

**IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY  
CONFIRMATION CASE NO. 61 OF 2007**

**THE STATE**

**VS**

**ELIAS MKANDAWIRE**

**From the First Grade Magistrate Court sitting at Mponela.  
Being Criminal Case No. 202 of 2006**

**CORAM: HON. CHINANGWA, J.**

**ORDER IN REVIEW**

The convict Elias Mkandawire appeared before the First Grade Magistrate Court sitting at Mponela from 19<sup>th</sup> October, 2006 to 24<sup>th</sup> November, 2006. It was on a charge of Theft by person employed in the public service contrary to section 283(1) and 278 of the penal code. Convict had pleaded not guilty, but at the end of trial he was found guilty, convicted and sentenced to 40 months penal servitude. He was convicted for obtaining money by false pretences contrary to section 319 of the penal code.

Particulars of the offence state that the convict between April and August at Madisi water scheme in Dowa district. Being a

person employed in the public service as a water assistant under Central Region Water Board and by virtue of his employment received or had under his custody or control the sum of K329,614.00 cash was unable to produce it to his employer or make account therefor.

The trial court properly found that convict could not be convicted of the charged offence under section 283(1) of the penal code. Although convict was a public servant, he was not a cashier for Madisi water scheme. Therefore the cash he received from various water commuters was not by virtue of his employment. The conviction on the offence of obtaining money by false pretences contrary to section 319 of the penal code was properly entered.

The issue of concern is the amount. The charge alleged that it was K329,614.00. When considering sentence the trial court said that the amount was over K300,000. The total amount from witnesses who testified does not add up to K329,614.54. For purposes of clarity the amounts are listed as follows:

PW1	-	K4,000.00
PW2	-	K4,500.00
PW3	-	K5,000.00
PW4	-	K6,300.00
PW5	-	K6,671.54

PW6	-	K6,700.00
PW8	-	K6,250.00
PW9	-	K2,000.00

**TOTAL - K41,421.54**

It is K41,421.54 which was proved in evidence which convict swindled the commuters. This is the amount which the trial court should have entered and taken into consideration in assessing sentence.

The next issue is in respect of the acquittal of convict by invoking section 254(1) of the Criminal Procedure & Evidence Code. This provision is applicable when no case to answer is entered. Where both the prosecution and defence have adduced evidence an acquittal is under section 259(2) of the Criminal Procedure & Evidence Code.

In the present case the trial court having acquitted convict on the original charge should have invoked section 157(1)(b) of the Criminal Procedure & Evidence Code to convict him of obtaining by false pretences under section 319 of the penal code. However the irregularities are curable under section 5(1) of the Criminal Procedure & Evidence Code.

The convict was sentenced to 40 months penal servitude based on K329,614.54. The proved amount is K41,421.54. The sentence is accordingly reduced to 12 months penal servitude.

PRONOUNCED in Chambers on this 3rd day of May, 2007 at Lilongwe.

R.R. Chinangwa

**J U D G E**