# JUDICIARY
# IN THE HIGH COURT OF MALAWI
# PRINCIPAL REGISTRY
# CRIMINAL REVIEW CASE NO. 6 OF 2022

[Being Criminal Case Number 102 of 2021 FGM sitting at Bangula]

BETWEEN:

**THE REPUBLIC**

-AND-

**NOAH TSABOLA .....1st CONVICT**

**SAUTSO BINGALA.....2nd CONVICT**

**CORAM:** **THE HONOURABLE JUSTICE J. M. CHIRWA**

Mr. Chisanga, Counsel for the State.

Mr. Mickeus, Counsel for the 1st Convict.

R. Chanonga, Official Court Interpreter.

M. Chirwa, Court Marshall

# JUDGMENT

## 1. Introduction:-

The 1st Convict was charged with the offence of being found in possession of forest produce without a permit contrary to Section 68(1) (b) of the Forest Act while the 2nd Convict was charged with the offence of trafficking in forest produce without licence contrary to Section 68(1) (c) of the Forest Act by the First Grade Magistrate's Court sitting at Bangula ("the lower court"). They were both convicted of the said offences upon their own admission of the charges and the facts and sentenced to pay fines of K250,000.00 and K150,000.00 and in default to serve 24 months and 18 months, respectively.

This case was set down to consider the propriety of the order made by the said court releasing the 451 timbers ("the said timbers"), the subject matter of the criminal proceedings in criminal case number 102 of 2021 in the lower court.

## 2. Facts:-

It was on or about the 18th of August, 2020 when the 1st Convict hired a motor vehicle registration number NE 2385, a Scania truck ("the said truck"), the property of a third party, to transport the said timbers which he bought from Mozambique. Upon arrival at Kafule location, Traditional Authority Tengani in the Nsanje District of the Republic of Malawi, they were apprehended by the forest officers who demanded a licence authorising the possession of the said timbers and a permit for the transportation of the same. The Convicts having failed to produce the licence and the permit, respectively, as requested by the said officers were arrested and taken to court, hence the present proceedings.

## 3. The positions of the parties hereto:-

### First, the State's position-

It is the case of the State that in the lower court it prayed for the forfeiture of the said timbers and the restoration of the said truck to the owner but the lower court ordered otherwise. The State argues that it differs with the lower court in that according to Sections 147 to 149 of the Criminal Procedure & Evidence Code ("

the CP& EC") there are three scenarios. The first is that the restoration of property to the rightful owner where the owner of the stolen property has been identified. The second is where the vessel which had been used by the convict in the commission of the offence belongs to a third party, the court should hear the said party before proceeding to make a forfeiture order of the vessel. The third scenario is where the court after conviction orders the forfeiture or confiscation of the property to the government. The case of **Khonje v Republic** [2012] MLR 125 is relied upon here by the State. It is the contention of the State thus, that after conviction it was sufficient for it to make a prayer for the forfeiture of the said timbers which were the subject matter of the charge as opposed to making an application for the forfeiture as opined by the lower court. It is the further contention of the State that had the State wanted the said truck which was used in the commission of the offence forfeited, then the State would have to make a specific application for the forfeiture of the same and the rightful owner of the same would have been called to show cause why the said truck should not be forfeited to Malawi Government.

It is the further case of the State that the lower court was wrong in ordering restoration of the said timbers which were the very subject matter of the offence to the 1st Convict. It is still further, the case of the State that by ordering the 1st Convict to get back the said timbers, the lower court was conferring the undeserving benefit on the said convict.

It is, in the premises, the prayer of the State that this Court should reverse the order of the lower court.

**Secondly, the position of the 1st Convict-**

It is the case of the 1st Convict that in restoring the said timbers and the said truck to them the lower court cannot be faulted. It is the further case of the 1st Convict that it is not mandatory that the court should order forfeiture in the event that an accused person or a convict had in his possession goods which were the subject matter of the offence. It is still further the case of the 1st Convict that Section 74 (1) of the Forest Act does not make it mandatory that the court must order forfeiture of forest produce. It is still further, the case of the 1st Convict that the use of the word "may" in the provision gave the lower court leeway to decide whether or not to order the forfeiture of such forest produce or not depending on the circumstances of the case since it is not mandatory. The 1st Convict is here relying on the case of **Kamanga v The Republic** 8 MLR 187.

It is, thus, the contention of the 1st Convict that the lower court did not err when it decided to order that the said timbers and the said truck be restored to the Convicts herein since it is not mandatory to order forfeiture.

It is still further, the case of the 1st Convict that since the lower court at page 3 of its judgment imposed fines of **MK250, 000.00 and MK150, 000.00** against the 1st and 2nd Convicts, respectively, it would be imposing double punishment and thus unjust for the lower court to have ordered forfeiture of the said timbers on top of the said fines. The 1st Convict is here relying on the case of **The Republic v Nkhunya,** Confirmation Case Number 1002 of 2002 where it is, so contended, the High Court acknowledges the need to avoid double punishment. It is still further, the case of the 1st Convict that since the said timbers were bought from Mozambique, a fact which, it is so contended, has not been disputed by the State, it was thus fair that the said timbers and the said truck be restored to the Convicts. And further, it is also contended, because they had lost a huge amount of money in the purchase and transportation of the same and considering that no forest had been destroyed in Malawi.

It is still further, the case of the 1st Convict that in the absence of evidence to show that the lower court exercised its discretionary powers wrongly this Court should thus hold that the lower court correctly opined that an order of forfeiture would have amounted to a double punishment and thus not proper.

It is, in the premises, the prayer of the 1st Convict that this Court upholds the decision of the lower court.

**Finally, the State's reply,**

In reply, to the1st Convicts' submission the State submits that sight should not be lost of the fact that the subject matter before the lower court were the said timbers and not the said truck and that the circumstances of the case would demand the forfeiture of the said timbers and not for the same to be restored to the 1st Convict. It is the further submission of the State that it was in evidence before the lower court through the caution statements of both the 1st and 2nd Convicts that the 1st Convict admitted that he made a misrepresentation to the 2nd Convict and the third party that he had a document from the Forestry Department to transport the said timbers from Mozambique to Malawi.

It is the further submission of the State that sometimes the word "may" does imply that the thing spoken of is mandatory. In the present case the lower court ought thus to have ordered forfeiture of the said timbers to the government in terms of Section 74(1) (a) of the Forest Act.

In the premises, the State has maintained its position that the decision of the lower court in not ordering forfeiture of the said timbers was wrong and ought to be reversed by this Court.

**4. Issue for the determination by this Court:-**

The issue for determination by this Court is whether or not the lower court erred in law in failing to make an order for forfeiture or confiscation of the said timbers.

**5. Determination:-**

In the determination of the above-stated issue, this Court finds it pertinent to reproduce the material provisions of the statute as follows:-.

First, Section 68 of the Forest Act which provides as follows:

> *"(1) Any person who-*
>
> *(a) knowingly received forest produce illegally; or*
>
> *(b) is found in possession of forest produce without a permit;*
>
> *(c) trafficks in forest produce without a licence, shall be guilty of an offence.*
>
> *(2) Any person who is convicted of an offence under subsection (1) shall be liable to a fine upon conviction of* ***K5,000,000.00*** *and to imprisonment of ten years."*

And secondly, Section 74 of the Forest Act which provides as follows:

> *"(1) Upon conviction of any person of an offence under this Act, the court may in addition to any other penalty provided by this Act, order-*
>
> *(a) that any forest produce which has been used in the commission of the offence shall be forfeited to the Government;*
>
> *(b)……*
>
> *(c)……*
>
> *(d)……*

*(e) the seizure of any carrier or vehicle which has been used in committing the offence.*

*(2)* .....

*(3) Any property forfeited to the Government pursuant to subsection1 (a), shall be dealt with in the manner that the Minister responsible for Natural Resources shall direct."*

Turning to the present case but before delving into the determination of the issue for determination, above-stated, this Court finds it necessary to dispose of the misconceptions of the parties hereto.

First, is the contention by the 1st Convict that since the said timbers were, allegedly, from a forest in Mozambique then it would not have been fair for the lower court to have ordered the forfeiture of the same to the government of Malawi. With due respect to the 1st Convict, there is nothing in the wording of Section 74 (1) (a) of the Forest Act from which it can correctly be construed that the powers of the court to make a forfeiture order ought to be exercised only when the forest produce is from a forest within Malawi and not without. Put simply thus, a court can make an order for the forfeiture of the forest produce even where the forest produce is from a forest outside Malawi.

Secondly, is the contention by the State that the use of word "may" in Section 74 (1) of the Forest Act ought, in the present case, to be construed to imply that it was mandatory for the lower court to have ordered forfeiture of the said timbers to the government. Again we due respect to the State, it is the view of this Court, and as also correctly contended by the 1st Convict, that the use of the word "may" in Section 74 (1) of the Forest Act denotes discretion on the part of the court. The lower court thus had discretion in the present case either to order or not to order forfeiture of the said timbers. It is however, trite that any discretion on a court of law ought to be exercised judiciously. Here this Court wishes to subscribe to the comments by **Chatsika J.** in the case of **Kamanga v The Republic** *(supra),* cited by the 1st Convict, on the use of the word "may" in the proviso to Section 7 of the Exchange Control Act when he said:-

*"It is significant that the word "may" is applied in that proviso, which, according to the rules of construction, denotes discretion on the part of the court. The court may exercise its discretion to order or to refrain from ordering the forfeiture of the money depending on the merits of the case."*

This Court has, equally, found erroneous the contention of the 1st Convict, whilst relying on the case of **Republic v Nkhunya** *(supra),* that had the lower court ordered the forfeiture of the said timbers then the same would have been unjust as it would amount to double punishment. There is ample case authority that confiscation or forfeiture orders should not be seen as punishments *per se*. For example, in the case of **Schaibir and Others v The State** [2008] 2ACC 7, the South African Constitutional Court held that while a confiscation order may have punitive effects, its primary purpose is not to punish. The principle in the **Schaibir** case was echoed in the cases of **National Director of Public Prosecutions v Phillips** [2002] (4) SA 60 (W) and the Namibian case of **Lameck and Another v the President of the Republic of Namibia and Others** [2012 A 54/2011. The matter was put even more clearly in the case of the **Republic v Oswald Lutepo** [2015] MWHC 492 where the court held that *"when it comes to confiscation of property, the process neither entails prosecution for an offence nor does it constitute imposition of a penalty....the process of confiscation is a process in rem, which focuses on the tainted property itself rather than the individual convict. The tainted property itself is the evil that ought to be remedied. The remedy is to have it confiscated."*

This Court wishes to subscribe to the contention of the State that in the present case the subject matter of the offences admitted by the Convicts were the said timbers which the 1st Convict was found to be in possession of without a permit and which the 2nd Convict was trafficking without a licence. This, in the words of the court in the **Lutepo** case, *supra,* was the tainted property and not the said truck. It is this evil which the lower court ought thus, to have remedied by making an order for the forfeiture of. It was, in this Court's view, thus erroneous for the lower court to have declined to make an order for the forfeiture of the same to the government on the pretext that it would have been discriminatory for it to order the forfeiture of only the said timbers and not the said truck. It is important here to note that since the said truck was the property of a third party who was not privy to these proceedings before the lower court no order for the forfeiture of the same

could thus have been lawfully made without first giving the said third party an opportunity of being heard in respect of the same.

This Court has found it, equally, erroneous, for the lower court to have declined to order the forfeiture of the said timbers on the pretext that the State did not make any application to have the same forfeited (vide p.2 of the judgment on sentence). The State having prayed for the forfeiture of the said timbers as recorded at page 2 of the judgment on sentence as follows: "Firstly, the State has prayed that the planks be for forfeited to Malawi government.....", the same, in this Court's view, sufficed as an application for an order for forfeiture. This Court is also at pains to appreciate the distinction made by the lower court between "an application" and "a prayer" because when a party to proceeding makes a prayer that party is, as a matter of fact, making an application. The word "prayer" in legal proceedings denotes an application or a request for something.

The case of **Kamanga v The Republic** *(supra),* relied upon by the 1st Convict in contending that the lower did not err in law in not ordering the forfeiture of the said timbers is, no doubt, distinguishable from the present case. In the **Kamanga** case the court decided not to order the forfeiture of the foreign currency found with the convict therein because of the extenuating circumstances therein which the court considered in exercising its discretion. In the present case no such circumstances were advanced by the 1st Convict. On the contrary, the facts that the 1st Convict was at all material times aware or conscious of the fact that he had no permit authorising him to possess the said timbers and his attempt to escape arrest when they met forestry officers are, in this Court's view, facts extenuating in favour of the exercise of the court's discretion to make an order of forfeiture of the said timbers.

It may be worth restating here that an order for the forfeiture of the tainted property, though made in addition to a fine, does not amount to double penalty as contended by the 1st Convict herein because the primary purpose of such an order is not to punish but to remedy the evil. The fact that Section 74 (1) of the Forest Act has the following words: *"the court may in addition to any other penalty provided by this Act"* specifically included therein goes to show that it was the intention of the legislature to give the courts powers to make additional orders over and above the orders for the payment of a penalty already imposed by the Act in a befitting and proper case. It can thus, not be held of the 1st Convict that an order of

the forfeiture of the said timbers would in the present case be tantamount to the imposition of a double penalty and unjust.

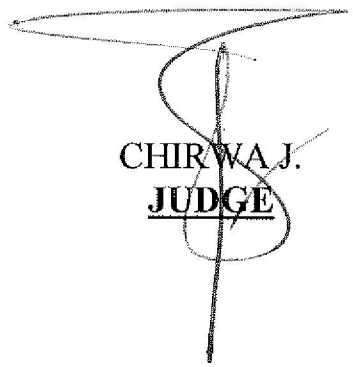
In the premises, it is the finding of this Court that the lower court had indeed erred in law in failing to make an order for the forfeiture or confiscation of the said timbers, the tainted property in this case. Put differently, the lower court had not properly exercised its discretion in the case in declining to order the forfeiture of the said timbers.

## 6. Conclusion:-

This Court having found that the lower court had indeed erred in law in not ordering the forfeiture of the 451 timbers to the Malawi Government, now proceeds to reverse the lower court's said decision and in turn orders the forfeiture of the 451 timbers to the Malawi Government. It is so ordered.

The orders for the payment of the fines in the sums of **K250,000.00** and **K150,000.00** made by the lower court against the 1st and 2nd Convicts, respectively, are hereby confirmed. It is further so ordered.

**Dated this 12th day of September, 2022.**



CHIRWA J.
**JUDGE**