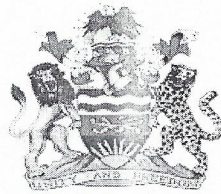


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IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CRIMINAL DIVISION

sitting at Chichiri

CONFIRMATION CASE No. 206 of 2020

(being criminal case no. 71 of 2019, SGM, Nsanje Magistrates' Court)



REPUBLIC

v

JUSSAB FOSTER

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ORDER ON CONFIRMATION

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nyaKaunda Kamanga, *J.*,

This criminal matter from Nchalo 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 28<sup>th</sup> August 2019, the defendant, Jussab Foster, appeared before the Second Grade Magistrate sitting at Nsanje where he pleaded guilty and was convicted of the offence of vandalising electricity installation equipment contrary to section 45(2)(d) of the Electricity Act. The defendant admitted that from on 8<sup>th</sup> September 2019 at Hassan Village in Nsanje district he vandalised two poles, four twin wire and a meter, all valued at K580,000.00 belonging to ESCOM. The defendant as he cutting down a tree which was close to ESCOM cables and poles, it fell on the cables causing two ESCOM poles to collapse and catch fire.

In mitigation of sentence the prosecution called for a stiffer sentences the defendant committed a serious offence. The 22 years old defendant requested for a lenient sentence because he was in school, although there is no explanation of the nature of studies. On 3<sup>rd</sup> October 2019 the Second Grade Magistrate in sentencing considered the penal provision, the fact that the defendant was a first time offender who pleaded guilty against the damage caused to public infrastructure. The defendant was sentenced to 36 months imprisonment with effect from the date of his arrest.

As was noted by the Magistrate the main factors to consider in imposing punishment for offences of vandalising electricity installation equipment are first, the circumstances of the vandalism, secondly the value of the property vandalised or damaged, thirdly the costs associated with replacing the vandalised equipment or apparatus and fourthly, the extent of the damage to the electricity installation equipment or apparatus. The circumstances of this case reveal that the damage was caused due to the defendant's careless in cutting down a tree. The value of the vandalised property was of course quite high at K580,000, as two poles, a four twin wire and a meter collapsed and caught fire.

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 vandalising electricity installation equipment contrary to section 45(2)(d) of the Electricity Act is well founded and is hereby confirmed. In terms of punishment, section 46 of the Electricity Act provides for the maximum penalty for the offence as a fine of K5,000,000 and imprisonment for 10 years. When faced with such a penal provision, where a fine is in combination with a prison sentence, in principle the penal provision must be read disjunctively. Accordingly, the imposition of a fine is considered first before resorting to a custodial sentence, as it is less onerous and in sentencing it is for the purposes of retribution and deterrence by depriving an offender of the financial benefit of the offence committed. There will serious circumstances of committing the offence where the fine and imprisonment can be imposed at once, when the fine is a clawback on illegal opulence, supposed or real: *Rep v Maria Akimu*, HC/PR Revision Case No. 9 of 2003. Considering that vandalising electricity installation equipment has a major effect on the quality of life of citizens in relation to their right to development and it costs a lot of money to repair or replace in certain serious circumstances of the commission of the offence the sentencing court should consider imposing both a fine and a custodial sentence.

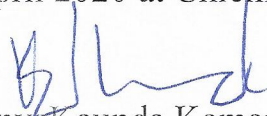
In practice, the amount of a fine should be determined in relation to the gravity of the offence and then the offender's means should be considered to decide whether he has the capacity to pay such an amount. A fine is against the convict and only his own means are relevant: *Rep v Luwanja & ors* [1995] 1 MLR 217. In regard to custodial sentences that have been imposed in similar cases this court will rely on those that involve theft of telecommunication cables belonging to Malawi Telecommunications Limited. These are the cases of the *Republic v Raphael Janken*, HC/Mzuzu DR Confirmation Case no. 2 of 2013 (unreported 11 June 2015) and *Republic v Nelson Chiwangulunda and Jimmy Alli*, HC/PR Confirmation Case 375 of 2015 (unreported 19 July 2016).

In *Republic v Raphael Janken* the High Court was of the view that a sentence of 18 months imprisonment imposed on a defendant who stole cables belonging to Malawi Telecommunications Limited valued at K1,234,440.00 was manifestly inadequate. The said sentence was reluctantly confirmed because at the time of review the sentence had already expired.

In *Republic v Nelson Chiwangulunda and Jimmy Alli* the defendants were convicted of the offence of theft of 25 metres of cobra copper cables valued at K3,337,000.00 which belonged to Malawi Telecommunications Limited (MTL) contrary to section 278 of the Penal Code. On review of the criminal matter the High Court also reluctantly confirmed the inadequate sentences of 36 months imprisonment that were imposed on each of the offenders due to the offenders non-appearance in court for the confirmation hearing.

In the present case, a custodial sentence was an appropriate form of punishment for a first time offender who pleaded guilty to vandalising of electricity installation equipment valued at K580,000 and had no financial means to pay a fine. However, considering the youthful age of 22 years for this first time offender, his plea of guilty and the circumstances of committing the offence this court finds that the sentence of 36 months imprisonment which was imposed on him was manifestly excessive. This court exercises its sentencing discretion by setting aside the sentence of 36 months that was imposed by the trial magistrate and substitutes it with a reduced sentence of 18 months imprisonment.

Dated this 22<sup>nd</sup> day of April 2020 at Chichiri, Blantyre.



Dorothy nyakaunda Kamanga  
JUDGE

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