

**IN THE HIGH COURT FOR ZAMBIA  
HOLDEN AT LUSAKA**  
(Criminal Jurisdiction)

**HPR/03/2017**

**BETWEEN:**

**CLEMENT MWALE**



**VS**

**THE PEOPLE**

**BEFORE HONORABLE JUSTICE MR. MWILA CHITABO, SC**

For the Appellant: Mr. Kingdom Chifumu Banda, SC of Messrs  
Chifumu Banda & Company

For the State: N/A

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**RULING UPON REVIEW**

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**Legislation referred to**

1. Criminal Procedure Code, Chapter 88 of the Laws of Zambia
2. Penal Code

**Cases referred to:**

1. Trinity Engineering (PVT) Zambia National Commercial Bank Plc  
(1995/1997) ZR 166
2. The People v. Patrick Massissani (1977) ZR 315
3. Mcfoy v. United Africa Limited 91961) 3 All ER 1063

This matter has been brought to my attention by the Appellants Advocate pursuant to Sections 337, 338 and 339 of the Criminal Procedure Code<sup>1</sup>. The application is supported by an affidavit deposed to by one Clement Mwale.

The essence of which was that the Appellant was on 29<sup>th</sup> March, 2017, convicted by the Honorable trial Magistrate of the 1<sup>st</sup> class on counts of offences of forgery contrary to Section 342 and 347 of the Penal Code<sup>2</sup> and detention of property contrary to Section 87 f the Penal Code<sup>2</sup>.

On 3<sup>rd</sup> April, 2017, he was sentenced to 1 year imprisonment with Hard labour with effect from the date of sentencing. Which sentence was suspended for 2 years. He was also fined K2, 000 and in default of payment to suffer service of 3 months simple imprisonment.

On 5<sup>th</sup> April, 2017, the Appellant appealed to the High Court against both conviction and sentence.

On 26<sup>th</sup> April, 2017 and unknown to the Appellant, the Learned trial Magistrate purportedly under the "Slip Rule" ordered that the Judgment delivered in open Court on 2<sup>nd</sup> March, 2017 be corrected so that the property he had purchased for K20, 000.00 from **Lucas Soko** before he died be given to the estate of the deceased person.

That the police at Chelston have been ordered to evict from the property though his appeal is pending to the High Court.



He finally deposed that the dispute over the property was before the High Court in Cause No. 2012/HP/1221 (between John Soko and Clement Mwale) who dismissed it on 30<sup>th</sup> June, 2015.

Upon perusal of the affidavit, I was satisfied that the issues that had been brought to my attention required urgent and emergent attention.

I therefore invoked the provisions of Section 377 and called for file IPB/208/2016 the case of The People v. Clement Mwale to examine the record of the criminal proceedings in the Subordinate Court for the purpose of satisfying myself as to the correctness, legality or propriety of the order of restitution dated 26<sup>th</sup> April, 2017 given after Judgment and long after an appeal had been lodged against both conviction and sentence made by the Subordinate Court.

I allowed the Learned State Counsel Mr. Kingdom Chifumu Banda to address me by invoking the provisions of Section 339 of the Criminal Procedure Code. It provides as follows:-

*“No party has any right to be heard, either personally or by Advocate before the High Court, when exercising its powers of revision. Provided that the High Court may, if it thinks fit when exercising such powers, hear any party either personally or by Advocate”*

In his concise submission, the learned state Counsel informed the Court that he entirely relied on the affidavit in support of the application. He pointed out that after the delivery of the Judgment

and pronouncement of the sentence the learned trial Magistrate became *functus officio* and as such had no jurisdiction to alter the Judgment or sentence under the purported “Slip Rule” and Order of restitution of the property subject to the appeal.

He further pointed out the High Court having dismissed the action in which Clement Mwale (the beneficiary of the restitution) on 30<sup>th</sup> June, 2015.

Learned State Counsel finally submitted that this was a proper case for the Court in its wisdom to exercise its powers of review and invited the Court either to review

- (a) Proceedings relating to the conviction; or
- (b) Review the restitution order purportedly made under the “SLIP RULE”.

Faced with the application before me, I visited the case of ***The People v. Patrick Massissani***<sup>2</sup>. This was the case in which an armed paramilitary officer had forced a married couple to undress and make love. He later took them to the police station where he administered strokes of the cane claiming that he had found them making love in the bush which he found to be wrong; in his view he had authority to punish them.

Upon conviction of the offence of assault occasioning actual bodily harm the Learned trial Magistrate sentenced him to a fine of K100 with 2 months imprisonment in default of payment.



The chief Justice, Silungwe CJ, as he then was having had his attention drawn to the case, descended to the High Court and called for the case record and having directed that notice be given to the accused pursuant to Sections 338 and 339 of the Criminal Procedure Code why the sentence should not be enhanced, reviewed the case in open Court, set aside the sentence of the lower Court and in place thereof imposed a sentence of 18 months with Hard Labour.

The instructive and authoritative pronouncement appears at page 236 lines 17 – 22. His Lordship put it this way:-

*“At the commencement of hearing on review it was ascertained that no appeal had been lodged. Care was taken that the hearing did not occur until time within to appeal had expired for the simple reason that a review of a Criminal case cannot validly be made where an appeal has been lodged within the prescribed period”*

In the case in casu, an appeal having been lodged during the prescribed period against both conviction and sentence, a review of the whole case cannot be validly exercised as proposed by the Learned State Counsel Mr. Kingdom Chifumu Banda.

This however does not end the matter. The record in the Court below reveals that after pronouncing the sentence, the Learned trial Magistrate without informing the accused nor inviting the State purported to recall the file and made an order for restitution of property to the complainant, which order was purportedly premised on the “*Slip Rule*”.

The order of restitution is invalid on three grounds.

Firstly, upon the legal premise that once the Learned trial Magistrate had convicted and passed sentence he became functus officio.

Secondly, the Appellant was not given an opportunity to be heard on the depriving him of his acclaimed right to property without due process of law, which is not in tandem with one of the rules of natural justice audi alterem partem.

Thirdly, the property subject of the appeal and subject to the restitution order was adjudicated upon in the case of John Soko (the complainant herein) and Clement Mwale (the Appellant) 2012/HP/2131 and my sister Hon. Justice F.M Chisanga, J as she then was on 30<sup>th</sup> June, 2015 dismissed the action for want of prosecution.

There is no record that the complainant applied for restoration or appealed against the dismissal.

I therefore agree with the Learned State Counsel that this is a fit and proper case insofar as it relates to the restitution order for review.

On the foregoing, I hold that the Order of restitution of the Learned Trial Magistrate issued on 26<sup>th</sup> April, 2017 is a nullity for want of jurisdiction, the order having been made when the Learned trial Magistrate was functus officio.



Lord Denning had occasion to pronounce himself on null and void situations in the celebrated case of **Mcfoy v. United Africa Limited**<sup>3</sup>, he put it this way at page 172:

*"If an act is void, then it a nullity, it is not only bad but it is incurably bad. There is no need for an order to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to declare it so. Any proceeding which is founded on it is also bad. You cannot put something on nothing and expect it to stay there, it will collapse"*

I respectfully agree that that is the correct postitulation of the law and I adopt the reasoning of His Lordship and I adopt the same as my very own and I have nothing useful to add.

Coming back to the "Slip rule device" the Court of final resort had occasion to pronounce itself on the "Slip Rule device. Ngulube CJ (as he then was) had occasion to instructively and authoritatively pronounce himself on the subject in the case of **Trinity engineering (PVT) v. ZNCB Plc**<sup>1</sup>.

The legend of the case was that after allowing an appeal the applicant applied for correction of the Courts Judgment on the basis that the award should have been expressed in kwacha and not in dollars. It was suggested that the Court could do so on the basis of the slip rule.

He put it this way:-

*That the slip rule was meant for the Court to correct clerical mistakes or errors in a judgment arising from the accidental omissions. In the present case the applicant was effectively seeking the reviewing and setting aside of the previous Judgment which is not permissible”*

The grant of a restitution order cannot by any stretch of imagination be deemed to be a correction of a clerical error or omission in the Judgment which is inclusive of the sentence.

In any event, there was no reference made to any rule or order or authority in the Subordinate Act that mandated the Learned Trial Magistrate to invoke the “slip rule” in the manner and fashion he applied it.

In conclusion, and for purposes of clarity, the Order of restitution by the Learned trial Magistrate dated 26<sup>th</sup> April, 2017 is hereby set aside.

Leave to appeal to the Court of Appeal is granted.

**Delivered under my hand and seal this <sup>5th</sup>..... day of May, 2017**



**Mwila Chitabo, SC**

**Judge**