

LL/CR/148/06/207

**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CRIMINAL APPEAL. NO.67 OF 2007**

HARRY MAKANJIRAAPPELLANT

-AND-

THE REPUBLICRESPONDENT

From the Second Grade Magistrate Court sitting at Lilongwe.
Being Criminal Case No. 364 of 2007

CORAM: HON.JUSTICE CHINANGWA, J

Miss Jere, Counsel for the State
Appellant, Present/Unrepresented
L. C. Munyenye, Court Interpreter
Mrs Namagonya, Court Reporter.

JUDGMENT

The appellant Harry Makanjira appeared before the Second Grade Magistrate Court sitting at Lilongwe on 21st June, 2007. It was on a charge of Obtaining money by false pretences contrary to section 319 of the penal code. He was convicted on

his own plea of guilty and sentenced to 24 months penal servitude.

Facts of the case show that appellant lives in area 36 in the city of Lilongwe. He lives with his parents. On 23rd October, 2005 appellant with intent to defraud obtained K70,000.00 from Brighton Zumazuma by falsely pretending that he would sell a plot to complainant. The said plot was already sold by appellant's father to another person. The two buyers met at the plot each intending to start development. They decided to refer the problem of ownership to appellant's father. Since the appellant's father was the owner his sale prevailed.

The appellant was arrested and prosecuted. As already stated earlier the appellant was convicted on his own plea of guilty and sentenced to 24 months penal servitude.

He now appeals against the magnitude of the sentence. In his petition of appeal appellant contends that he is a first offender and he pleaded guilty. The property which he sold belonged to his father. Moreover the complainant refused repayment. Presently he is on ARV drugs and T.B treatment. He pleaded with the customer to repay him but had refused.

In this court appellant added that he offered to repay K10,000, but complainant wanted K35,000 cash as initial

repayment. He prayed to this court to forgive him because there are many problems in prison. One of them is lack of food.

Counsel Miss Jere standing in for counsel Khunga adopted the skeleton arguments filed by the latter. She prayed to the court that the sentence be upheld. It was her submission that medical treatment can be obtained from a government hospital. On food it was her submission that appellant is given what the prison can afford.

My starting point is to refer to section 5 of the Criminal Procedure and Evidence Code. It states:

“5(1) subject to section 3 and to the other provisions of this code, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or review on account of any error, omission or irregularity in complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code unless such error, omission or irregularity has in fact occasioned a failure of justice.”

As I proceed in this judgment I will bear in mind the above stated provision.

As I understand the petition of appellant he contends that mitigating factors in his favour were not considered by the trial court. It is observed that on page 7 of the court record the trial court made these remarks before imposing sentence.

“On mitigation accused person said he keeps two orphaned children. He also looks after his grandparents. He is also a family man. He is a TB patient. The state on the other hand told this court that accused is a first offender. He readily admitted the charge, and his admission is a sign of remorse on his part.

The offence is also a misdemeanour. All these are mitigating factors which this court will consider when passing sentence. On the other hand I take note that there is a big loss on the complainant because the money which accused took (K70,000.00) has not been recovered. I will also consider this fact when passing sentence. I am aware that the policy of our law requires that first offenders should be considered for non-custodial sentences but this is usually applicable in less serious offences. However,

considering that there is no recovery and the way things happened I feel custodial sentence would be appropriate. I therefore sentence accused to 24 months IHL with effect from date of arrest”

From the above extract it is very clear that the trial court took into consideration all possible mitigating factors in his favour and against him to arrive at this sentence. The trial court can not be faulted.

The appellant argued in his appeal that the property he sold belonged to his father. What he omits to see is that he failed to pass on legal ownership to the complainant because the property was not his own. It is immaterial that the property belonged to his father. He also failed to repay complainant.

On his illness the prison authorities are competent to handle illnesses. Those they are unable to handle they usually refer them to Kamuzu Central Hospital. On food situation, if true, it is a matter of concern. However it is no good reason to release the appellant because he is not the only one facing food shortage. Otherwise all the inmates would be entitled to be released.

On the final analysis the appeal against sentence fails in its entirety.

Pronounced in open court this 12th day of December 2007 at
Lilongwe.

R.R. Chinangwa
JUDGE