

**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CRIMINAL APPEAL NO. 69 OF 2006**

BETWEEN

**TOBIASI MCHERAGULE KAMWENDO....
APPELLANT**

-AND-

THE REPUBLIC..... RESPONDENT

**From the First Grade magistrate Court sitting at
Mchinji. Being Criminal case no. 49 of 2006**

CORAM: HON. CHINANGWA, J.

Appellant, present/unrepresented
Kachule, Counsel for the Respondent
Msiska, Court Interpreter
Mrs Jere, Court Reporter

JUDGMENT

The appellant Tobiasi Mcheragule Kamwendo appeared before the First Grade Magistrate Court sitting at Mchinji from 23rd January to 31st March, 2006. It was on a charge of Breaking

into a building and committing a felony therein contrary to section 311(1) of the penal code. Appellant pleaded not guilty. After full trial he was found guilty, convicted and sentenced to 36 months I.H.L. He is at Maula prison serving this term.

Appellant appeals against both conviction and sentence. However in this court he stressed much on the conviction. Facts are to the effect that appellant is Group Village Headman Kamwendo. There was a project to build Kamwendo police unit in his area. Building materials was supplied by Mchinji District Assembly. Such materials included bags of cement.

Mr Matiasi Kafera (Pw2) of village Matibula, T.A. Simphasi Mchinji provided two rooms of his house to store materials. These two rooms were under the charge of Francis Kapenda (Pw1) of village Mazambani, T.A. Zulu, Mchinji. He was the storekeeper. The projet foreman was Hollace Kosankheni.

On 28th November, 2005 Pw1 noticed that 64 bags of cement had missed. Investigations revealed that appellant had taken them. As usual the matter was reported to police. That resulted to his arrest and prosecution. Evidence from Pw1, and Pw2, show that appellant had confessed to have stolen them. They said that he wrote a letter confessing to have committed the crime. Although appellant denied in his

evidence before the trial court to have stolen them. He was convicted.

In this court appellant said that 64 bags of cement were part of bags left over after the project. There were sold for K42,000 which was used to pay the contractor and creditors. Since they were told by the Assembly to raise money by themselves to pay the contractor.

In the court record there is a letter written by appellant in Chichewa. It was addressed to Mr Mbalale and Mr Kapenda (Pw1). The appellant explained in the letter to have taken cement and sold it. The reason was to pay debts incurred on the project. On close scrutiny of the letter it is clear that it is not a confession that he stole cement. But on explanation to the effect that cement was sold in order to pay debts.

Prosecution did not adduce evidence to dispute the fact that the local community was required to pay the contractor or suppliers of materials or labourers. It is also observed from the letter that appellant told Mbalate and Kapenda that he was going to attend to a funeral in Lilongwe. Upon return he would go to the Assembly (boma) to give a report on the cement. This is not a confession as alleged by the prosecution witnesses. All what the appellant was saying was taking responsibility to account for the cement.

Pw6 a policeman who investigated the case said in evidence that appellant confessed to have committed the offence. On examination of the caution statement it is to the effect that cement was sold in order to settle debts incurred on the project. This to me was not a confession as alleged by Pw6.

The burden of adducing evidence was on the state. Indeed that burden was discharged. The state called 6 witnesses. Further to this the state had the burden to prove the case against the appellant beyond reasonable doubt. The evidence does not prove beyond reasonable doubt that appellant stole 64 bags of cement. What is in evidence is that cement was sold on his authority so that money raised be used to pay debts owed to contractors. In the circumstances I find it unsafe to uphold the conviction and sentence. The conviction is quashed and sentence of 36 months penal servitude set aside. Appeal allowed.

Pronounced in Open Court on this 31st day of January, 2007 at Lilongwe.

R.R. Chinangwa

J U D G E