IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION
Criminal Appeal No. **13** of **2020**
[CSA/HC/CA/53/2020]
[being criminal case no. 126 of 2020, FGM, Chiradzulu Magistrates' Court]

In the matter between:

STELLA TSAMWA, VERONICA TSAMWA & GRACE TSAMWA

v

THE REPUBLIC

JUDGMENT

nyaKaunda Kamanga, J.,

The three Appellants, Stella Tsamwa, Veronica Tsamwa and Grace Tsamwa appeared before the First Grade Magistrate sitting at Chiradzulu on 27th April 2020 where they were charged of the offences of malicious damage contrary to section 344(1) of the Penal Code and theft contrary to section 278 of the Penal Code. On the same day the trio of women were convicted on the two counts following their pleas guilty and were each sentenced to concurrent punishments of 12 months imprisonment for malicious damage and 24 months imprisonment for theft.

The convicts filed a petition of appeal to the High Court against both the convictions and sentences that were imposed on them on the grounds that appear subsequently.

The grounds of appeal

The particulars of matters of law and facts which the Appellant argue were erred by the lower court are included in five grounds of appeal which are as follows:

1. the Magistrate erred in law by convicting the Appellants on their own plea of guilty when in actual fact the Appellants never pleaded guilty.
2. the Magistrate erred in law by convicting the Appellants on their own plea of guilty when the Appellants qualified their admission.
3. the Magistrate erred in law by failing to record the plea of the Appellants in as nearly as possible the words used by the Appellants.

   Particulars of the ways used by omitted by the Court

   i. yes we damaged the crops because there was a court order restraining them from using the land.
   ii. we did it because they were not supposed to use the land.
4. the Magistrate erred in law by convicting the Appellants on their own plea of guilty without first ascertaining that the accused understood the nature and consequences of their plea.

5. that the sentences of 12 months for the offence of malicious damage and 24 months for the offence of theft were excessive based on the circumstances of the case vis-à-vis the mitigating factors.

In brief this court has been called upon to determine whether or not the convictions by the lower court should be upheld or quashed and that in the event that the court upholds the convictions, whether the sentences imposed are excessive.

The record of the lower court

From the record of the case, on the first count the Appellants were charged of the offence of malicious damage contrary to section 344(1) of the Penal Code. The particulars of the offence were that the three Appellants on the same date and place stated in the 1st count stole assorted crops value of K560,000 the property of Mrs. Veronica Makina. As recorded by the Magistrate the responses to the accusations contained on the first count that the prosecution had commenced against the Appellants were as follows as appears on pages 1 and 2:

1st accused : 'I understand the charge and I admit the charge. Yes I damaged the crops- The garden was stopped. Nobody ordered us to damage the crops.'

2nd accused: 'I understand the charge and I admit it. Yes I damaged the crops since there is a stop order. I did it on my own.'

3rd accused: 'I understand the charge and I admit it. Yes I did destroy the crops- I did it on my own.'

On the second count the Appellants were charged of the offence of theft contrary to section 278 of the Penal Code. The particulars of the offence were that the three Appellants on 19 March 2020 at Bowadi Village in the district of Chiradzulu willfully and unlawfully damaged assorted crops, property of Mrs. Veronica Makina.As appears on the record of the case the responses to second count that the prosecution had levelled against the Appellants were as follows as appears on pages 2 and 3:

1st accused : 'I understand the charge and I admit it. I did it on my own. The garden was stopped.'

2nd accused: 'I understand the charge and I admit it. Yes I took the things. We had no permission to take the things'

3rd accused: 'I understand the charge and I admit it. I indeed took the things. We had no permission.'

The trial Magistrate then proceed to record the following statement

'plea of guilty to both counts to all of you'

However, an examination of the responses of the first and second accused persons to the accusations from the prosecution on both counts shows that the pleas were qualified, in that the accused persons justified their actions to the existence of a 'stop order'. It was therefore wrong in law for the Magistrate to enter a plea of guilty. Further, the responses by all the accused persons shows that the third ground of appeal, which alleges that the Magistrate failed to record the plea of the Appellants in as nearly as possible in the words used by the Appellants, has no merit at all and it is dismissed. The allegation by the Appellants that some words that were used by them were omitted by the Magistrate is not supported by the responses that appear on the record of the case and have been quoted in full above. The legal practitioner of the Appellants has not made it clear to this court where he obtained the alleged particulars of this

ground of appeal. It is a principle of procedure and practice that a record of a case speaks for itself.

The statement which the prosecutor read in support of the pleas of guilty that had been entered by the Magistrate were to the effect that complainant, Veronica Makina, who happens to be a farmer grew maize, tomatoes, pigeon peas and other garden vegetables. On 19th March 2020 the complainant saw the Appellants enter the garden and harvest her maize. After which they damaged the garden and destroyed farm produce, such as pigeon peas, tomatoes and vegetables and took away some of the damaged crops. The value of the damage caused and the crops was K560,000. The complainant after reporting the matter to the village head she was advised to report the matter to Chiradzulu police station, whose officers arrested and charged the Appellants with two counts of criminal offences. What is an interesting part of the facts in support of the prosecution is what was recorded by the police investigators in the caution statements, which reveal that the Appellants expounded on the alleged issues, as will be outlined below.

Under exhibit marked P1, the caution statement of Stella Tsamwa, it is recorded that there was a land dispute between Edna Makina and the Appellants. That after the Chiradzulu Magistrates' Court had ordered that the land belonged to Edna Makina the Appellants had appealed to the High Court as well as obtained a stay order that no one should farm on the land in dispute. However, the conduct of the complainant in damaging the crops of the Appellants before the complainant proceeded to plant her own crops on the same piece of land angered the 1st Appellant and her co-accused. So the Appellants decided to revenge against the lady by harvesting a bag of maize each and destroying the mustard vegetables, pigeon peas and millet of the complainant.

In exhibit marked P3A the second Appellant, Veronica Tsamwa, in her caution statement states that during the morning of 19th March, her mother Stella Tsamwa, her sister Grace Tsamwa and herself went to the garden at Bowadi Village. Similar to what Stella Tsamwa has said, this piece of land was the subject matter of a dispute between her mother and Edna Makina. While in the garden they slashed down crops which had been planted by Edna Makina such as millet, mustard, pigeon peas and maize. After their acts of destruction, each of the Appellants took away a bag of maize. The second Appellant explains that the Appellants did this because Edna Makina and her group of people had also cut down trees and crops that had been planted by the Appellants in the same garden. That the matter was taken before Chiradzulu Magistrates' Court where it was ordered that the land belongs to Edna Makina. The Appellants being dissatisfied with the judgment they lodged an appeal at the High Court as well as obtained an order staying execution of the judgment. However, Edna Makina continued to farm on the land which made the Appellants angry and caused them to do what is alleged in the charge sheet. Veronica Tsamwa also mentions that the millet and pigeon peas which were slashed were still tender as these crops had not yet produced seeds.

The third Appellant, Grace Tsamwa, in her caution statement, exhibit marked P2A, states that on the 19th day of March 2020, the three Appellants went to the garden which is the subject matter of the land dispute between Edna Makina and themselves. The Appellants slashed down crops such as millet, maize, pigeon peas and mustard. Each of them collected a bag of the maize cobs that they had cut down while some was left behind. The millet and pigeon peas that they had destroyed had not yet produced seeds. According to the third Appellant they conducted themselves in this manner because there was an order of stay over activities on the garden from the court, the police and also the chief. In addition the decision over the land dispute had also been appealed against before the High Court. According to the third Appellant Edna Makina disregarded the court order and continued to farm on the land, where in 2018 she

destroyed the trees and crops of the Appellants. The Appellants decided to do likewise as a form of revenge as Edna Makina insisted that she had won the court case while the Appellants were of the view that the decision on the matter was being appealed against. The third Appellant admits that they damaged the crops and took away the maize for the reasons she explains in her caution statement.

After all the three Appellants had conceded that the facts that had been presented by the prosecution were correct, the Magistrate found them guilty and convicted them on both counts of the criminal offences that they were charged with. After the Magistrate had considered the factors that they prosecution and Appellants had raised in mitigation of sentence, the penal provisions and the circumstances in which the offences were committed he proceeded to sentence each one of the offenders to the following concurrent punishments: 12 months imprisonment for malicious damage and 24 months imprisonment for theft.

The submissions of the Appellants

In regard to the first ground of appeal, the legal practitioner for the Appellants rely on section 251 of the CP and EC in asserting that the lower court erred in law by not warning the convicts on the consequences of pleading guilty to the offences. That the Magistrate was supposed to ascertain that the Appellants understood the nature and consequences of their pleas and that they intended to admit without qualification the truth of the charge against them. The Appellants contend that they never pleaded guilty to the charges levelled against them since their response is indicated to have been as follows:

> 'yes, we removed the crops because there was a stay order, they were not supposed to work on the land'

As has already been noted by this court, the statement quoted above which the legal practitioner has advanced as the response from the Appellants has not been located anywhere on the record of the case. The legal practitioner would have helped this appeal court if he could have pinpointed the exact page number where such response was recorded otherwise this court assumes that this is the legal practitioner's own framing of how the Appellants should have best responded to a reading of the charges. The Appellants argue that they qualified their action by stating that the other party had no right to work on the land hence their action. It is contended that the matter required further probe other than a conviction without hearing evidence. The Appellants submits that in the totality of the circumstances there suffered a miscarriage of justice by being convicted on their own pleas of guilty.

In regard to the last ground of appeal the Appellants argue that if the court upholds the convictions, the sentences imposed on the convicts are excessive after examining the level of culpability and the conduct of the convicts during trial. The legal practitioner for the Appellants submits that the Appellants regret their action and were remorseful by pleading guilty and did not waste the court's time: *Gondwe v Rep* criminal appeal no. 109 of 1997. It is further submitted that such first time offenders have a high propensity of being reformed than an accused who does not plead guilty.

The Appellants submit that they have no previous criminal record and not being habitual criminals, a sentence which is reformatory and not deterrent will be just in this case. After referring to several cases, including that of *Matindi v Rep* [1996] MLR 355 and sections 339 and 340 of the CP and EC the legal practitioner for the Appellants contends that regardless of the gravity of the offence, that one is a first time offender should always be calculated in favour of the offender in question. It is argued that if a convicted person has led a clean and blameless life prior to his conviction, such factor goes to his credit and ought to be given meaningful consideration as the court addresses its mind to the question of sentence: *Rep v*

Eneya and others criminal case no. 53 of 2000. On basis of the legal policy that first offenders should not be slapped with custodial sentences unless there are compelling reasons to mete out a custodial sentence: *Rep v Kolowiko* [1996] MLR 355, the Appellant submits that unless there are exceptional grounds, the custodial sentences to the first offenders are excessive and in violation of section 19(2) of the Constitution. That if the court imposes a custodial sentence, the reasons for doing so should be satisfactory.

Further, the court is called upon to consider the provisions of section 340 of the CP and EC to order a suspended sentence where the accused is a first time offender. If the court deems that a suspended sentence is not applicable on the accused, the Appellant submits that the court should be lenient on the accused. The Appellants prays that the court invokes section 339 of the CP and EC by giving them a suspended sentence or reducing their sentences to 7 months IHL.

The submissions of the Respondent

The Respondent in their skeleton arguments which were filed on 19th October 2020 contends that the lower court erred in law by convicting the Appellants on their own pleas without first ascertaining that the Appellants understood the nature and consequences of their guilty pleas. The Respondent assert that the trial court must always have regard to the provisions of section 251(2) of the Criminal Procedure and Evidence Code before recording a plea of guilty. The Respondent contends that the lower court did not comply with the provisions of section 251 of the CP and EC and an error law of law was occasioned. The respondents rely on the cases of *Kennedy Mawindo v Rep* criminal case no. 34 of 2016 (unreported) and *Isaac Sithole and Emmanuel Cosmas v Rep* criminal review no. 37 of 2010 (unreported) in support of their arguments. The submission of the Respondent is that the convictions cannot stand as the lower court did not comply with s 251(2) of the CP and EC and that the Appellants having served a substantial part of their sentences a retrial of the matter will not be in the interest of justice. The prayer of the Respondents is that the Appellants should be immediately released from prison.

In regard to the sentences the Respondent having noted the maximum punishments of 5 years imprisonment both under s 344(1) of the Penal Code and section 278 of the Penal Code the Respondent contends that if the court upholds the convictions of the Appellants then the sentence which were on the higher side should be reduced. On the first count it should be reduced from 12 months to 6 months and the sentence of 24 months for theft should be reduced to 9 months imprisonment. The Respondent rely on the following cases on sentencing principles: *Republic v Tione Chavula*, criminal case no. 83 of 2005; *Rep v Harrison Suluma and anor* and *Republic v Dzakumwa Makosi*, confirmation case no. 54 of 2016.

The decision

Under section 251(2) of the Criminal Procedure and Evidence Code a plea of guilty can only be recorded where there is an unequivocal admission of guilt. The law on a plea of guilty has considerably been explained in many cases, such as the cases of *Magwaya v Republic* [1975–1977] 8 MLR 323, *Watson and another v Republic* [1994] MLR 383, *Republic v Mphande* [1995] 2 MLR 586 and *Byson and others v Republic* [1997] 1 MLR 47. An examination of the pleas of the all the Appellants in the context of the prosecution statement and the documents that were tendered in evidence surely casts serious doubt on whether the Appellants intended to admit the charges. What is clear is that the caution statements of the all the three accused persons, which were part of the facts in support of the prosecution, contests the charges against them. The Appellants' narrating of the events when they were cautioned, as appear in the

cautions statements, were equivocal and it was wrong in law and irregular for the Magistrate to confirm recordings of pleas of guilty: *Republic v Gama* [1997] 2 MLR 34. The pleas were qualified because all the Appellant in their caution statements allege that the land in dispute was a subject matter before the High Court which had also allegedly granted an order of stay which Edna Makina disregarded. The Appellants' response also implies that the Appellants had no legal right to do what they did. The Magistrate should have entered pleas of guilty for the all the Appellants on both counts and should have commenced trial to afford the prosecution opportunity to prove the criminal allegations beyond reasonable doubt.

This court finds that some of the grounds of appeal have been made out and all the convictions are quashed. Consequently the sentences imposed on the three Appellants are set aside.

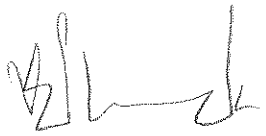
The matter is remitted back to the lower court for a retrial. The lower court should conduct a retrial of this matter within 30 days after the receipt of the case file.

It is also ordered that a plea of *autrefois* convict will not be open to any of the Appellants during their re-trial.

It is noted that the first Appellant was already released on bail. I now order that the second and third Appellants be also released bail pending commencement of a new trial. They are bonded to the court in the sum of K50,000.00 in cash form. They should secure two sureties, one being a blood or marital relation, each one of whom should be bonded to the court in the sums of K300,000.00, not in CASH form. All the Appellants should report to the Officer in Charge of the nearest police station to their home once every month. Any travel documents that they have should be surrendered to the police station where they will be reporting for bail.

It is further ordered that following retrial, if the Appellants are found guilty and convicted, the period of time that they have already spent in custody shall be included in sentencing.

Pronounced in open court this 6th day of November 2020 at Chichiri, Blantyre.



Dorothy nyaKaunda Kamanga
JUDGE

Case information :

Date of hearing	:	19th October 2020.
Mr. Aufi	:	Legal Practitioner for the three Appellants.
Mr. Chisanga	:	Principal State Advocate for the Respondent.
The three Appellants	:	Present /represented.
Mr. Amos/ Ms Ngoma	:	Court Clerks.