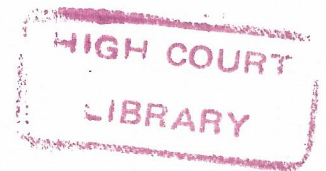


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IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION
sitting at Chichiri

CONFIRMATION CASE No. 37 of 2020

(being criminal case no. 121 of 2020, SGM, Mbulumbuzi Magistrates' Court)

REPUBLIC

v

EMMANUEL CHIKAPA

ORDER ON CONFIRMATION

nyaKaunda Kamanga, J.,

This criminal matter from Mbulumbuzi Magistrates' Court was remitted to the High Court for review in line with section 42(2)(f)(viii) of the Constitution, section 25 of the Courts Act and section 15(1) of the Criminal Procedure and Evidence Code (hereinafter the CP and EC) to enable the High Court of Malawi verify the legality of the proceedings and whether the defendant was subjected to a fair trial and sentencing by the subordinate court.

On 6th September 2019, the defendant, Emmanuel Chikapa, appeared before the Second Grade Magistrate sitting at Mbulumbuzi where he pleaded guilty and was convicted of the offence of theft of a bicycle valued at K24,000 contrary to section 282(h) of the Penal Code. He admitted to stealing and selling the bicycle which the victim had left in his safe custody. The defendant in his caution statement stated that he was indeed left with the bicycle for safekeeping but decided to take it to Chirimba and sell it. The defendant failed to retrieve the and return the bicycle although he was given time and chance to do so.

In mitigation of sentence the prosecution called for a stiffer sentence for the youthful first time offender as the complainant had lost his asset due to the failure to recover it. The 21 years old defendant requested for a lenient sentence claiming that he was school going, although he did not provide particulars of his learning, and that he was suffering from ulcers. The Second Grade Magistrate after considering the provisions of section 340 of the CP and EC which provides for leniency towards first time offenders as well as the defendant's plea of guilty he noted that the defendant failed to stick to his promise of assisting the prosecution to recover the bicycle, which generally happens to be a very important mode of transportation for an African villager. He was sentenced to 48 months imprisonment with effect from date of arrest.

Bicycles are a very common form and most accessible mode of transport in Malawi as the cost cars and motor bikes are beyond the financial means of the majority of households: Eric Pelsler, Patrick Barton and Lameck Gondwe (2004) *Crimes of Need, results of the Malawi National Crime Victimization Survey* Zomba: National Statistical Office of Malawi at p32. The theft of bicycle should be appropriately addressed by the criminal justice system in order to reduce the rate of victimization for this household crime. Section 282(h) of the Penal Code provides for the offence and punishment of theft of a bicycle as stipulated below:

“If a theft is committed under any of the circumstances following, that is to say—

(h) if the thing stolen is a bicycle,

the offender is liable to imprisonment for ten years.”

The case law guideline sentence for theft of a bicycle was laid down several decades ago in the case of *Paulo v Republic* (1923-1961) ALR (Mal) 682 where it was suggested that the sentencing starting point for theft of a bicycle should be 18 months IHL. The case of *Republic v Matiki* [1997] 1 MLR 159 (HC) confirmed that the sentence for theft of a bicycle where the bicycle is recovered should not exceed 18 months unless the circumstances dictate otherwise. In the case of *Republic v Tonnex Chikuli* Confirmation Case No. 174 of 2005 (unreported) the court held that in cases where there is ordinary theft of a bicycle, a plea of guilty is taken and there is recovery, the sentence ranges from 12 to 15 months imprisonment. In *Republic v Charles Mendulo* HC/PR Confirmation case no. 288 of 1998 (unreported) the court held that in cases where the stolen bicycle is recovered, the scale for sentencing ranges between 12 and 18 months imprisonment. Following the above sentencing guidelines the court in *Republic v Salanje Mkwanda* Conf. Case No. 94 of 2008 (unreported) found a punishment of 60 months imprisonment for theft of a bicycle disproportionate to the crime committed. In that case the offender had several antecedents which weighed in his favour: he was a first time offender, young, pleaded guilty and the stolen bicycle was recovered. On confirmation of sentence, the punishment was reduced to 12 months IHL.

However, where the stolen bicycle was not recovered the court sentenced the defendant to 18 months' IHL in the case of *Republic v Gomani* [1997] 2 MLR 77 (HC). In *Republic v Fraction* HC/PR confirmation case no. 1914 of 2005 (unreported) where the value of the stolen bicycle was K2,500, which was less than one month's earnings, the court held that the appropriate sentence for the offence was 15 months IHL.

The *Magistrates' Court Sentencing Guidelines* (Blantyre: Malawi Judiciary, 2018 at 31) have reduced the sentencing guideline slightly by proposing the starting point for the punishment for theft of a bicycle as 12 months imprisonment. The theft of a bicycle being a crime involving dishonesty its punishment is based on circumstances of the case. The general principles and

guidelines for sentencing in cases involving dishonesty are covered at length in the case of *Republic v Kotamu*, HC/PR Confirmation case no. 180 of 2012 (unreported 27 June 2013). The case of *Republic v Kotamu* proposes the use of the time taken to acquire the stolen property, based on the national minimum wage, as a tool for determining the appropriate punishment for the various offences involving dishonesty. The theft of bicycle is regarded as an aggravated offence which attracts two years premium because of the nature of the property stolen. In *Republic v Danga and two others*, HC/PR Confirmation case no. 253 of 2013 (unreported 26 August 2013), the defendants were convicted of theft of a bicycle valued at K12,500. On review the High Court was of the view that the sentence of nine months imprisonment which the lower court had imposed was manifestly inadequate. The main aggravating factor being the fact that the defendants teamed up to commit the offence. The High Court suggested that a proportionate sentence would have been 15 months imprisonment. In the case of *Republic v Douglas Naluso*, HC/PR confirmation case no. 337 of 2014 (unreported 6 June 2014), a youthful offender from Nkando stole a bicycle valued at K25,000 which belonged to his sister and sold somewhere in Blantyre. On review of the criminal matter the High Court considered the youthful age of the convicted offender and reduced the punishment that was imposed on the defendant of the offence of theft of bicycle from 18 months IHL to 12 months imprisonment.

After examining the record of the case this court finds that the finding by the lower court of guilty and the conviction of the defendant for the offence of theft of bicycle contrary to section 282(h) of the Penal Code is well founded and is hereby confirmed. A custodial sentence was also an appropriate form of punishment for the first time offender, who after deliberately stealing and selling the bicycle caused the victim to suffer a complete loss as he did not assist the prosecution to trace and recover the bicycle. In regard to the punishment meted out this court is of the opinion that the sentence of 48 months imprisonment with hard labour that was imposed on the defendant for committing this felony is manifestly excessive for the first time offender and way beyond the sentence guideline. This court exercises its sentencing discretion by setting aside the sentence of 48 months that was imposed by the trial magistrate and substitutes it with a reduced sentence of 15 months imprisonment.

Dated this 20th day of April 2020 at Chichiri, Blantyre.


Dorothy nyakaunda Kamanga
JUDGE

CASE INFORMATION:

The Prosecution	:	Absent
Defendant	:	Absent /unrepresented
Mr. Amos	:	Court Clerk