



IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION

CRIMINAL APPEAL CASE NO. 8 OF 2017

RAPHAEL FRANK

V

THE REPUBLIC

Hon. Justice M L Kamwambe

Mr. Chisanga of Counsel for the State

Mr. Chirwa of counsel for the Applicants

Amos..... Official Interpreter

RULING

Kamwambe J

The Appellant Raphael Frank was convicted on his own plea of guilty of the offences of being found in possession of prescription only medicines without authority contrary to Regulation 35(1) of the Pharmacy, Medicine and Poisons Regulations as read to section 65(1) of the Act, and being found in possession of property suspected to be unlawfully obtained contrary to section 329 as read with section 34 of the Penal Code and was sentenced to 42 months imprisonment for the 1st count and 9 months imprisonment for the 2nd count. The sentences were ordered to run concurrently.

The grounds of Appeal are as follows:



- I. The lower court erred in not fully appreciating the provisions of sections 339 and 340 of the Criminal Procedure and Evidence Code when dealing with first offenders.
- II. The lower court erred in sentencing the Appellant to a custodial sentence without the option of a fine contrary to the dictates of the law and procedure.
- III. The lower court erred in fact by holding against the weight of the evidence that the appellant possessed huge quantities of prescription only medicines thereby misleading itself into passing a severe and excessive sentence.
- IV. The lower court erred in imposing a severe sentence of imprisonment greater than usual length on a first offender simply to act as a deterrent to other potential offenders.
- V. The lower court erred in imposing a discriminatory custodial sentence without the option of a fine on the Appellant while his colleagues arrested at the same time with him and on similar charges were all given options of fines.
- VI. The sentences passed were excessive in the circumstances.

From the 1st ground of Appeal Appellant states that the lower court fails to consider sections 339 and 340 of the Criminal Procedure and Evidence Code since the offender was a 1st offender. I wish to say that it is imperative for the court to mention why these sections are not going to be used or in the alternative why a custodial sentence is preferred to a non-custodial sentence in respect of a 1st offender. It would appear that the lower court did not consider these two sections and this was wrong in practice. However, I do not find

that to be a serious fault so as to nullify the case. The lower court is faulted for imposing a sentence that would act as a deterrent to others from committing the offence. In **Rep v Banda**, the court observed that it is wrong to sentence an accused person who is a first offender to a severe sentence just for purposes of deterrent to potential offenders. I should agree with *the State* however, the public is suffering extensively because medicines in public hospitals are missing yet those same medicines are easily available in other outlets. To address this public outcry and as an exception we can use a deterrent sentence in this regard even to 1st offenders. The grave repercussions on the public should matter most.

In regard to the 1st count the maximum penalty is a fine not more than K50,000, and when we convert this in accordance with the Fines and Conventions Act, it represents today K1,000,000.00 maximum. Section 65 (1) also provides for a custodial sentence for a term not exceeding five years. It was appropriate for the lower court to impose a custodial sentence *pf* 42 months.

The lower court explained clearly why it passed a deterrent sentence. The court at page 14 of the judgment said.

"He bought them here in Malawi and that he was selling them to his fellow human beings yet he knew nothing how the medicines works if taken without proper prescription.

Furthermore, he had never attended any course regarding how the medicines should be kept so that they should not be spoilt.

We all know and believe that if medicines are taken without proper prescription they are hazardous to human life.

Nearly every day we hear that there is no enough medicines in our public facilities yet our government and donors are pumping a lot of

money buying the prescription only medicines and distribute them to the public hospitals."

· At page 18 the court said that the punishment to be imposed will be a lesson to him and to would be offenders. If the court will be imposing light sentences, many people will be encouraged to engage themselves in the business of selling the prescription only medicine.

I do not intend to fault the reasoning of the lower court. The Appellant's business is a hazard to society. He is amongst those putting Malawi in bad picture, even to the donors. Of course he is a first offender and he pleaded guilty. The custodial sentence imposed is more than half of the maximum sentence of 5 years imprisonment. This is not normal practice.

As regards to second count, the penalty imposed is 9 months imprisonment, the maximum is 2 years as a misdemeanor. I would not agree with the Appellant that 9 months for offending against section 329 of the Penal code is excessive considering the nature of stolen items even if he is a 1st offender. It is quite in order in view of the offence that was committed. I would not wish to tamper with it.

It is also argued that the Appellant was arrested alongside other accused persons who were tried separately and a fine was imposed against them. The record of the other accused persons was not before me and so I cannot say why fines only were imposed. I cannot comment. The penalty section says that one shall be liable to a fine and to imprisonment for a term of five years. It does not say a fine or a term of years. (Emphasis placed). Being a first offender who deserved a short sentence, I substitute the sentence of 42 months

imprisonment with one of 12 months imprisonment and to pay a fine of K200,000.00, imprisonment sentences to run concurrently. In default of paying K200,000.00 he shall suffer 10 months imprisonment, sentence to run consecutively.

I believe that there is no need to touch on each and every individual ground of appeal as I have fulfilled what was required by the petition of appeal. The order that I have come up with will put the other grounds to rest.

Made in Open Court this 6th day of June, 2017 at Chichiri, Blantyre.



M.L. Kamwambe

JUDGE