



THE REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

ZOMBA DISTRICT REGISTRY

CRIMINAL DIVISION

CRIMINAL APPEAL CASE NUMBER 12 OF 2021

**(BEING CRIMINAL CASE NO. 442 OF 2020 BEFORE THE SENIOR RESIDENT
MAGISTRATE SITTING AT MULUNGUZI)**

BETWEEN:

CHIKONDI NKHOMA APPELLANT

AND

THE REPUBLIC RESPONDENT

CORAM: HONOURABLE JUSTICE T. S. MASOAMPHAMBE

Mdazizira (LAB), of Counsel for the Appellant

Salamba (State), of Counsel for the Respondent

Tweya, Official Court Interpreter

Chilombo, Court Reporter

JUDGMENT

1.0 Introduction

1.1. This is an appeal brought by the Appellant, Chikondi Nkhoma, against the judgment that was made by the Senior Resident Magistrate sitting at Mulunguzi, Zomba, on 8th December, 2020.

1.2. The Appellant was convicted on his own plea of guilty on three counts namely; riding a motor cycle without a license contrary to section 18 of the Road Traffic Act, riding a motorcycle without insurance contrary to section 141 of the Road Traffic Act and using an unregistered motorcycle contrary to section 11 of the Road Traffic Act. Following which, the Court ordered forfeiture of the Appellant's motorcycle.

1.3. The Appellant appeals to this Court on the ground that the learned Magistrate erred in law in ordering forfeiture of the motorcycle under section 168 of the Road Traffic Act when the Appellant was not charged with an offence relating to section 83 of the Road Traffic Act or a regulation made under section 181 (1) (a), (l), (n) or (q) of the Act.

2. Issues for Determination

2.1. Whether or not an order for forfeiture was appropriate in the circumstances of this case?

3. Analysis of the Facts and the Law

3.1. The principles guiding this Court in exercise of its power on appeal were laid down by the Supreme Court of Appeal in Pryce v. Republic, [1971-72] 6 ALR (Mal) 6:

"In our opinion the proper approach by the High Court to an appeal on fact from a magistrate's court is for the court to review the record of the evidence, to weigh conflicting evidence and to draw its own inferences. The court, in the words of Coghlan v Cumberland (3) ([1898] 1 Ch. at 704 and 705; 78 L.T. at 540) must then make up its own mind, not disregarding it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong."

3.2. It is always important for the Appellate Court to bear in mind that the Magistrate has lived the case in the course of trial and accounts should be taken of this factor. In making up its own mind the Court must remember that it has neither seen nor heard the witnesses and that the view of the Magistrate on credibility of witnesses whether stated in express terms or seen from this judgment by necessary inference is entitled to great weight.

3.3. To begin with, an order for forfeiture is provided under section 168 of the Road Traffic Act, which stipulates that the Court convicting any person of an offence under section 167 (1) as read with section 83, or a regulation made under section 181 (1) (d), (l), (n) or (q), may, without notice to any person, declare a vehicle or its load or both which was or were

used in the commission of the offence and which was or were seized under the provisions of this Act, or the convicted person's rights in such vehicle or load or both, to be forfeited to the Government.

3.4. It is clear that lawful forfeiture is done when one has been convicted of an offence under section 167 (1) as read with section 83, or when one has been convicted of an offence under a regulation made under section 181 (1)(d), (l), (n) or (q) of the said Act.

Section 167(1) of the Road Traffic Act creates offences under the Act. It provides that any person who contravenes or fails to comply with any provision of the Act shall be guilty of an offence. While Section 83 of the Road Traffic Act on the other hand, requires a road service permit to be displayed on motor vehicles. It stipulates that *No person shall operate a motor vehicle of any class referred to in section 81(1) on a public road unless a valid road service permit is displayed on such motor vehicle.*

3.5. Section 181 (1) of the Act provides as follows:

The Minister may, make regulations in respect of any matter contemplated, required or permitted to be prescribed under this Act and generally as to the use of any vehicle on a public road, its construction and equipment and the conditions under which it may be used and in any other respect for the better carrying out of the provisions or objects of this Act, and in particular, but without prejudice to the generality of the foregoing provisions, with respect to;

(d) the maximum mass, laden or unladen, of any vehicle, the height and the width of any load which may be carried by any vehicle, the manner in which any vehicle may be loaded, the extent to which any load may project in any direction and the maximum mass of any vehicle or any part thereof supported by the road or by any specified area thereof, when any vehicle referred to in this paragraph is operated on a public road;

(l) the regulation of the use and control of any vehicle on a public road, its construction, equipment; width of tracks, dimensions, mass and use in respect of either chassis and body or chassis, body and load and the conditions under which it may be used;

(n) the protection of any public road, the mass, tyres and load of any vehicle in relation to any specified bridge or ferry, the time when and speed at which any

vehicle of a specified mass may be allowed to cross any bridge or ferry, and furnishing of security by any person against damage to any public road by reason of heavy traffic, and making good the cost of repairing such damage;
(q) the determination of the number of passengers for the transport of which a certain class of motor vehicle is adapted and the number which may be transported, the general safety, comfort and convenience of passengers carried on or by such a motor vehicle and the conduct of the driver, conductor and passengers on such a vehicle;

3.6. The Appellant argues that the lower Court erred in ordering forfeiture of the motorcycle as the offences committed in the present matter do not fall under the conditions for an order for forfeiture as illustrated in the preceding paragraphs.

3.7. The Respondents on the other hand first submitted that the Court erred in making the forfeiture order and that it be quashed. During hearing, the Respondents asked for amendment of their position and argued that the Court herein should maintain the order by the lower court and that the offences in question are subject to the provisions cited in the preceding paragraphs.

4. Determination

4.1. The appellant was charged with three counts under the Road Traffic Act. The first count is *riding a motor cycle without a license contrary to section 18 of the Road Traffic Act*. Section 18 of the Road Traffic Act provides as follows:

(1) No person shall drive a motor vehicle, teach for gain the driving of motor vehicles or accompany the holder of a learner's license on a public road except under the authority and in accordance with the conditions of a driver's license issued to him under this part or of any document deemed to be a license for the purposes of this part and unless he keeps such driver's license or documents or any other prescribed authorization with him in the vehicle.

(2) Subject to section 20, no person shall drive a motor vehicle on a public road under the authority of the learner's license unless such person is accompanied by and is under direct supervision of a person who is in

possession of driver's license authorizing him to drive a class of that vehicle and occupying the seat next to the holder of such a learner's license.

4.2. The second count is *riding a motor cycle without Insurance contrary to section 141 of the Road Traffic Act*. Section 141 is in the following terms:

- (1) Subject to this Act, it shall not be lawful for any person to use or cause or permit any other person to use a motor vehicle on a public road unless there is in force in relation to use such a motor vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of the third party risks as complies with the requirement of this Part.*
- (2) Any person who contravenes subsection (1), shall be guilty of an offence and upon conviction shall be liable to a fine not exceeding K10000 Or imprisonment for a period not exceeding two years or to both fine and such imprisonment.*
- (3) Where any person is convicted of an offence under subsection (1), the court convicting him shall, in addition to any penalty, disqualify him from holding or obtaining a driving license, for a first offence, for a period of not less than six months, and for a second offence a period of not less than one year and for a third and subsequent offence for a period of not less than 5 years.*

4.3. The Appellant was also charged with the offence of *using an unregistered motorcycle contrary to section 11 of the Road Traffic Act*. Section 11 is worded as follows:

- (1) The Minister shall, by regulations published in the Gazette, prescribe the registration and licensing of motor vehicles, including the structure and manner of implementing the system.*
- (2) No person shall operate on a public road any motor vehicle which is not registered and licensed under this part.*

4.4 Section 18 of the Road Traffic Act prohibits the *ridding of a motorcycle without a license*. Section 11 of the Road Traffic Act prohibits any person from *operating on a public road any motor vehicle which is not registered*. The two sections do not provide for penalties for their breach. Ordinarily, the charges under sections 18 and 11 should have made reference

to section 167 of the Act which provides for penalties for offences and penalties for contravening or failure to comply with any provision of the Act. However, this was not done in the present case. I am of the considered view that such omission is not fatal.

4.5 In the case of **Chombo v Republic**, [1994] MLR 66 at 70, the court had this to say in relation to the omission akin to the one in the present case:

“Regarding the third count, to which ground 3 partially relates, Mr Kadzakumanja has observed that the rule under which the charge was brought does not provide for any penalty for its breach. I agree. The rule only prohibits the carrying, or having possession of, in a game reserve, any instrument or equipment for hunting or any firearm without written permission of a Game Control Officer, the charge, therefore, should have made reference to section 41(4) of the Act which provides for the penalty for the contravention of any rules made under the Act. I have considered all the circumstances and it seems to me, quite clearly, that the appellant was not prejudiced by the prosecution’s failure to cite the penalty section in the charge. I think this is an irregularity which is curable by application of section 5 of the Criminal Prosecution and Evidence Code in that no failure of justice appears to have been occasioned by it.”

4.6 It is not disputed that the Appellant was riding a motorcycle without a license and the said motorcycle was not registered. These facts were admitted by the Appellant. He, therefore, contravened sections 18 and 11 of the Road Traffic Act whose penalty is provided under section 167 of the Act. Section 167 is worded as follows:

“(1) Any person who contravenes or fails to comply with any provision of this Act shall be guilty of an offence.

(2) Any person convicted of an offence under any provision of this Act for which no special penalty is provided by this Act shall be liable to a fine not exceeding K20,000.00 or to imprisonment for a period not exceeding one year or both such fine and imprisonment.”

4.7 It is our view that the Appellant was properly convicted in the court below on all three counts. This includes count two which is *riding motorcycle without insurance contrary to section 141 of the Road Traffic Act.*

4.8 Having convicted the Appellant on all three counts on his own plea of guilty, the learned Magistrate proceeded to make an order of forfeiture under section 168 of the Road Traffic Act. In his words, the Magistrate said:

"I will sentence you to a forfeiture under section 168 of the Road Traffic Act. I will forfeit the motor cycle to Malawi Government."

4.9 Section 168 of the Act is in the following terms:

"The court convicting any person of offence under the section 167(1) as read with section 83, or a regulation made under section 181(1)(d), (i), (n) or (q), may, without notice to any person, declare a vehicle or its load or both which was or were used in the commission of the offence and which was or were seized under the provisions of this Act, or the convicted person's rights in such vehicle or load or both, to be forfeited to the Government:

Provided that such declaration shall not affect any right which any person other than the convicted person may have to the vehicle or its load or both was or were being used or would be used in the commission of the offence concerned, or that he could not prevent such use."

4.10 We are of the view that the court below made two grave errors in sentencing the Appellant. Firstly, the court having convicted the appellant on all the three counts, it was supposed to sentence him on each of the three counts. Unfortunately, that was not done. Sadly, he proceeded to make a forfeiture order under section 168 of the Road Traffic Act – the second grave error. Section 168 is very clear to which offences section 168 is applicable. Section 168 is not and cannot be applicable on offences under sections 18, 141 and 11 of the Act.

5.0 Conclusion

5.1 All in all conviction on all three counts is upheld. We, however, set aside the forfeiture order and order the trial court to properly resentence the Appellant within thirty days from today. It is so ordered.

Made this Wednesday the 27th day of April, 2022 at Zomba.


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JUDGE