IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 9 OF 2021

(Being Criminal Case No 280 of 2020 in the First Grade Magistrate Court sitting at Nchalo)

PATRICK NKOSA

-V-

THE REPUBLIC

CORAM: HON. JUSTICE AGNES PATEMBA
Mr. Maele, Counsel for the Appellant
Mr. Chisanga, Counsel for the Accused
Mrs. Mthunzi, Court Reporter
Mr Amos, Official Interpreter

JUDGMENT ON APPEAL

1. The Appellant, Patrick Nkosa was arrested on the 21st November, 2020 on the allegation that he committed the offence of being found in possession of forest produce without Permit contrary to Section 68 (3) (a) of the Appellant was Forest Act. He pleaded not guilty to the charge and after full trial, the First Grade Magistrate found the Appellant guilty and convicted him of the offence of being found in possession of forest produce contrary to section 68 (3) (a) of the Forestry Act and was sentenced to 36 months Imprisonment with Hard Labour.

SUMMARY OF FACTS

2. The prosecution evidence was to the effect that on the night of 21st of November, 2020 the Forestry Department received information from a well-wisher that a truck, registration number BX 660 Mercedes Benz is loading charcoal at Chapananga. The Forestry officers managed to ambush the driver of the truck and stopped him. When asked about the load he indicated that he carried bags of potatoes. However, after being quizzed he revealed that he was carrying bags of charcoal and had no documentation of ferrying charcoal. He revealed that the owner of the charcoal is Patrick Nkosa Hamba. The driver called the owner of the charcoal to join him which he did. He was asked to produce documentation permitting him to possess the said charcoal but failed to produce the same. The appellant was arrested and charged with the offence of found in possession and trafficking charcoal without permit contrary to section 68 (3) (a) of the Forestry Act.

3. The defence evidence was to the effect that the Appellant got charcoal from his friend Domingo who hails from Mozambique. He tendered 2 documents written in Portuguese to show that he got charcoal from Mozambique. However, he testified that he does not know the content of the document that he tendered in court. He informed the court that he was on his way to the Forestry office in Chikwawa to secure a permit or licence when the truck which was carrying the charcoal was intercepted by Lengwe National Parks officers. He admitted that he had no permit to possess charcoal when he was arrested by forestry officer.

GROUNDS OF APPEAL

4. Being dissatisfied with the lower court judgment he filed an appeal with the High Court and raised the following grounds;

   (a) That the Lower Court erred in law in convicting the Appellant of the offence of being found in possession and trafficking charcoal without permit contrary to section 3 (a) of the Forestry Act when there was no evidence proving the charge.

   (b) That the sentence of 3 years IHL is manifestly excessive.

ISSUES

5. The Court is called upon to consider the following issues;

   (a) Whether the lower court erred in convicting the Appellant

   (b) Whether the offence of being found in possession of charcoal was the appropriate offence to be charged with or not

   (c) Whether the sentence was manifestly excessive or not

THE LAW

6. Section 68 (3) (a) of the Forestry Act states that:-

   Any person who without a licence or permit

   (a) Enganges in the production or possession, trafficking or sale of Charcoal commits an offence and shall be liable upon conviction to a fine of K5, 000,000.00 and to imprisonment for ten years.

Section 2 of the Forestry Act provides that;

Forest means an area of land proclaimed to be a forest under this Act or unproclaimed land with less trees on it.

ANALYSIS

7. The Forestry Act makes it an offence for any person to be engaged in production, possession, trafficking or sale of charcoal without a permit or licence. Section 73 of the said Act makes it an offence whether the forestry produce (which includes charcoal) is from within the jurisdiction or from outside the jurisdiction. The person who is in possession or trafficking forestry produce must obtain a licence or permit prior to the possession of the charcoal. It is an offence if the Appellant did not have any permit or licence from the department of forestry to possess charcoal which is a forest produce.

8. The Appellant admitted that he did not have any permit when he was found in possession of the charcoal. He alleged that he got the charcoal from Mozambique. He tendered some documents to show that he got the charcoal from Mozambique. The lower court on this issue had this to say on page 4 of the judgment;

> *The first accused told the court that the vehicle which was carrying the bags of charcoal was intercepted when it was on its way to forestry offices in Chikwawa district for him to have a licence. It is clear from what he said that he had no licence when the vehicle carrying bags of charcoal was intercepted. He said that he had documents from authorities in Mozambique. Unfortunately those were not licences / permits. Licence are only issued by licensing officers from the department of forestry. I therefore find that the first accused had no licence /permit to possess 124 bags and other 3 small bags of charcoal.*

9. This Court agrees with the lower court's observation that indeed the documentation presented by the Appellant in the lower court as proof of importation of charcoal is not valid documentation. As such there is no proof that the said charcoal was imported from Mozambique. If indeed he imported the said charcoal from Mozambique the Appellant was under obligation to bring importation certificate before the court. He was expected to show Malawi Revenue Authority documentation that he had paid duty of the said imported charcoal. None of the documentation mentioned above was presented before the court. So it is clear that the allegation of importation of charcoal does not arise in this matter, therefore the charcoal that was in possession of the Appellant was produced within the jurisdiction. If indeed he got the charcoal from Mozambique to Malawi, it means the Appellant smuggled the charcoal to Malawi which is an offence.

10. The above discussion answers the critical question that Counsel raised in his submission under paragraph 3.1.11 as to whether the charcoal which was found with the Appellant is a forest produce having in mind the definition of forest produce under section 2 of the Forestry Act which applies within the boarders of Malawi. Suffice to say that the charcoal which was found in possession with the Appellant was found at Chapananga in Chikwawa district which is within the borders of Malawi.

11. Counsel for the Appellant made submissions that the law regarding forestry is not clear because under section 81(1) of the Forestry Act there is prohibition from the making of or selling of charcoal from indigenous timber. Counsel argued that it should conversely follow that it is not an offence under the Forestry Act to make or sale charcoal from exotic trees or timber. It would similarly be odd if the law prohibited making of timber from indigenous trees only but crimininalised the possession of charcoal from exotic trees when the making of the same is not a criminal offence.

12. It should be made clear that the law is not criminalizing possession of charcoal. The law makes it an offence to possess charcoal without a licence. The Appellant was convicted not because he possessed charcoal. He was convicted because he had no licence to possess the said charcoal. There is no offence if one has a licence to possess any forest produce.

13. Section 81 of the Forestry Act (As amended by Act No. 7 of 2020) provides that;

> *(1) No person shall make or sell charcoal from indigenous timber or tree except pursuant to a licence issued under this section.*
>
> *(2) Notwithstanding any provision of this Act, any officer shall not be allowed to issue a charcoal licence under this section other than the Director of Forestry.*
>
> *(3) Upon application in the prescribed form, the Director of Forestry may, where he finds that the making of charcoal shall utilize plantation timber or indigenous timber or trees consistent with the applicable forest management agreement plan or forest management agreement or forest plantation agreement or concession agreement issue a licence to an applicant to make charcoal in such quantity and from such timber or trees as may be specified in the licence.*

14. The concerns raised by Counsel for the Appellant under section 81(1) of the Act, that the Act is prohibiting the making of charcoal from indigenous timber or trees and yet it does not prohibit the making of charcoal from exotic timber or trees have been addressed under section 81(2) of the Act. The law provides that the Director of Forestry may issue a licence to an applicant to make charcoal from **plantation** timber or trees or indigenous timber or trees. Licence may therefore be given to an applicant to make charcoal from plantation (planted) trees or timber or from indigenous (natural) timber or trees. My understanding of plantation timber or tree is that it refers to exotic timber or trees which has the characteristics of being planted and specially taken care of. I therefore do not find any ambiguity with the provisions of the Act as submitted by Counsel. Making of charcoal from exotic and indigenous timber or trees requires one to have a licence from the Director of Forestry.

15. The State properly charged the Appellant with the right offence and the same was proved beyond reasonable doubt by the state. The appeal is therefore dismissed.

16. Counsel for the Appellant submitted that if the court upholds the conviction, he is of the considered view that the sentence is excessive and the Court should consider reducing the sentence of 36 months IHL to a fine of K200,000.00 or to 6 months IHL. The offence of possessing charcoal without a licence under section 68 (3) (a) attracts a penalty of a fine of K5, 000,000.00 and to imprisonment for ten years. The Appellant was sentenced to a custodial sentence of 36 months IHL. Counsel further submitted that the lower court took into consideration the previous conviction of the Appellant which was not properly proved. He cited the case of ***Saka v. Republic*** 11MLR 118 at 120 where the Court said that;

> It is a general principle that after securing a conviction, the prosecution must present a list of previous convictions which should be put to the accused. In this resent case the prosecutors says he knew the Appellant personally and that he was in prison at one time. Indeed, this the Appellant admitted. He stated that he was in prison on a civil matter, namely tax defaulting.

17. He further cited another case of ***Republic v. Phiri*** 1997(2) MLR on page 36 where the Court stated on page 38 that;

The Court below when passing sentence, considered the fact that the defendant had previous convictions. I do not think the Court was right in that. These had not been proved. The Prosecutor told the Court that the defendant had just been released from prison for committing a similar offence. The matter was not put to the prisoner at all there was no certificate of his previous convictions. This is not the way to prove previous convictions for purposes of having them influence the court. The court should, if it did not want to adjourn for purposes of proving the previous convictions, they could have treated the defendant as a first offender. The way to prove the previous convictions to the satisfaction of the court is under section 181 of the Criminal Procedure and Evidence Code and section 7 of the Fingerprints Act

18. Page 49 to 51 of the lower court record shows that the lower court adjourned the matter to allow the prosecution bring evidence to prove that the Appellant was not the first offender. On the appointed date, the State was ready to parade two witnesses to prove that the Appellant was not the first offender. Before the first witness took his stand to testify against the Appellant, it was at this point when the Appellant apologized to the court for denying that he is not the first offender. He admitted that indeed he was once convicted of a similar offence and was sentenced to a fine of K250, 000.00. The court proceeded to treat him as a repeat offender and sentenced him to 36 months IHL. The lower court followed all the necessary procedures to prove that the Appellant is not the first offender. Therefore the submission made by Counsel for the Appellant that there was no evidence against the Appellant that he was a repeat offender does not hold water.

19. Counsel for the Appellant submitted that the sentence of 36 months IHL imposed by the lower court was on a higher side and prayed to the court to consider reducing it to either a fine of K200,000.00 or custodial sentence of 6 months IHL. Section 68 (3) (a) of the Forestry Act provides that the penalty for committing an offence of possession or trafficking in charcoal is a fine of K5,000,000.00 and imprisonment of 10 years. The law does not give the court an option to either mete out a fine or custodial sentence to a convict. My understanding of the provision is that the court is under obligation to sentence the convict

to both a fine and to a custodial sentence. The maximum sentence of such an offence being 10 years imprisonment shows that possession of charcoal is a serious offence.

20. I have argued somewhere that courts should strive as much as possible to enforce the intentions of the Legislature whenever they are meting out sentences to convicts. It wouldn't be in the interest of justice that an offence which attracts 10 years imprisonment then a court should impose a custodial sentence of 6 months IHL to a convict who is a repeat offender. It is a mockery to justice. There is need for concerted efforts to ensure the forest produce is protected using the law which was put in place. A strong message ought to be sent out to the community that possession of charcoal is a serious offence. We cannot have beautiful laws on paper and yet fail to implement the same.

21. The Appellant was once given a fine of K250, 000.00 for committing a similar offence. The Court expected the Appellant to have learnt a lesson and be of good behavior. Instead the Appellant continued to commit the same offence by contributing to the depletion of nature.

22. There is no compelling reason why this Court should not uphold the sentence imposed by the lower court. In conclusion therefore I dismiss the appeal and uphold the sentence imposed by the lower court of 36 months IHL.

23. I so order.

Delivered this **16th** Day of **July** 2021.

AGNES PATEMBA,

JUDGE