



**JUDICIARY**  
**IN THE HIGH COURT OF MALAWI**  
**PRINCIPAL REGISTRY**  
**CONFIRMATION CASE NO 404 OF 2010**  
**THE REPUBLIC**

**Versus**

**FELIX MADALITSO KEKE**

**In The First Grade Magistrate Court sitting at Dalton Court, Limbe Criminal Case no. 1 of 2009**

**CORAM:**

**THE HONOURABLE JUSTICE D MWAUNGULU**

Salamba, Senior State Advocate, for the State

Accused, present, unrepresented

Mwanyongo, Official Court Interpreter

**Mwaungulu J**

## **JUDGMENT**

### **INTRODUCTION**

In this case, where the offender pleaded guilty to the charge, the First Grade Magistrate at Limbe Dalton would have not passed the particular imprisonment if the magistrate approached sentencing methodically and applied the principles properly to that sentence. The First Grade Magistrate convicted the accused of robbery on 5 January 2010. The accused, in a company of others armed with panga knives and riffles, swooped and robbed the complainant when he was driving into his house from work. All the offenders left. The police, after investigations, arrested the accused. The accused admitted the charge at the police and at the First Grade Magistrate. This Court is required to exercise its powers under sections 25 and 26 of the Courts Act and sections 15 (1) and 160 of the Criminal Procedure and evidence Code.

I heard the accused person and Mr. Chingota, Senior State Advocate. Mr. Chingota supports the conviction and sentence. He, correctly, in my assessment, supports the conviction because of the accused person's guilty plea. He thinks, however, that given the aggravating circumstances in this case the sentence of ten years must be confirmed. He cited the cases of *Republic v Kasondo* (2007) Confirmation Case No. 447 (unreported) and *Republic v Misoya* (2008) Confirmation Case No. 70 (unreported) where this Court confirmed sentences of seven years imprisonment and *Republic v Bakali* (2004) Confirmation No.271 (unreported), arguing that the cases establish a starting point.

There cannot be any problem with the conviction. The accused person made an unequivocal plea. The facts the Public Prosecutor proffered buttressed the unequivocal plea. There was nothing between the Public Prosecutor's presentation of the facts and when the First Grade Magistrate to compromise either the plea or the facts the Public Prosecutor presented to support the plea or, according to *R v Mokum* [1992] Crim LR 98 (CA), enabled the Public Prosecutor to either concede the fact or prepare as in *R v Newton* (1992) 77 Cr App R 13, followed in *R v Costly* (1989) 13.

In sentencing the accused to ten years imprisonment with hard labour, the First Grade Magistrate considered the following aggravating: weapons were used; and large amount of property stolen. The First Grade Magistrate found the following mitigating: plea of guilt; and that the accused was offending for the first time. She applied the following principles of sentencing: prevalence of the offence; the seriousness of the offence; general and specific deterrence. It is a bit unclear how the lower court dealt with the mitigating factors. She actually mentions them. However, she cites this statement from this Court's decision in *Phiri and Others v Republic* (1996) criminal Appeal case No 6 (unreported); leaving the impression that she will not take those into consideration:

*“Some crimes ... are so heinous that pleas that a crime is a first offence or that the accused has not been to prison before were of little relevance. It should hardly be expected that a man who goes out with a gun to terrorize in the company of others will find a court with the itching ear to hear lamentations of mercy.”*

In the final disposal, however, she suggests that the sentence was arrived at considering mitigating and aggravating factors. The doubts must be resolved in the offenders favour.

In this case the sentencer concluded, correctly, in my judgment, that a custodial sentence was appropriate for the crime. The reasons for arriving at the specific sentence suggest that the sentencing court's method resulted in the sentence imposed to which different principles of sentencing were applied to arrive at a sentence the subject of this review. This Court should, therefore, stress the method and principles of arriving at a correct sentence in specific crimes. Particular factors to this family of offences will be treated in a different case to avoid a lengthy judgment.

#### SENTENCES TO CONFORM TO THE CONSTITUTION

Hitherto the basis on which appellate courts have had to overturn the sentence has basically been that the sentence was manifestly excessive or inadequate as to comport an improper exercise of the discretion. In either case the sentence was inadequate or excessive if there would be a sense of shock after due regard of the offence, offender, victim and the public, for which criminal justice serves an interest in relation to the latter, it must not be ignored that it is also in the public interest that criminals are treated justly, humanely and according to the fundamental principles and provisions of our new constitutional order. Section 19(3) of the Constitution now creates a fundamental right to citizens not to be subjected to “Cruel, inhuman or degrading treatment or punishment.” Sentences courts pass are therefore, violation of the Section if they are ‘cruel, inhuman or degrading’. It is not that the sentences be all or are two of these; the sentences will be unconstitutional on any one ground. Sentencers must now be wary and ensure that in sentencing offenders the sentences comport with these constitutional rights. No sentence is per se constitutional; courts must, therefore, have to ensure that their sentences do not offend section of the Constitution (*Solemn v Helm* – 463 U.S. 277 (1983), United Supreme Court:

“In sum, we hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted. Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals. [Footnote 16] But no penalty is *per se* constitutional. As the Court noted in *Robinson v. California*, 370 U.S. at 370 U. S. 667, a single day in prison may be unconstitutional in some circumstances.” (Per Powell J)

Judicial opinion suggests that the test even when regarding constitutional and human right provisions is the same, namely the shock test. The test of proportionality of the sentence to

the crime is the vogue test (ibid). The justification for this may very well be that a sentence that is not manifestly excessive or inadequate is unlikely to offend the Constitution so much so that it is only sentences that are excessive that will offend the rule. This would need a two tier test where human rights and Constitution considerations only arise when the sentences are manifestly excessive. This comports that human rights and constitutional considerations would not be regarded as the first tier. I think that these must be one and uniform test, the constitutional test, whether the sentence or punishment is cruel, inhuman or degrading. The strength of this test is that it allows the sentencer to focus on the offender once we have determined the sentence based on the offender, offence, the victim and the public interest.

### SENTENCING APPROACH

Over all, in considering whether the sentence is cruel inhuman or degrading, the appellate court will investigate if the sentence fits the offence (crime), the victim, the offender, and the public interest or public goals. Courts sentencing at first instance must carefully examine these four heads of sentence and treat them in this order. In practical sentencing, the sentencer must operate in this order. This sequencing is more likely to produce uniform and fair sentences after properly considering factors exogenous to the crimes that are determinative of final disposal of the crime and the offender

#### **Primary principle: proportionality with offence**

The dominant theme on this consideration is that a court must pass a sentence commensurate with the crime committed. “In sum, we hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted” (Per Powell J in *Solemn v Helms*). This is the only sentence that conforms to the fundamental principles of *justice* and fairness. All the other considerations raised later align themselves to this.

#### *Maximum sentence*

Invariably all crimes that courts handle base on the Penal Code; the principles espouse in this judgment should apply to other crimes, statutory or common law. The premium and premier consideration here is the maximum sentence set for the crime. The principle here, based on fiction, is that the maximum sentence is meant for the most serious offence which, notionally, has yet to occur, if ever it will. The fiction, however, helps us to avoid, until the legislature increases the sentence, passing sentences close to the maximum each time a shockingly serious instance of the offence occurs, lest we fail to have discretion when a more serious instance of the offence occurs.

#### *Starting point*

The problem must then be determining what would be the minimum sentence, for the simplest crime before considering all else. For courts at first instance, this can be tricky and

worrisome exercise. It need not be. Where there are guidelines, the court at first instance must abide by the guidelines which suggest a starting point. Starting points are an attempt by appellate courts to arrive at what should be the lowest threshold for the specific crime given the *mens rea* and *the actus reus* of the crime as provided in the penal provision. This is what has been popularly known as the usual crime. Starting points achieve fairness and uniformity of approach and enable to arrive at sentences that treat the like a like while regarding differences in the extent and intensity of a specific crime. Where there are no guidelines the court at first instance must determine the threshold based on the maximum sentence and crimes actually committed in its community.

### *Aggravation and Mitigation*

The starting point is dominated by the *mens rea* and *actus reus* of the crime. There is a basic mental component of a crime and basic actions and omissions that constitute a crime. Many factors may enhance or ameliorate the mental component of a crime. Equally, many factors can aggravate or mitigate on the actions or omissions comprising a specific crime. In considering factors that may influence sentencing for the offence committed contemporaneous circumstances before and after the offence may militate against or for the offence. Conduct that show malice, recklessness, and wanton before and after the crime may aggravate the offence; remorse, assistance to the victim; reparation will militate against a harsh sentence.

Sentencers must develop from their own experience and from appellate courts the peculiar aggravating and mitigating circumstances generally and in specific offences. Speaking generally, by regarding the mental and actions in crimes, the following circumstances will aggravate the offence: actual or threatened violence; previous convictions; excessive cruelty to a victim; vulnerability of the victim on account of age, disability or infirmity; multiple victims' multiple crimes; substantial loss; breach of trust; planned or organized crime; multiple offenders. The following factors may mitigate: first offence, age, duress; provocation; restitution of property and lesser participation in a crime.

### *Sentencing guidelines*

Courts have complete discretion to determine the sanction fitting a crime within the maximum sentence prescribed by the legislature. Sentencing involves application of this discretion across offences of different degrees under the law and consideration of over a variety that without guidelines sentences would be fortuitous and disparate. Consequently, once a guideline is given, departure from it must be punctuated by reasons. Sentencing guidelines are based on nationwide considerations; sentencers are, however, supposed to be sensitive to sentencing trends in their locality for better administration of justice and better response to criminality in specific areas.

### **Considering the victim**

There is no one to whom the crime is more immediate, real and preoccupying than the victim of a crime. While our laws are sparse on victim and witness support, courts at first instance must regard the impact of the crime on the immediate and intermediate victims of a crime, more especially in crimes involving personal violence. Even for other crimes, the social and economic consequences on the victim and society must be in the calculation in terms of public expenditure on surveillance, security and insurance (or lack of it). At a personal level the loss of something cherished or valuable and the prospect of replacing it must catch the imagination of a sentence at first instance.

### **Considering the offender**

By focusing on the maximum sentence and the lowest thresholds of a crime the sentencer at first instance and determining the correct sentence the court is equipped to consider that the sentence fits the offender. As a matter of policy sentences that ignore this aspect run a high risk of being unfair on offenders who have committed similar crimes and are likely to be discriminatory for treating the different in the same way or treating the same people differently. Generally criminal justice treats different people differently based on age, mental capacity, antecedents and, sometimes, gender, degree of participation in the crime. At the level of detail, there would be many actions or omissions and mental conditions that the sentencer must individuate to the particular offender or as against another offender which, if ignored, can result in unfair sentences.

#### Age

##### *19 to 25 years*

One most critical consideration about the offender is age. For ages between 19 and 25, commission of a crime may be a result of impetuous, immaturity, youth or adventure. A severe sentence may be perceived by a young offender as reflecting a harsh society on which to avenge. Long prison sentences for young persons may actually delay social integration to enable a young life to start a new life and lead a meaningful life. For young offenders, therefore, a short, quick and sharp sentence may achieve the ends of justice and deter future offending.

##### *25 to 35 years*

For offenders between 25 and 35 a sentencer may allow a full rigour of the sentence that fits the crime on the assumption that at that age the offender is supposed to have developed a mature temperament towards and mature understanding about crime and consequences about crime and its impact on the offender, the offender's family and the society of which the offender is integral. On the other hand the sentencer could reduce the sentence considering that an offender at that age has lived longer without trouble with the law.

##### *36 to 60 years*

For those aged thirty-six years to 60 years, they are entitled to considerations that apply to the prior age group. On the other hand sentences could be reduced precisely because of the reduced risk of reoffending at that age.

*61 years +*

For those above 60 years, the considerations between 25 to 60 years apply. On the other hand the sentencer must seriously consider sections 339 and 340 in respect for this age group.

### Repeat offenders

Generally, for repeat offenders the sentence that fits the crime must be carried out. It is improper, without legislation, to increase the sentence on account of the fact that the accused person has been previously sentenced. The discretion to consider whether to impose the full sentence deserved by the crime is based on principles. Generally the offender must have been sentenced previously to a similar offence or a genre of offences many times and within a short duration. Generally, the courts have required that there should not be a long interposition between the previous conviction and the current conviction.

### Spent Convictions

In the United Kingdom, the Rehabilitation of Offenders Act 1974 makes a convicted person a rehabilitated person once the rehabilitation period has elapsed with the consequence that the conviction is spent. Section 7 provides that the Act does not apply to criminal proceedings. That notwithstanding, Lord Widgery, C.J., issued Practice Direction [1975] where he states that neither Counsel nor the Judge should refer to spent convictions if it 'can be reasonably avoided.' Judicial opinion supports such a view generally. In the absence of the equivalent of Rehabilitation of Offenders Act 1974, since a President or a Presidential Candidate has a seven year reprieve under section 80 (7) (c) of the Constitution, courts should completely disregard convictions over seven years old as a matter of principle and their general power to disregard such convictions. If the President has such a reprieve, why not an offender who has tried to live an honest life for seven years? It is logical because all of us at a certain age are eligible for candidacy for candidacy for the presidency. What is good for the goose is good for the gander! Periods lower than seven are discretionary.

The Penal Code proposes a greater offence for certain repeat offences of dishonesty. Beyond that for repeat offenders the court will consider preventive sentencing.

### First Offenders

For first offenders, the sentencer must go through the sentencing process suggested in the case of *Bobat v Republic* (1994) Criminal Appeal Case No. 29 (unreported)

### Discrimination and Gender

**Sentences passed must avoid racial discrimination. More realistically they must not discriminate against gender. That does not mean that a sentencer must disregard gender completely; this could mean treating different things in the same way. Generally a death sentence should be converted to life if the woman is pregnant. Consequently, unless the crime is very serious, a prison sentence should be reduced where the woman is pregnant. The court should, therefore, seriously consider section 339 and 340 of the Criminal Procedure and Evidence Code.**

### **Public interest**

Considerations of the public interest when sentencing offenders must go beyond considerations of deterrence; there is always the consideration that the public whose interest the sentencer wants to serve includes the prisoner before the court at first instance. It is in the public interest that sentences are passed which are not cruel, degrading and inhuman. Harsh or lenient sentences may not necessarily serve the public interest; they are likely to have an opposite effect. While sentences must fit the crime, the offender and the victim, they must also fit and cohere with overall sentencing goals, justice, reformation, restoration and rehabilitation. Our sentences may not be in the public interest if they only succeed in instilling crime and fail in bringing the prisoner a better person in society's continuum.

In relation to young offenders and first offenders, it is wrong to use them for general deterrence, which is using them as a means to deter others. Such sentences are wrong in principle; they comport using life as a means to an end. In these circumstances, the offender deserves the sentence that fits the crime subject to factors that affect him and the consequence of the crime on the victim. First and young offenders, however, can be sentenced for specific deterrence, that is serving sentences which should prevent them from reoffending. In this case, the principle that the sentence must fit the crime results in that considerations of the seriousness of the offence comport the extent to which the offender's specific crime affects more people in the community in which he is. If more people are put in fear of a common crime, the offence is serious in that sense.

Sentencers must be aware that broader sentencing goals must be employed in the context of justice and fairness with a view not to impose cruel, inhuman and degrading punishment. To that end, it is wrong to impose long sentences for the rehabilitation of an offender. Equally, even reformatory options, such as probation and community service must only be understood from the context of a just and fair punishment in relation to the crime and the offender.

### **DISPOSAL OF THE CASE**

The sentence the lower court passed was on the face of it manifestly excessive. The sentence of ten years that the lower court arrived at was the net sentence after factoring all mitigating and aggravating factors. Consequently, without the mitigating factors, the lower court was contemplating a sentence in the environs of fifteen years. That would be manifestly excessive for



an offence of the nature committed. Moreover, the case would be well over sentences the court passes for homicides such as murder or manslaughter. That is not to suggest that we can never have sentences in burglary that would merit the same sentences as murder. This is to suggest that this case is not such a one.

The lower court never considered the guidelines that this Court has laid down for robbery. The cases cited by the Senior State Advocate do not establish a starting point for robbery. If anything, they establish a trend. The starting points for robberies under sections 301 (1) and 301 (2) and where guns are involved were amalgamated in *Republic v Makhumula* (2010) Confirmation Case No. 139 (unreported):

*“Sentencers at first instance must acquaint themselves with guidelines that superior or reviewing courts lay down. In the case of Robbery, there are three guidelines. For robbery under section 301 (1), the starting point is five year imprisonment with hard labour (Republic v Matetewu and Another (1995) Confirmation Case No. 1312 (Unreported); for aggravated robbery under section 301 (2), the starting point is eight years (Republic v Phiri (1996) Criminal Appeal Case No 6 (unreported); and, for robbery where guns are involved, ten years is the starting point (Republic v Zoola (1995) Confirmation Case No. 276 (unreported).”*

In this case, that guns were involved transposed the offence from a section 301 to a section 301 (2) robbery for which the starting point is ten years. The following aggravating factors, scaling upwards, probably pushed the sentence to 12 to 13 years: more than one person was involved in the crime; there were other types of weapons apart from guns; the offence caused much anxiety and fear on all the victims. Against this, there were mitigating factors: the accused is 39 years, he has lived for a long time without trouble with the law; the accused person cooperated with the police; he pleaded guilty. The plea of guilty entitled him to up to a reduction of third of the sentence. In any case, the lower court applied wrong principles. Relying on the case of *Republic v Dzatopesa* (1994) Confirmation Case No. 1344 (unreported), the lower court set to impose a sentence on a first offender that would also comport punishment for general deterrence. We cannot use first offenders that way.

The right sentence in this case is seven years imprisonment. I, therefore, set aside the sentence of ten years and I substitute thereto a sentence of seven years imprisonment.

Made in open court this 18th Day of June 2013

D.F. Mwaungulu

**JUDGE**

