



**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY**

CRIMINAL DIVISION

CRIMINAL APPEAL CASE NO. 24 of 2021

**(Being Criminal Case No. 335 of 2021 in the Second Grade Magistrate Court
sitting at Lilongwe)**

Between:

ERIC MUGERWA APPELLANT

and

THE REPUBLIC RESPONDENT

CORAM: Honourable Justice Annabel Mtalimanja

Mr. Khumbo Soko, of Counsel for the Appellant

Mr. Daniel Kuyokwa, of Counsel for the Respondent

Mrs. Choso, Court Clerk

Mrs. Namagonya, Court Reporter

**JUDGMENT ON APPEAL AGAINST CONVICTION AND
SENTENCE**

Mtalimanja, J

1. On 14th April, 2021, the Appellant, Eric Mugerwa, was charged before the Second Grade Magistrate sitting at Lilongwe with the offence of Buying

smallholder agricultural produce without a licence contrary to Regulation 3 (1)(b), as read with Regulation 8 (a), of the Smallholder Agricultural Produce (Marketing) Regulations, Cap. 65:05 of the Laws of Malawi. The particulars of the offence alleged that on or about 12th April, 2021, the Appellant engaged in the business of buying Smallholder agricultural produce, namely, 640 bags of soybeans for gain or profit, without a licence, at Namitete Trading Centre. On his own plea of guilty, he was convicted as charged. He was sentenced to pay a fine of K1 000, in default of which he would serve one month imprisonment with hard labour. The 640 bags of soybeans and the motor vehicle used to ferry the said bags were forfeited to the Malawi Government.

2. On 7th May, 2021, the Appellant filed a Petition of Appeal on the following grounds:
 1. The Magistrate erred in law in convicting the Appellant of an offence which is not known under the law;
 2. [without prejudice to Ground 1] the Magistrate erred in law when she proceeded to convict the Appellant when the facts as narrated by State did not support such a conviction;
 3. The Magistrate erred in law when she held that soybeans is an agricultural produce for purposes of the offence with which the Appellant was charged.
 4. The Magistrate erred in law in making forfeiture orders without affording the Appellant an opportunity to make representations; and
 5. [without prejudice to ground 4] that the sentence imposed by the Magistrate was in any case manifestly excessive and occasioned a failure of justice.
3. On 26th May, 2021, this Court, upon application by the Appellant, set aside the forfeiture orders and ordered that the 640 bags of soybeans and the motor vehicle be restored to the Appellant.

4. The hearing of the Appeal was set down for 4th June, 2021. In support of Appeal the Appellant duly filed and served Arguments. The State did not file any response. Instead, on 3rd June, 2021, the Respondent filed a Notice of Preliminary Issues to be raised at the hearing of the Appeal, namely:
 - a. That the Notice of Appeal was filed by Kita & Co on 5th May, 2021.
 - b. That the Order restoring the soybeans and the motor vehicle to the Appellant and the notice of hearing of the Appeal had been filed by Soko & Co.
 - c. That the Respondent had not been served with any notice of change of legal practitioner.
5. At the hearing of the Appeal, Counsel for the Appellant submitted that none of the preliminary issues raised had merit since the Respondent was duly served and even acknowledged, the Notice of Change of Legal Practitioners from Kita & Co to Soko & Co and the Petition and Grounds of Appeal. In response, Counsel for the Respondent conceded that indeed the return of service showed that all the highlighted documents had been duly served on the Respondent, within time, on 11th May, 2021. Counsel informed the Court that he had made concerted efforts to check with their Registry if the Appellant had served any processes, but was informed that there were none. Further, Counsel lamented with the Court on the internal challenges within the Director of Public Prosecutions Chambers relating to the management of documents that have been served on them, which is resulting in failure to attend to court business efficiently.
6. This Court makes an observation, specific to this case and generally to other cases that have come before this Court, that lapses in the internal arrangements within the Director of Public Prosecutions Chambers keep being cited for *inter alia*, failure to comply with time limits and to attend to court business efficiently. Time and again adjournments are sought on account of these lapses.
7. This Court seizes this opportunity to reiterate two crucial points. Firstly, adjournments are not granted as a matter of course. Whilst the decision to

grant an adjournment lies within the discretion of the court, this discretion is neither exercised arbitrarily nor on the basis of flimsy reasons. Secondly, internal arrangements are not the concern of the court. Each litigant, including the Director of Public Prosecutions, is required and expected to ensure that all that needs to be done internally to ensure court business is not being unnecessarily disrupted has been done. Thus, lapses in internal arrangements that have the net effect of negatively affecting court business are not a cogent basis for granting an adjournment.

8. Presently, since the Respondent had been properly served with the processes, as a matter of principle, this Court ordered the Appellant to proceed prosecuting his Appeal.
9. After the hearing, the Court allowed the Appeal and set aside both the conviction and sentence. This now is this Court's reasoned opinion.
10. It will be recalled the Appellant filed five grounds of appeal. On reflection, the Court will first consider ground 1 of appeal since the success of that ground effectively disposes of the remaining 4 grounds.
11. 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 with and convicted of the offence of Buying smallholder agricultural produce without a licence, contrary to Regulation 3(1)(b), as read with Regulation 8(a), of the Smallholder Agricultural Produce (Marketing) Regulations, Cap. 65:05 of the Laws of Malawi.
12. An examination of the statute book shows that the Regulations under which the Appellant was charged and convicted were revoked by Government Notice 75 of 1994. The Appellant was therefore charged and convicted under a non-existent law. The position of the 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 constitutes a valid offence at the time of its commission or omission.

13. The Constitution, in section 42 (2)(f)(v) safeguards this position by providing that

“an accused person has the right not to be convicted on an offence in respect of any act or omission which was not an offence at the time when the act was committed or omitted to be done, and not to be sentenced to a more severe punishment than that which was applicable when the offence was committed”. (emphasis added)

14. Since the Smallholder Agricultural Produce (Marketing) Regulations were revoked in 1994, the Appellant could neither be charged nor convicted under this law. This Court thus agrees with the Appellant that indeed the lower Court erred in law by convicting him under a non-existent law.

15. This Court therefore finds that the proceedings in the court below were a nullity and an exercise in futility. For the avoidance of doubt, it must be recorded that the finding that the proceedings were a nullity is notwithstanding the fact that the Appellant pleaded guilty. A plea of guilty can only be sustained where an accused person has been charged with a valid offence.

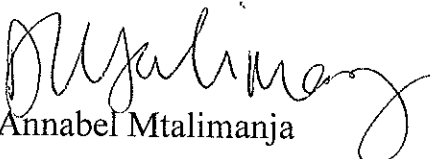
16. Since the proceedings were a nullity, the conviction and sentence cannot stand, hence both being set aside.

17. The conviction and sentence having been set aside, grounds 2 to 4 of Appeal automatically fall off and the Appeal succeeds in its entirety.

18. It will be remiss of this Court not to comment on the “mishap” of the lower court proceeding on revoked legislation. It appears to this Court that it is more than likely that the lower Court, the State and Counsel who represented the Appellant in the lower court were all using an unrevised statute book. As this case has shown, the need to regularly consult the law revision orders and keep abreast of developments in the law cannot be

overemphasized. The Registrar, Chief Resident Magistrates and the Director of Public Prosecutions are hereby enjoined to ensure all courts and prosecutors, respectively, are furnished with the updated statute book and kept abreast of the law revision orders.

Pronounced this 17th Day of June, 2021.


Annabel Mtalimanja
JUDGE