REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY (CRIMINAL DIVISION)

CONFIRMATION CASE NO. 775 OF 2024

[Being Criminal Case 374 of 2024 at Mchinji Magistrate's Court]

REPUBLIC

V.

ISAAC MBAWU

CORAM: HONOURABLE JUSTICE MZONDE MVULA.

Mrs. E. Khonje, Court Clerk and Official Interpreter.

ORDER IN CONFIRMATION

Mvula, J.

1.0 **Introduction**

1.1 The Chief Resident Magistrate **must** reproduce this order to First Grade Magistrate in Mchinji, which tried all the case in point of Isaac Mbawu who without colour of right made entry into Mchinji Forest Reserve, and cut 7 *Julbernadia Paniculata* trees to make charcoal in a protected area. The Forestry officials must be commended for acting swiftly to arrest the arrogant criminal who not only entered the protected area illegally, but had the clout to fell species of trees and make charcoal in the same area. This impudence to nature cannot and should not be tolerated at all. We have a duty to protect plant and animal species for the benefit of posterity, especially those in protected areas. Charcoal production in forest a forest reserve suggests systematic depletion our forest reserves by wanton felling of trees when green sources of energy encouraged by Government are available.

1.2 When the justice machinery is rolled into motion, the law has placed certain safeguards which the courts as custodians of justice, need to navigate in the

conduct of judicial proceedings. Upon review, I noticed the Magistrate imposed huge fines and default custodial sentences without due regard to the law. The Magistrate consistently committed procedural law errors, common place across Subordinate Courts in the Region, and indeed in Malawi. The High Court has made several orders in confirmation to guide the position. There is little change looking at the trend in the courts below. We shall therefore make court specific orders, so that we track progress, and learning curve in particular magistrates, under doctrine of *stare decisis*. The court of the Magistrate should religiously follow rulings from the High Court, delivered in exercise of supervisory powers under sections 25 and 26 of the Courts Act.

1.3 To the offence of illegal entry into a Protected Forest Reserve contrary to section 32 as read with section 108 of the National Parks and Wildlife Act, the convict was ordered to pay K500,000 fine in default serve 18 months' imprisonment with hard labour. Count 2 of illegal cutting of trees contrary to section 64(1)(a) of the Forestry Act, the Magistrate ordered K1,500,000 fine in default serve 36 months' imprisonment. The same sentence was meted out on count 3 of illegal charcoal production contrary to section 81(1) of the Forest Act. Apparently, the offender has not yet paid these fines. This means he is currently serving the default position in Prison. That is why it is important to guide the position.

1.4 The direction made by the High Court in **Republic v Clemence Nkhoma Confirmation case number 10 of 2024 at the Lilongwe District Registry (unreported)**, informs the present order. This authority builds on the many other cases before it, how Magistrate courts should conduct themselves as a matter of procedure before imposing a fine as case disposal tool. I am yet to see a file where due process of law was followed before fine imposition. Hence, the present order to remind magistrates on what needs to be done in the circumstances.

2.0 **Consistent error of procedural law by Magistrates before fines imposition:**

2.1 As a point of departure, the sentencing court has wide discretion to pass out sentences. This follows for offences where no specific sanction is stated under

the law, mostly misdemeanours. Section 34 comes to guide the position. It guides that minor offence can be disposed of, by a fine or prison term not exceeding two years or both. Section 340(1) of the Criminal Procedure and Evidence Code, *alias*, the Code must always be borne in mind. The legal principle is that first offenders should not be sent to prison.

2.2 They must get other forms of punishment, other than imprisonment. They must not be mixed with hardened prisoners. See **Rep v. Chikazingwa 11 MLR 160.** This means that only with valid reason should the court be minded to send a first offender to prison. In other words, all first offenders must be availed non-custodial sentences. Extending that provision, a prison term for a first offender needs justification by the court imposing it.

2.3 Secondly, prison term or custodial sentences should never be over used as a sanction. Chapter VI of the Penal Code lists in section 25, up to 14 different kinds of punishments which a trial court can tap from and use. Determinant is the offence committed as well as jurisdiction of the sentencing court. The magistrate should be familiar with each of them and state with reason, why the penalty was proffered in place of the other, to justify the sentence imposed.

2.4 The court below missed out two important procedural aspects, in the following fashion:

2.4.1 It is a cardinal principle of sentencing that where a sentence has with it a fine and prison sentence, respecting the intention of Parliament, the offender must be given the option of payment of a fine. See **Rep v Foster and Others (1997) 2 MLR 84**. The court therefore must state why not prison term opting to avail to the offender the option of a fine. Despite the legal principle, exercise of judicial discretion, allows departure from the fine to go straight to prison term depending on circumstances. There must **always** be justification as demanded by section 340(1) of the Code *inter alia* where the offender is the worst, or the ways of committing the offence are hair raising. See **Rep Kamil and Yaghi 6 ALR Mal 358.**

2.4.2 The Magistrate needs to have regard to the Fines and Conversions Act Cap 8:06 of the Laws of Malawi, if it is applicable in deserving cases. This statute, makes fines to be uplifted to be commensurate with the current economic environment. In this regard, the Magistrate should always start from the penalty providing statute which provides for the original fine. Then, demonstrate how the Fines (Conversions Act) applies or and which multiplier is in point, to provide for the current maximum sentence. If it does not apply, then same should be stated as well clearly in the order. See **Rep v Molland Chilembwe Confirmation case 1082 of 2020 Lilongwe District Registry. (Unreported).** Any failure to import the Fines (Conversions) Act in a necessary case, and failure to execute such systematic demonstration, by the Magistrate is an act of judicial impropriety.

2.4.3 If the Magistrate wishes to proceed with imposition of a fine, **a means test must always be conducted**. Legal precedent is awash that before any trial court can impose a fine as way of case disposal, the court must ascertain the means the offender earns their living. This involves a candid examination, of earnings. If the offender earns a living though business, how much is made per day, week or month, or year as case may be, must be used to benchmark the fine. This probe gives efficacy to the process. The fines imposed by the Magistrate here and generally, suggest that fines are just being plucked from the air, as if catching flying ants (*mafulufute*). Failure to conduct the means test, is laxity. Magistrates need to be admonished over casual approach towards duty.

2.5. A fine that is imposed without conduct of **means test** is arbitrary. It violates judicial functions. Such fine departs from settled law, and often times, does not balance with the default sentence. A trial court is guided by mandate of the judiciary in Section 9 of the Constitution of Malawi. It should only have regard to legally relevant facts and prescriptions of law. Means test imports legally relevant facts through which the trial court benchmarks the fine. The fine therefore becomes premised on the law, bringing integrity of fines to the judicial process. A fine should be balanced between the offence, extenuating

circumstances and means through which the offender attains livelihood. It should neither be too much nor little to be easily afforded as if buying justice.

2.6 **Means test** therefore gives the much-needed legal basis to ground a fine. First, it is a prescription of law to account for how a fine was arrived at. The offender must always be involved in the process of coming down to a fine. Such order must fit the offender, and the offence, be fair to society, and blended with a measure of mercy in the circumstances. See **Rep v Muhamed Abdul Ibrahim [2010] MLR 311.** Second, it allows the Magistrate to consider on record, and not from the air, extenuating circumstances of the offender. Third, and most importantly, it allows the fine to be measured. The means of the offender must be recorded and benchmark the final order by the trial court, from the aggregate. The inquiry of means must become part of the record of the proceedings, before arrival at the final order. See **Banda v Rep 9 MLR 172.**

2.7. Without conduct of the necessary **means test**, makes the K500,000 fine on count 1 and K1,500,000 on counts 2 and 3 respectively, excessive, arbitrary, and therefore illegal. In this regard, the default sentence equally becomes excessive. With the fines arbitrarily arrived at, they are disregarded at this confirmation. Instead, the convict shall be subjected to default sentences only. Operation of section 3 of the Code, ensures that substantial justice must be done without undue regard to technicality. Accordingly, counts 2 and 3 sentences are reduced with 18 months. This is fair in the circumstances.

2.8 "*Reading makes a full man, speaking a ready man and writing like an exact man*" as said by Sir Francis Bacon, former Lord Chancellor of Great Britain. Magistrates who want to go far with career, and expand knowledge base, must be well read at all times in the orders in confirmation, judgments on appeal and orders on review from the High Court, to be well grounded in their mandate.

Made this 19th November, 2024

JUDGE.