IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION

CRIMINAL APPEAL NO.41 OF 2018

STEVEN KAMPHANGALE BANDA

-V-

THE REPUBLIC

Coram: Hon. Justice M L Kamwambe

Mr T Chirwa of counsel for the Appellant

Mr A Likwanya of counsel for the State (Anti-Corruption Bureau)

Amos...Court Clerk

JUDGMENT

Kamwambe J

This is an appeal against conviction and sentence of 10 years imprisonment for money laundering contrary to section 35 (1) (a) of the Money Laundering Act. Appellant was acquitted of the charges of abuse of office contrary to section 25 (b) of the Corrupt Practices Act and obtaining property by false pretence contrary to section 319 of the Penal Code.

The grounds of appeal are as follows:

1. That the learned magistrate erred in law and fact in finding that the Appellant had dubiously obtained the money in question.
2. That the learned magistrate erred in law and fact in finding that the Appellant, in possessing this money, was maintaining

a standard of living above that which was commensurate with his official emoluments or other known sources of income.

3. That the learned magistrate erred in law in convicting the Appellant when there was no evidence before the court showing that the money herein were proceeds of any crime; when there was no evidence establishing that the money was derived, directly or indirectly, from a proven crime.
4. That in the circumstances of the case the punishment of 10 years imprisonment is manifestly excessive.

Appellant's counsel argues that the State did not establish all the elements of money laundering. He cited the case of **Rep. –v- Angella Katengeza Criminal Case No. 26 of 2013** which outlined the elements as follows:

1. Acquire property in issue
2. Property must be proceeds of a proven crime
3. Accused must have reason to know that property is derived from a proven crime.

He says that fraud was not proved in the lower court and maintains that the offence of money laundering must always have a predicate offence which led to money laundering. He also believes that sentence is excessive and that the wrong Act was applied in considering sentence.

Counsel for the State submitted that Appellant got the money by false pretence which was supposed to be paid to Mudi Sacco main account by members who are deducted monthly, and he put it in his shareholders account at Mudi Sacco. He took advantage because he was the responsible officer as salaries officer. He (Appellant) produced three cheques amounting to over 2 million Kwacha and deposited it to his personal shareholders account. Then he started withdrawing from it for his own use. Realising that he had no explanation as to source of this money, he introduced a story that he had a loan from his employer and therefore would pay back to Sacco. He wanted to show that the money was given to him as a loan when it was not like that. The loan was not approved in the regular manner, if it was approved at all, and the one who approved it is now late. Loan approval procedure was not

followed. The vouchers supporting the loan do not show that it was for the purchase of a motor vehicle.

Counsel for the Appellant refuses that money was stolen from main account. He, however, admitted that loan procedure was not followed and that Appellant knew that he was not entitled to the motor vehicle loan but that he had intention to give back. He maintains that the money in issue did not come from a criminal activity. On sentence, he decried the retrospective application of the law of sentencing by using the new law.

I have gone through the cases of **Maxwell Namata** v **The Republic MSCA Criminal Appeal No.13 of 2015** and the case of **Republic –v- Savala Criminal Case No. 28 of 2013** by Mwale J. In **Masankho Chingoli –v- The Republic Criminal Appeal No. 19 of 2017** I supported the views of my learned Judge in the Savala case and I said that the offence of money laundering is a distinct offence from theft in Malawi and does not require a predicate offence to prove it. It is a standalone offence not dependent on any other case for its existence. All that has to be done is to show that the money originated from proceeds of crime. However, the Malawi Supreme Court case of **Maxwell Namata (supra)** states that:

The offence of money laundering under section 35(1) of the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act reads as follows:

1) *A person commits the offence of money laundering if the person knowing or having reasonable grounds to believe that any property in whole or in part directly or indirectly represents any person's proceeds of crime-*
    a. *a) converts or transfers property knowing or having reason to believe that property is the proceeds of crime, with the aim of concealing or disguising the illicit origin of that property, or of aiding any person involved in the commission of the offence to evade the legal consequences thereof;*

The elements of the offence are:

1) A person must know or have reasonable grounds to believe that any property in whole or in part directly or indirectly represents any person's proceeds of crime

2) The person must transfer or convert the property knowing that the property is the proceed of crime
3) The person must aim to conceal or disguise the illicit origin of the property.

Whether property dubiously obtained

The Appellant complains that the magistrate erred to conclude that the property was dubiously obtained. I believe by saying dubiously he means fraudulently or with some dishonest behaviour. This is the property alleged to be proceeds of crime. The question we need to address is, which is this property which is alleged to be proceeds of crime? From perusing the file the property is the sum of MK2, 336, 870.00 which was in the form of three cheques being deductions from members' salaries which were allegedly paid by Appellant into his Mudi Sacco personal shareholders account. These cheques carried the amounts of MK998, 200. 00, MK938, 670. 00 and MK400, 000.00 respectively totalling MK2, 336, 870. 00. The next question is to ascertain the source of this money paid into Appellant's personal account at Mudi Sacco, and not into the main account for all members. Further we should see if there is evidence that it was paid into Appellant's Mudi Sacco personal account by the Appellant.

The three cheques paid by Appellant into the personal account of the Appellant were supposed to be paid into the main account of Mudi Sacco. PW 6 said that the first cheque came with instructions that it be deposited in Appellant's account because it was part of a debt that he got from his work place pertaining to a motor vehicle advance. PW 6 went further to say that Appellant explained that he had been given a loan in instalments and that he would pay to Mudi Sacco in instalments. The second cheque came in December, 2011 and it was the same story. PW 6 explained that his boss Mr Kanyika was surprised that the cheque had no supporting attachments. A few days later, they received a letter from Mr Tsabola, a junior boss to Appellant, as an assistant accountant at DHO Blantyre, now late, confirming that Appellant received a loan of MK2.3 million from Ministry of Health (at page 152 of the record). The letter was attached to the file at Mudi

Sacco. The MK400, 000.00 deposit was for 29th February, 2012 (at page 157 of the record).

The Appellant filled a Sacco loan application, hence the amounts were given to him by way of loan. The loans were given to him on the basis that he will be able to pay back once he his loan from Ministry of Health was paid, specifically that he obtained a loan from his employer. The loan was never repaid. Even if repayment was through deductions from his salary, such deductions were never done, after all, he prepared payslips/salaries himself. He did not include deductions from his salary of the MK1.5 million loan he got from Mudi Sacco. PW6 said that he was not competent to comment on whether he repaid the MK1.5 million. I find that this amount is not relevant to the matter before us.

PW 7, Isaac Kanyika of Mudi Sacco confirmed that Appellant was given a loan of MK1.5 million. He noticed that the loan was not being serviced, as such, they were forced to write off the loan against his shares which accumulated to MK1.2 million. After they did this he applied to withdraw his membership from Sacco. Reserve Bank of Malawi intervened and advised them not to proceed processing Appellant's application to withdraw. PW 7 said at page 180 that the accused paid the loan fully by Sacco offsetting it with his shares. He repaid by Sacco off writing the shares because he failed to pay in the ordinary manner (page 183).

Witnesses from DHO explained procedure of applying for a motor vehicle advance. It is not disputed that the Appellant flouted the procedures. In short, let me say that the advance/application does not exist since there is no record wherever, not at the Blantyre DHO nor at Ministry of Health Headquarters. No one attended to such an application by the Appellant and he was not entitled to a motor vehicle advance. It is evident from the record that he never disclosed to anyone details of his application and how much loan he was given. This buttresses the fact that there was no genuine application for a motor vehicle advance. No one saw it anyway. Hence, I find that either the Appellant was working in collusion with Mr Tsabola the deceased, or he wrote the letter as if it was written

by Mr Tsabola. Whatever happened was fraudulent and utter falsehood in a bid to beat the system.

In view of what I have stated above, I find that the property was acquired dubiously on the pretext that he was going to pay back through a loan from Ministry of Health. He did so by false pretence under section 319 of the Penal Code, although the lower court acquitted him on the charge of acquiring property by false pretence. The lower court misled itself on the facts by concluding that the accused person's application went through numerous checks and balances through the system and at no point was the application flagged as irregular. If the lower court had thoroughly gone through all the evidence, it would not have reached this conclusion. There was just no application for a loan at all to talk about as no one else dealt with it at all the stages except Mr Tsabola and the Appellant. No application for the Appellant was authorised by those eligible to do so. The lower court failed to appreciate the facts properly. The acquittal was wrongful, unfortunately the prosecution did not appeal.

The second ground of appeal is that the learned magistrate erred in law and fact in finding that the applicant, in possessing this money, was maintaining a standard of living above that which was commensurate with his official emoluments or other known sources of income. I do not think that such a finding would be a basis of finding the Appellant guilty since it does not appear as an element of the offence of money laundering. I wonder why counsel for the Appellant brought it out as a ground of appeal when it has no real bearing on the case at hand. I observe that even in his submissions he has not argued this point to help the court see its relevance.

The third ground of appeal is that the learned magistrate erred in law in convicting the Appellant when there was no evidence before the court showing that the money herein were proceeds of any crime; when there was no evidence establishing that the money was derived directly or indirectly, from a proven crime. I think I have adequately covered this ground when I was dealing with ground one above, as such, need not start repeating myself. The false pretence was his representation that he has been

granted a loan at his workplace which will enable him to pay back the money obtained from Mudi Sacco, when there was no such loan applied for at his workplace. This was backed by a letter written by one Tsabola on the strength of which he was allowed to put the cheques in his personal shareholders Sacco account, and not in Sacco Main Account. To prove money as proceeds of crime one has to prove fraudulent or dishonest conduct in the acquisition of money, and in the circumstances herein, the Appellant knew or had reasonable ground to believe that what he was doing was unacceptable conduct. His actions fall within section 35 (1) (a) of the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act. The money so laundered must be proceeds of crime and not necessarily proceeds of proven crime. The circumstances will show that some crime predicated the money laundering. That one intended to pay back does not negate the intention to fraudulently acquire the money.

The last part of the offence section needs to be dealt with conclusively. It states:

> *"...with the aim of concealing or disguising the illicit origin of that property.....to evade the legal consequences thereof".*

The act of producing the letter written purportedly by Mr Tsabola was to conceal the illicit origin of the money.

In fact, theft can also be imputed in this case since he had shown that he had intended to use the money at his will. Section 271 (2) (e) explains as fraudulent conduct where in case of money, there is an intent to use it at the will of the person who takes or converts it, even though he intends afterwards to repay the money.

The fourth ground of appeal is that the punishment of 10 years imprisonment is manifestly excessive. Counsel for the State justifies imposition of this sentence because at the time of sentencing, the Financial Crimes Act, which repealed the Money Laundering, Proceeds of Serious Crimes and Terrorist Financing Act under which Appellant was convicted, was in force. This case was caught between two Acts. We would wish to know how the repealing section 141 reads.

1) Subject to subsection (2), The Money Laundering, Proceeds of Serious Crime and Terrorism Financing Act is hereby repealed.
2) Anything done in accordance with the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act repealed under subsection (1), prior to the commencement of this Act and which may be done in accordance with the provisions of this Act, shall be deemed to have been done in accordance with this Act.

The language of the repealing Act seems clear to me that it now replaces the old law and the new law is applicable. How can a law that is repealed and therefore not existing be applied? Nothing allows us to continue using the old law. If it said cases in transition from the old law should apply the old sentences, I would be comfortable to apply the old repealed law. But this is not what it provides. I would agree with the State that cases cited under the old repealed law do not apply.

Under the old law, sentences for money laundering carried the maximum of 10 years imprisonment. Since people can be involved in fraudulent acquisition of proceeds worth billions and shortly it will be trillions of Kwachas, it is justified to enhance the maximum sentence now to life imprisonment. This shows how serious financial crimes can be. The money herein was all, if not substantially recovered. Looking at the amount involved which is a paltry MK2.3m, I am of the view that 10 years imprisonment is too harsh and therefore manifestly excessive. I therefore replace the sentence with one of 3 years imprisonment.

Pronounced in open court this 10th day of July, 2019 at Principal Registry, Chichiri, Blantyre.

M L KAMWAMBE
JUDGE