IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CRIMINAL APPEAL CASE NO. 90 OF 2008

BETWEEN

FELIX MAZONI …… APPELLANT

AND

THE REPUBLIC ……. RESPONDENT

Being Criminal Case No. 104 of 2008 before the Principal Resident Magistrate sitting at Lilongwe.

CORAM : CHOMBO, J.

: Appellant, Unrepresented – Present
: Mr. Chiundira, for the State
: Mrs Kabaghe – Court Reporter
: Kaferaanthu – Court Interpreter

JUDGMENT

The appellant, a former employee of Mitundu Chipiku stores, was found guilty of theft of property of the complainant worth K572,000.00 and sentenced to 24 months imprisonment with hard labour. He now appeals against the conviction and sentence filing 7 grounds as follows put by the appellant:

1. P1 told the lower court that he never saw me going back to the shop after we had knocked off, hence forth the lower court erred in taking account of his evidence because PW1 (my work mate) was only suspicious on me and that what he tendered in court were hearsay.

2. There was no collaborating evidence because what PW1 said in court did not match with what PW2 tendered in the lower court.
3. As a Branch Manager, I was entrusted with huge sums of money before (more than K1,000,000.00) as such any attempts to swindle the money in dispute was inappropriate and illogical.
4. In a situation where there was an element of doubt, the lower court failed to apply the benefit of doubt to declare the amount of money in dispute as a shortage0 to be dealt with as an in house matter.
5. The share of the blame was not rationalized because PW2 Security Guard also had the safe keys, and they never searched me.
6. I was at large because in a situation where there is a shortage or cash has been stolen the Branch Manager has always been the victim, as such I was of the view that torture, beauty and my arrest will be definite and examples are of my predecessors.
7. The lower Court never applied any precedence of the case. In mitigation, I have the following.

(a) I am first offender.
(b) I have got 6 dependents
(c) I am HIV Positive and prone to heart attacks.

The State filed skeletal arguments opposing the appeal in its entirety urging the court to confirm both the conviction and sentence.

The evidence on record was that on the material day, after the day's sales the appellant told PW1, a cashier employed by Chipiku, not to put the money for that

day's sales in the safe. Appellant told PW1 that they were keeping the money somewhere else. They knocked off and appellant had the keys. He came back to the office on that day. The following morning Appellant called PW1 that the keys were with his wife and that he (appellant) had gone away. PW1 went to inform the manager, who decided to inform his head office and police about the development and the K459,000.00 not put in the safe the previous day was found missing.

PW2 testified that he is the Chipiku Stores Auditor, and appellant was branch manager based at Mitundu. On 16 February he was asked to conduct an emergency stock-take and in the presence of Police cash in the shop was counted and it was discovered that K4,000 petty cash, K477,864.00 sales for the previous day was stolen and there was stock-loss of K108,648.00.

PW3 testified that he is a Security Guard at the said shop. He stated that he was on duty on 15th February. The shop closed at 5.00pm and all staff knocked off About five minutes later, the appellant came back to the shop and opened it. He came out with a Geisha Shop carton but PW3 did not ask him for the contents of the carton.

PW4, a Police officer, testified that on 16 February it was reported to him that the branch manager, the appellant was missing. He went to the shop with staff of Chipiku and it was discovered that property worth about K572,000.00 of Chipiku was stolen. Appellant was arrested on 12 April at Lunzu Trading Centre operating a telephone bureau. On interrogation, he admitted stealing the money and he

showed PW4 the things that he had brought using the stolen money. The recovered items were valued at K92,000.00 and they were tendered as exhibits in the lower court.

It is true that PW1 never saw the Appellant going back to the shop after the two knocked off from work. The appellant was seen by the security guard, PW3 who also testified in court that Appellant came back to the shop after they had knocked off. Although the Appellant states on appeal that PW1 was just suspicious about him, the Appellant himself in his evidence admitted he had gone back to the shop about 10 minutes after he and PW1 had knocked off and locked the shop. Appellant therefore has confirmed the evidence of PW2 and to some extent that of PW1.

The evidence of PW1 on the fact that Appellant went back to the shop after knocking off need not be treated as inadmissible hearsay evidence, especially where the Appellant himself admits that, that is what actually happened. The same was stated also by PW2 who actually said that the Appellant came to the shop, opened, went in and came out with a carton of Geisha. When the appellant was asked about the matter on arrest he admitted to have stolen the money. I have tried to look at the second round of appeal based on the evidence of PW1 and PW2. What the two said did not match all the way, and indeed it did not need to match because the two gave evidence on completely different aspects. What did match however is that PW1 and the Appellant knocked off together at 5.00 pm and they went home. This was after the Appellant had told PW1 not to deposit the money in the safe, which evidence Appellant has not disputed.

Then PW2 testified that Appellant came back after work, opened the shop and came back with a carton. This evidence has been corroborated in a material way by the Appellant himself. What is of interest is that the Appellant submits that the security guard had the keys to the safe and yet the blame has not been rationalized. If indeed the security guard had another key to the safe it is interesting that the Appellant did not at anytime, bring out the question by either cross-examining the security guard about it or in his own evidence in examination in chief. Should the court take it that this is only an after thought – to try and bend the wheels of justice. As I find no grounds to believe that this was the case and dismiss it.

The Appellant, in ground number 6 said that history has shown that whenever money is found missing at Chipiku shops, it is always the branch manager who is quizzed about it. Unless the appellant is a prophet he could not have guessed that money had been stolen from the shop without any report of the same. I have no doubt that the reason why he left before any report of shop property being stolen was made is because he knew what he had done – his conduct and what he told PW1 is conclusive evidence that he had stolen the money. According to evidence of PW1, on cross-examination by Appellant is that he firstly told PW1 that head office had phoned to tell Appellant not to put the money in the safe. Then Appellant phoned PW1 and told him that "ndachita zoti zindithandize" and asked PW1 to collect the shop keys from his wife. After this, the Appellant left. The Appellant confirmed that he went away after telling PW1 to get keys from his wife and in his evidence he said he had found another job and did not want to let

his employer know about the interviews; although the Appellant said that he was at large because he was afraid of arrest. This evidence does not hold water. He had been employed for 5 years before he stole the money and had never been arrested before, or at least the Appellant has not given any evidence to that effect. He only became agitated when he knew that because of the trail he had left behind he would be required to give account.

It can not be true that the allegation that he stole less than K1 million is illogical when he was entrusted with larger sums of money. This argument in itself is illogical, no one other than the Appellant would know why he stole that amount of money if indeed he used to handle larger sums. But whatever the sums Appellant stole is immaterial, the question at the end of the day is whether it has been proved beyond reasonable doubt that he stole the money in question from his employer. That question, I am afraid must be answered in the affirmative. The appellant stated that the lower court did not apply any procedure to his case. I am afraid to say that the Appellant must be misguided on this ground. If a court does not use precedence in its decision there is no miscourage of justice. A court's responsibility is to decide a case on the facts before it and, if it becomes necessary, use precedence. I find therefore, having dealt with all the grounds of appeal that the conviction was properly grounded at the close of trial in the lower court. Accordingly, I dismiss all the grounds of appeal.

The appellant asked the court to take into account the fact that he is a first offender, he had six dependants and that he is HIV positive and prone to heart attacks. I have looked at the total evidence on record, the amount of property

and money lost by the employer, and consider that the sentence is appropriate. On the issue of being HIV positive I advise the Appellant to register his status with the prison authorities so that he can benefit from the very good HIV/AIDS program that the Prison is running.

MADE in Court this 3rd September, 2008.

E.J. Chombo

J U D G E