



REPUBLIC OF MALAWI  
IN THE SUPREME COURT OF APPEAL

SITTING AT BLANTYRE

CRIMINAL APPEAL NO. 02 OF 2021

(Being High Court of Malawi, Zomba Registry, Criminal Appeal No. 36 of 2017)

BETWEEN

ZEESHAN JARAL RAJA.....APPELLANT

AND

THE REPUBLIC.....RESPONDENT

CORAM: HON JUSTICE L P CHIKOPA SC, DEPUTY CHIEF JUSTICE

HON JUSTICE F E KAPANDA SC, JA

HON JUSTICE H S B POTANI SC, JA

HON JUSTICE J N KATSALA SC, JA

HON JUSTICE M C C MKANDAWIRE SC, JA

HON JUSTICE S A KALEMBERA SC, JA

HON JUSTICE D T K MADISE SC, JA

HON JUSTICE R S MBVUNDULA SC, JA

HON LADY JUSTICE D nyaKAUNDA KAMANGA SC, JA

Twea, I, Counsel for the Appellant

Respondent Absent/unrepresented

Chimkono / Mthunzi (Mrs.), Court Clerks

Mutinti, Court Reporter

**JUDGMENT**

***Hon Chikopa SC, Deputy Chief Justice***

1. The appellant was convicted by the Chief Resident Magistrate sitting at Zomba of the offences of Defilement contrary to section 138 of the Penal

Code and Child Trafficking contrary to section 79[1] of the Child Care Justice and Protection Act. He was sentenced to custodial punishments of 16 years on the first count and 9 years on the second count. The appellant appealed to the High Court. The appeal was ultimately dismissed. The court then enhanced the sentences to 30 years IHL on the first count and 20 years on the second count. The appellant subsequently sought further recourse by appealing to this Court.

2. Initially, the appellant was represented by M/S Maele Law Practice and M/S Gobz & Rechtswissenschaft. The former filed four grounds of appeal in a notice dated January 28, 2021 while the latter filed three grounds of appeal in a notice dated February 5, 2021. For the sake of brevity, we will not set out the grounds of appeal due to the conclusions reached herein.
3. By a notice dated April 21, 2023 M/S HSK Twea & Associates notified this court of a change of legal practitioners. They replaced the abovementioned legal firms in their role as counsel. By yet another notice dated July 17, 2023 the newly appointed lawyers filed an amended notice of appeal. It had a total of 14 grounds, superseding the initial combined total of seven grounds.
4. The appeal was set for hearing on July 23, 2024 before the full bench of this Court. On July 22, 2024 the appellant acting through his lawyers brought an *ex parte* application before a single member of this court, essentially seeking permission to file skeleton arguments in support of their appeal out of the designated time frame. In the alternative, they sought an adjournment of the hearing of the appeal. In support of the application, there was an affidavit sworn by Counsel. The best that can be said about the affidavit is that it fell quite short of expectations as it significantly lacked the requisite detail. There was not much, if any, said as to why there was a failure to file the argument on time or what injustice would be suffered by the respondent or any interested party if the extension was granted or denied. The single member refused to hear the matter. Instead, he referred it to the full bench for consideration during the hearing of the substantive appeal.
5. On the date of the hearing, the respondent, i.e. the State, was conspicuously absent. They had been duly served. Yet again we will say that it is most unfortunate that the State did not avail itself at these proceedings. This is particularly disconcerting, after all this court is the

Supreme Court of Appeal. As articulated in *Mutharika & Anor. v Chilima & Anor.* (MSCA Constitutional Appeal 1 of 2020) [2020] MWSC 1 (8 May 2020) and *Civil Liberties Committee v Minister of Justice and another* [2004] MLR 55 (SCA), the judgments rendered from Malawi's apex court serve as precedent and binding on the Courts below, consequently, it is imperative that the prosecution avails themselves of the opportunity to argue their position and be heard.

6. Regarding the applications to file skeleton arguments out of time, or, alternatively, to adjourn the matter and the appeal itself, it is important to reaffirm our position that we do not entertain the kind of application before us so late in the day. This practice adversely affects good case management and results in unnecessary delays. Practice Direction Number 1 of 2010 provides that an appellant shall file skeleton arguments with the court within fourteen (14) days after filing the appeal with this Court and shall concurrently serve a copy of the skeleton arguments on the respondent. In *Malawi Housing Corporation v Western Construction Company Limited* [2014] MLR 209 (SCA), the court noted that, when considering applications for enlargement of time within which to file skeleton arguments, the courts possess a wide discretion in instances of procedural non-compliance. Similarly, in *Roads Authority and Roads Funds Administration v AL-Abdulhadi Engineering Consultancy* (Civil Appeal 22 of 2023) [2024] MWSC 7 (14 March 2024), the court allowed an enlargement of the time for filing of skeleton arguments in the interests of justice, as the delay was not inordinate, and the Respondent had not suffered any prejudice. However, as a one-off exceptional measure and bearing in mind that this is a criminal appeal, as well as the absence of any suggestion of injustice being suffered by the absent respondent or to this Court, we allowed the appellant to file his skeleton arguments late. Nevertheless, we declined to grant the application for an adjournment, as there was no good reason for doing so. In *Minister of Finance and others v Mhango and others* [2011] MLR 174 (SCA), this Court clarified that the determination of whether to consider an application for an adjournment resides entirely within the discretion of the court, contingent upon the specific circumstances presented.
7. Upon meticulous consideration of the said arguments in the light of the grounds of appeal, we have reached the determination that the grounds of appeal against convictions lack substantive merit. Hence, they are accordingly dismissed.

8. With regard to the aforementioned sentences we are of the firm view that the sentencing court should have granted the appellant the opportunity to be heard before enhancing the sentences. It is a well-established principle within criminal procedure that the making of an order adverse to the defendant should not occur without notifying them or affording them a chance to present their case. In *Rep v Muhamed Abdul Ibrahim* [2010] MLR 311 (HC), the High Court, while acknowledging its power to reverse the sentencing orders of the lower court, remarked that in instances where an adverse order is contemplated against convicts, it is imperative to hear them before making such an order. The court noted that:

“proceeding to sentence them now in a manner at variance with the trial court’s sentiments would be to take undue advantage of the review process and allow the State to get through the back door that which they could not get via the front door namely a stiffer sentence” at p314.

9. The above principle is applicable to the present case, in that the court should have duly informed the appellant of its intention to enhance the sentences. The appellant would therefore have been at liberty to show cause as to why the court should refrain from enhancing the sentences. It is only after this process that the sentencing court ought to have been in a position to exercise its discretion regarding the enhancement of the sentences herein. The record indicates that no such procedural exercise occurred. The appellant was not informed of his right to argue against any intended sentence enhancement. To that extent, the sentencing court erred in law.

10. Further, it is important to note that in the court below a notification regarding the enhancement of the sentences could also have been communicated by the State by way of a cross-appeal for enhancement of a manifestly inadequate punishment. In this matter, it is noteworthy that the State did not file a cross appeal; instead, it contended that the sentences were manifestly excessive, and that they should be reduced. In the case of *Clive Macholowe v Rep* [2006] MLR 68 (SCA), this esteemed Court could not interfere with the manifestly inadequate sentences imposed by the learned Judge of the court below, primarily because the State had not filed a cross appeal on the issue of sentence. Consequently, this situation underscores the critical importance of

procedural adherence in appellate processes, particularly highlighting the implications of the absence of notice or warning of enhancement of sentence on the ability of appellate courts to intervene in sentencing outcomes.

11. Accordingly, we hereby set aside the enhanced sentences. Instead, the appellant will, before the expiry of 90 days from this date, appear before the High Court, other than the one which imposed the enhanced sentences that have just been set aside, to be heard on why the sentences imposed by the Chief Magistrate East should not be enhanced. This order must be treated as a notification that his sentences will be considered for enhancement. After a sentence rehearing, the court will impose whatever sentences it deems fit, taking into account the individual circumstances of the appellant, the nature of the offences, the need for justice for the victims and the community, while also incorporating elements of mercy.

12. Until such time as the High Court renders its decision regarding the new sentences, the appellant will continue to serve the sentences initially imposed by the Chief Resident Magistrate sitting at Zomba. To that limited extent, the appeal succeeds.

***Hon. Kapanda SC, JA***

13. I agree with the judgment rendered by the Deputy Chief Justice and concur with the opinions expressed by my esteemed colleagues. Nonetheless, I consider it necessary to elaborate on certain facets of this case to underscore key procedural and substantive principles that are integral to our decision. It is essential to illuminate these aspects not only to reinforce the robustness of our legal analysis but also to guide future interpretations and applications of the law in similar circumstances. This further examination will ensure clarity and consistency in our jurisprudence, thereby strengthening the rule of law and promoting justice.

*Procedural Fairness in Sentencing*

14. The sentencing court's failure to notify the appellant of its intention to enhance the sentences, along with its neglect to provide the appellant with an opportunity to present arguments on this matter, represents a significant procedural oversight. Such omission starkly contravenes the fundamental principles of natural justice, especially the right to be heard, a pillar crucial to equitable judicial proceedings as underscored by the

landmark case of *Ridge v. Baldwin* [1964] AC 40, where the House of Lords held that fair hearing rights must be stringently observed. Additionally, this principle is further illuminated by *Audi Alteram Partem*, which mandates that no person should be judged without a fair opportunity to contest the charges against them.

15. As highlighted in the lead judgment, it is critical that such procedural deficiencies are not merely overlooked. These lapses not only undermine the fairness of the trial process but also impinge on the integrity of judicial outcomes. This sentiment echoes the decision in *Entick v Carrington* [1765] EWHC J98, where the court emphasized the importance of adhering to procedural justice to safeguard individual liberties. Lord Camden, delivering the judgment, underscored that no government official or executive power could override the law or infringe on individuals' rights without proper legal authority. The ruling established that even the highest levels of government are not above the law, and procedural justice is crucial in protecting citizens from arbitrary power.
16. Given these precedents, the procedural errors in the present case necessitate a judicial response that upholds the integrity of our legal framework. Therefore, in the interest of justice and pursuant to the principles enshrined in our legal system, it is imperative that the enhanced sentences be set aside, and the procedural shortcomings rectified. This corrective action is crucial to maintain public confidence in the judiciary and to ensure that justice is both done and seen to be done.

#### *Role of the Apex Court*

17. This case serves as a poignant reminder of the critical role played by the Supreme Court of Appeal in safeguarding procedural fairness and delivering justice. As the apex guardian of legal principles and judicial integrity, this Court's intervention to correct the errors of the sentencing court not only reinforces its commitment to upholding the highest standards of justice but also underscores its pivotal position in our judicial hierarchy.
18. The correction of such procedural errors is essential, particularly in the complex landscape of criminal law, where the consequences of judicial decisions can have profound impacts on individual lives and broader societal trust in the legal system. It is therefore incumbent upon

lower courts to exercise heightened vigilance and meticulous care in respecting and protecting the procedural rights of all parties involved. This vigilance is crucial not just in maintaining the fairness of the trial process but also in ensuring that the justice system remains a reliable and respected institution.

19. This Court's proactive stance in identifying and rectifying judicial missteps serves as a beacon of procedural and substantive justice. It sends a clear message to all judicial bodies about the importance of procedural accuracy and fairness, particularly in criminal proceedings where the stakes are exceptionally high. Such diligence ensures that the judiciary not only administers justice but also fosters an environment where legal rights are consistently honoured and protected.

#### *Delays and Case Management*

20. The appellant's delayed submission of skeleton arguments, together with the associated application for adjournment, highlights deficiencies in case management by the appellant's counsel. This situation prompted judicial intervention to maintain the procedural integrity of the appellate process. The Court's decision to accept the late filing while rejecting the adjournment request deftly balances the imperative of judicial efficiency with the essential requirement of ensuring a fair resolution in criminal appeals, as elucidated in cases like *Dyson Ltd v Hoover Ltd* [2001] EWCA Civ 1440, where the Court stressed the importance of adhering to procedural deadlines while allowing some flexibility in exceptional circumstances. The court recognized that strict adherence to deadlines is crucial for the efficient administration of justice, but also noted that in certain exceptional cases, flexibility might be necessary to ensure fairness and justice.
21. By permitting the late submission, the Court has prudently addressed the immediate procedural requirements without undermining the appellant's right to a fair hearing, adhering to principles set forth in *Broome v Cassell & Co Ltd* [1972] AC 1027, which underscores the judiciary's role in safeguarding the rights of the parties involved. However, the acceptance of such procedural irregularities, though warranted in this instance, should not become commonplace. Nevertheless, it must be recognized that consistent deviations from established procedural norms could potentially erode the rigor of case management practices, with the consequent risk of leniency becoming a habitual practice.

22. Thus, it is imperative for both the judiciary and the legal profession to maintain strict adherence to procedural guidelines and deadlines, ensuring exceptions like this remain just that—exceptions. This approach is vital not only for preserving the efficiency and predictability of the courts but also for upholding the professional responsibility of legal practitioners. The courts must enforce these standards rigorously to prevent a culture of complacency that could undermine the judicial system's efficiency and reliability. Such diligence in procedural adherence reinforces the accountability of legal professionals, compelling them to manage their cases with the highest level of precision and care.

#### *Sentencing with Mercy*

23. While this Court has directed the appellant to appear before a different court to be heard on the enhancement of sentences, it is imperative to underscore the critical balance between justice and mercy in sentencing decisions. Sentences must indeed reflect the seriousness of the offenses and consider the interests of the victims and the community. It is crucial to emphasize the necessity of aligning sentences with the severity of the crime to maintain public confidence in the justice system.

24. However, it is equally important to consider the potential for rehabilitation and the broader principles of fairness. Sentencing should not only serve as a deterrent but should also offer the offender an opportunity for rehabilitation whenever feasible. The principle of proportionality, as outlined in *R v Wong* [2002] 1 SCR 489, also mandates that sentences should not be more severe than necessary to achieve the goals of justice, highlighting the necessity for a balanced approach that considers the individual circumstances of the offender. In *R v Wong* (ibid), the Supreme Court of Canada did address the principle that sentences should not be more severe than necessary to achieve the goals of justice. The court emphasized the importance of a balanced approach that considers the individual circumstances of the offender. This ensures that the punishment fits not only the crime but also the context and the offender's background, promoting fairness and rehabilitation where possible. Furthermore, it is well to note the importance of considering the unique circumstances and backgrounds of offenders, thereby reinforcing the need for tailored and equitable sentencing approaches that extend beyond mere punitive measures.

25. In directing the appellant to a different court for consideration of sentence enhancement, this Court acknowledges the necessity of a thorough re-evaluation of the case, ensuring that all sentencing factors are carefully weighed. Such judicial discretion ensures not only adherence to legal precedents but also the integration of mercy and fairness in judicial decisions, promoting a more humane and just legal system.

#### *Upholding Judicial Integrity*

26. The absence of the respondent, represented by the State, during proceedings at this apex Court is deeply regrettable and merits serious attention. As a principal party in criminal proceedings, the State's active participation is fundamental to the integrity and efficacy of the judicial process. Its presence is essential not only for arguing its case but also for aiding the Court in making informed decisions that reflect the full scope of the issues at hand.

27. Nonattendance by the State risks compromising the administration of justice by impeding the Court's ability to hear a comprehensive view of the matter, thereby potentially skewing the fairness of the proceedings. Moreover, such lapses can significantly erode public confidence in the effectiveness and impartiality of the justice system, as public perception is crucial to the legitimacy of judicial outcomes.

28. It is imperative that this issue be addressed with urgency by the relevant authorities. Ensuring strict adherence to procedural norms, including mandatory participation by the State in all stages of judicial proceedings, is critical to upholding the rule of law and maintaining the trust of the community in our legal system. The implementation of stricter attendance protocols for state representatives in judicial processes should be considered as a measure to prevent future occurrences of this nature and to reinforce the fundamental principles upon which our justice system is built.

#### *Conclusion*

29. I concur with the disposition of this appeal as articulated in the lead judgment. The convictions are sustained, while the enhanced sentences are vacated due to identified procedural irregularities. The circumstances surrounding the appellant's case underscore the critical importance of rigorous adherence to procedural fairness and the necessity for diligent advocacy in our legal system.

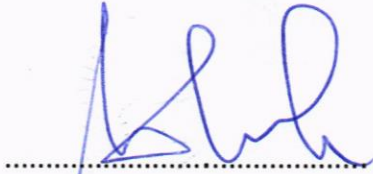
30. The preservation of procedural fairness is paramount, ensuring that all parties are afforded a fair opportunity to present their case under equitable conditions. This principle is vital not only for the legitimacy of the judicial process but also for maintaining public trust in the efficacy and integrity of our legal system. As demonstrated in this case, deviations from established procedural norms can lead to significant injustices, which this Court is duty-bound to rectify.
31. Furthermore, the role of diligent advocacy cannot be overstated. Legal representatives must uphold the highest standards of professional responsibility, ensuring thorough preparation and adherence to procedural requirements. This commitment serves as a safeguard against potential oversights and errors that could compromise the delivery of justice.
32. In conclusion, this appeal highlights the integral role of procedural discipline and the active engagement of legal counsel in upholding the principles of justice. It is imperative that these standards be meticulously maintained to ensure that the rights of all individuals are protected and that our legal system continues to function with the highest degree of integrity and fairness.

Pronounced at Blantyre this 23<sup>rd</sup> day of July, 2024


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HON DEPUTY CHIEF JUSTICE L P CHIKOPA SC

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HON JUSTICE F E KAPANDA SC, JA

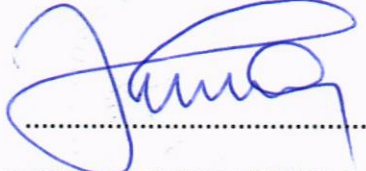
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HON LADY JUSTICE NYAKAUNDA KAMANGA SC, JA