



**IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL CASE NO. 38 of 2021**

**(Being Criminal Case No. 226 of 2021 in the Senior Resident Magistrate Court  
sitting at Dedza)**

**Between:**

**ALBERT JOSEPHY ..... APPELLANT**

and

**THE REPUBLIC ..... RESPONDENT**

**CORAM: Honourable Justice Annabel Mtalimanja**

Mr. Mkandawire, of Counsel for the Appellant

Mr. Mwenechanya, of Counsel for the Respondent

Mr. Saukila, Court Clerk

Mrs. Mpagaja, Court Reporter

**JUDGMENT ON APPEAL AGAINST SENTENCE**

**Mtalimanja, J**

1. The Appellant, Albert Josephy was charged in the Senior Resident Magistrate Court sitting at Dedza with the offence of Buying agricultural produce (98

bags of beans) without a licence, contrary to Regulation 3 as read with Regulation 8 (a) of the Agricultural Produce (Marketing) Regulations, promulgated under the Agriculture (General Purposes) Act, Cap. 65:05 of the Laws of Malawi (hereinafter the "Regulations"). On his own plea of guilty, he was fined K70, 000, or in default thereof, to serve a custodial term of 3 months. The lower Court further ordered forfeiture of the 98 bags of beans to the Malawi Government.

2. Dissatisfied with the sentence and order of forfeiture, the Appellant has appealed to this Court on the following grounds:
  - (a) The lower Court erred in fact and in law in imposing a fine of K70, 000 by using the multiplier or conversion rate not sanctioned by the Fines and Conversion Act;
  - (b) The lower Court erred in fact and in law in making a forfeiture order when the specific law, namely the Agricultural Produce (Marketing) Regulations governing the offence in question only imposes a fine of K1000 and imprisonment for 3 months; or in the alternative
  - (c) The lower Court erred in fact and law in imposing both a fine and forfeiture order, thus making the sentences excessive for a first offender who readily pleaded guilty;
  - (d) The sentences were against the weight of the evidence in all the circumstances of the case.
3. Counsel for the Appellant and the State duly filed Submissions, to which this Court has had recourse in the determination of this Appeal.
4. As indicated, the Appellant was convicted on his own plea of guilty. This Court finds no reason to impugn the said conviction. It is therefore hereby confirmed.
5. Regarding the sentence, by virtue of Regulation 3 as read with Regulation 8 (a) of the Regulations, any person who sells agricultural produce without a valid licence is liable upon conviction to a fine of K1000 and to imprisonment for 3 months. This law having been promulgated in 1987, the Fines

(Conversion) Act, Cap.8:06 of the Laws of Malawi is applicable to determine the penalty value for this offence herein. As per Part I of the Schedule to the said Act, the multiplier number to get the penalty value in the present matter is 50. In that vein, the fine permissible under Regulation 8 is K50, 000.

6. The record shows that the lower Court imposed a fine of K70, 000 on the Appellant. This Court agrees with both the Appellant and the Respondent that this was an error of law as the lower Court imposed a fine that exceeds that which is prescribed by law. The fine of K70, 000 can therefore not stand. It is consequently set aside and substituted therefore with a fine of K50, 000.
7. The Appellant also contends that the lower Court erred in fact and in law in making a forfeiture order when the Regulations only impose a fine and imprisonment for 3 months.
8. As a starting point, it is instructive to note that forfeiture is a legal tool that serves *inter alia* the purpose of depriving criminals of the proceeds of crime. The policy behind the punishment of forfeiture is to preclude persons from benefitting from their own crime.
9. Section 149 (1) of the CP & EC provides that

*“At any time in the course of, or after the conclusion of, an inquiry or trial, the court may make such order as it thinks fit for the disposal, by destruction, forfeiture, confiscation, delivery to any person claiming to be entitled to possession thereof, or in any other manner, of any property or documents produced before it or in its custody or regarding which any offence appears to have been committed or which has been used for the commission of any offence.”*

10. As this Court understands it, this section 149 is a general provision that grants courts discretionary power to order forfeiture of any property or documents regarding which any offence appears to have been committed or which has been used for the commission of any offence, where the court deems it fit. Looking at the manner this provision has been couched, this Court surmises

that this forfeiture is not punishment for the offence *per se*, rather it is to empower a court to deal with documents or property that have been used in the commission of a crime; particularly where the law creating the offence makes no provision for this.

11. This Court is fortified in reaching this conclusion upon an examination of the provisions immediately preceding section 149, i.e. section 147 and section 148. These provisions provide for the manner in which a court should deal with property found on an accused person and restitution of stolen property, respectively. It becomes apparent that the intention of the legislature was to grant courts general powers as provided in section 149 (1) to order forfeiture if deemed fit.
12. Whilst Regulation 8 (a) does not make provision for forfeiture, it is this Court's considered view that this is without prejudice to the general powers granted by section 149. The sentence of a fine imposed by the lower Court is clearly provided for by Regulation 8(a). As the record shows, the lower Court first imposed the sentence on the Appellant, then invoked section 149 (1) to make the forfeiture order, as a further order to deal with the agricultural produce that had been bought without a licence.
13. But for omitting to ask the Appellant to be heard before making the forfeiture order against him (which is dealt with below), this Court finds that the lower Court properly invoked the power to make the forfeiture order to deal with the beans. This Court thus finds that there was no error of law in imposing the fine as well as making the forfeiture order.
14. Upon perusing the record, this Court observes that prior to making the forfeiture order, the lower Court did not ask the Appellant to make representations why such order should not be made against him. According to the case of *Watson and another v Republic* [1994] MLR 383 an accused person should first be given the opportunity of making representations against the making of a forfeiture order before the order is made. It was also stated in the case of *Republic v Hara* [1997] 1 MLR 395 that not giving an accused person the opportunity of being heard before a forfeiture order is made is wrong because this is violation of a fundamental principle of law that a person

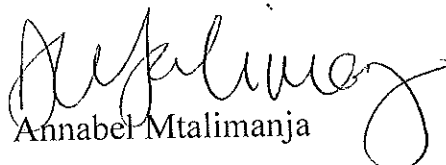
may not be condemned to any penalty without first being accorded the opportunity of being heard.

15. Now, the Court is cognizant of the fact that the Appellant has not raised this as a ground of appeal. However, on account of the fact that appeals come to this Court by way of re-hearing, as well as the fact that this Court cannot close its eyes to an order that is patently wrong in law; this Court will interfere with the forfeiture order.

16. On the premise of the *Watson* and *Hara* authorities above, this Court finds that the forfeiture order was not properly made and it is therefore set aside. Consequent thereto, this Court orders that the 98 bags of beans, or if already sold, the proceeds from the sale thereof, and any interest that may have accrued thereon, should be restored to the Appellant accordingly.

17. It is so ordered.

Pronounced in open Court this 24<sup>th</sup> Day of September, 2021.

  
Annabel Mtalimanja

**JUDGE.**