

**IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CONFIRMATION CASE NO. 403 OF 2000**

**THE REPUBLIC  
Versus  
1. USEN MDALA  
-and-  
2. ALI CHINDAMBA**

**From the First Grade Magistrate's Court (A) Sitting at Mangochi Criminal case No. 172 of 2000**

**CORAM: THE HON. MR JUSTICE F.E. KAPANDA**

**Mr Kamwambi, Chief State Advocate of Counsel for the State  
Accused, present but unrepresented  
Mrs Kachimanga, Official Interpreter/Recording Officer**

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**Kapanda, J**

**ORDER IN CONFIRMATION**

**Introduction**

The convicts were charged with the offence of trespassing on a graveyard. This offence is stipulated in Section 129 of the Penal Code (Cap. 7:01) of the Laws of Malawi.

The prisoners were sentenced to serve a custodial sentence of twenty-four(24) months. This

punishment was meted out on the Defendants on the 8th day of August 2000. As shall be noted later, in this order, the sentence that was meted out by the First Grade Magistrate sitting at Mangochi is the maximum that is provided for under the said Section 129 of the said Penal Code.

As required by the provisions of the Criminal Procedure and Evidence Code the matter was referred to the High Court for confirmation. I happen to have been the Reviewing Judge and was of the view that a sentence of twenty-four(24) months imprisonment with hard labour was manifestly excessive. I did, therefore set down the case for consideration of the said sentence.

#### Facts of the Case

The prisoners pleaded not guilty to the charge of trespassing on a burial place. There was overwhelming evidence offered by the State that the two had indeed trespassed on a graveyard. The court judged them guilty and convicted them accordingly. The convictions can not be questioned and they are, therefore, confirmed. Following from what I have just pointed out above the question that this court is left to deal with is the sentence that was passed by the court below.

#### Sentence

The offence of trespassing on a graveyard is a misdemeanour. The section that creates this offence does not provide for the penalty where a person commits this offence. Thus one must have recourse to Section 34 of the Penal Code (Cap. 7:01) of the Laws of Malawi which provides that:-

“When in this code no punishment is specifically provided for any misdemeanour, it shall be punishable with a fine or with imprisonment for a term not exceeding two years or with both.”

It is clear that the Magistrate imposed the maximum penalty. As has been said several times maximum penalties are reserved for the worst criminal conduct. In the matter at hand the Magistrate has not given reasons for imposing the sentence of two(2) years which is the maximum that is provided for under the section that deals with penalties for misdemeanours. The sentence imposed was therefore wrong in principle and excessive. The Magistrate has not demonstrated why he did not mete out a sentence of a fine for it is trite law that where the law provides for fine or imprisonment as a penalty for commission of an offence a court is required to go through a process of elimination of the said penalties. Thus unless a fine is found not be an adequate punishment then the court may proceed to consider custodial imprisonment. The court proceeded to impose a custodial sentence without any process of elimination. In view of the fact that the Magistrate never considered this principle of sentencing I found the sentence that he imposed to have been on a wrong principle of sentencing. It is no wonder that the approach by the Magistrate resulted in an excessive sentence being meted out on the convicts.

For this reason the sentence that was imposed on the Defendants will have to be disturbed. This court therefore passes a sentence of ten(10) months which will result in the immediate release of the prisoners. It is so ordered that they be released from custody unless they are being held for other lawful reasons.

Made in open Court this 8th day of June 2000 at the Principal Registry, Blantyre.

**F.E. Kapanda**

**JUDGE**