

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Confirmation Case number 669 of 2002

REPUBLIC

Versus

SYMON KAMUNA

From the First Grade Magistrate Court sitting at Midima Criminal Case number 306 of 2002

**CORAM:** DF MWAUNGULU (JUDGE)

Chimwaza, Deputy Chief State Advocate, for the State

Defendant, present, unrepresented

Kamanga, court interpreter

**Mwaungulu, J**

**JUDGEMENT**

The judge who reviewed this matter set it down to consider the sentence the lower court imposed on the defendant. The Midima First Grade Magistrate Court convicted the defendant, Symon Kamuna, of theft. Theft is an offence under section 278 of the Penal Code. The lower court sentenced the defendant to three years imprisonment with hard labour. The reviewing judge, correctly in my judgment, thought the sentence manifestly excessive. In my judgment, the sentence errs on the side of principle too.

The facts are not complex and, to the extent they resolve matters the judge raises, are as follows. The defendant stole items worth K 375 from a hawker. He pleaded guilty in the lower court. The lower court approached the matter from the perspective that theft is a very serious offence. Of the crimes in our Penal Code, the law indicating offences involving high moral turpitude, simple

theft is not even in the top or middle bracket of serious crimes under our criminal law. On the contrary, among the felonies, a classification still persisting in our criminal law, theft is the lowest of offences, attracting a maximum sentence, as the lower court observed, of five years imprisonment. Neither was this crime committed in circumstances justifying aggravation of the sentence.

The lower court also approached the matter from the perspective that the lower court previously convicted the defendant of unlawful wounding. The lower court thought the defendant was not entitled to leniency at all. The lower court should not have approached the matter that way. First, the offence was quite different from the one the lower court convicted the defendant for this time around. Generally, and the case of *R v Chang'ono* (1964-66) ALR (Mal) 415, suggests it, it is previous convictions the similar offence charged that the court should consider. Moreover, the defendant had only one previous conviction. In *Republic v Zwangeti* Conf. Cas. No. 179 of 2002, unreported, this Court said:

“Of course, the defendant had a relevant previous conviction. It was only one. The defendant, in my judgment, had not lost his whole right to leniency.”

Thirdly, previous convictions are not a reason for passing a sentence higher than one justified by the nature and circumstances of the offence, the circumstances of the offender and the victim and the public interest. There are decisions of this Court: see *Bwanali v R* (1964-66) 3 ALR (Mal) 329. There is also a decision of the Supreme Court: *Maikolo v R* (1964-66) ALR (Mal) 584. The sentencing court must arrive at the right sentence deserved by the crime. After that, previous convictions are reasons for maintaining the right sentence (*R v White* (1923-61) 1 ALR (Mal) 401; and *Bwanali v R*).

The offence, theft of property worth K 375, even factoring in the victim's station in life, is manifestly excessive. Moreover, the defendant is young, pleaded guilty to the offence and is offending for the first time. It is wholly inappropriate for sentencing courts to pass long and heavy sentences for young offenders committing otherwise not serious offences. For first and youthful offenders, a short and a quick prison sentence, if deserved, may just be as effective. Sentencing courts must take pleas of guilty seriously. Apart from saving courts resources, time and space, such pleas redirect the court's effort to more deserving cases. Moreover, such pleas are the surest proof that avoids miscarriages of justice possible through the trial process. Lower courts should, when dealing with first offenders follow the suggestions this Court made in *Bobat v Republic* Criminal Appeal case number 29 of 1994, unreported. This is a sure way to arrive at the right sentence. In my judgment a sentence lower than six months was appropriate. The lower court should have ordered community service or suspended the sentence. I pass a sentence as results in the defendant's immediate release.

Made in open court this 24<sup>th</sup> Day of July 2003.

D F Mwaungulu

**JUDGE**