

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL APPEAL NO. 21 OF 2001

HARRY AMOSI MTELERA

versus

THE REPUBLIC

From the Senior Resident Magistrate's Court at Blantyre : Criminal Case No. 545/2000

CORAM: TEMBO, J.

Appellant, Present unrepresented

Manyungwa, Counsel for the Respondent

Nthole, Court Clerk

JUDGMENT

TEMBO, J. This is an appeal by Harry Amosi Mtelera against conviction and sentence. Mtelera and Elioti Khoza were jointly charged with the offence of theft from a motor vehicle, contrary to Section 278 as read with Section 282 (c) of the Penal Code, the particulars of which were that No. 9027 2/Sgt. Mtelera and No. A 6068 Const. Khoza on the 1st day of December, 2000, at Mdeka Trading Centre, in the district of Blantyre, stole 101 bags of fertilizer, which both of them were guarding, to the value of K158, 772.00, the property of Agora, from motor vehicle registration No. 6968722.

After a full trial, during which eleven witnesses for the prosecution and two witnesses for the accused persons had testified, the learned Senior Resident Magistrate found Mtelera guilty of the

offence charged and acquitted Khoza of that offence. Mtelera was then sentenced to five years imprisonment with hard labour. Mtelera is now appealing against that conviction and sentence.

Mtelera is not legally represented. He has, nonetheless, filed a number of grounds for the instant appeal. Put briefly, Mtelera contends that the learned Senior Resident Magistrate erred in that the conviction was against the weight of the evidence. As to the sentence, Mtelera contends that the learned Senior Resident Magistrate erred in that in sentencing Mtelera to five years imprisonment, the learned Magistrate did not take into account the mitigating factors which were in favour of Mtelera; namely that he is a first offender; that he is in poor health; and that he has served in the Police service for 27 years without being guilty of any misconduct whatsoever. It is further contended that Mtelera is being punished twice, thus upon conviction he was sentenced to 5 years imprisonment and that the Court has also ordered that half of Mtelera's pension be paid to Agora. Besides that, the Police Authorities have ordered that Mtelera should not receive any salary effective from the date of his arrest, December, 2000.

A perusal of the record and judgment of the lower court clearly provides the basis upon which the conviction was founded. To begin with, let me point out that on the day and at the place in question, a truck had overturned on the side of the road. At that time the truck had a full load of fertilizer, in fifty kilogramme - bags, belonging to Agora. The appellant and Const. Khoza were assigned to provide guard services for the security of the truck and the fertilizer on board the truck.

During the time the appellant and Khoza performed their officially assigned function at the scene of the overturned truck, both of them had donned police uniform and had carried some arms for that purpose.

PW1, PW2 and PW3, among others, testified to the effect that Mtelera had in fact abdicated from the performance of his officially assigned function of maintaining guard of the truck and its load of fertilizer. Instead Mtelera had turned himself into a salesman of fertilizer; and provider of free fertilizer to some. Indeed, PW7 went so far as telling the Court below that Mtelera had gone about Mdeka area at night soliciting customers to buy the fertilizer which he offered for sale from the stranded truck. PW7, following the offer so made, bought two bags of fertilizer from Mtelera. Mtelera had sold the fertilizer at prices of K4000 or K5000 per fifty kilogramme bag, which prices were manifestly below the market price then obtaining at ADMARC: namely, K1,300 per bag. No wonder, then, that over a short period of time, in fact overnight, a lot of bags of fertilizer went missing from the stranded truck. It is, in that regard, also expedient to note that Mtelera had sold the fertilizer at those very low prices to a number of people including PW2, PW3 and others besides offering some of it for free to some of his acquaintances, such as PWI and PWII.

Granted the foregoing, this Court holds the firm view that the prosecution had proved the charge against the appellant beyond reasonable doubt. In the circumstances, the conviction by the lower

Court cannot be faulted. The appeal against conviction is dismissed accordingly.

On the sentence, it is quite apparent that the term of imprisonment of 5 years on a first offender comes to the Court with a sense of shock. It is quite correct to say that the appellant ought to have done better than he did granted his long service within the Police Service and, therefore, the great trust reposed in him at the time. Be that as it may, sight should not be lost of the fact that the maximum penalty prescribed for this offence is only ten years imprisonment. Even with such aggravating factors as to the loss suffered by several persons involved, including the complainant, a sentence of 5 years imprisonment for a first offender in the shoes of the appellant is manifestly excessive. The Court would, therefore, set aside the sentence of five years imprisonment and substitute it with one for three years effective from the date of the order of the lower Court now replaced in that regard, thus 28th March, 2001. It is so ordered.

The ancillary order by which the lower Court had directed the Malawi Police Service to pay half the terminal benefits to the appellant in order to alleviate the appellant's punishment and prevent unnecessary hardship on his part is hereby quashed. Payment of terminal benefits is a matter which properly ought to be determined regard being had to the conditions of service for the Malawi Police Service to which the contract of employment for the appellant is or was subject. There is no evidence on the record of the lower Court to signify the fact that in making the order in question the lower Court had had regard to the requirements of such conditions of service.

PRONOUNCED in Open Court this 15th day of June, 2001, at Blantyre.

A.K. Tembo

JUDGE