

**IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY  
CRIMINAL APPEAL NO.82 OF 2007**

PATRICK KAPOLO .....APPELLANT

-AND-

THE REPUBLIC .....RESPONDENT

Being Criminal Case No. 131 of 2006 in the Senior Resident  
Magistrates court sitting at Lilongwe

**CORAM: HON.JUSTICE CHOMBO, J**

Appellant, Present/Unrepresented  
Kayira, Counsel for the State  
Chulu, Court Interpreter  
Mbewe, Court Reporter

**JUDGMENT**

The appellant was convicted on the charges of burglary and theft and sentenced to 3 years and 2 ½ years respectively. It was submitted by the appellant that he was arrested in April 2006 and his case was completed in 2007. When sentence was being passed the period that the appellant had spent in custody prior to the conviction was not taken into

consideration. The appellant now seeks court indulgence to take into account the 16 or so months that he was on remand, return of personal property collected by police during investigations and the court to take into account other mitigating factors.

The state opposed the appeal holding that taking into account the value of the property stolen the sentence is not manifestly excessive. On the other mitigating factors the State was of the view that the appellant should have thought of the consequences of his actions before getting involved in the illegal acts.

The appellant submitted and the State agreed that the appellant had been arrested on 26 April 2006. The counsel for the State however informed court that he did not have the last page of the lower court's record and was not sure of the court's ruling on that issue. It is pertinent to consider what was the intend of the said court in imposing the sentence. It will be necessary therefore to quote what the lower court said:

*“This case was registered in court on 27<sup>th</sup> April 2006. The convicts have been in custody since then or even from a few days before that. They are both to be treated as first offenders. They caused some damage to the complainant's house, particularly, at one of the*

*windows. They stole a number of valuable articles. Both burglary and theft are felonies and their convictions having come about after full trials. I sentence Patrick Kaporo and Christopher Smart each to 3 years imprisonment with hard labour on the burglary count and to 2 ½ years IHL each on the theft count. The sentences are to run concurrently with effect from the date of conviction.”*

In my view the lower court was well aware of the time that the appellant had been in custody prior to the pronouncement of the sentences. The court however chose to ignore the period that the appellant had spent in custody. A number of things exercised my mind. The lower court could have chosen to make the date of arrest to be the effective date of the sentence but instead chose the date of conviction. I then considered the sentences imposed and other factors of the case. I actually found that the sentences were on the lower side. I considered a number of aggravating issues

- (a) the value of the property stolen*
- (b) the fact that not all of it was recovered*
- (c) the fact that the appellant actually sold part of the property and made financial gains from his illicit activities.*

- (d) *the fact that it was an offence committed after premeditation and with another person.*
- (e) *the high rate occurrence of such offences in the city*

And left to me, I would actually have considered enhancing the sentence. It is not proper however to merely enhance sentence because one thinks that a lower sentence does not serve the purpose. I have come to the conclusion that the facts of the appellant's situation did not move the lower court to take into account the period in question. This court would be passing the wrong signals if it reduced the sentence imposed by the lower court in the circumstances.

The appellant submitted that conditions in prison are harsh and that members of his family are facing hardship as a result of his incarceration. As observed by the lower court, these are matters that should have deterred the appellant before committing the offence. He chose to take a path that leads to prison and must therefore get the consequences thereto.

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The appellant submitted that police confiscated his personal property. I note however that some of the property collected from the appellant's house was identified by the complainant as property stolen from his house. It is therefore ordered that any property not forming part of the property of the

complainant be returned to the appellant; unless the police have good reasons for holding on to the same, which reasons must be given to the appellant.

MADE in court this 7<sup>th</sup> February, 2008.

CHOMBO  
**JUDGE**