IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL CASE NO. 35 OF 2007

THE REPUBLIC

Vs

DR MILTON KUTENGULE

CORAM: **HON. JUSTICE F.E.KAPANDA**

Mr Chiwoni, DDP/CSA/State Advocate

Mr Kaphale, Representing the Accused
Mr Kamanga, Official Interpreter

Place and Date of hearing: Blantyre, 6th March 2007

Date of Ruling: 27th March 2007

RULING

Introduction

The matter herein was coming so that the Defendant could plead to the charges preferred against him. The plea process could not take place because of objections. There was an objection regarding the counts and the authority to prosecute. At first there was clearly a multiplicity of counts which was against law. The State accordingly reduced the charges upon seeing the folly of continuing with the bill of indictment as it stood then.

As we were about to take yet another fresh plea some more objections were raised *viz.* in relation to Mr. Mbendera acting for the State and in connection with the counts in the fresh charge sheet. The issue of the appointment of Mr. Mbendera being appointed to conduct the prosecution of this matter has now been put to rest. The Court is now invited to make determinations on objections relating specifically to the counts.

The Objections and Determination

In the main the Defendant alleges that there is duplicity in Count 1. Further, the accused is of the view that there is lack of sufficient particulars in the said Count 1 in the new charge sheet.

As regards the Second count, the Defendant observes that there is lack of particulars. As will be seen later, the observation by Mr. Kaphale is correct and the State has conceded that count two offends the provisions of Section 42 of the Constitution. Indeed, Counsel avers that there is need for the Count to mention the particular instruction that was allegedly breached by the Defendant so that the latter is aware of the *actus reus* of the offence. Pausing here, I must mention that Mr. Mbendera apparently concedes that there is need to work out that count so that the Defendant is informed of the particular instruction that was allegedly breached.

The Defendant has also taken issue with the State on the 3rd count. It is submitted by him that it is wrong to charge him with the offence of theft by servant when in the other counts he has been described as “a person employed in the public service.” The complaint really is that there is a lot of inconsistency in the way the State wants to treat the suspect herein. However, it is my conclusion that it does not work to the disadvantage of the

Defendant to be charged with the offence of theft by servant instead of being charged with the offence of theft by public servant. Indeed, as I see it, there are more disadvantages associated with being indicted as a public servant than being charged with theft by servant.

There is also submitted by the Defendant that the State has not dealt with the issue of multiplicity of counts. The counts that have been isolated for this attack are counts 3, 4 and 5. The suspect alleges that the amount of money involved in these three counts are the same thus making the counts scandalous because of their alleged multiplicity. Further, the Defendant has complained of inconsistency in the amount he allegedly stole as the figures vary from being MK1.8 and MK8.3m so that he is left wondering as what amount he allegedly stole. The State might wish to revisit this count and see whether it does not offend the observations of this Court in **Mvula and Jumbe** case.

The State, through Counsel Mbendera, has among others submitted that it should be left to decide what charge to prefer against the Defendant. Accordingly, the State sees nothing wrong in charging the Defendant with theft by servant instead of theft by public servant. I wish to agree with the State on this. It should not lie in the mouth of the Defendant to dictate what offence he should be charged. Indeed, if the Defendant thinks that the State has goofed on this respect let him take up that issue during submissions or at closure of the State's case.

On the question of duplicity in count 1, where the Defendant has been charged with refusing or neglecting to pay public money into some account, it is the contention of Counsel for the State that there is no such duplicity. In the State's view the offence may be committed by either refusal or neglect and that indeed Section 88(1)(c) of Public Finance Management Act (Act No. 7 of 2003) does not create two offences.

I am afraid to say that in alleging that the Defendant refused or neglected to carry out the instructions the State is not alleging the

commission of two offences. The situation is analogous to a charge for burglary where a suspect is charged with use of force at or immediately before the commission of offence that in itself does not amount duplicity. In short, there is no duplicity in count 1.

As regards count 2 the objection by the Defendant is sustained. The indictment in count 2 is just overcrowded but has no details. The State must provide particulars not in due course as it was suggesting but now. Indeed it is well to point out every amendment to a count must be accompanied with a fresh plea. Consequently, the Court can not wait for the State to go and get the particulars in future as that would entail the fresh arraignment of the Defendant. If we can we avoid making these proceedings lengthy and appear as if the Defendant is being persecuted we must do so now. For this reason, count 2 must be sanitized now before the Defendant is asked to plead to it.

Let me observe that there is nothing wrong in the State charging a Defendant in the alternative. Actually, the position at law is that where a person is charged in the alternative a Court is enjoined not to find him/her guilty on both counts. As I understand the law, the court would decide, after hearing all the evidence, which offence, if any, the defendant has committed[1]. In saying this I am also advising Counsel for the State to be alive to this fact that it is not how many alternatives in the charge sheet that count but what evidence you adduce to prove a particular count between the two alternatives. It is well, therefore, to understand that it is pointless and reprehensible to charge an accused with all the offences which he appears to have committed in the course of one transaction.

The objection raised with respect to count 2 is sustained. As a result the State is advised to go back to draw up the charges properly with all the observations made in mind.

[1] Republic vs. Banda and Subili Cr. Case No. 1974 (unreported)

The matter shall now come for plea on a date to be fixed by the Registrar. The Defendant's bail bond is extended accordingly.

Pronounced in open court this 27th day of March 2007 at the Principal Registry, Blantyre.

F.E.Kapanda

JUDGE