



**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL APPEAL CASE NO. 7 OF 2008**

- 1. ANDREW LIKHULE**
- 2. NAISON LESTON**

AND

THE REPUBLIC

CORAM: HON. JUSTICE E.B. TWEA
J. Phillipo State advocate for the State
Convict present and unrepresented
P. Mangison, Official Interpreter

J U D G M E N T

Twea, J

The appellants were charged and convicted before the First Grade Magistrate Court at Midima on a charge of unlawful use of land contrary to Section 316(1) of the Penal Code. They were sentenced to pay a fine of K15,000 cash of which K10,000 each was to be given as compensation, in default, 9 months imprisonment. They now appeal against both the conviction and sentence.

The State did not support the conviction.

The particulars of the charge read as follows:-

“Andrew Likhule and Naison Leston on the 31st day of August 2007 at Siliya Village in the District of Chiradzulu

unlawfully used the piece of land belonging to Mr Jack Kandiyado without his consent”.

The facts of the case were not disputed. The land in dispute belonged to the late uncle of the appellants. When their uncle died it was decided that the land would be distributed to orphaned members of the family. While this was pending, one Mabvuto, a brother to the appellants lived off the land. Later he sold the land to the complainant without consulting the others. When this matter came to light, it was referred to the village headman. The complainant was ordered to get his refunds of the purchase price from the family of the appellants. The complainant resisted mainly because of the appreciation in value after the developments he made thereon.

The matter was again adjudicated upon by Traditional Authority Nkalo. The decision was, again, in favour of the appellants. The appellants then went ahead to enter the land. The complainant then referred the matter to Police.

The appellant were arrested, charged and prosecuted.

The section in issue reads as follows:-

316-(1) Any person who ploughs sows or otherwise cultivates any land or who occupies, uses or damages any land or anything thereon, the freehold or leasehold title of which land is vested in any other person, without the consent of the person in whom such title is vested or his agent, shall be guilty of a misdemeanor and shall be liable to imprisonment for three years”.

It is clear from the facts that the land in issue was customary land. This land therefore does not fall in the category of the land in Section 316(1) of the Penal Code, to wit freehold or leasehold title. For this reason a lone the charge is rendered defective.

Further, from the evidence on record, it is clear that the complainant “*bought*” the land from one Mabvuto when the lad was due for redistribution to the orphaned members of the appellant’s family. To begin with customary land is vested in perpetuity in the President, as the legal fether, for the people of Malawi under Section 25 of the Land Act. No one individual has title to it. Therefore no one can sell it. All individuals on

customary land only have right to user, not title to the land. The right to user can be transferred, assigned, abandoned, forfeited or surrendered but the land cannot be alienated by sale: *Hon. David Faiti vs. Saulosi Kandindo Civil Cause No. 1412 of 2005* (unreported see also: *Jayshree Patel vs. Khuze Kapeta and Kaka Holdings Ltd Civil Cause No. 3277, 2003* (unreported) and *Nicco J.G. Kamanga vs. Jossianne le Clerq and Regional Commissioner for Lands Civil Cause No. 2829 of 2006* (unreported)). One Mabvuto therefore had no title or right to sell the customary land. Further he had no right to assign it to the complainant without the consent of the other family members who had assigned him the right to use the land pending re-distribution.

In this vein therefore, the complainant could not have obtained title to the land. Further, the rulings by this traditional authorities, who are vested with the authority to authorize use and occupation of customary land under the supervision on the Minister responsible for land: Section 26 of the Lands Act, were correct.

The applicants therefore were wrongly charged and convicted. As I said on 11th March when I delivered my ruling in open court the conviction is quashed and the sentence is set aside. Their obligations for bail pending appeal are also discharged. The fines, if paid, must be refunded to them.

This appeal therefore succeed entirely.

Pronounced in Open Court this 3rd day of June, 2008 at Blantyre.

E.B. Twea
JUDGE