

REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

ZOMBA DISTRICT REGISTRY

CRIMINAL REVIEW CASE NUMBER 3 OF 2021

(Being Criminal Case No 157 OF 2021 before the FGM at Phalombe)

BETWEEN

THE REPUBLIC

AND

RHODA LYTON AND NINE OTHERS

ORDER ON REVIEW

Rhoda Lyton, John Gomanj, Franck Topholo, Enifa Kachere, Pilirani Padwale, Samson Daniel, Mary Austine, Blessings Willy and Mike Raphael were charged and convicted of the offence of buying or dealing farm produce without licence contrary to Regulation 3(2)(b) as read with Regulation 8 of the Smallholder Agricultural Produce (Marketing) Regulations. They were sentenced to a fine of K60, 000 each and in default 9 months imprisonment. In addition to the punishment, the court further ordered that the owner of the vehicle should pay a fine of K175, 000 to redeem the vehicle and that farm produce subject of the offence be forfeited to the government.

The Chief Resident Magistrate wrote this court requesting for urgent review of the matter on the basis of a similar decision of the High court in the case of *Erick Mugerwa v. Republic Criminal Appeal No. 24/2021 HC (LL)* where it was held that the Regulation relied upon was no longer law.

The High Court exercises powers of review over subordinate courts under sections 25 & 26 of the Courts Act and section 362 of the Criminal Procedure and Evidence Code. The sections provide as follows;

Section 25 of the Courts Act

The High Court shall exercise powers of review in respect of criminal proceedings and matters in subordinate courts in accordance with the law for the time being in force relating to criminal procedure

Section 26 of the Courts Act

- (1) In addition to the powers conferred upon the High Court by this or any other Act, the High Court shall have general supervisory and revisionary jurisdiction over all subordinate courts and may, in particular, but without prejudice to the generality of the foregoing provision, if it appears desirable in the interests of justice, either of its own motion or at the instance of any party or person interested at any stage in any matter or proceeding, whether civil or criminal, in any subordinate court, call for the record thereof and may remove the same into the High Court or may give to such subordinate court such directions as to the further conduct of the same as justice may require.*
- (2) Upon the High Court calling for any record under subsection (1), the matter or proceeding in question shall be stayed in the subordinate court pending the further order of the High Court.*

Section 362 of the Criminal Procedure and Evidence Code

- (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been forwarded under section 361, or which otherwise comes to its knowledge, the High Court, by way of review, may exercise the same powers as are conferred upon it on appeal by sections 353 (2) (a), (b) and (c), and 356.*
- (2) No order made in exercise of the powers conferred in this section shall be made to the prejudice of an accused unless he has first had an opportunity of being heard either personally or by a legal practitioner in his own defence.*

In exercise of its powers on review, the High Court can alter the conviction and sentence passed by the lower court.

The Chief Resident Magistrate in remitting the file to this court, referred this court to the decision of Honourable Justice Mtalimanja in the case of *Erick Mugerwa v. Republic Criminal Appeal No.*

24/2021 HC (LL) where the convict was charged and convicted and the same law as in the present case. The relevant part of the judgment reads as follows;

In ground 1 of appeal, the Appellant contends that the Magistrate erred in law in convicting him of an offence which is not known under the law. As indicated, the Appellant was charged and convicted of an offence of buying or dealing farm produce without licence contrary to Regulation 3(2)(b) as read with Regulation 8 of the Smallholder Agricultural Produce (Marketing) Regulations, Cap 65:05 of the laws of Malawi.

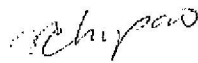
An examination of the Statute book shows that the Regulations under which the Appellant was charged and convicted were revoked by Government Notice No. 75 of 1994. The Appellant was therefore charged and convicted under non-existent law. The position at law and basic tenet of the criminal justice system is that a person can only be charged with and convicted of an act or omission which constitute a valid offence at the time of its commission or omission.

The court having found that the Regulations under which the appellant were charged and convicted were non-existent proceeded to find that the proceedings were a nullity and an exercise in futility notwithstanding that the Appellant pleaded guilty to the charge. As a result, the conviction and sentence passed were set aside.

The situation of the nine convicts in this case is similar to that of the Appellant in the ***Erick Mugerwa v. Republic Case***. They were all charged under the revoked Regulation 3(2)(b) as read with Regulation 8 of the Smallholder Agricultural Produce (Marketing) Regulations. On the authority of the ***Erick Mugerwa v. Republic Case*** and in view of section 42(2)(f)(v) of the Constitution which safeguards the right of an accused not to be convicted of an offence which was not an offence when the act was committed, the convictions and sentences in respect of the 9 convicts in the present case cannot stand. The proceedings were a nullity and they are set aside. The order of forfeiture is also set aside as the conviction on which it was based cannot stand. Similarly, the order of the fine of K175, 000 to the owner of the vehicle used to carry the farm produce is also set aside. The order of the fine on the owner of the vehicle is quite strange and it has no basis in law even if the convictions were lawful. A person cannot be ordered to pay a fine without first being convicted of an offence and nowhere in the judgment of the lower court is it shown that the owner of the vehicle was convicted of an offence. According to the record, the owner of the vehicle is Patrick Masangwi. Although he was charged together with the nine convicts, his case was withdrawn when the nine convicts pleaded guilty to the charge and at the time of the sentence, there was no indication that he had been convicted.

The Court in the *Erick Mugerwa case* advised the Registrar, the Chief Resident Magistrates and the Director of Public Prosecutions to ensure that all courts and prosecutors are furnished with updated statute book and to be kept abreast of the law revision orders. This directive be taken seriously by all concerned parties to ensure that justice is served.

Pronounced in Chambers this 29th of day of July 2021.



Violet Palikena-Chipao

JUDGE