

IN THE HIGH COURT OF MALAWI  
MZUZU DISTRICT REGISTRY  
CRIMINAL DIVISION

CONFIRMATION CASE No. 474 OF 2019

[being criminal case no. 52 0of 2019, PRM, Mzuzu Magistrates Court]

*In the matter between:*

THE REPUBLIC

v

PATRON NDHLOVU

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ORDER IN CONFIRMATION

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*nyaKaunda Kamanga, J.,*

The accused person, Patron Ndhlovu, was initially charged with six counts which were as follows: the first count of the offence of forgery of a judicial record contrary to s. 357 of the Penal Code; the second count of forgery of a judicial record contrary to s. 357 of the Penal Code; the third count of forgery of a judicial record contrary to s. 351 as read with s. 357 of the Penal Code; the fourth count of forgery of an official stamp for a government department contrary to s. 359(a) of the Penal Code; the fifth count was forgery of an official stamp for a government department contrary to s. 359(a) of the Penal Code; the sixth count of attempted theft contrary to s. 401 as read with s. 278 of the Penal Code. The accused person elected to represent himself in the subordinate court.

The accused person initially pleaded not guilty to all the six counts of the offences that he was charged with and the matter was adjourned for commencement of trial. Later the prosecution and defendant entered into plea bargaining as a result of which the counts were reduced to two counts. In the new amended charge sheet which was issued on 24<sup>th</sup> July 2019 shows that the first count is the offence of forgery of an official stamp for a government department

contrary to s. 359(a) of the Penal Code. The particulars of this offence are that the defendant between the month of November 2018 and January 2019, within Mzuzu City, with intent to defraud or deceive, forged an official stamp, namely, '*a court seal for the Chief Resident Magistrate North*', and signing on the said court seal in the name of the Chief Resident Magistrate North, without the authority of the said Chief Resident Magistrate.

The second count on the new charge is the offence of attempted theft contrary to s. 401 as read with s. 278 of the Penal Code. The particulars of the offence on the second count are that the defendant during the month of November 2018 at the National Bank of Malawi Head Office in Blantyre city, attempted to steal money amounting to three million, five hundred and three thousand and three hundred and thirty Malawi Kwacha (MK3,503,330.00), the property of the said National Bank of Malawi.

The accused person pleaded guilty to both counts and the facts which the prosecution narrated in support of their case will be reprinted below:

'...in the month of November 2018, the Chief Resident Magistrate for the Northern Region, in the person of Mrs. Gladys Assima Gondwe, received a query from her immediate supervisor, the Registrar of the High Court and Supreme Court of Malawi, on the propriety and authenticity of a number of garnishee orders which were purportedly issued by her court against National Bank of Malawi, in respect of civil cause number 875 of 2018, between *Jaison Mphande and Central Poultry (2000) Limited* and against the NBS Bank Limited, in respect of civil cause number 101 of 2018 between *Mercy Kalimbele and Saffintra Malata*, civil cause number 256 of 2018, between *Henzile Mphande and Kulima Gold and Rab Processors Limited*, civil cause number 314 of 2017 between *Mark Kumwenda and ETG Input Limited and Export Trading Company Limited* and against First Capital Bank Limited, in respect of civil cause number 314 of 2017 between *Mark Kumwenda and ETG Input Limited and Export Trading Company Limited* and civil cause number 256 of 2018 between *Henzile Mphande and Kulima Gold and Rab Processors Limited*'

Upon receiving the above query the CRM(N) requested the officials of the bank to bring to her office copies of the said alleged garnishee orders for her inspection and investigation into the said matter. After inspection of the same the CRM(N) realised that the said court documents and records were forgeries as she 'noted that



she was not the one who signed on the said judicial record, which purportedly was signed by the Chief Resident Magistrate Court North, and also that the common seals for the Chief Resident Magistrate Court North, and the cashier's official 'PAID' stamp which were embossed on the said documents and records, were not the common seals for the Chief Resident Magistrate Court North.'

After having inspected the said judicial record and purported orders Mrs. Gondwe then advised the bank official not to issue any payment against the said garnishee orders, which were amounting to MK3,503,330.00. The garnishee attachment order to show cause (nisi), garnishee attachment order absolute, the response of the legal practitioner for the National Bank of Malawi to the Chief Resident Magistrate Court, North are the documents that make up the judicial record which was inspected and verified and verified by the CRM(N) and found to be false judicial record was tendered in evidence as exhibit marked EXP1.

The prosecution stated that in early January 2019 a similar set of documents involving three court cases purportedly issued under *Mercy Kalimbele and Safintra Malata Limited* civil case number 101 of 2018; *Henzile Mphande and Kulima Gold and Rab Processors Limited* civil cause no. 256 of 2018 and *Mark Kumwenda and ETG Input Limited and Export Trading Company Limited* civil cause number 314 of 2017 were presented for verification to the CRM(N) by officials from NBS Bank. The said bank had already frozen a total sum of K9,745,450.00 in the accounts of their respective customers in preparation for releasing and satisfying the money to the judgment creditor. After inspecting and verifying the said documents Mrs. Gondwe found them to be false judicial records for the same reasons that were given to the documents from National Bank of Malawi. The CRM(N) advised NBS Bank not to release the money. This bunch of documents were tendered in evidence as exhibit marked EXP2.

The prosecution narrated that on 12<sup>th</sup> January 2019 Mrs. Gondwe received a final query from Mr. Mtokale of First Capital Bank Limited in respect of two garnishee orders which had been served on the bank and purportedly issued by the CRM(N) under *Henzile Mphande and Kulima Gold and Rab Processors Limited* civil cause no. 256 of 2018 and *Mark Kumwenda and ETG Input Limited and Export Trading Company Limited* civil cause number 314 of 2017. The prosecution also mentioned that the legal department of First Capital Bank had a insistently received a number of text messages and calls from a cellular phone line with number 0883274200 following on the payment from the garnishee orders.

After thoroughly inspecting this set of documents the CRM(N) reached the conclusion that the said documents were similar to the ones which she had already inspected as requested by officials from the National Bank of Malawi and NBS Bank Limited and that they were forged. This set of documents was tendered in evidence and marked EXP4. Mrs. Gondwe advised First Capital Bank officials not to proceed to release the sum of money amounting to K6,106,450.00. On 14<sup>th</sup> January 2019 the CRM(N) reported matter to police who following investigations arrested two suspects, Zizipizgani Gama and Willard Kachikwati, who were about to obtain payments from First Capital Bank at Mzuzu Branch on the basis of the garnishee orders which were already disowned as forgeries by the CRM(N). The two suspects mentioned the defendant to be the person who sent them to collect the said payment from the bank. On 19<sup>th</sup> January 2019 the defendant was arrested at Lilongwe City Mall at AXA offices as he was trying to collect a cheque which the two suspects had communicated to have sent to him by courier.

At the time of his arrest the convict was searched and on his person was found with a flash disk in which soft copies of all the documents which relied on by the prosecution had been saved. A TNM sun card for number 0883274200 was also found on his person together with a headed paper written Lameck & Company. All the items found following this search were also tendered in evidence. On the 20<sup>th</sup> day of January 2019 the defendant led the investigators to a place where he was staying in Lilongwe where the police recovered three forged seals, namely: court seal for the Chief Resident Magistrate Court North; a 'PAID' Chief Resident Magistrate Court North Accounts Stamp and a PAID stamp. The police also recovered two ink pads in red and black colours. All these items were also tendered in evidence. Also discovered and recovered at the premises of the convict were a bunch of documents which appeared to be the original copies of some of the documents in the form of garnishee orders which were sent to the three banks for purposes of defrauding them, as earlier explained in this order. These garnishee orders were also tendered in court.

Another document tendered in court was a document of search with TNM showing call logs and identities of persons, which revealed that cellular phone number 0883274200 was registered in the name of the defendant. This is the same number on which legal practitioner Mr. Mtokale had received text messages and calls from some unknown person inquiring about payment of money against garnishee orders which were purportedly issued by the CRM(North).



The prosecution also visited the registry of the Chief Resident Magistrate to inspect and verify the civil register book for the civil causes as indicated on the forged garnishee orders. The search revealed that all the cases referred to earlier did not exist in the civil register as the parties and causes of action were different and the narration of the entries which was tendered in court as part of the facts against the defendant was as follows:

- civil cause number 101 of 2018 was between Martin Nyirenda and Junior Moyo and was for damages for impregnating a certain named girl.
- Civil cause number 314 of 2017 was between David Zimba and Tuntufye S. Lwesha and Prime Insurance Company Limited and the claim was for unliquidated damages for injury arising out of a road accident.
- Civil Cause number 577 of 2018 was not registered in the cause book, as it was blank in the register book.
- Civil Cause number 875 of 2018 was between Alick Manda and Jack Mulazi and the claim was compensation for committing adultery with the plaintiff's wife.
- Civil cause number 256 of 2018 was between James Mlenga and TNM and was an application for a search warrant for a lost phone.

Other than the above entries the rest of the purported civil cause numbers did not exist in the register book of the CRM(N).

When the defendant was cautioned and charged with forgery of judicial records with intention to defraud he gave a written response indicating that he was exercising his constitutional right to remain silent. In his evidence of arrest the defendant also his response by his own hand and he denied the charges levelled against him. Both the caution statement and evidence of his arrest were tendered in court by the prosecution.

When the facts were presented to the trial court, the defendant admitted them to be true. He also admitted them without any qualification and informed the court that he was aware that he could be convicted and sent to prison by admitting the charges. On 24<sup>th</sup> July 2019 the defendant was convicted following his own pleas of guilty and admission of facts narrated by the prosecution supporting the two counts of the offences that were levelled against him.

The circumstances of the case, the admission of the facts and pleas of guilty and the evidence in support of the prosecution case that was before the magistrate

warranted the findings of guilty and conviction of the defendant on each of the counts that he was charged with. Accordingly, this review court finds the convictions on all the two counts appropriate and proceeds to confirm them.

The convict herein was sentenced to concurrent custodial terms of 60 months imprisonment with hard labour on the first count of the offence of forgery of an official stamp for a government department contrary to s. 359(a) of the Penal Code and 12 months imprisonment with hard labour on the second count of the offence of attempted theft contrary to s. 401 as read with s. 278 of the Penal Code.

Section 15 of the CP and EC provides for automatic review of sentences imposed on convicts. This order is also made in exercise of authority by the High Court under the abovementioned provision as well as s. 25 of the Courts Act and s. 360 of the CP and EC. Considering the current situation of the COVID-19 pandemic this court exercised its discretion under section 363(2) of the CP and EC to conduct this review without hearing neither the accused nor the prosecution.

Since the convict was a first time offender the sentencing court considered the provisions of ss. 339 and 340 of the CP and EC and whether he deserved to be considered for alternative punishment like compensation, community service, suspended sentence, other than an immediate custodial sentence. The trial court formed the view that the non-custodial forms of punishment would not suffice having in mind the nature of the offence, the public interest and the attendant aggravating factors that were highlighted by the prosecution and ordered the immediate operation of the sentences.

Pursuant to s. 260 of the CP and EC and after the magistrate had invited the parties to address the court on what should be an appropriate sentence in the circumstances the prosecution made the following submissions: that the defendant was a first time offender however what aggravated the case was that the defendant who happened to be a seasoned private practice lawyer made a false court seal with which he was embossing documents which he had prepared and issuing in the name of the CRM(North) without the authority of the said CRM(N) and being a danger to society he deserves isolation from it. The reason behind it was to defraud and deceive banks into paying him amounts of money and they nearly did if the CRM(N) had not timely intervened. The defendant relying on his legal knowledge and practice carefully planned to commit the fraudulent acts; the crimes which the defendant committed are serious in nature as they had the potential of putting the



whole judicial and justice system into disrepute and at stake. The prosecution submitted that the court should use its sentencing discretion judicially and make sure that the convict get his just deserts in sentencing. The prosecution called upon the court to mete out maximum sentences in both counts without being bothered by the common myth that worst offenders are yet to be born and relied on the case of *Funsani Payenda v Republic*, Sentence Rehearing Case No. 18 of 2015. Further the defendant was running from long arms of the law as he answering to similar charges before the Chief Resident Magistrate sitting at Lilongwe under criminal case number 406 of 2017 but he had absconded as such a warrant for his arrest was issued on the 5<sup>th</sup> day of April 2018 by the presiding magistrate. The said warrant had not been executed on him when he was being arrested on the 19<sup>th</sup> January 2019 on the present charges and subsequent conviction. Leaving the conclusion that the offences in this criminal matter were committed whilst he was on the run from law enforcement and that he had not learned any lesson from his previous altercation with the law. The prosecution submitted that there were little signs of remorse and that the convict was sophisticated and calculating in his actions as he used his legal training to engage in illegal transactions, thereby breaking the law and ethics regulating the legal profession. To make matters worse the Mr. Ndhlovu ‘betrayed the sanctity of the court, the very institution he was expected to serve and protect as its officer’.

It is on record that the defendant at the age of 40 years was mature enough to know what he was doing. Relying on the principles propounded in the case of *Republic v Felix Madalitso Keke*, High Court Principal Registry, Confirmation Case no. 404 of 2010 the court determined that the defendant did ‘not deserve to be given a short, quick and sharp sentence because he is not a young offender falling in the ranges of 19 and 25 years old’.

On the other hand, the defendant in his plea in mitigation he stated to have ‘apologised to the Judiciary, to the Chief Resident Magistrate North, in particular to Mrs. Gladys Gondwe and to the legal profession as a whole as well as to any other person affected by his actions. He told the court that he is not apologizing to seek lenience but as a moral duty and acceptance of responsibility. He has admitted that he did not behave properly and that it is his wish the present proceedings and the resultant imprisonment will pave way for a new chapter in his life.’

The defendant also requested the court to consider ss. 339 and 340 of the CP and EC and that he must be given reasons for a custodial sentence. The defendant admitted that the criminal matter involved breach of trust, abuse of authority and that although non-custodial sentences are rarely imposed in such cases and he was not going to plead for one but it was up to the court to examine the circumstances of the case and determine if a non-custodial sentence is appropriate as guided by the case of *Republic v Lutepo*, criminal case no. 202 of 2014. In arguing against imposition of a maximum sentence the defendant relied on the cases of *Isaac v Republic* 1923-60 ALR(Mal) 74 and *Republic v Eneya and Others* Criminal case no. 53 of 2000. He told the court that he had saved court's time, space and resources by pleading guilty at the earliest possible opportunity in much as the plea of guilty was entered on 4<sup>th</sup> July 2019. He initially made the initiative on 24<sup>th</sup> January 2019 when the matter was being handled by the Regional Prosecutions Office and on 1<sup>st</sup> April 2019 he initiated the same plea when the matter was transferred to State Advocate Chambers. His argument was that the step he took entitled him to a one-third reduction in sentence by the authority of *Republic v Lutepo*, criminal case no. 202 of 2014. He also told the court that he cooperated with law enforcement agencies in that he did not resist arrest, he led the police to the recovery of the stamps and seals and his plea of guilty. All the steps go towards showing remorse as per the cases of *Nyoni and others v Republic* [1997] 2 MLR 163 and *Gondwe v Republic* Criminal Appeal No. 109 of 1997. The defendant referred to the case of *Magamba and others v Republic* [1999] MLR 142 in seeking the court's lenience as he mentioned that the conviction would have negative effects on his life in that his career as an attorney was over, he would not be able to engage in any public service and that it would be extremely difficult for him to earn a living after being released from custody. He also informed the court that the offences in this criminal matter were committed in the same transaction and he prayed that they should attract concurrent sentences and that they should operate from the date of his arrest as he had been in custody for over nine months.

The magistrate correctly noted that the general principle in sentencing is that the punishment must fit the crime and the offender, be fair to society: *Republic v Shauti*, confirmation case no. 68 of 1996 (unreported). While noting the serious circumstances of the case the magistrate on pages 17 to 18 of the judgment made the following observation:



‘Here we have a lawyer of several years at the bar and an officer of the court who between the months of November 2018 and January 2019 within the Mzuzu City made a false court seal for the Chief Resident Magistrate North with which he was embossing on documents which he had prepared and signing on the said court seal in the name of Chief Resident Magistrate North, without the authority of the said Chief Resident Magistrate North. The reason for making such a false court seal and signing on the false court records and the uttering of the same to various banks was clearly to defraud or deceive the said banks into paying him the amounts of money. The said banks nearly paid out the sums of money to the convict, if it was not for the timely intervention of the Chief Resident Magistrate for the Northern Region, Mrs. Gladys Assima Gondwe. I agree with the State that such conduct must be met with the greatest revulsion it deserves. This conduct of the convict has indeed the capacity of putting the whole judicial or justice system into disrepute. The sophistry with which the convict executed the offences in this case are very atrocious. He had to sit down and prepare for the commission of the said crimes by coming up with the said fake court seals, fake cashier’s stamp and “PAID” stamp, coat of arms of the Republic of Malawi and a legal firm which purportedly authored the said documents. It should not be surprising, therefore, when the State is calling for a maximum punishment for the crimes committed by the convict in this case.’

The trial court relied on the case of *Republic v Simpokolo*, confirmation case no. 68 of 1996 which discusses some of the factors to consider in sentencing for forgery in the following terms:

‘...in arriving at the right sentence for forgery or uttering, the court has to look at the nature of the document forged and its consequences. A very important document could be forged with dire consequences. Conversely, modest consequences could be had from a document by nature important. The sentence must have regard to all this...’

As was correctly noted by the learned trial magistrate, forgery is one of the serious offences under the Penal Code. The actions by the defendant of forging a court seal for the Chief Resident Magistrate North and signing on garnishee orders the name of the Chief Resident Magistrate North, without the authority of the said Chief Resident Magistrate as narrated by the prosecution was very serious and proportional punishment should be imposed on the defendant. One of the

consequence of the forgery is that the criminal act enabled the defendant to use the legal process to attempt to steal a huge sum of money amounting to K3,503,330.00 from National Bank of Malawi. As was correctly noted by the magistrate, the actions of the defendant were not only unlawful but were also unethical and had the potential of putting the integrity of the court and the legal profession in Malawi in disrepute.

The maximum penalty for forgery under s. 359(a) of the Penal Code is imprisonment for seven years. A serious consideration of the aggravating and mitigating factors and the cases of *Idi v Rep* [1991] 14 MLR 103 (SCA); *Kumwenda v Rep* [1993] 16(1) MLR 233 (SCA) and *Rep v Majiya* [1997] 2 MLR 87 strongly persuades this review court to hold the opinion that the sentence of 60 months imprisonment that was imposed on the convict was manifestly excessive. Especially, after considering the defendant's plea of guilty, his being a first time offender, his apology and his cooperation with the investigators to help them unearth his criminal enterprise. The penalty of imprisonment for 60 months was too close to the maximum penal provision for forgery of a government instrument of imprisonment for 7 years that is provided for under s. 359(a) of the Penal Code and it defeats the benefit to a convict of receiving a lighter sentence following the process of plea bargaining. Further, the case of *Republic v Raphael Frank* HC/PR Criminal Appeal No. 8 of 2017 (unreported 6<sup>th</sup> June 2017) holds that it is not normal sentencing practice to impose a custodial sentence 'that is more than half of the maximum sentence' provided for in the statutory provision. Consequently, this review court in exercises of its sentencing discretion sets aside the sentence of 60 months IHL that was imposed by the subordinate court on the defendant and substitutes thereof a reduced term of 30 months imprisonment. Timely review of criminal matters is a viable strategy for controlling the prison population through early releases or sentence modification as has happened in this case. Short and reduced prison terms reduces the prison population and prison cell space is efficiently utilised by accommodating more offenders of shorter sentences or creating room for the remaining prisoners. Through this review process the convict has managed to earn a reduction by half of the sentence which was imposed on him which will reduce the length of time that he will spend in custody and a step that also helps to decongest the prisoner population during this period when the prison authorities are facing challenges in reducing the prisoner population and implementing social distance measures in order to prevent and contain the corona



virus known as COVID-19. As of yesterday the 12<sup>th</sup> August 2020 Malawi had registered 4,752 confirmed cases, of which 2,071 were active and there had been 152 deaths (Ministry of Health, COVID 19 Daily Info Update). While the Ministry of Health only provides the general statistics, in respect of prisons it was reported on 6<sup>th</sup> August 2020 that the number of coronavirus cases in the country's prisons was at 107, with Chichiri Prison in Blantyre and Nkhata Bay Prison as the worst hit: *The Nation* newspaper <https://www.mwnation.com/prison-covid-19-crisis-worsens/>. After this order was pronounced, on 17<sup>th</sup> August 2020 it was reported that out of ten inmates who were tested five inmates had Covid-19 at Mzuzu Prison which was accommodating 784 prisoners (of whom 88 are women) instead of its capacity of 550: *The Daily Times* 'Mzuzu Prison fears 50% inmates infected.' As of 18<sup>th</sup> August 2020 the prisons had 155 confirmed cases and mass tests for covid-19 had commenced at Chichiri Prison: *The Nation* newspaper 18 August 2020 at page 1. The situation of prison overcrowding, with prisons holding 14,000 people against the design capacity of 5,000 inmates, makes social distancing impossible and places prisoners in dire conditions and at high risk of being exposed to and contracting Covid-19. It is therefore critical that the criminal justice system intensifies on implementing strategies, such conducting camp courts for bail applications and review of convicts' criminal files, which will assist in controlling and reducing the prisoner population.

In regard to the second count this court is inclined to confirm the punishment of 12 months imprisonment for committing the offence of attempted theft. Although an attempted theft is a misdemeanour and the maximum penalty under s.34 of the Penal Code is two years imprisonment, the circumstances in this case, especially the abuse of the process of the court and unethical conduct by the defendant as a legal practitioner warrants the custodial term that was imposed by the magistrate. The 12 months imprisonment is therefore confirmed with effect from the 19<sup>th</sup> January 2019. This court also finds that it was proper that, the trial magistrate having considered the provisions of ss.339 and 340 of the CP and EC and the circumstances of the case and the offender, he was compelled to order the immediate operation of the sentences. No reasonable legal practitioner who is also an officer of the court should engage in such nature of forgery and attempted theft. To date the defendant has been in custody for a period of 19 months and if the prison authority should consider it appropriate to apply a general remission of one

third of the prisoner's sentence under s.107 of the Prisons Act then this convict herein is likely to be released in the coming month of September 2020, after he has completed a period of 20 months of service under the fresh warrant of commitment.

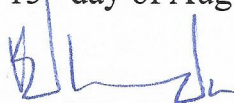
Beyond and in addition to the review process and following the approach that was taken in the case of *Dr. Mpinganjira v Director of ACB HC/PR Criminal Review Case No. 3 of 2020* (unreported 28<sup>th</sup> February 2020) this review court having noted the manner in which the defendant, as a legal practitioner, abused the process of the court in order to engage in criminal activities and which also resulted in him conducting himself in unethical manner it is appropriate that this court admonishes him under s. 89(1)(c) of the Legal Education and Legal Practitioners Act. It is so ordered.

It is also ordered that the Registrar of the High Court of Malawi should within 30 days hereof and in pursuant to s. 90(3)(a) of the Legal Education and Legal Practitioners Act refer Mr. Patron Ndhlovu, as a legal practitioner, and this criminal matter in which he has been convicted of two criminal offences relating to his professional conduct, to the Disciplinary Committee of the Malawi Law Society so that the Society can inquire into the conduct of their member.

If the defendant is not satisfied with this order he can exercise his constitutional and statutory rights to appeal against the judgment of subordinate court, as was already explained to him by the trial magistrate, since this court has proceeded to make this order without hearing the parties.

The defendant is also at liberty to appeal against the consequential orders that this court has made in respect of him as a member of the legal profession.

Pronounced in open court this 13<sup>th</sup> day of August 2020 at Mzuzu.



Dorothy nyaKaundaKamanga  
JUDGE

*Case information:*

Mr. Patron Ndhlovu	:	Present/ self-represented.
Mr. D. Malunda	:	Senior Assistant Chief State Advocate.
Mr. Ganizani Msukwa	:	Court Clerk.