



IN THE HIGH COURT OF MALAWI

MZUZU REGISTRY

CRIMINAL APPEAL NO. 106^B OF 2017_A

Being Criminal Case No. 100 of 2016 in the FRM's Court Sitting at Karonga

MOSES MBUKWA

VERSUS

THE STATE

CORAM: HON. JUSTICE T.R. LIGOWE
W. Nkosi of Counsel for the State
N. Mdazizira of Counsel for the Appellant
C. Chawinga, Official Interpreter
J. Chirwa, Court Reporter

JUDGMENT

Ligowe J

- 1 The appellant in this case was convicted of the offence of theft by servant contrary to section 286 of the Penal Code on a plea of guilty and sentence to 48 months imprisonment with hard labour. He was a clerk at St Steven Parish of the Roman Catholic Church at Kasantha, responsible for collecting and keeping church finances. Around mid-April 2016 he was asked to submit a financial report of the church. His report showed that the church money amounting to K3 156 796 but only K38 091.76 was available at the Bank. Asked where the rest of the money was, he said he had lent K1 600 000 to his

friend Emmanuel Kayira at Karonga who would return it the following morning. He had lent K120 000 to one Kachere his business partner in August 2015, K70 000 to Kanyika in September 2015, K10 000 to BarnabaChawinga and K20 000 to Hukain December 2015, K10 000 to Mr Simwera in January 2016 and K35 000 to Mr Ngonya. These people had promised to return the money within a short time. He also stated that he used to take K10 000 to cater for his needs which he intended to return because his salary was only K10 000 per month. By the end of September 2015, he stated, he discovered K1 500 000 was missing. In trying to recover the money the appellant led Father Mwenegamba and a police officer to meet Emmanuel Kayira at Karonga but he ran away.

2 The appellant was convicted of stealing K3 118 704.50 which is the difference between K3 156 796 in the books and K38 091.76 at the Bank.

3 In his sentence the FGM first considered that the money was meant to serve the larger community being church funds. It was also a breach of his trust as a church clerk to steal the money. And that the money had not been recovered. The FGM then considered that the appellant is s first offender, he pleaded guilty and looked remorseful.

4 The appeal is against the sentence only on the ground that it is manifestly excessive. In his argument counsel for the appellant cited *Rep v. Kampango* [1991] 14 MLR 432 where the High Court confirmed a sentence of 12 months for theft by servant and *Mwambala v. Rep* [1990] 13 MLR 283 where a sentence of two years was passed for the same offence. It was not clear from counsel's argument why the appellant should be dealt with similarly but he emphasized that the appellant's plea of guilty, that he is a first offender and that he showed remorse ought to have been given meaningful consideration. Counsel for the State however argued that fours imprisonment is not unusual for similar offences.

5 The principle to apply in an appeal of this nature is that the discretion of the trial court should not be interfered with unless the trial court erred in principle or omitted some

material factor or the sentence is manifestly excessive or inadequate as to comport an error of principle.

6 The learned FGM can only be faulted for considering breach of trust in sentencing the appellant. This element is inherent in the maximum penalty of 14 years imprisonment for theft by servant under section 286 of the Penal Code.

7 Superior courts in this country have been developing sentencing guidelines for the sake of a uniform approach to sentencing so that similar offences and offenders are sentenced similarly. In *Republic v. John Manyowa* Conf. Case No. 120 of 2012 (Principal Registry)(unreported), Justice Mwaungulugave sentencing guidelines for offences involving dishonesty, including theft by servant on the basis of the national minimum wage. He considered the subject matter of the property stolen, the status of the offender, circumstances in which the crime is committed, and the value of the property in coming up with the guidelines. He first gave a guideline for simple theft, that in view of the maximum penalty of five years imprisonment, where the value of the property stolen is less than or equivalent to one and half years salary at the minimum wage, sentences of up to one year imprisonment would be appropriate and this may not need be custodial for first offenders. Where the value of the property stolen is between one and half years and four years' salary at minimum wage, two years imprisonment is appropriate. And where the value of the property stolen is above four years' salary at minimum wage the court should exercise quite some discretion. As for aggravated thefts attracting a maximum of 14 years imprisonment as in theft by servant, he said:-

“By regarding the maximum sentence fourteen years, the starting point will be by adding a premium of three years above the values established under the guidelines for theft simpliciter. This premium caters for thefts based on the nature of the crime and breaches of trust the aggravation envisaged in the penal provisions.”

8 This means for theft by servant the guideline is that where the value of the property stolen is less than or equivalent to one and half years salary at the minimum wage, sentences of up to four years imprisonment would be appropriate. Where the value of the property

stolen is between one and half years and four years' salary at minimum wage, five years imprisonment is appropriate. And where the value of the property stolen is above four years' salary at minimum wage the court should exercise quite some discretion.

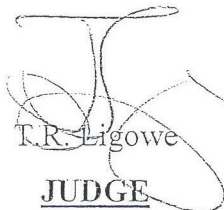
9 Now the minimum wage for the financial year 2017/18 is K25 000 per month. This translates to K300 000 per annum. K3 118 704.50 involved in this case is therefore slightly over ten years of the annual minimum wage.

10 *Republic v. John Manyowa* is actually an attempt to set more reliable after guideline in *Rep v Misiri*, Conf. CaseNo.1392 of 1994 (unreported) which no longer reflected proper sentencing in view of inflation. It is therefore obvious that *Rep v. Kampango* [1991] 14 MLR 432 and *Mwambala v. Rep* [1990] 13 MLR 283 decided earlier than *Rep v Misiri*, cannot offer proper guidance for the sentencing today.

11 The guidelines normally set the sentence at the minimal level of culpability and action of an offender who pleaded not guilty to the offence. The sentencing court then goes up or down the guideline in view of the aggravating and mitigating factors in the case. It was held in *Republic v. Chimimba* Conf. Case No. 138 of 2013 (Principal Registry) (unreported) that it is prudent to go up first on account of the aggravating factors and then down with the mitigating factors assigning a value to every factor. An early guilty plea may attract up to a third reduction.

12 Since value of the money stolen by the appellant in this case surpasses four years' salary at the current minimum wage, I do not find the FGM's sentence wrong in principle or excessive. It is confirmed and the appeal is dismissed.

13 Made this 30th day of March 2018.


T.R. Ligowe
JUDGE