IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY

CRIMINAL APPEAL CASE NUMBER 86 OF 2006

BETWEEN

JOHN MWACHILIRA ---------- APPELLANT

AND

THE REPUBLIC ---------- RESPONDENT

CORAM : SINGINI, J

: Appellant, unrepresented
: Mrs. Kachale, Principal State Advocate, of counsel for the State
: Mrs. Mbewe, Court Reporter
: Mrs. Nakweya, Court Interpreter

JUDGMENT

This is an appeal against sentence where the appellant was convicted on 5th October, 2006, by the Second Grade Magistrate Court sitting at Nathenje in Lilongwe District of the offence of theft from a house in Dunde Village, Traditional Authority Chadza, Lilongwe District, where the appellant hails from, and the offence of housebreaking into that house. He was sentenced for theft to twelve months and for housebreaking to twenty-four months imprisonment with hard labour.

It would seem the house was either his own mother's house as in his mitigation he regrets having done wrong to his mother or it was the house of his brother of the same surname, one Mr. Mdaona Mwachilira,

but both the mother and the brother lived in the house. One may conclude from the evidence on record that the house was a family home to the appellant as well. He had left the village to visit a friend in another area and when he came back some four days later on 24th September, 2006, around two o'clock in the afternoon, he found the house locked and there was no one to open the house for him. He gained entry into the house through one of the windows by breaking the window, and that entry is what constituted the offence of housebreaking.

When Mdaona Mwachilira entered the house later that afternoon he saw that a window was broken and discovered several items missing from the house. He suspected theft of the items. He reported the matter to the police and gave the name of the appellant as the suspect, having seen him around earlier that day. The items reported to have been stolen were a pair of shoes, a bag of rice of 25 kilograms, a pair of jeans trousers, two T-shirts, and one short sleeves shirt.

The police arrested the appellant and recovered from him the pair of shoes. The appellant admitted entering the house in the manner complained but to have taken only the one pair of shoes and the bag of rice.

Those really were the brief facts. Although the appellant entered a plea of not guilty and the matter went to trial, he virtually admitted the offences. His appeal is only against both sentences as being excessive in the circumstances of the offences and with regard to his individual factors. The State not only does not oppose the appeal but actually supports the appeal against sentence.

The appellant is a first offender. He virtually admitted the offences, except denying the range of items he was accused to have stolen resulting in the court entering a plea of not guilty. I would also take account of the fact that the pair of shoes he stole was recovered. I also bear in mind that this was really a domestic misconduct by the appellant, and he is on record to have shown deep remorse over his conduct towards his family members. The appellant explains taking away the bag of rice as being for food as he felt hungry at the time. However, taking a bag of 25 kilograms of rice cannot be justified on account of being food ration to quench one's hunger for the day. Nonetheless, the aspect of a domestic environment in which this case occurred is, to my mind, a major mitigating factor in sentencing.

All things considered, in my judgment this was by no means near the worst cases of the offences of theft and housebreaking; and if, as a matter of sentencing principles, punishment of offenders must be tempered with mercy, I find that the case of the appellant fits the application of that principle. The young age of the appellant at 25 years when he was being sentenced ought also to have been taken as a mitigating factor in sentencing him.

As observed in the submission by Counsel for the State, the lower court appears to have given much consideration to the need to deter the prevalence of the offence of housebreaking in society. The court overlooked the well settled sentencing principle, which I do affirm in my judgment, that generally deterrent sentences are not to be imposed on first offenders: see the case of *Rep v. Banda* 8 MLR 7.

In those circumstances, I allow the appeal against both sentences. I set aside the sentences and substitute them with a sentence of six months imprisonment with hard labour on both counts to run with effect from the date of arrest of the appellant on 24th September, 2006, since when he has been in custody. This should result in the appellant's immediate release from prison.

PRONOUNCED in open court at Lilongwe District Registry this 21st day of November, 2007.

E.M. SINGINI, SC.
J U D G E