



REPUBLIC OF MALAWI

IN THE HIGH COURT

Revenue Division

Lilongwe District Registry

Miscellaneous Criminal Application no. 03 of 2022

**(Being Criminal case no. 741 of 2021 in the Chief Resident Magistrate Court
sitting at Lilongwe)**

The Republic

and

Likki Manishanker Reddy

Suresh Kumar Reddy

CORAM : JUSTICE MATAPA KACHECHE

Mr. K Soko

Counsel for the accused (applicants)

Mr. A Chungu

Counsel for the State (Respondent)

Miss F Francisco

Counsel for the State (Respondent)

ORDER ON REVIEW

1. This is my ruling on a motion by the accused persons for a review of the decision of the Chief Resident Magistrate, sitting at Lilongwe, denying them their request to have two of the prosecution witnesses herein recalled to testify in the case against them.
2. The motion is brought under section 26(1) of the Courts Act and Section 360 of the Criminal Procedure and Evidence Code.
3. The facts on which the motion is based are uncontested. The accused persons are answering 3 counts under the Customs and Excise Act in the lower court. Initially Justice Patrick Chirwa presided over the case when he was the Chief Resident Magistrate (C). Upon being appointed a Judge of the High Court he ceased presiding over the matter and the new Chief Resident Magistrate took over the matter. By that time only two witnesses testified out of a possible ten. The accused persons, on the basis of section 165 of the Criminal Procedure and Evidence Code, filed a notice to recall the witnesses. Their ground for the request was that they wanted the Court to assess the demeanour of the witnesses. The Court dismissed the request.
4. The accused persons being aggrieved by the decision moved this Court to review the same. The notice of motion is framed in the following manner:

"TAKE NOTICE that the accused persons in the above particularised criminal proceedings before the Chief Resident Magistrate Court sitting at Lilongwe shall move the High Court ... to review the aforementioned proceedings and satisfy itself as to the correctness of the findings and orders recorded or passed therein and as to the regularity of the said proceedings".

5. While it is not mandatory under Section 26 of the Courts Act and Section 360 of the Criminal Procedure and Evidence Code for the parties to be heard on review, unless a decision will be made against a party in which case such party must be heard, the motion herein was not a mere request for review, it was in a form of formal court proceedings requiring the parties to be present. So I heard both parties on the issues.
6. Counsel for the accused persons has put the question for review as follows: was it lawful for the Magistrate to refuse to recall witnesses in terms of section 165(2) of the Criminal Procedure and Evidence Code? Counsel then submits that it was unlawful as the Magistrate applied her own test other than the test prescribed by statute.
7. The State argues that the magistrate took into account the test required under statute to deny the accused persons request. Noting that the witnesses came as experts and their evidence was not controversial and that there was no exceptional issue that could not be remedied without the recalling of the witnesses.
8. Section 165 provides as follows:
Cases heard by one magistrate continued by another magistrate
(1) Subject to subsections (2) and (3) respectively, wherever any magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or trial, ceases to exercise jurisdiction therein and is succeeded, whether by virtue of an order of transfer under this Code or otherwise, by another magistrate who has and who exercises such jurisdiction, the succeeding magistrate may act on the evidence so provided by his predecessors, or partly recorded by his predecessor and partly himself, or he may re-summon the witnesses and after recording the reasons for the first mentioned magistrate's ceasing to exercise jurisdiction recommence the inquiry or trial.
(2) In any trial the succeeding magistrate shall, save where he is of the opinion that the presence of a witness cannot be obtained without an amount of delay or expense which, in the circumstances of the case, he considers unreasonable, re-summon and release the witness or any of them if so requested by an accused.
(3) The High Court may, whether there be an appeal or not, set aside [a] conviction passed on evidence not wholly recorded by the magistrate before whom the conviction was heard, if it is of opinion that the accused has been materially prejudiced thereby, and may order a new inquiry or trial.
9. Whereas this provision needs to be looked at as a whole, it also needs to be looked at disjunctively. First there is subsection (1) which seems to give the magistrate the power to move herself to consider whether to recall witnesses or not. In that scenario the magistrate has, in my view, no limitation on factors to consider when making her decision.

10. On the other hand, there is subsection (2) which guides the magistrate on factors to consider if there is a request for a recall. While subsection (1) does not grant the accused person a right to recall of a witness, subsection 2 does grant that right. The right is not absolute though. It has limitations. But the limitations are in built within the subsection. The limitation is where the magistrate is of the opinion that the presence of a witness cannot be obtained without an amount of delay or expense which in the circumstances of the case she considers unreasonable. Other than this limitation the magistrate does not have much discretion in the matter where an accused person has requested for the recall of a witness.

11. It has to be emphasized that it is recognised by the provision that when recalling the witnesses there would be a delay and expenses would be incurred. However, it is not all delay and expense that would warrant the magistrate to deny the request. The requirement is that the amount of such delay or expense should be considered unreasonable in the circumstances by the magistrate.

12. In this case the magistrate gave the reason for refusing to recall the witnesses thus:

"11. Let me observe that indeed the accused has a right to recall this witness but the right is not absolute. The court has to form an opinion that the recall will not cause further delay and that it will not incur any expenses or that it is reasonable in the circumstances of the case."

12. It was observed in the case of Rep v Sosola and others Homicide cause no. 69 of 2019 in the order for directions for continued hearing of the case dated 18th September 2018, where two of the 12 accused persons applied for the recall of state witnesses. The Honourable Judge, Justice D nyaKaunda Kamanga remarked that 'recalling of witnesses occasions delay in a trial which is against the spirit of section 42(2)(f)(i) of the Constitution and therefore should be resorted to sparingly. Generally, a court will be reluctant to resummons witnesses where it would occasion inordinate delay in a case that had already been delayed or has taken long'.

Expense: can it be said that the witness can be secured without an amount of expense? The State has addressed the Court on the issue [of] expenses and indicated that such recall will incur expenses on the part of the State.

13. Reasonable: whether it is reasonable in the circumstances to allow the recall of the witnesses, this court has had the occasion to peruse the Court Record and noted that there are witness statement[s] which were filed and further in addition the witnesses gave oral evidence which is clear and straight forward on the court record. The Court has no reason to cast doubt on the notes that were recorded by the preceding Chief Resident Magistrate, now Judge. The Court believes the accused person will not be prejudiced in any way should these witnesses not be recalled. The accused persons were legally represented by competent Counsel in the case when the witnesses testified, they had opportunity to challenge his evidence and test it through the rigors of cross-examination.

14. Further, the Court has noted that since the proceedings commenced there have been two attempts by defence Counsel to have the accused persons discharged on the grounds that the State was not ready to prosecute them due to the fact they were delaying. One of the reasons the [defence] raised for praying to have the accused

discharged was the matter delaying. Obviously if the State witnesses are going to be recalled it will be a recipe for [delaying] the matter further.

15. It is the opinion of this Court that it will be unreasonable to recall the two witnesses as prayed by the defence Counsel, when their evidence will not be the only evidence that the Court will rely upon in arriving at its decision, there are 7 more witnesses to be called by the State, whom the court will appreciate their demeanor.

16. Accordingly this prayer for recall is not allowed. It is dismissed in its entirety." (Emphasis supplied by me).

13. Clearly, in my view, although the Acting CRM did mention the issues of delay and expense she did not make a finding or form an opinion that such delay or expense would be unreasonable in the circumstances. She clearly acknowledged that the State mentioned that they would incur expense by recalling the witness, which is inevitable anyway and the framers of the law knew that. But she needed to form an opinion that such expense would be unreasonable in the circumstances which she did not. The same applies to the delay which she mentioned.

14. In fact, in paragraph 11 she seems to suggest that there should be no any expense or delay for the accused persons to be allowed to recall the witnesses. Yet these are inevitable results of a recall.

15. Her reason for finding it unreasonable to recall the witnesses is found at paragraph 15 where she states that the witness' evidence will not be the only evidence, that there would be 7 more witnesses for the Court to assess the demeanour. In my view the demeanour of one witness cannot be substituted with that of another. This reason and all other considerations cannot hold in light of the requirements of section 165.

16. She also formed an opinion that the non-recall of the witnesses would in no way prejudice the accused persons as the accused were legally represented throughout the proceedings. In my view it does not matter whether an accused is represented or not. If it were so the law should have expressly stated that.

17. I therefore remit the file with a direction that the magistrate should reconsider the request specifically with reference to the reasonableness of the amount of delay or expense to be incurred by the recall of the witness.

18. It is so ordered today the 24th day of March, 2023.



16. Chimbizgani Matapa Kacheche
Judge.