**IN THE MALAWI SUPREME COURT OF APPEAL**

**AT BLANTYRE**

**MSCA CRIMINAL APPEAL NO. 1 OF 2009**
*(Being High Court Criminal Appeal No.26 of 2008)*

**BETWEEN:**

SAM JOHN LEMOS MPASU..... .....APPELLANT

**AND**

THE REPUBLIC.....RESPONDENT

**BEFORE :** **THE HON. CHIEF JUSTICE MUNLO, SC, JA**
**THE HON. JUSTICE MTAMBO, SC, JA**
**THE HON. JUSTICE TEMBO, SC, JA**

Chokhotho, Mwakhwawa Counsel for the Appellant
Kayira, Kalebe, Chiundira, Namanja Counsel for the Respondent
Mwale, Chief Law Clerk/Official Interpreter
Singano, Senior Personal Secretary

## JUDGMENT

**TEMBO, SC, JA**

The appellant was charged with and convicted of three counts of the offence of abuse of office contrary to section 95 of the Penal Code before the learned Chief Resident Magistrate at Lilongwe. He was sentenced to imprisonment for two years on each count and the three sentences were to run consecutively. The appellant appealed to the High Court against the conviction and the sentence. Upon hearing the appeal, learned Manyungwa, J, delivered the decision of the High Court, confirming both the conviction and the sentence. The appellant is aggrieved by that decision hence the instant appeal before us, by which he prays for a quashing of the conviction on all the three counts and, in the alternative, a reduction of the sentence in each count and further for an order that the sentences should run concurrently.

The notice of appeal is supported by eight grounds of appeal against conviction and two grounds of appeal against sentence. These constitute the issues for our consideration and determination as follows: that the learned judge erred in law (a) in holding that the appellant was a person employed in the public service; (b) by making inferences which were not supported by facts; (c) by holding that the appellant did an arbitrary act prejudicial to the rights of the Malawi Government when there was no evidence before the court showing any prejudice; (d) in holding that the appellant did an arbitrary act prejudicial to the rights of the Malawi Government when there was no evidence of any rights that were so prejudiced; (e) by finding that the appellant had some gain, financial or otherwise, in the arbitrary act as the finding was not supported by the charge sheet or the evidence; (f) by inferring the element of abuse from the alleged arbitrary act in the absence of any evidence to support the element of abuse; and (g) in holding that the arrangement was concluded by the appellant single handedly contrary to evidence that showed that it was someone else that concluded the contract and that other people worked with the appellant and advised him. It is also the contention of the appellant that the decision, confirming the conviction of the appellant, was made against the weight of the evidence. Respecting the sentence, it is contended that a sentence of six years imprisonment with hard labour was manifestly excessive and wrong in principle in all the circumstances of the case. Finally, it is contended that the learned judge erred in law by taking into account irrelevant and unsupported facts as aggravating factors.

We must acknowledge both written and oral legal arguments of counsel for the appellant and for the respondent to which we have had full regard in our consideration and determination of this appeal. Where necessary, we have expressly and specifically referred to such legal arguments in the course of this judgment.

We now must briefly state the relevant facts in the case which are gleanable from the court record and the judgment of the High Court placed before us. To begin with it is apposite for us to observe that there is no controversy, among the interested parties to this appeal, as to such facts, which are as follows:

The offences under consideration in the instant appeal were allegedly committed by the appellant in or about August and September, 1994. By then, the appellant was a Cabinet Minister responsible for Education, during the reign of the United Democratic Front Party led Government (the Government). The Government had then adopted a policy for the provision of free primary school education (FPE) to all pupils enrolled in Government Primary Schools in the country.

In the course of seeking to effectively and efficiently implement the FPE policy, the appellant and officials of his Ministry carried out consultations among themselves. It was, through such consultations, that they ascertained and agreed that the Ministry would require a lot of instructional materials, including text books, teacher's guides, exercise books, ball pens and pencils, for the ensuing primary school academic year, then scheduled to commence on 26th September, 1994. Respecting exercise books, the quantities required were as follows: six million for term 1; twelve million for term 2; and three million for term 3. Besides, it was resolved that the number of teachers required for a successful implementation of the policy had greatly to be increased, hence advertisements were published to ensure prompt recruitment of such teachers.

A survey was then conducted by the officials of the Ministry of Education to ascertain the potential of local suppliers to supply the required amount of instructional materials. The survey results showed that the local suppliers did not then have in stock the required amount of instructional materials which they could readily have supplied in time for the commencement of the first term of the academic year in question. What was required to be supplied then was a quantity of three million exercise books. However, it was the view of the local suppliers, then, that they could mobilize such quantity of exercise books from their outstations, only if they were granted sometime to do so. It was, therefore, put to the appellant to change the time scheduled for the commencement of the first term, namely, 26th September, 1994, to some

later date, in order to accommodate the request of the local suppliers. The appellant declined to accept the request for the postponement of the primary school calendar, on account of not wishing to be frowned upon or laughed at by the Malawi Congress Party (MCP) and the Alliance for Democracy (AFORD) for failure to implement the FPE programme as earlier scheduled.

During the second or third week of August, 1994, the appellant convened, in his office, a meeting of all senior staff in the Ministry of Education. During the meeting the appellant informed his officials that Fieldyork International, a U.K. based firm, was ready and willing to supply all the exercise books and pencils which were required by the Ministry. During that meeting a caution was sounded, by one of the officials, against any attempted move in the procurement of the required instructional materials which would flout the laid down Government procurement procedures.

Briefly stated, the procurement procedures mandated any Ministry or department of Government, intending to procure goods or services, to first determine the type or kind and quantity of goods or services intended to be procured. Upon doing so, a Ministry or a department was required to submit a request in writing to the Central Tender Board for authority to procure the goods and services. On receipt of a request therefor, the Central Tender Board would, by itself without any prior authorization from the Ministry of Finance, approve of any request whose value did not exceed the amount of four hundred eighty thousand Kwacha (MK480,000.00). Any request for the procurement of goods or services, whose value was in excess of that amount could only be approved by the Central Tender Board with prior approval of the Ministry of Finance. Where and when the Central Tender Board resolved to approve of any request made to it, the Central Tender Board was the only authority mandated to issue a communication to a supplier, who or which was successful at tender, notifying the supplier of that fact. Thereafter, the Ministry or department concerned would issue an order to the supplier to supply.

The meeting was, therefore, informed that such procedures had to be followed in the buying of the required instructional materials and that failure to do so would be inappropriate for the Ministry of Education. Against the requirement under the procurement procedures and the caution earlier on sounded by the official during the meeting, the appellant, on the next day following the date of the meeting, gave instructions for the issuance of a letter of intent to Fieldyork International for the procurement of the following: 2 million 40 paged exercise books airfreight; 3 million 40 paged exercise books sea freight; 3 million 80 paged exercise books sea freight; and 8 million pencils

airfreight. After the letter of intent had been faxed on 23rd August, 1994, the appellant informed his officials that Fieldyork International will definitely honour the request by the Ministry. He, thereupon, instructed Fieldyork International to treat the letter of intent as a binding order. He also called upon his officials to treat it likewise; thus, as effecting a binding contract.

However officials of the Ministry, nonetheless, insisted on their advice that a submission be made to the Central Tender Board for authority, on the part of the Ministry, to procure the required instructional materials from Fieldyork International and local suppliers. For that purpose, PW1, the Principal Secretary for Education approached the Central Tender Board for approval of the orders of the Ministry in that regard. He subsequently traveled to Blantyre to discuss the matter with the Central Tender Board. During such discussions PW1 was informed by the Central Tender Board that the Ministry's orders had to be referred to the Ministry of Finance, for the approval of the Minister, in that the orders were of the value far in excess of the amount of MK480,000.00. PW1 accepted the position of the Central Tender Board on the matter in that proceeding in that way was in compliance with the procurement procedures. On his return trip to Lilongwe, PW1 passed through Mangochi where the appellant was at the time, to brief him accordingly. PW1 found the appellant engaged in discussions with officers from Fieldyork International.

On its part, thereafter, the Central Tender Border indeed referred the matter to and for the approval of the Minister of Finance, who approved the orders for procurement from local suppliers only. He withheld his approval of the orders from Fieldyork International due to what was said to be lack of proper analysis. In that regard, it was the testimony of PW1, that eventually Fieldyork International sent a proforma invoice of £1,930,000.00 without any breakdown of how Fieldyork International had arrived at that figure.

Upon receipt of the letter of intent dated 23rd August, 1994, Fieldyork International gave its response on 29th August, 1994, stating that they would deliver the required instructional materials as follows: two million exercise books by air; three million 40 paged exercise books by sea; three million 80 paged exercise books by sea; and three million pencils by air. By then Fieldyork International also sent a proforma invoice dated 26th August, 1994, for GBP 1.93 million. As stated above, the invoice did not specify, or have the breakdown of, how that amount was arrived at.

When the Fieldyork International invoice was presented for payment, the Reserve Bank informed the Ministry of Education that it

had no foreign exchange resources to cover the bill. Instead the Reserve Bank, through its own initiative, established that the Malawi Finance Company in London would have supplied the same quantity and quality of materials at about a quarter of the price demanded by Fieldyork International and on favourable terms of payment, given the forex shortage. This fact was communicated to the appellant by the Governor of the Reserve Bank to no avail.

Whilst the Governor of the Reserve Bank was waiting for a response from the appellant on the proposal to have the instructional materials procured from the Malawi Finance Company in London, in that such procurement would be cheaper and on favourable payment terms given a severe shortage of foreign exchange then experienced by the country, Fieldyork International sent to Malawi a Russian Chartered plane with a full load of such materials. The aircraft landed at the Kamuzu International Airport on 23rd September, 1994, prior to any approval for the procurement being granted by the Central Tender Board and the Ministry of Finance. This was in complete disregard of the Government procurement procedures then in force.

Eventually a payment of GBP300,000 was made in order to allow the chartered plane to leave Malawi territory so as to avoid any embarrassment being caused to the Government and the people of Malawi. The consignment had immediately been distributed to all the districts of Malawi by use of ten trucks, hired for the purpose. Since there were no warehousing facilities at Kamuzu International Airport (KIA), the consignment of such materials could not be checked before distribution to verify the quantities actually received from Fieldyork International.

It is, among other things, against the background of the foregoing facts that the High Court confirmed the conviction of the appellant on three counts of the offence of abuse of office contrary to section 95 of the Penal Code, which provides as follows –

> *"Any person who, being employed in the public service, does or directs to be done, in abuse of the authority of his office, any arbitrary act prejudicial to the rights of another shall be guilty of a misdemeanour.*
>
> *If the act is done or directed to be done for purposes of gain he shall be guilty of a felony and shall be liable to imprisonment for three years..."*

To begin with, did the learned judge err in law in holding that the appellant was a person employed in the public service? Learned Counsel for the appellant have strongly argued that the learned judge in fact erred in so holding. In part, they have cited and relied on two decisions of this court in the cases of **The President of the Republic of Malawi and Speaker of the National Assembly –vs- RB Kachere and Others** MSCA Civil Appeal No. 20 of 1991; and **Fred Nseula –vs- Attorney General and Malawi Congress Party** MSCA Appeal No. 32 of 1997. They have submitted that the two cases are authority for the view that the Office of the Minister under our Constitution is not a public office; that the lower court then stated that before emergence of the two cases, cited hereinabove, on the legal scene, the position at law was as provided for under section 4 of the Penal Code, section 2 of the Penal Code and also section 2 of the General Interpretation Act. Learned Counsel for the appellant, further argued that the court employed erroneous reasoning when arriving at its decision; that the **Kachere** and **Nseula** (supra) cases did not create law but rather defined the law as provided for in the 1994 Constitution. Counsel for the appellant further argued that the 1994 Republican Constitution draws a distinction between political posts held by those who are elected under the Constitutional provisions as well as the Parliamentary and Presidential Elections Act from persons who hold their posts pursuant to the provisions of the Public Service Act (Act No. 19 of 1994).

To begin with, we must observe the fact that the two decisions of this court cited hereinabove and relied upon by the appellant were made on 20th November, 1995, and 15th March, 1999, thus after the date in or about August and September, 1994, when the appellant is alleged to have committed the offences with which he was charged and convicted of. Besides, the issues before the court in both of these cases are not on all fours with those arising in the instant case under section 95 of the Penal Code. In any case following the making of those decisions by this Court, Parliament has passed an Act which essentially overrules the effect of those decisions: **Constitution Amendment Act** No. 13 of 2001, amending section 93 (2) of the Constitution as follows:

> *"S.93(2) Every Government department shall be under the supervision of a Principal Secretary who shall be under the direction of a Minister or Deputy Minister and whose office shall be a public office."*

In considering and determining this issue, the learned judge in confirming the position taken by the learned Chief Resident Magistrate on the matter, reasoned as follows –

*"The lower court placed reliance on section 4 of the Penal Code, and found that the appointment of a Minister, was in fact an appointment to a public office. Section 4 of the Penal Code, provides:*

> *'Person employed in the public service', means any person holding any of the following offices or performing the duty thereof, whether as deputy or otherwise, namely:*
>
> *(a) any civil office including the office of the President, the power of appointing a person to which or of removing from which is vested in the President or in a Minister or in any public Commission or Board.....*

*Consequently, I find as the learned Magistrate did, that in 1994 which is the time when these offences are alleged to have been committed, the office of a Minister was a public office, and that the appellant was public officer, as envisaged in section 95 of the Penal Code."*

We cannot agree more with both the learned Judge and the Chief Resident Magistrate in that regard. The learned Chief Resident Magistrate made his decision on 8th April, 2008 whereas the learned Judge did so on 27th March, 2009. By then, the effect of the decisions in the **Kachere and Nseula** cases made in 1995 and 1999, respectively, had long been repealed by the Constitution Amendment Act NO. 13 of 2001. In the circumstances, the applicable law in considering and deciding the charge made against the appellant were sections 95 and 4 of the Penal Code. The learned Chief Resident Magistrate and the learned Judge cannot be faulted in that regard. Consequently, we dismiss the appellant's ground of appeal that the learned judge erred in holding that the appellant was a person employed in the public service.

Having so determined are we, nonetheless, of the same view which the appellant maintains by his contention that the learned judge erred (b) by making inferences which were not supported by facts; (c) by holding that the appellant did an arbitrary act prejudicial to the rights of the Malawi Government when there was no evidence before the court showing any prejudice; and (d) in holding that the appellant did an arbitrary act prejudicial to the rights of the Malawi Government when there was no evidence of any rights that were so prejudiced? We deal with these grounds of appeal together because they raise and relate to similar issues of fact.

A glance at the facts which are contained in the Court record and indeed outlined in the judgment now appealed against, which facts we have partially outlined hereinabove, readily and irresistibly gives the following impression on the issues raised by those grounds of appeal. The appellant in his capacity as a Cabinet Minister responsible for Education had the authority to oversee the effective and efficient implementation of the FPE Policy of the Government. In doing so, he was duty bound to ensure that all laid down Government procurement procedures were fully observed and complied with by all persons in his Ministry, including himself, who were concerned in the procurement process.

Against express caution from the officials of his Ministry, the appellant issued directions to his officials for the procurement of instructional materials from Fieldyork International in complete disregard of the existing Government Procurement procedures. No measures were taken, at the outset, to have the matter referred to the Central Tender Board, an institution which was then mandated to effect procurement of goods and services for the Government. In that way, Fieldyork International was identified and selected for the purpose by the appellant without regard to such procurement procedures or indeed without any apparent contribution by the officials of his Ministry. Although some senior officials of his Ministry appear to have carried out some actions themselves, quite apart from the appellant, in the whole process of procurement of instructional materials from Fieldyork International, it was abundantly clear that such officials did so on express instructions, and at the instance, of the appellant. To that extent apart from personally and singularly identifying and selecting Fieldyork International to be the entity to supply the instructional materials in question, the appellant also personally drafted the letter of intent which he directed to be issued to Fieldyork International by his Principal Secretary. Besides, the appellant instructed Fieldyork International and the officials in his Ministry to regard the letter of intent as effecting a binding contract with Fieldyork International for the intended procurement.

It was by way of an afterthought and indeed upon insistence of the officials that the matter of procurement of instructional materials from Fieldyork International was subsequently and eventually referred to the Central Tender Board. Even upon so doing, the appellant continued to maintain his direct business lines with Fieldyork International, concerning the intended procurement, until the arrival of the consignment by a Russian cargo plane at Kamuzu International Airport, on a date when the clearance of the procurement had, in accordance with Government procurement procedures, not yet been finalized with the Central Tender Board and the Minister of Finance.

The Government, through the Reserve Bank and in liaison with Treasury, despite the foreign exchange shortage then experienced in the country, grudgingly paid to Fieldyork International the sum of GBP 300,000.00 in order to facilitate the departure of the Russian Cargo plane from the Kamuzu International Airport (KIA) and thereby to avoid any embarrassment being caused to the Government and the people of Malawi. The cost of that consignment, in the view of the Reserve Bank, was several fold higher than the price at which a similar consignment would have been quite cheaply paid for by the Malawi Finance Company; and therefore save the then scarce hard earned foreign exchange for the Government and indeed the Country at large. In the circumstances, we would dismiss grounds (b)(c) and (d) accordingly. We so decide.

Next, we must consider whether we share in the view of the appellant that the learned judge erred in finding that the appellant had some gain, financial or otherwise, in the arbitrary act in that the finding was not supported by the charge sheet or the evidence. A glance at the charge sheet respecting the three counts of the offence of abuse of office contrary to section 95 of the Penal Code with which the appellant was charged conspicuously reveals the fact that the appellant was merely charged with the misdemeanour and not the felony of abuse of office. Indeed, the learned Chief Resident Magistrate conceded that fact in his judgment and proceeded accordingly. It was in our view, therefore, wrong for the learned Magistrate and also the learned Judge in the High Court to have appeared to have dealt with the appellant as if he had been charged with and convicted of a felony under section 95 of the Penal Code. The charge sheet and the evidence on record are silent on the aspect as to whether the appellant had gain, either financial or otherwise. In his own eloquent testimony, the appellant clearly spelt out the sole motivating factor behind his actions in the matter; and that the same was purely and exclusively political. Thus, the appellant at all cost wished to succeed in the implementation of the FPE Policy of Government, on account of not wishing to be frowned upon or laughed at by the Malawi Congress Party and the Alliance for Democracy for failure to implement the FPE programme as earlier scheduled. We would accordingly allow this ground of appeal. We so decide.

As to whether the learned Judge erred in law by inferring the element of abuse from the alleged arbitrary act in the absence of any evidence to support the element of abuse; and in holding that the arrangement was concluded by the appellant single handedly contrary to the evidence that showed that it was someone else that concluded the contract and that other people worked with the appellant and advised him; we have this to say: our discussion above respecting grounds (b)(c) and (d) fully covers and applies to both of these grounds as well. We,

have shown, hereinabove, that the appellant single handedly and indeed without any apparent contribution from his officials, identified and selected Fieldyork International for the procurement of the instructional materials in question. Besides, the appellant personally drafted a letter of intent which he directed his Principal Secretary to issue to Fieldyork International. Again we have pointed out that the appellant had communicated to Fieldyork International and senior officials in his Ministry for them to regard the letter of intent as effecting a binding contract between Fieldyork International and the Government. We have also pointed it out, hereinabove, that although some senior officials from the Ministry appeared to have carried out some actions, themselves, quite apart from the appellant, in the whole process of procurement of instructional materials from Fieldyork International, it was abundantly clear that such officials did so on express instructions, and at the instance, of the appellant. To that extent, we have demonstrated above how that was so. In the circumstances, we would equally dismiss both of those grounds accordingly.

In the result, we dismiss the appeal against conviction in its entirety, except with regard to the ground of appeal (e) respecting the finding that the appellant had some gain, financial or otherwise, which we have allowed.

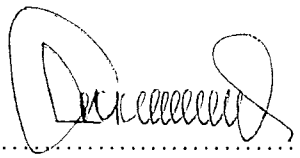
We now must revert to the appeal against the sentence in regard to which the appellant has raised two grounds of appeal. It is contended that a sentence of six years imprisonment with hard labour is manifestly excessive and wrong in principle in all the circumstances of the case. We have already allowed the appellant's appeal against his conviction of the offence of abuse of office contrary to section 95 of the Penal Code, as a felony. Where a person is charged with an offence, as a felony, under section 95 of the Penal Code she or he is liable to imprisonment for three years. Whereas, if he or she is charged with a misdemeanour, he or she is liable to imprisonment for two years under section 34 of the Penal Code, which provides as follows –

> *"When in this Code no punishment is specially provided for any misdemeanour, it shall be punishable with a fine or with imprisonment for a term not exceeding two years or with both...."*

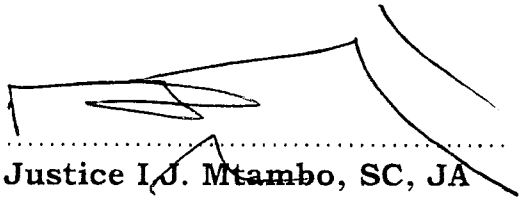
We observe that in the instant case, the appellant was sentenced on each count to two years imprisonment with hard labour. This means that the appellant was subjected to the maximum punishment prescribed by the law for the offences in question. It is trite law that a maximum penalty prescribed under any penal provision is usually and only reserved for imposition in respect of the worst case scenario of the

offence. In the instant case, we do not share in the view of the learned Judge and the learned Chief Resident Magistrate in regarding the circumstances of the instant case as providing or representing a worst case scenario of the offence under section 95 of the Penal Code. We are of the firm view that, the learned judge erred in law in imposing a maximum penalty in the circumstances. We, therefore, pursuant to section 11 (2) of the Supreme Court of Appeal Act set aside a sentence of imprisonment for two years on each count and substitute for each count a sentence of fourteen months imprisonment, accordingly, to run consecutively with effect from 8th day of April, 2008, the date of conviction of the appellant by the Chief Resident Magistrate. We so order.

**DELIVERED** in Open Court on this 14th day of January, 2010, at Blantyre.



Signed.....
**Hon. Chief Justice L.G. Munlo, SC, JA**



Signed.....
**Hon. Justice I.J. Mtambo, SC, JA**

Signed.....
**Hon. Justice A.K. Tembo, SC, JA**