

**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CRIMINAL APPEAL CASE NO. 52 OF 2007**

JOHN MKWEZALAMBA..... APPELLANT

-VS-

THE REPUBLIC..... RESPONDENT

From the First Grade Magistrate Court sitting at Kasungu,
being criminal case no. 588 of 2006.

CORAM: HON CHINANGWA, J

Appellant, Present/Unrepresented
Kayuni, Counsel for Respondent
Munyenyebe, Court Interpreter
Kabaghi, Court Reporter

JUDGMENT

The appellant John Mkwezalamba appeared before the First Grade Magistrate Court at Kasungu on 28th December, 2006. It was on a charge of Theft by a person employed in the public service contrary to section 283(1) of the penal code. The amount stolen was K87,652.00 The appellant was convicted on his own plea of guilty. The trial court imposed a minimum mandatory sentence of 14 years penal servitude.

I remind myself that I did not have the advantage, which the trial court had, to assess witnesses. I also remind myself of section 5 of the Criminal Procedure and Evidence Code.

Briefly the particulars state that the appellant on 5th November, 2006 at Sopani Teachers' Development Centre in Kasungu district being employed in the public service, as a teacher, and having by virtue of his employment received or had in his custody or control the sum of the K87,652.00 was unable to produce it to his employer or make due account therefor.

The gist of his appeal is against sentence. He argued that the trial court did not consider that he is a first offender. It did not take into account the period of 6 months which he spent in remand. Finally he prayed to this court to allow him to refund the money. He asked for a period of 3 months so that his relatives could raise money on his behalf.

The starting point is section 283(4) of the penal code. It sets minimum mandatory terms for money or property proved stolen. Where there is restitution, then the minimum terms do not apply. Instead section 283(4)(a) applies. In the present case appellant was given opportunity by the trial court to retribute but he failed. Therefore, the trial court was obliged to impose the minimum mandatory term of 14 years for any

amount from and above K80,000. The fact that appellant is a first offender or a TB patient are not mitigating factors especially where there is no restitution.

The appellant contends that he stayed in remand for 6 months, which time, the trial court did not consider the effective date the sentence was to operate. It is observed from the court record that the appellant committed the offence on 5th November, 2006. He was arrested on 20th December, 2006. He was convicted on 28th December, 2006. He was sentenced on 18th May, 2007, but with effect from 20th December, 2006 the date of his arrest. It is therefore, incorrect to accuse the trial court that it did not take into account the time spent in remand waiting for sentence.

The next issue relates to the prayer that he should be allowed to refund money to his employer. He asked for 3 months so that his relatives raise funds. It is observed that after conviction on 28th December, 2006 appellant was allowed a grace period of two weeks in order for him and relatives raise funds. That period subsisted up to 18th May, 2007. They failed to raise it. Even now both appellant and relatives have no money. It does not make any judicial sense to extend a grace period after sentence. This ground fails.

Before I finalise, it is observed that the trial court did not make an order under section 283(6) of the penal code. I therefore make an order under section 283(6) for the seizure of money, or seizure and sale of appellant's property. Proceeds of sale to be paid to Malawi government (Ministry of Education). Any excess to be repaid to appellant.

Appeal dismissed.

Pronounced in Open Court on this 23rd day of August, 2007
at Lilongwe.

R.R. Chinangwa
J U D G E