JUDICIARY

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL APPEAL 45 OF 2006
(Being Criminal Case No. 182 of 2006 In the First Grade Magistrate Court Sitting at Balaka)

IGNASIO CHIYEMBEKEZO AND MASAUKO KUSALE

VERSUS

THE REPUBLIC

CORAM: THE HONOURABLE JUSTICE E. B. TWEA
Kumitengo, of Counsel for the State
1st Accused present
2nd Accused absent
Mrs S. P. Moyo

J U D G M E N T

Twea, J

This is an appeal against of the conviction for the first accused and the sentence for the second accused.

The undisputed facts were that the two accused and a third party, then at large, broke and entered the house of Father Gamba on the night of 1st April. 2006. They stole a variety of entertainment equipment all valued at K390,000.

It was on record and was not disputed that the stolen items were taken to the house of the grandmother of the second accused. The second accused requested her to store the property he bought in Blantyre with his friends.

He also requested that he and his friends should sleep on the verandah of her house which they did.

Later, on the morning of 2nd April, 2006, the accused and his colleague took away some of the property. Eventually they started selling the property. The second accused took police to a bottle store where he sold a DVD.

In the defence, the first accused admitted to have committed the offences. The second accused denied to have entered and stolen He alleged that he was forced by the other two. However, he admitted everything else he did thereafter. The court found both of them guilty and convicted them.

The accused were aged 20 years and 17 years respectively.

The appeal in respect of the second accused was that the trial was null and void. It was contended that he was a juvenile, and that the court of the First Grade Magistrate Balaka not being a juvenile court it had no jurisdiction to try him.

I wish to point out that 6(ii) of the Children and Young persons Act provides as follows:-

> "(i) Subject to hereinafter provided, no charge against a juvenile shall be heard by a court other than a juvenile court:
> Provided that –
> (ii) a charge made jointly against a juvenile and a person who has attained the age of eighteen years shall be heard by a court of appropriate jurisdiction other than a juvenile court."

I think it is important to point out that this Section must be read in conjunction with Sections 55(1) and 15 of the Children and Young Persons Act. Section 55(1) reads:

> "55(1) where, under Section 6, a court other than a juvenile court hears a charge against a juvenile and finds him guilty of an offence, it may exercise all the power which a juvenile court might have exercised if it had heard his charge and found him guilty."

Section 15-(1) refers to validation of proceedings and orders where there has been incorrect presumption of age.

Clearly therefore, the submission by Counsel that the proceedings in respect of the second accused were null and void is not tenable. The First Grade Magistrate Court, Balaka had jurisdiction and power to dispose of the case.

Be this as it may, I note that the trail court did not observe the requirement of Section 4 of the Children and Young Persons Act which stipulates that the terms "Conviction" and "Sentence" shall not be used against any juvenile. In this respect therefore I quash the conviction and set aside the sentence entered against the second accused.

I note that the juvenile has been in custody since May, 4, 2006. The juvenile would now be 19 years old. It would not be appropriate to order that the case be disposed of according to the Children and Young Persons Act. I therefore order his immediate release.

For the first accused the appeal against sentence must succeed.

I have noted that although the first accused pleaded not guilty, in his defence he informed the court that he does not wish to defend himself he admitted to have committed the offences. It is also clear, that the first accused had been helper at the orphanage run by the complainant. He was of good character. He was influenced by the third man who came from Blantyre who was much older and had experience in disposing of stolen things. The court should have also taken into account the remorse. Last but not least he is a first offender.

According to the Sentencing Guidelines, for the starting point this offence's should be six years. In my view the confession is a strong mitigating factor and a sign of remorse. This should be coupled with the fact that most of the property was recovered. I find that it is proper to reduce the sentence to 5 years on the first count and 5 months on the second count, and I so order. The sentences will run concurrently.
To this extent the appeal succeeds.

Pronounced in Open Court this 27th day of February, 2008 at Blantyre.

E. B. Twea

JUDGE