IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL APPEAL NO. 59 OF 2000

LUKA ASEKWE AND SAM AKALINDA

VS

THE REPUBLIC

From the Senior Resident Magistrate's Court at Blantyre Criminal Case No. 55 of 2000

CORAM: CHIPETA, J.

Nyimba, of Counsel for the Appellant

Manyungwa, of Counsel for the Respondent

Nthole, Official Interpreter

JUDGMENT

The first Appellant, Luka Asekwe, is a Zambian. The second Appellant, Sam Kalainda, is Malawian. On the first count the two were on their own pleas of guilt jointly convicted of the offence of giving false information on citizenship contrary to Section 33(1) of the Malawi citizenship Act and were each sentenced to 18 month imprisonment with hard labour. On the second count the first Appellant was convicted alone, again on a plea of guilt. This was in respect of the offence of attempt to obtain a Malawi passport by false pretences. On this count the charge pegged the offence to Section 401 and 402 of the Penal Code when it should have read contrary to Section 319 as read with Section 401 of the Penal Code. The sentence the 1st Appellant got on the second count was a fine of K1,000.00 or in default 6 months imprisonment. It was ordered that the default term would be served consecutively with the sentence on the first count in even if the fine not being paid.

The matter herein has come to this court by way of appeal against sentence. The convictions are not being challenged and are in fact, in my view, quite sound. The fault about lack of reference to some provisions of the Penal Code was not such as to prejudice the first Appellant in his understanding of the offence levelled against him in the second count. The facts narrated in support of that count, which he unequivocally admitted as he had done the reading of the charge well displayed the offence proffered and .....I thus consider them to have supplied for that minor defeat. I am

accordingly amply satisfied about the sincerely of the 1st Appellant's plea on both counts and the corrections of his convictions thereon. I accordingly confirm the said convictions. I am ..... amply satisfied about the sincerety of the second appellant's plea the first count and as to the genuineness of his conviction on that count. I accordingly in like manner confirm his conviction on that count.

The story behind this matter is quite brief. The 1st Appellant after failing to get a visa to travel to the United Kingdom in his home country, Zambia, set off for Malawi to pursue the same luck through crucial means. Aiming at obtaining a Malawian passport in this regard he teamed up with the second Appellant and added the name "Phiri" to his real names. He proceeded to pretend to be a Malawian from T.A. Machinjiri's area in Blantyre. Both Appellant then approached the office in Blantyre and on presenting passport application forms certaining this false information paid the appropriate fee for a passport allowing for travel to the United Kingdom. They were arrested on the day they hoped were going to collect the passport.

The two Appellant's are represented by Mr Nyimba, of Counsel and the State is represented by Mr Manyungwa, Assistant Chief State Advocate. It was signed on behalf of the Appellant that the sentences handed down by the lower court herein are manifestly excessive and that as such they deserve to be set abide and replaced with much lighter penalties. It was in fact contended that the lower court should rather have passed alternative non- custodial sentences in the case. In support of this time of argument emphasis was laid on the facts that the Appellants are first offenders, that they readily pleaded guilty, and that the offences herein were of a technical nature in that no real loss or damage occurred. Mr Nyimba contended that from the penalties laid down by the legislature for the offence in the first count, which are a fine of K1,000.00 and imprisonment for three years, the impression created is that this offence is a misdermeanour. Bearing in mind that the false information was in fact not acted upon and that no passport was actually issued to the 1st Applicant, Mr Nyimba argued that the sentence of 18 months imprisonment with hard labour for that offence was two high.

It was also argued on behalf of the first Appellant that it was an error of law on the part of the lower court to direct the default term of imprisonment on the second count to run consecutively to the term of imprisonment on the first count. The two offences herein, it was contended, were part and parcel of one and the same transaction and were committed at the same time and should therefore at the worst have attracted concurrent penalties. Mr Manyungwa on behalf of the State was in full agreement with the arguments advanced on behalf of the Appellant. In short he supported the ..... and has in favour of interference with the sentences imposed by the lower court, which sentences he considered to be manifestly excessive.

I have in the course of considering this appeal borne in mind the principle of sentencing

discussed in the case of Rep -vs- Ghanti (1975-77) & MLR 69. It was clearly laid out in that case that a sentence should be fitting to the crime and the criminal and at the same time be fair to society. Mercy, it was said, should not be the equivalent of weakness or sympathy with criminal behaviour. The mitigatory factors capitalized in by learned Counsel for the Appellants equity that are quite peniful and are truly deserving of meaningful credit in favour of the Appellants as regards the penalty they deserve to get for the offences in question. A factor which equally deserves weight but which was not argued was one relating to the ages of the Appellants. As per the charge sheet the two Appellants are respectively aged 28 years and 27 years which is quite youthful and this ought to have attracted some further leniency for them. It strikes me that bearing in mind these ages, the ready pleas of guilt and the fact that the Applicants are first offenders to award them 18 months on the first count, which is half of the maximum possible penalty in this type of case, is rather harsh. In regard to the sentence the 1st Appellant got on the second count I observe that contrary to practice the means of the Appellant were not ascertained before the court decided to punish him with a fine. That aside it is to be observed that as per Section 29 of the Penal Code a default sentence of 6 months can only be attached to a sentence of fine exceeding K1,000.00 but not exceeding K3,000.00. For the fine the lower court imposed the legally acceptable maximum default sentence was 3 months imprisonment only. Further it is the position of the law that for offences committed at the same time or as part of the same transaction or same serves of transactions the appellants manner of penalizing the offender is to make his punishments concurrent unless special reasons exist for making them consecutive. In this case it may well have been thought by the lower court that the 1st Appellants would pay the fine and consequently avoid the additional default term, but as indicated earlier the basis on which the court opted for this mode of penalty was not buttressed with any preliminary inquiry as to the ability of the Appellant to meet the fine. All in all I think those are sufficient errors surrounding the sentence in the second count to warrant interference with it by this court.

Be this as it may I quite agree with the court below that despite the Appellants herein being first offenders custodial sentences were duly deserved in this case. While the learned Mr Nyimba was quite eloquent in arguing that the offences herein were technical in nature and that no real damage or loss was occasioned I think the learned magistrate was correct in taking a firm view of these offences. It is quite clear to me in this case that the first Appellant in the commonness of these offences demonstrated peculiar determination and criminal ingenuity. For him to cross borders, secure a surname sounding Malawian, manage to secure an accomplice or accomplices in not only obtaining a Malawian village address but also a Malawian postal address, have the District Commissioner’s office confirm his place of birth in Malawi, and pay K2,000.00 as passport fee among other things, to me, is evidence of a real criminal mind at work and one determined not to stop at anything, and not evidence of a mind that almost accidentally lands one in a technical offence. The fact that his trick was discovered and that no passport was thus issued does not minimize the blameworthiness of his mind and his actions. I am convinced that he will go to Zambia all the way camping if the sentence he is given does not teach him the lesson that it is no trivial matter to try and steal another country’s citizenship and citizenship rights. As for the second Appellant he is a man who

is willing to sell his country for personal benefit regardless of whatever the first Appellant secured his favour for. He too deserves a proper lesson.

For reasons I gave earlier I set aside the sentences imposed on the two Appellants herein. While I applaud the need for custodial penalties in this case, as I indicated due to the ages, the pleas of guilt, and the fact that the Appellants have no previous records their sentences deserve scaling down but only to the level to fit the crimes and the criminals themselves apart from being fever to society. In so exercising this leniency I am sharing no sympathy or weakness with the criminal behaviour they demonstrated. I in hearing the lower court's sentences, sentence the 1st and second Appellants to 9 months imprisonment with hard labour only on the first count. On the second count I sentence the 1st Appellant to 6 months imprisonment with hard labour only. This second sentence is to run concurrently with the sentence on the 1st count. To this extent only the appeals of the two Appellants herein succeed.

Pronounced in open Court this 2nd day of January, 2001 at Blantyre.

A.C. Chipeta

JUDGE