

**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CRIMINAL APPEAL NO. 90 OF 2007**

COSMAS KASIYAFUMBI..... APPELLANT

-AND-

THE REPUBLIC..... RESPONDENT

From the First Grade Magistrate Court sitting at Mkukula,
Dowa being criminal case no. 19 of 2005.

CORAM: HON CHINANGWA, J

Appellant, Present/Unrepresented
Khunga, Counsel for the Respondent
Njirayafa, Court Interpreter
Z. Mthunzi, Court Reporter

J U D G M E N T

The appellant Cosmas Kasiyafumbi appeared before the First Grade Magistrate Court sitting at Mkukula, Dowa on 19th December, 2005. It was on a charge of Theft of goods in transit contrary to section 278 as read with section 282(c) of the penal code. The value of goods was K1,986,150.00 being the property of Farmers' World Limited. He was convicted on his own plea of guilty and sentenced to 5 years penal servitude.

Facts narrated by the prosecutor before the trial court show that appellant is a professional driver. He was employed by Chifundo Haulage. Farmers' World Ltd hired a motor vehicle Toyota registration no. SA 4497 from Chifundo Haulage. The driver of that motor vehicle was appellant. On 7th December, 2005 appellant was assigned to deliver 400 bags of maize and 1056 bags of groundnuts. Total value was K1,956,150.00. These commodities were to be delivered in Ntcheu and Liwonde depots. He returned to Lilongwe. Appellant when asked about the deliveries failed to give a satisfactory account. Put under pressure he revealed that in conjunction with Mr Moyo and Mr Magombo he had sold the consignment to Mr Juma Onani in Dedza. Appellant was arrested and charged with the present offence to which he admitted. Police managed to recover K239,000. As already mentioned earlier appellant was convicted on his own plea of guilty.

Appellant appeals to this court on sentence only. The petition of appeal is in Chichewa. As I understand the petition of appeal the grounds are as follows:

1. *That he is a first offender*
2. *He pleaded guilty*
3. *He returned the stolen property*
4. *The sentence is excessive in the circumstances.*

Prosecuting his appeal on 12th December, 2007 appellant prayed that the sentence be reduced.

The state being represented by counsel Khunga adopted the skeleton arguments by counsel Gloria Kalebe. He submitted that the maximum custodial sentence in Theft under section 278 of the penal code is 5 years. He urged court to consider reducing the sentence because it was not the worst in the theft category. He conceded that the state was aware that appellant acted in breach of the trust the employers had in him. However mitigating factors in his favour be also considered. That is that he pleaded guilty and a first offender.

The first ground to deal with is that he is a first offender. Section 340(1) Criminal Procedure & Evidence Code deals with a convicted first offender. It provides:

“Where a person is convicted by a court other than the High Court of an offence (not being an offence the sentence for which is fixed by law) and no previous conviction is proved against him, he shall not be sentenced for that offence, otherwise than under section 339, to undergo imprisonment (not being imprisonment to be undergone in default of the payment of a reasonable fine) unless it appears to

the court, on good grounds (which shall be set out by the court in the record), that there is no other appropriate means of dealing with him.”

During consideration of sentence the trial court took into account the provisions of section 340 Criminal procedure & Evidence Code. The mitigating factors such as the plea of guilty. The trial court considered that in view of the large quantity of stolen property to the tune of K1,986,150.00 not recovered. The only means of dealing with the appellant was to impose a custodial term. It therefore imposed 5 years penal servitude. It is my view that the circumstances of the case merited a custodial term. Notwithstanding the fact that he is a first offender.

I now proceed to determine the second ground that he pleaded guilty. Where a criminal offender pleads guilty it is a mitigating factor in his favour. This factor was taken into consideration. Refer page 13 of the court record. The trial court held the view that a custodial term was appropriate.

The third ground relates to the fact that the stolen property was recovered. This is untrue, stolen property was not recovered. Police recovered from him K239,000 which were proceeds of sold stolen items. Of course the trial court took this amount of money into consideration in appellant's favour.

Theft of goods in transit carries a maximum custodial term of ten years imprisonment. Refer to section 282© of the penal code. The question I ask myself is whether the sentence should be reduced. What is the basis for me to do so. I also bear in mind section 5(1) Criminal Procedure & Evidence Code in particular regarding sentence. I take into consideration that appellant is a first offender, pleaded guilty and that K239,000 cash was recovered. Against this is that a large amount was lost about K1,700,000.00 worth of goods.

It is very clear from the facts that appellant deliberately committed this offence. The motive and who persuaded him to commit it are immaterial. The appellant has to suffer the consequences. I uphold it. The appeal against sentence is dismissed.

PRONOUNCED in Open Court on this 21st day of December, 2007 at Lilongwe.

R.R. Chinangwa

J U D G E