

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CONFIRMATION CASE NO. 738 OF 2000**

**THE REPUBLIC
Versus
SYMON MISOMALI**

From the Second Grade Magistrate's Court Sitting at Phalombe Criminal Case No. 278 of 2000

Coram: Hon. Justice F.E. Kapanda

Miss Chimwaza, State Advocate for the State

Accused, Non-represented

Mr Kamanga, Official Interpreter/Recording Officer

Kapanda, J.

ORDER

Introduction

The Defendant was charged with the offences of burglary and theft. He appeared before the Second Grade Magistrate's Court, sitting at Phalombe where, after full trial, judged guilty of the said two offences of burglary and theft. The court below sentenced the convict to thirty (30) months imprisonment with hard labour in respect of the offence of burglary and for the offence of theft the court ordered him to serve a custodial sentence of ten (10) months. The sentences were made to run concurrently and also subject to confirmation by the High Court.

At the time the case record was brought before the Reviewing Judge it was the view of the learned judge, and I agree with him, that the sentence meted out on the burglary charge is manifestly inadequate. In fact it is also the view of the State that the sentence that was passed for the offence of burglary is indeed inadequate. I must point it out that the sentence will have to be

enhanced as suggested by the learned judge who reviewed the case record.

Facts of the Case

The prisoner pleaded not guilty to the offence of burglary but was all the same found guilty and convicted after a full trial. This offence is stipulated in Section 309(A) of the Penal Code (Cap 7:01) of the Laws of Malawi.

It is a fact that the prisoner broke and entered into the house of the complainant. The breaking and the entry was done during the night of 25th July 2000. He was nearly caught in flagrante delicto. He was later arrested upon surrendering himself to the police. There is no dispute with regard to the findings of fact by the court below and conviction of the prisoner. The conviction must be, and is hereby, confirmed.

Sentence

As noted above the court below sentenced the felon herein to serve a custodial sentence of thirty (30) months for the offence of burglary. It is apparent from the record of the said court below that the magistrate arrived at this quantum of a sentence after considering that the offender had no previous criminal record and that at the time of the convict broke and entered into the house there was no person inside the house. On the face of it these were matters that the court ought to have taken into account in arriving at the appropriate sentence.

But looking the other side of the scale of justice this court is of the view that this sentence did not take into account the maximum penalty that has been prescribed for this offence. It is trite law that burglary carried the maximum penalty of death or imprisonment for life. It therefore goes without saying that burglary is a very grave offence if one just looks at the maximum penalty that the legislature has provided for this offence. A custodial sentence of thirty (30) months does not reflect the seriousness of this offence.

In point of fact the High Court has stated, in more than one case on confirmation, that for burglary the starting point, in so far as the quantum of sentence is concerned, should be six (6) years (72 months) and the sentence may be scaled down or enhanced depending on the mitigating or aggravating factors obtaining in a particular case. I wish to observe that I have not found any serious mitigating factor in favour of the defendant, in the instant case,

that would necessitate the confirming the sentence passed from the court below.

For the reasons given above I am inclined to enhance the sentence of thirty (30) months, as suggested by the reviewing judge, and it is hereby enhanced to six (6) years imprisonment with hard labour. The felon shall now serve a custodial sentence of 72 months. It is so ordered.

Made in open Court this 12th day of April 2001 at the Principal Registry, Blantyre.

F.E. Kapanda

JUDGE