands the matters he is in court for or in the presentation of his defense, will interfere with the conviction where there are serious defects in the framing of charges (R v Miti (1923-61) 1 ALR (Mal) 205). The Court will not interfere where the defect occasions no injustice to the defendants (Britto v R (1961-63) 2 ALR (Mal) 511). In this matter, the prosecutor presented the facts in support of the plea succinctly and in a manner clearly demonstrating the defendants committed two offences. The defect in the particulars did not prejudice the defendants. The conviction is confirmed.*

The only defect in this case was in the particulars of the charge but the facts were concisely presented thereby occasioning no injustice.

Defects in the present case were that the particulars were insufficient, that the plea taking process was defective and that the facts in support of the charge were not sufficient. In relation to defect in the plea taking process, non-compliance with section 251 of the CP & EC, have been held to be fatal. In the cases of ***Thokozani Malenga v. Republic Criminal Appeal No. 19/2021; Isaac Sitole and Emmanuel Cosmos v. Republic*** Criminal Appeal No. 37/2016; ***Yamikani Paul v. Republic*** and ***Republic v. Pempho Banda & Others [2016] MWHC 589*** it was held that failure to adhere to section 251 of the CP & EC is fatal and cannot be cured under sections 3 & 5 of the CP & EC. Considering that there were multiple defects some of which are incurable under sections 3 & 5 of the CP & EC, the court finds that the conviction cannot stand. It is quashed. Having quashed the conviction, it is unnecessary to consider the propriety of the sentence imposed as the sentence has no basis to stand on. It is set aside.

The court did consider the issue of retrial following the quashing of the conviction. Considering that the defects not only touched the particulars of the offence and the plea taking process but also facts narrated for the offence, a retrial would give the State a second bite of the cake. The Court has also considered that that the Appellants have been in custody for close to five months and in is of the view that order for retrial is not appropriate in the circumstances. Having quashed the conviction and set aside the sentence, the court orders that the Appellants be released from custody unless if held for other lawful causes.

Joint charge

No issue was raised by the parties as regards the propriety of charging the Appellants under one count but the court noted that there was some irregularity which for future purposes must be guarded against. It is noted from the responses of the Appellants as well as from their caution statements that they prayed different roles in the offence which they were alleged to have committed. Some were merely parents who had sent their children to the initiation camp for initiation but were not part of the initiation process itself. This is applicable to the 2nd, 3rd, 4th, 5th and 6th Appellants. First Appellant was a traditional initiation doctor (Ngaliba) who initiated the boys. The seventh Appellant was a village headman from the village where the initiation camp was set up. Section 127(4) of the CP & EC provides for joinder of accused persons. According to the section, the following people can be jointly charged;

(a) persons accused of the same offence committed in the course of the same transaction;
(b) persons accused of an offence and persons accused of abetment, or of an attempt to commit such offence;

(c) persons accused of more offences than one of the same kind (that is to say, offences punishable with the same amount of punishment under the same section of the Penal Code or of any other written law) committed by them jointly within a period of twelve months;

(d) persons accused of different offences committed in the course of the same transaction;

.....

The court is also mindful that under section 21 of the Penal Code, people who aid, abet or procure the commission of an offence may be charged as though they committed the offence themselves and that as such the Appellants even though they played different roles, they could be charged together. However considering their different roles it would have been proper whilst charging the Appellants under one charge sheet to charge the Appellants in separate counts to reflect their different roles or in the alternative in the presentation of the facts to reflect the different roles which every person played and why that brings them within the offence.

Pronounced in Open Court at **Zomba** this **11th** Day of **April, 2021**.

Violet Palikena-Chipao

JUDGE