JUDICIARY

IN THE MALAWI SUPREME COURT OF APPEAL
AT BLANTYRE

**MSCA CIVIL APPEAL NO. 25 OF 2010**
(Being Commercial Case No. 20 of 2008)

**BETWEEN:**

**BOWLER BEVERAGE CO. LTD.....PLAINTIFF**

**-AND -**

**TRADE KINGS LIMITED.....DEFENDANT**

**CORAM: THE HONOURABLE JUSTICE E. B. TWEA, JA**
Gondwe, of Counsel for the Applicant
Majamanda, of Counsel for the Respondent
Balakasi – Official Interpreter

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## RULING

**Twea, JA,**

This is an application by the respondent seeking leave to amend notice to affirm and vary the judgment of the court below, brought under Order III Rules 13(1) and 19 of the Supreme Court of Appeal Rules, hereinafter referred to as the Rules, Order III r. 13(1) of the Rules provides as follows:

> "13. –(1) It shall not be necessary for the respondent to give notice of motion by way of cross – appeal; but if a respondent intends upon the hearing of the appeal to contend that the decision of the Court below should be varied, or that it should be affirmed on grounds other than

> those relied on by that court he shall within one month after service upon him of the notice of appeal cause written notice of such intention to be given to every party who may be affected by such contention, whether or not such party has filed an address of service. In such notice the respondent shall clearly state to grounds on which he intends to rely and within the same period he shall file with the Registrar four copies of such notice of which one shall be included in the record, and other three copies provided for the use of the members."

The judgment in issue was delivered on 3rd April, 2009. The notice in respect of varying the judgment was filed on 26th May, 2009. No issue was taken on the date and in the course of hearing the application to amend, the appellant intimated that they do not object to the request for extension of times to regularize the delay and also allow the respondent to file notice to affirm the judgment. Notably, the intended amended notices did not comply with civil forms 6 and 7 of the Rules, the parties agreed however, that these be filed, in duly amended form, before the hearing.

When the application to amend was called, the appellant indicated that it was their wish to have the case disposed of on merit than technicalities. However, they had objection to one part of the intended notice, being paragraph 1.2 of the same. This read as follows:

> "1.2 The plaintiff/appellant did not in the action in the Court below serve a reply to defence or defence to the counter claim and consequently there was no issue between the parties regarding the propriety or effectiveness of the cancellation of the said trade mark be the Registrar of Trade Marks."

The appellant contended that this matter was not before the Court below. It was not denied that they did not serve a reply to the defence or a defence to the counterclaim. It was contended however, that their course of action was influence by the ruling and directions of the judge when he dismissed their applications to strike out the defence. The judge said:

> "I therefore dismiss the plaintiff's application. I order that the defendant furnishes the plaintiff the particulars of the fraud to be relied upon within 7 days of this order. I further order that either party furnishes the other any requested

> information in writing within 7 days of receipt of the request."

The appellant argued that this determined what would be in issue at the trial, therefore, the respondent should not be allowed to rely on paragraph 1.2 above quoted as it would be raising issues not before the Court below.

The respondent, however insisted that pleadings cannot be ignored and further, that they would not be bringing anything new by relying on the same.

It is not my duty to decide on the issues now. I only wish to re affirm that leave to amend notice of appeal or respondent' notice, should be considered together with Order 59/7/1 of Supreme Court Rules. The rule clearly stipulates that such leave would ordinarily be granted unless –

(a) the amendment raises issues not open on the pleadings;
(b) the facts necessary to sustain the point of law concerned have not been established in the evidence; or
(c) the granting of leave to amend would give rise to ***significant prejudice*** to the other party.

Taking into account the above, one notes that the discretion of the Court to grant leave to amend is generally unfettered: See ***Perry V St Hellen's Land Construction Co. Ltd (1939) 3 All E.R. 113***. Having regard to the facts of this case, I do not think that the appellant can successfully bring this case within the above stated exceptions. I am further fortified in this because the judge in the court below in his judgment, at page 22, said:

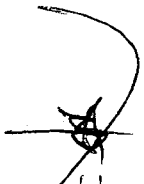
> "Having said this much, I now turn to the point that the plaintiffs marks were cancelled by the Registrar and the plaintiff was communicated of that fact by letter of 11th November, 2004. The plaintiff has up to now not challenged this cancellation of the marks. It is trite law that a determination of a matter by whichever officer public or private including court judgments is valid unless reversed by a competent authority following any laid down procedures in the relevant statute or other instrument."

I would not wish to speculate, at this point in time, on the scope of this general statement of law by the court below. All I can say for now is that whether or not the specifics of the counterclaim can be supported and how far they can be so supported can only be determined at the hearing. In saying this, I bear in mind the general powers of this Court on appeal under Section 22 of the Supreme Court of Appeal Act, Order III r 26 of the Rules and Order 59 r 10 of Rules of Supreme Court, more particularly, Order 59/10(6) which provides that:

> "(6) The powers of the Court of Appeal in respect of an appeal shall not be restricted by reason of any interlocutory order from which there was no appeal."

I therefore dismiss the appellants objections. I accordingly grant leave to the respondent to amend their notices as prayed, with costs.

***Pronounced in Chambers*** this 27th day of July, 2010 at Blantyre.



E. B. Twea
**JUSTICE OF APPEAL**

JUDICIARY

**IN THE MALAWI SUPREME COURT OF APPEAL**
**AT BLANTYRE**
**MSCA CRIMINAL APPEAL NO. 6 OF 2007**
*(Being High Court Case No. 165 of 2003 sitting at Mulanje)*

**BETWEEN**:

CHARLES KHOVIWA.....APPELLANT

-and-

THE REPUBLIC.....RESPONDENT

**BEFORE**: **HON. JUSTICE D.G. TAMBALA, SC, JA**
**HON. JUSTICE A.K.C.NYIRENDA, SC,JA**
**HON. JUSTICE E.M. SINGINI, SC, JA**
Mlenga & Chungu,Counsel for the Appellant
Ms Kayuni & Nkosi, Counsel for the Respondent
Mwale, Recording Officer
Singano (Mrs), Senior Personal Secretary

**J U D G M E N T**

**TAMBALA, SC, JA**

On 16th September, 2003, the appellant was convicted of murder contrary to section 209 of the Penal Code, by the High Court sitting with a jury at Mulanje. He was sentenced to suffer death. The appellant's case moved through the High Court System with commendable speed. The crime was committed on 1st January, 2002. On 16th September, 2003 full trial commenced before the late Chimasula, J; the trial was concluded on the same day, resulting in the conviction and sentence of the appellant. The trial court handled the case with remarkable

efficiency. But the appellant is dissatisfied with his conviction and sentence. He decided to bring this appeal.

Fortunately for the prosecution, the crime was committed in full view of eye witnesses who readily gave evidence, in the court below, on the side of the prosecution. The first witness, who gave evidence for the prosecution, was Aramson Muchiwa. He is an uncle of the appellant. He said that on 1st January, 2002, he found the deceased struggling with the daughter of Waheliwa over a chair. The deceased wanted to take away the chair claiming that it was brought there by his father. The witness got hold of the deceased and asked him to leave the place. The deceased refused to listen. He insisted that he wanted to take away the chair. He assaulted the witness. Then the appellant and one Roid Peter came to the place and intervened. They beat up the deceased. The witness pleaded with them to stop assaulting the deceased, but they did not listen. The deceased began to run away from the place. The appellant and Roid Peter pursued him. The witness tried to call them back, but he was unsuccessful. They continued with the chase.

The second witness was Dalitso Walasi. His evidence was that on the material day he had gone to a grocery to buy soap and as he was walking back from the grocery he saw the appellant and Roid Peter chasing the deceased. He noticed that the deceased fell down after one of his pursuers had tripped him. Then he saw Roid Peter stabbing the deceased with a knife. The appellant also stabbed the deceased with a knife. They both stabbed him in the chest. After stabbing the deceased the handle of the appellant's knife broke away leaving the blade embedded in the victim's body. The deceased managed to stand and run briefly before he collapsed and fell down. He died later, on the same day.

The appellant's appeal is grounded on the partial defence of provocation. It was argued that this possible defence was not fully explained to the jury. It is true that the deceased assaulted Aramson Muchiwa who is an uncle of the appellant. But the deceased used bare hands during the assault. Besides, the person who was assaulted pleaded with the appellant and his colleague to stop assaulting the deceased. He also pleaded with them and requested them to call off the chase against the deceased, but the appellant and his accomplice refused to pay attention. Clearly the deceased had given up the fight and ran away to save himself from further trouble, but the appellant and his colleague could not give him a chance to escape. They pursued him, caught up with him and stabbed him to death. We do not think that the evidence left sufficient space for grounding the defence of provocation. We have examined the learned judge's direction to the jury and we think that the learned judge did not err in the manner in which he addressed the jury, considering the overwhelming evidence supporting murder

which was adduced in the court below. We are not satisfied that there is any merit in the ground of appeal on which the appellant relies.

We must now consider the appeal against sentence. It is true that in the case of ***Twoboy Jacob v. Republic M.S.C.A. Criminal Appeal No. 18 of 2006***, this court accepted the High Court's decision that the mandatory imposition of the sentence of death in every conviction of murder, regardless of the presence of mitigating circumstances, is unconstitutional. We also agreed that the trial judge must at all times possess discretion in relation to the gravity of sentence which must be imposed, even in cases where the defendant is convicted of murder: see ***Constitutional Case No. 12 of 2007 Kafantayeni and Another v. Attorney General.*** In the present case however, we take the view that the appellant does not deserve the court's lenience. The appellant and a colleague assaulted and stabbed a defenceless person who was fleeing the scene of a fight to save himself from trouble. The appellant and his accomplice did not want to give the deceased a chance to live. His conduct on the material day was inexcusable. He deserves the death sentence.

The appellant's appeal is unsuccessful. It is dismissed.

**DELIVERED** in Open Court this 1st day of July, 2010 at Blantyre.

Signed.....
**D.G. Tambala, SC, JA**

Signed.....
**A.K.C. Nyirenda, SC, JA**

Signed.....
**E.M. Singini, SC, JA**