



IN THE HIGH COURT OF MALAWI
MZUZU REGISTRY: CRIMINAL DIVISION
Criminal Confirmation Case No 248 of 2016

*(Being Criminal Case No. 35 of 2015 before the First Grade Magistrate Court
sitting at Chintheche)*

The Republic

-v-

Alex Phaka

CORAM:

HONOURABLE JUSTICE D. A. DEGABRIELE

Mr. W. Nkosi

Counsel for the Republic

Mr. C. Duke

Counsel for the convict

Ms L. Munthali

Official Interpreter

Mrs J. Chirwa

Court Reporter

DeGabriele, J

ORDER ON CONFIRMATION


The convict was charged, tried and convicted on the offence of housebreaking and theft contrary to sections 309 (a) and 278 of the Penal Code. He was sentenced 72 months IHL on the 1st count and 12 months IHL on the 2nd Count. The brief facts are that the convict broke into the house of Hemera Phiri and stole MK10,500 which had been borrowed from a village bank, an adaptor and a memory card. Some of the stolen money was recovered.

The age of the convict is not stated in the lower court's record and as such this court is unable to ascertain whether he was a young man or not. The recovery of some of the money goes on to mitigate the offence. The convict had no criminal record and he had lived with the victim as a good neighbour for a long time. The convict is a first offender and the laws require that he be considered for a non-custodial sentence. However, such first offenders can be handed down custodial sentence if that is the appropriate way to deal with them. When such a custodial sentence is imposed, the Court must take heed the persuasive statement in the decision of *Republic v Shauti Confirmation Case No 175 of 1975 (unreported)*, that such a custodial sentence be blended with a measure of mercy according to the circumstances of the case.

The aggravating factors are that he did not plead guilty and some of the money was not recovered. The manner in which he committed the offence was not destructive of the property of the victim, but in his attempt to escape arrest he did use force and injured the victim and her daughter. From this evidence, it seems that the aggravating factors outweigh the mitigating factors. However, bearing in mind that he had lived with the victims as a good neighbour and this was an opportunistic offence, I find that the sentence was excessively manifest in the circumstances regardless of the aggravating factors. I am of the view that in these circumstances he still deserved a custodial sentence.

To this end I confirm the conviction and reduce the sentence on the first count from 72 months to 48 months imprisonment with hard labour. I also reduce the sentence on the 2nd count from 12 months to 6 months. The sentences will run concurrently from the 24th of March 2015.

Made in Chambers at Mzuzu Registry this 19th day of March 2018


D.A. DEGABRIELE
JUDGE