



**IN THE HIGH COURT OF MALAWI**  
**LILONGWE DISTRICT REGISTRY**  
**CRIMINAL APPEAL NO. 88 OF 2014**

**BETWEEN:**

**TRYSON BANDA.....APPELLANT**

**-AND-**

**THE REPUBLIC.....RESPONDENT**

**CORAM: HON. JUSTICE DR. C.J. KACHALE, *Judge***

*Nkhono*, of Counsel for the Appellant

*Ndiyani/Chikankheni (Ms.)*, Senior State Advocates for the Respondent,

*Namagonya*, Court Reporter

*Tembwe*, Court Interpreter

**JUDGMENT**

*Tryson Banda* was found guilty of theft by servant by Mchinji First Grade Magistrate Court and sentenced to five years imprisonment. He has since appealed against both the conviction as well as the sentence. As regards the conviction there are three grounds of appeal which essentially challenge the adequacy of the evidence or the sufficiency of the legal analysis undertaken by the trial court. Thus it has been proposed that in terms of circumstantial evidence, it was not established that the only explanation for the stock shortage was the alleged theft by the appellant. The appellant has further questioned the soundness of the charge sheet before the trial court. In respect of the sentence, three grounds of appeal have also been raised. In summary it has been argued that the sentence was manifestly excessive and out of keeping with principles applicable for first-time offenders.

The state has opposed the appeal against the sentence. It has been suggested that the evidence was adequate to found a conviction. With respect to the sentence the state supports the appeal; the court has thus been requested to impose a lower sentence than what the trial court did. On appeal this court is not bound by the factual conclusions and legal analyses of the trial court; instead the evidence may

be examined afresh and different conclusions reached based on that reconsideration. Of course, in performing this task the appellate court must appreciate the advantage that the trial court enjoys in terms of assessing the demeanour of the various witnesses presenting the evidence; indeed in so far as the sentence is concerned appeal courts should not interfere with the same too readily. The law says that such interference may be allowed where the sentence is wrong in principle, or is otherwise manifestly excessive or inadequate. It is not legitimate for an appellate court to substitute a sentence simply on the ground that it would have at first instance have been inclined to impose a different sentence than the trial court.

The present appeal was delayed because certain critical documents with regards to the audit upon which the shortage was established were missing from the court file. Even so, this court was satisfied in the end that the judgement at trial was sufficiently elaborate to represent a true record of all the relevant evidence. Indeed, two such documents (i.e. the audit report as well as one GRN were retrieved from the trial court). In considering the present appeal, therefore, the completeness of the trial record has not been very decisive.

It is also proper to appreciate the industry of both counsels for the appellant as well as the state. Their submissions have been very instrumental in establishing the prevailing jurisprudence on matters of shortages in the context of theft by servant. One or two decisions are quite authoritative in that regard. There is the decision of **R-v-Alifeyo** 1 ALR (Mw) 256 as well as **Banda-v-Rep** 6 ALR (Mw) 383. According to these precedents, in the absence of direct evidence of theft (to explain a stock shortage) the court has a duty to determine whether the circumstances established in the case, including the shortage, compel it to conclude beyond any reasonable doubt that the accused stole the property or money charged. The relevant considerations for such an analysis would include:

- i. The size of the shortage;
- ii. Whether persons other than the accused had control of or access to the stock;
- iii. Whether it is reasonably possible that the deficiency is due to causes other than dishonesty on the part of the accused;
- iv. Whether circumstances have been proved which suggest that the accused enriched himself by means of the money or good in his charge.

The courts have further emphasized that the more appropriate remedy in the event of stock shortages might be civil proceedings.



In this particular instance there is evidence submitted by the prosecution in the form of the appellant's caution statement which shows that he denied stealing the fertilizer. In fact the totality of the evidence suggests that there was an arrangement between Farmers' World and Mardef whereby the latter borrowed stocks from the former. According to the appellant, that could well account for the shortage attributed to him in this charge. The auditor told the trial court that the appellant admitted the theft. Other witnesses came along to cite what the appellant allegedly told them; in effect he absolved the rest of his staff of responsibility and told him that he would handle any queries about shortages. The court at first instance found that as evidence of theft against the appellant. In the opinion of my court, that conclusion was not sound in law. As disclosed by the clerk from the same shop, each day they were able to balance the books and the stocks. This might suggest that there were others besides the appellant who had access to the stocks. In other words, the state never established exclusive control and access to the stocks on the part of the accused person.

According to the precedents cited earlier such a scenario may raise reasonable doubt in favour of a suspect. Besides, the deficiency could reasonably be attributed to mistakes in reconciling the stocks released to Mardef by the Farmers' World shop staff. In any event, no evidence was led to show what (if any) benefit had accrued to the appellant as a form of illicit enrichment from the alleged theft. In all fairness, it might well be that the appellant was negligent in managing his employer's goods; but the criminal law cannot be invoked in a scenario where the evidence is not as conclusive. In the opinion of this court on appeal, the trial magistrate failed to conduct a proper analysis of the evidence presented by the state. For example, whereas the investigator tendered a statement which was in effect exonerating the appellant, he was at the same time allowed to give hearsay evidence concerning the alleged admission of wrong doing by the appellant to the auditors. That was highly irregular and occasioned injustice in this trial.

On the whole, therefore, it is found that the present conviction is unsafe and it is hereby set aside.

The court would go further and observe that in terms of the decision of Twea, J (as he then was) in **Nyamatcherenga-v-Rep**; Crim. Appeal No. 56 of 2000 (unreported) the present charge was indeed defective. i.e. the proper charge should be premised on section 278 as read with section 286 (1) of the Penal Code. Merely citing the latter provision does not create an offence. Furthermore the case of **Kuchipanga-v-Rep** 14 MLR 167 clearly established that it is wrong in law to combine in omnibus fashion various stolen items in a charge of theft by servant.

Thus in this case the fertilizer should have been charged as a separate count to the cash, or the airtime units and so on. In the premises the court having found that there was inadequate evidence in the first place, will express no opinion as to whether those defects would have been curable under sections 3 and 5 of the CP&EC; see the cases of **Rep-v-Nahuwo** 6 ALR (M) 433 and **Kuweruza-v-Rep** 9 MLR 7 cited with approval in the **Nyamatcherenga case** (above).

The court having set aside the conviction, it is unnecessary to consider the appeal against sentence.

### **Conclusion**

In the premises, the court hereby sets aside the conviction of Tryson Banda for theft by servant contrary to section 278 as read with section 286 (1) of the Penal Code. The conviction has been found to be unsafe as the trial court failed to properly address its mind to the relevant law in cases of shortages of stocks. It bears emphasis here that it is rather unconscionable to assume that every shortage is a result of theft. There will be cases where direct proof of such theft is readily available; that is straight forward enough. However our law states that if the state wishes to invoke stock shortage as evidence of theft, then other pertinent factors should be taken into consideration. In considering those matters in this appeal, this court has reached the conclusion that there was a failure to discharge the burden of proof beyond a reasonable doubt by the state. Any such doubt, in law, must be resolved in favour of the appellant.

The court hereby orders that the said Tryson Banda be released from custody forthwith, unless being held for other lawful case.

**Pronounced in open court this 20<sup>th</sup> day of August 2015 at Lilongwe.**

***C.J.Kachale, PhD***  
**JUDGE**