IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL DIVISION

CONFIRMATION CASE NO. 1047 OF 2021
(Being Criminal Case No. 799 of 2021 before the Senior Resident Magistrate Court sitting at Blantyre)

THE REPUBLIC
V
KENNETH MAJAWA

Coram: Justice Vikochi Chima
Mr Mphepo, Senior State Advocate
Mrs Kasambara, Senior Legal Aid Advocate
Mrs Moyo, Court Clerk

ORDER IN CONFIRMATION

Chima J

1. Kenneth Majawa, who is aged 34 years, was convicted of causing grievous harm contrary to section 238 of the Penal Code and was sentenced to 40 months imprisonment with hard labour. The convict is a member of the community policing forum at Manyowe location.

A. THE PROSECUTION EVIDENCE VERSUS THE DEFENCE EVIDENCE

2. The evidence of the complainant, who was the first prosecution witness, was that on the material day around 1 p.m. while he was up and about selling clothes, he met two men who were members of the community policing forum. When he saw them, he started running away and they started shouting. They managed to apprehend him. He identifies one of the men as Patrick Nawena. According to the complainant, earlier that day, the village headman had issued an order that the complainant was to be arrested and taken to the police. He stated that the village headman had wanted him to be arrested for having taken clothes and a stool from a certain lady who had failed to pay back a debt that she owed the complainant.

3. The complainant states that he having been arrested, he was taken before the village headman. While he was there, the convict came and started hitting him with a baton stick and also incited others to beat him. Then the convict poked and punctured his eye.
4. The second prosecution witness, PW2, stated that the village headman had ordered the arrest of the complainant on suspicion of theft. He stated that when the complainant was arrested and was being taken to the police station, his apprehenders tied his hands with *luzi*. While on the way, the strings broke and the complainant threw a fist at the convict. It was his evidence that as the convict deflected the blow, the complainant got injured in the eye in the process.
5. The evidence that the convict gave in his defence is that the village headman had asked the convict and other members of the community policing forum to arrest the complainant who was suspected of theft. While the convict was in his barber shop around 2 p.m., someone came to tell him that a man had jumped into a certain lady's fence compound. The convict and other members of the community policing forum went to investigate this incident and identified the tresspasser as the complainant. The complainant was drunk at the time. They tied him up with *luzi* and took him to the village headman. The village headman advised them to take him to the police. They started off for the police station. On the way, the complainant became uncooperative. He sat down and was refusing to move. Then the strings with which he was tied with got torn and he threw a fist at the convict and wanted to run away. The convict had a baton stick in his hand. As the convict tried to deflect the blow and the complainant wanted to run away, in the fray, the complainant ended up poking his eye with the baton stick that the convict held up. His eye was surgically removed at the hospital.

B. THE FINDING OF CONVICTION

6. This was the gist of the evidence that was before the magistrate. Having examined the totality of the evidence, I am unable to agree with the final conclusion that he came to, that of a conviction. Firstly, one sees that the prosecution evidence from the two principal witnesses, the complainant and PW2 is conflicting and as I will later demonstrate, the complainant's account is wanting. The complainant's evidence is that the convict **deliberately** injured him while they both were at the village headman's house. According to PW2, the complainant was injured by some misfortune and this happened while the complainant was being taken to the police station.
7. Both accounts cannot be correct. The magistrate was supposed to make a finding of fact on this issue. He does not come out clear on this. He was supposed to state which witness he believed and why and whether he believed the entire testimony of that witness or if not, the parts that he believed, and also to state why he found it that way. One is persuaded to think that the magistrate believed, at least in part, the testimony of PW2, for he wrote:

> 'PW1 who also happens to be the complainant informed this court that he met two people who were members of the community policing who wanted to arrest him and started running. When they caught him, the accused started beating him with a baton stick and incited people to beat him. However, a person does not start beating another for no reason. It was the evidence of PW2 which shed more light. He said that it was the complainant himself who started the fight as he was the one who threw

a blow at the accused and it was in the process of the accused deflecting the blow that the complainant got injured.'

8. From the above quote, one is still left at a loss to know what the magistrate believed as to where the injury took place, whether at the village headman's or on the way to the police, more so if one reads what follows in the judgment.
9. Then the magistrate continues to write:

> 'In his defence, the accused said he was hit by the complainant when he was resisting arrest. He further said, the complainant had untied the rope which was used to tie him and he was turning rapidly and accidentally hit him with the baton stick. He, in essence, denied having punctured the complainant's eye but puts the blame on the complainant for resisting the arrest. He, however, does not deny that it was him who was carrying the baton stick. However, it was CW1 who put the nail onto the coffin so to say. He portrayed the accused as someone who used excessive force in dealing with the complainant. He said he tried to protest the complainant and that the accused took the law into his own hands.
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> It is surprising why the accused person had a baton stick at all when his friends from the community policing did not carry any weapon. It can even be said that the accused went prepared when going to arrest the complainant. This might be because as the accused said, the complainant had been arrested a number of times and he could foresee that he might resist the arrest. But still the fact that he could foresee the complainant resisting the arrest is not sufficient to warrant the carrying of the baton stick. A person does not carry a weapon that they never intend to use.
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> It was stated by the accused that the complainant threw the first blow and PW2 said the accused was deflecting the blow from the complainant when he got injured. But it has to be remembered that the complainant was alone while the accused had three other people with him. This cannot be said to be a case of self-defence because the accused had friends with him and even if this were to be taken as self-defence, the amount of force used is not proportional. The law of self-defence demands that the action taken should be proportional with the force exerted by the other party. In this case, there was nothing suggesting that the complainant was armed at all.'

10. From what the magistrate wrote above, it can be seen that he somehow continued to believe PW2's testimony, that the complainant was injured while they were taking him to the police station and not at the village headman's house. The magistrate also shows that he believed that the complainant was injured while in the company of the convict and three other persons and not while he was in the midst of a lot of people at the village headman's. This shows that he disbelieved the complainant's testimony in these respects. Why he does not believe the testimony of the complainant on these points, he does not say. The magistrate, however, goes on to believe that the convict intentionally injured the complainant and that it was no accident. Why he decides to believe the complainant when he had earlier on disbelieved him--he does not say. It is very important when a court is faced with conflicting evidence of two or more witnesses to clearly state which testimony, if any, out of the witnesses it believes and why and also to state why it does not believe the other testimonies. The court can also choose to believe only parts of a witness' testimony but then it must also give reasons for the same. In essence, the court must create or reconstruct a version of what it believes happened based on the witnesses' testimonies.
11. Reaching this far, this court is of the view that the summation that the magistrate made in the last preceding quote is a misapprehension of the evidence. In the first place, according to the complainant's evidence, the complainant was arrested by one Patrick Nawena and another and then he was brought to the village headman. According to the complainant, the

convict had come from his barber shop and gone to the village headman's where the complainant was. From this version, therefore there would be no reason for making a finding that the convict had gone with a baton stick 'to effect an arrest' for at that time the complainant was already arrested. As for the convict's version, the convict states that he had just been told while he was in his barber shop that there was a trespasser at a certain compound. He did not even know who the intruder was. Of course, from his evidence, he did indeed carry a baton stick when he went to investigate. This is the very reason I said it is important for the court to state as to which piece of evidence it believes as to what happened. Here, one cannot tell what the magistrate's conclusion was: whether he believed that the convict found the complainant already arrested at the village headman's house or that the convict went to a certain lady's compound and arrested the complainant (and that he had gone there not even knowing whom he was going to find as the tresspasser). Actually, on this point, it appears, the magistrate believes the convict's version that the convict went into a certain lady's compound where he arrested the complainant.

12. I have pointed out that the prosecution's evidence of the two main witnesses is in conflict on major issues as one of the reasons I do not support the conviction. My second reason is that the evidence of PW2 is actually in agreement with the evidence of the convict. It also agrees with the convict's caution statement, which was the convict's version close to the time after his (the convict's) arrest. PW2's account which is the same as the convict's is plausible and the law is that if an accused raises a reasonable doubt as to his guilt, he must be acquitted. The magistrate decided to disbelieve PW2's version on whether the injury was intetionally inflicted or not on account that the complainant was alone while the convict was with three other people. If the magistrate believed that the piece of evidence which was brought by PW2 that the context of the injury was on the way when the convict was with some three other colleagues, why does he not go on to believe the rest of PW2's evidence and also the convict's testimony as well as PW2's evidence which states that the injury was an accident? Why then does he choose to believe the complainant's version at this point when he (the magistrate) had decided to disbelieve what the complainant stated was the context of his injury? Frankly, the complainant's evidence is the incredible one. He states that he was arrested at the village headman's command and that the village headman had ordered that he be taken to the police after he was arrested. Yet, in his evidence, he does not say what role the village headman took after he was arrested and taken before him. Was the village headman just watching as the convict mobilised others and beat him or was he part of the people that beat him even to the point where the convict poked his eye? The complainant does not come out clearly how the convict injured him. Did the convict aim by pointing the baton stick into the complainant's eye? Who made the decision that he (the complainant) be taken to the hospital? What became of the plan of taking the complainant to the police? The complainant is conveniently skipping vital information that should make the whole story complete and went further to paint an untrue picture that the convict beat him up at the village headman's.

13. Thirdly, I find the convict's as well as PW2's more plausible than the complainant's that the complainant's injury was an accident that happened because the complainant was resisting being taken to the police. Even the magistrate himself was prepared to accept that it was the complainant himself who had started the commotion when he hit the convict with his fist and that the complainant was wounded due to the convict's reaction.
14. Section 33 of the Criminal Procedure and Evidence Code empowers private persons to arrest without warrant any person reasonably suspects of having committed a serious offence. Section 20 of the Criminal Procedure and Evidence Code prescribes how an arrest should be effected. It states that:

> '(1) In making an arrest a police officer or other person making the arrest shall actually touch or confine the body of the person to be arrested, and shall inform the person that he is under arrest.
> (2) Where the person to be arrested submits to the custody by word or action, the arrest shall be effected by informing the person that he is under arrest.
> **(3) If the person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest.**
> **(4) This section shall not justify the use of a greater force than was reasonable in the particular circumstances in which it was employed or was necessary for the apprehension of the offender.'**

15. The magistrate takes issue with the fact that the convict had carried a baton stick when he was called upon to apprehend the intruder who had jumped into private property. I do not think that is reasonable. The convict is amember of the community policing forum and it is only rational that he be reasonably armed when he goes on such missions even if, as in the case at hand, did not even know that it was the complainant, a suspicious character, who was the intruder. The law does allow use of force on a person being arrested, if they try to resist the arrest so long as the force used is reasonable in the particular circumstances.

C. HOSTILE WITNESSES AND COURT WITNESSES

16. There is one more important point that I would like to address concerning how the magistrate had conducted himself as regards a witness named Patrick Nawena. When the convict was called to his defence, he said he would himself testify and that he would call witnesses, in particular, he mentioned that he would call Patrick Nawena. After the convict had testified, the matter was adjourned to another date to enable Patrick Nawena attend court. On the scheduled date, the record shows that the convict informed the court that he had no capacity to summon the witness. This court is not certain what this meant, whether it was the fact that the convict was unable to send word to the witness since the convict was in prison, or that the convict lacked resources, whether financial or otherwise to enable the witness to travel to court. The court ought to have ascertained the difficulty that the convict was facing and should have tried to assist him where it could.
17. Curiously, however, the next thing the court said is that the court would summon the witness as its own witness under section 201 of the Criminal Procedure and Evidence Code. The record states that:

> 'I order that the witness should come as the witness of court under section 201 of the Criminal Procedure and Evidence Code.'

18. Section 201 of the Criminal Procedure and Evidence Code states:

> '(1) Subject to subsection (2), any court may, of its own motion at any stage of any inquiry, trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.
> (2) The prosecution or the accused or his legal practitioner shall have the right to cross-examine such person, and the court shall adjourn the case for such time, as it thinks necessary to enable such cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of such person as witness.
> (3) In exercising the powers conferred on it under subsection (1), the court shall be governed by the interests of justice and, in particular shall avoid taking over the prosecution of the case.'

19. The magistrate does not record why he intended to call the said witness as a court witness. It was held in *Chiwaya v Rep*[1] and also in *Rep v Kumisewa*[2] that the right of the court to call and recall witnesses in trials should be sparingly used and, when used, reasons should appear clearly in the record. It has been held further that as a rule the prosecution should be the first to lead its evidence and then the defence, and that after the evidence of both parties has been received, the prosecution or the court can only call fresh evidence where the matter has arisen *ex improviso* and which no human ingenuity could have foreseen.[3] Spencer-Wilkinson, C.J. said in *R v Raphael*[4] that:

> 'It is clearly much fairrer to an accused person that the whole of the evidence against him should be given before he is called upon to enter on his defence and normally it is only when the accused himself raises a new point that further evidence can properly be called after the conclusion of the defence.
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> In all summary trials it is highly desiarable that at the conclusion of the evidence for the prosecution the magistrate should take stock of the situation in order to be sure: (a) that the accused has a case to meet within the meaning of s.203 of the Criminal Procedure Code; and (b) that the case he has to meet is correctly charged in view of the evidence given. This, therefore, is the natural point in the proceedings when witnesses should be recalled or additional witnesses called if it is considered desirable to do so. The danger of recalling witnesses after the defence is that the accused may never have had a real opportunity of meeting the points raised by the additional evidence.'

20. In *Rep v Kumisewa*, the accused had been convicted of housebreaking and theft. The complainant was not called by the prosecution to give evidence and at the close of the prosecution case no evidence had been led on either charge to justify the accused being required to answer either charge. The accused was called upon his defence. The accused denied the charges and said he had taken the radio, the subject-matter of the theft, from the complainant as a pledge for money lent by the accused to the complainant. At the close of the accused's case the court adjourned the hearing to a later date ordering the complainant to be summoned. At the adjourned date the complainant gave evidence. He said that he found his house had been broken into on 5 May 1973, the date of the alleged housebreaking by the accused, and his radio had been stolen. The magistrate convicted the accused. In considering whether the evidence justified the convictions, Mead J considered the propriety of the court calling the complainant to testify after both the prosecution and the defence had closed their cases. He held that the law as regards the court calling a witness is the one

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[1] [1966-68] 4 ALR Mal 64
[2] [1973-74] 7 MLR 285
[3] *R v Raphael* [1923-60] ALR Mal 377; *Rep v Kumisewa* supra note 2
[4] Ibid at paras 5-20

that was expressed by Spencer-Wilkinson, C.J. in *R v Raphael*[5] where the Honurable Chief Justice cited with approval the principle in *R v Day*.[6] That proposition is that the prosecution must as a rule close its case before the defence begins, but that if a matter arises *ex improviso* which no human ingenuity could have foreseen there seems to be no reason why that matter may not be answered by contrary evidence on behalf of the prosecution, and further, that the court's statutory power to call witnesses at any stage should be exercised with this principle in mind. In the *Rep v Kumisewa* case, Mead J said that the evidence of the complainant was not a matter *ex improviso* and that the complainant's evidence was the basis of the prosecution case; there was, therefore, no justification for the magistrate calling the complainant after the close of both the prosecution's and the accused's case. Of course, in any event, the judge stated that he had found that the complainant's evidence had not advanced the prosecution case anyway. He quashed the convictions because the evidence against the accused, even without the complainant's testimony, was not sufficient to support the convictions.

21. In *R v Day*,[7] the appellant was convicted of forging a cheque for £5. The prosecution's case depended entirely upon the evidence of an accomplice, Miss Dixon, who had been convicted previously of the theft of the cheque form used in the commission of the forgery. The prosecution also produced two letter-cards which were stated to have been received by a police officer from the appellant, and the writing upon these was thereafter treated as the genuine handwriting of the appellant. Those letter-cards had been written by the appellant and received by the police officer before the appellant was charged, and they had been thereafter in the hands of the prosecution.
22. When the prosecution case was closed, it depended upon the evidence of the accomplice, Miss Dixon, and counsel for the defence submitted to the judge at the trial that there was no corroborration of the evidence of that accomplice as was required by the rule of practice stated in *R v Baskerville*.[8] Counsel for the prosecution answered that contention by saying that the only evidence by way of corroboration was to be found in the handwriting on those two letter-cards and he suggested that the jury could be invited to arrive at a conclusion without any positive evidence of a handwriting expert to assist them. The judge then expressed his view that the jury could not be asked to give a verdict without some assistance by way of expert evidence, but he decided that the mere lack of corroboration was not a sufficient ground for him there and then to withdraw the case from the jury, and that the jury would have to pass their verdict on the evidence subject to his direction, which would be based on the decision in *R v Baskerville*.
23. Thereupon counsel for the appellant called the appellant into the witness-box and he gave evidence. He was the only witness for the defence, and his evidence was a complete denial

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[5] Ibid
[6] [1940] 1 All E.R. 402
[7] Supra note 4
[8] [1916] 2 K.B. 658; 12 Cr. App. Rep. 81

that he had written the cheque or signed it. When the defence case was closed on the Saturday of the trial, the judge adjourned the case, and in adjourning it, said this:

> 'I shall adjourn the case at this point until 11 o'clock on Monday morning. In the meantime the prosecution can consider whether they will or will not make an application to me for leave to tender further evidence...'

24. On the Monday morning, the prosecution asked permission of the court to call additional evidence, that of a handwriting expert to say that there were similarities between the known genuine handwriting of the appellant and the handwriting of the signature of the cheque in question. Counsel for the defence objected to the application stating that the prosecution and the defence had closed their cases and that nothing had arisen *ex improviso* that could justify the calling of fresh evidence either by the prosecution or the judge. The judge overruled the objection and admitted the evidence. In the result, the accused was convicted.
25. On appeal, Hilbery J stated that the law on the calling of fresh evidence after the prosecution and defence cases is closed was laid down in *R v Harris*, [9] that:

> 'But it is obvious that injustice may be done to an accused person unless some limitation is put upon the exercise of that right, and for the purpose of this case, we adopt the rule laid down by Tindal, C.J., in *R v Frost* (1840) 4 St. Tr. N.S. 85 where Tindal, C.J. said: "There is no doubt that the general rule is that where the Crown begins its case like a plaintiff in a civil suit, they cannot afterwards support their case by calling fresh witnesses, because they are met by certain evidence that contradicts it. They stand or fall by the evidence they have given. They must close their case before the defence begins; but if any matter arises *ex improviso*, which no human ingenuity can foresee, on the part of a defendant in a civil suit, or a prisoner in a criminal case, there seems to me no reason why that matter which so arose *ex improviso* may not be answered by contary evidence on the part of the Crown" That rule applies only to a witness called by the Crown and on behalf of the Crown, but we think that the rule should also apply to a case where a witness is called in a criminal trial by the judge after the case for the defence is closed.'

26. The Appeal Court in *R v Day* held that, without the supplementary evidence, which on appeal was found to have been wrongly admitted, the appellant would not have been convicted. The conviction was, therefore, quashed.
27. In the present case, when Patrick Nawena came, the magistrate, however, recorded him as DW2 (Defence Witness No.2). Soon after the witness' evidence-in-chief, the court recorded that the witness would be treated as the court's witness and invited the convict to cross examine him. One wonders who had conducted the examination in chief of the witness since at first the magistrate had recorded that he was a defence witness when earlier on he had stated that he would call the witness as the court's witness, and then after the evidence in chief gave the witness the status of court witness. Actually, in the judgement, he is called a court witness, "CW1". Did the court decide to treat the witness as a court witness just because the evidence that the witness brought was adverse to the convict? That is not a reason to treat a witness who was called by a party and who has given adverse evidence against the party as a court witness. The court could have assisted the convict in summoning the witness on account that the convict lacked the wherewithal of calling him, but, that in itself would not turn him into a court witness. The best that can happen where a witness gives adverse evidence to the calling party is that party to ask leave of the court

[9] [1927] 2 K.B. 587; 20 Cr. App. Rep. 86

to cross examine the witness on a previous statement to discredit the witness and so have the court declare him hostile.[10]

28. The evidence of Patrick Nawena was quite brief and rather elliptical. It states:

> 'I know the accused as a fellow member of the police forum. The accused is in court because of the eye injury. On that day, I tried to protect the complainant. The accused took the law in his hands. He poked the complainant on the eye and the complainant got injured.'

29. It is strange that the court declared that this was its witness and yet the court does not seem to have asked him the right questions, like, where the wounding took place and how it came about. The scanty sayings of the witness should not have been of much help to the magistrate. Yet clearly the magistrate drew adverse inferences against the convict from it.

D. THE ORDER

30. The prosecution's evidence is conflicting and the convict's evidence raises a very serious doubt as to his guilt. The magistrate drew wrongful inferences from the so called court witness. On the whole, the magistrate's analysis of the evidence is convoluted. Under these circumstances, I find the conviction to be unwarranted and I quash it and order the accused's acquittal.

Made in open court this day the 18th of May 2022

V. Chima

Chima J

[10] *R v Koche* 1 ALR Mal 397; *Karima v Rep* 4 ALR Mal 601