IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY
CRIMINAL REVIEW CASE NO. 2 OF 2020
(Being Criminal Case No. 26 of 2020)
(In the Third Grade Magistrate Court Sitting at Domasi)

THE REPUBLIC

AND

NDALAKWANJI VICTOR

CORAM: NTABA Z, JUSTICE

ORDER ON REVIEW

1.0 BACKGROUND

1.1 The Third Grade Magistrate Court sitting at Domasi on 7th February, 2020 convicted Ndalakwanji Victor (female) on two counts of theft contrary to section 278 of the Penal Code. The particulars of the charge were that the convict on or about 6th February, 2020 at Songani Trading Centre in the district of Zomba stole a purse containing identity cards, two memory sticks, office keys and K24,000.00 belonging to Dr. Magret Maoni as well as stole a hussle bag containing a small Itel phone, 2 national identity cards, a necklace, earrings and K4,300.00 belonging to Ms. Sharia Chapula. The lower court found her guilty and sentenced her to six (6) months imprisonment with hard labour subject to confirmation by the High Court on the same day she was tried and the conviction was on her own plea of guilt. The convict also had a third count which was withdrawn by the complainant.

1.3 The matter was brought to the attention of the High Court for purposes of review due to the fact that the convict was heavily pregnant and was due to give birth very soon. The Court was requested to review the appropriateness of giving a custodial sentence to a pregnant woman.

2.0 THE LAW AND COURT'S DETERMINATION

2.1 By law, under sections 42 (2) of the Constitution, 25 and 26 of the Courts Act as well as 360 of Criminal Procedure and Evidence Code (hereinafter referred to as "the Code") this court is seized of this case for purposes of review. In reviewing, this court is requested to examine the record of any criminal proceedings before any subordinate court for the purpose of reviewing the proceedings and

satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

2.2 Firstly in dealing with this matter, I would like to highlight a fundamental principle of Malawian criminal law which is provided for in section 3 of the Code which states that the principle that substantial justice should be done without undue regard for technicality shall at all times be adhered to in applying this Code. It is this Court which is very much concerned with when examining this review. Further it also recognized that where a finding by a lower court results in a failure of justice, such failure must be rectified. The rectification should be done at the earliest possible time. Section 5 of the Criminal Procedure and Evidence Code is clear on this -

> 5.(1) Subject to section 3 and to the other provisions of this Code, no finding arrived at, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal of complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code unless such error, omission or irregularity has in fact occasioned a failure of justice.
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> (2) In determining whether any error, omission or irregularity has occasioned a failure of justice the court shall consider the question whether the objection could and should have been raised at an earlier stage in the proceedings.
> (3) The important admission or rejection of evidence shall not, of itself, be a ground for the reversal or alteration of any decision in any case unless, in the opinion of the court before which an objection is raised—
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> (a) the accused would not have been convicted if such evidence had not been given or if there was no other sufficient evidence to justify the conviction; or
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> (b) it would have varied the decision if the rejected evidence had been received.

2.3 Secondly, this court is mindful of the Constitutional tenets of a right to a fair trial as espoused in section 42. This Court is ever so mindful that throughout the process of trial, an accused person's rights should be considered and upheld where legally required. Consequently, it is acknowledged in meting out justice, it should do so by taking into account fairness and equity in all aspects. Therefore, this Court is cognizant that a reviewing court should examine all issues on the court record, that is, a re-examination of the entire trial process.

2.4 At this point, it is crucial to highlight that a court in exercising its review powers shall not act as a bar to an appeal unless the review took place in an open court where both parties had an opportunity to be heard. In addition, it is provided that on review, a court exercises the same power as the powers of appeal provided under section 353 of the Code as such the two concepts are related to each other.

2.5 This Court hereby noted that the lower court's conviction as well as sentence on the two counts of theft were solid in terms of the law. However, the Court noted that the sentencing in this case needed to be addressed due to the circumstances of the convict *viz-a-viz* human rights and justice. It should be pointed out that the third count of theft which was withdrawn by the complainant was withdrawn because she was exercising mercy/leniency on the convict due to her pregnancy. Interestingly, the prosecutor in highlighting mitigating and aggravating factors also noted the pregnancy as well but prayed for a custodial sentence. The magistrate on page 16 of her sentence analysis indicated that she noted that Ms. Victor had raised the issue of her pregnancy but she stated that the convict should have considered her responsibility before committing the offence and that she should have thought twice as such she would still be imprisoned. Interestingly, the prosecutor and magistrate concentrated on the fact that this offence is common at Songani Trading Centre as the rationale for the custodial sentence. They however never buttressed this conclusion with any information. Actually even if they had done so, they were supposed to show that the present convict is the none who committed such offences and was convicted of them before in order to have a justification for such a conclusion. Since that never happened then the punishment being given to this convict must not be general but of specific deterrence. In short, the magistrate did not in this Court's view balance the mitigating and aggravating factors because it was clear that the convict was a first offender, pleaded guilty, pregnant, relatively young (being 26 years old), value of property and there was recovery of some items. The aggravating factors were offence is rampant and she had more than one count against her were not sufficient to warrant a custodial sentence.

2.6 Turning to the issue of sentence. This Court wants to remind itself and the lower court, that sentencing should always follow the principles set down in sections 339 and 340 of the Code. The offence which the Appellant was found guilty of was a felony which is punishable with a maximum sentence of five (5) years as per section 278 of the Penal Code. It is trite law that courts should be mindful of all nuisances in criminal matters before them and the statement on sentences conforming to the Constitution by Justice Mwaungulu (as he then was) in ***Madalitso Keke v The Republic***¸ Confirmation Case No. 404 of 2010 (HC)(PR)(Unrep) –

> *"Hitherto the basis on which appellate courts have had to overturn the sentence has basically been that the sentence was manifestly excessive or inadequate as to comport an improper exercise of the discretion. In either case the sentence was inadequate or excessive if there would be a sense of shock after due regard of the offence, offender, victim and the public, for which criminal justice serves an interest in relation to the latter, it must not be ignored that it is also in the public interest that criminals are treated justly, humanely and according to the fundamental principles and provisions of our new constitutional order. Section 19(3) of the Constitution now creates a fundamental right to citizens not to be subjected to "Cruel, inhuman or degrading treatment or punishment." Sentences courts pass are therefore, violation of the Section if they are 'cruel, inhuman or degrading". It is not that the sentences be all or are two of these; the sentences will be unconstitutional on any one ground. Sentencers must now be wary and ensure that in sentencing offenders the sentences comport with these*

constitutional rights. No sentence is per se constitutional; courts must, therefore, have to ensure that their sentences do not offend section of the Constitution (Solemn v Helm – 463 U.S. 277 (1983), United Supreme Court:

> *"In sum, we hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted. Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals. [Footnote 16] But no penalty is per se constitutional. As the Court noted in Robinson v. California, 370 U.S. at 370 U. S. 667, a single day in prison may be unconstitutional in some circumstances." (Per Powell J)"*

2.7 Malawian courts have stressed that first time offenders should be highly considered in terms of non-custodial sentences as noted in ***Republic v Mahomed Hanif Bobat***, Criminal Appeal Case No. 29 of 1994 (HC)(PR)(Unrep) where Mwaungulu J (as he then) was stated that sentencers should know that it is the clear intention of parliament that first offenders should be spared from the horror of prison life. It is therefore to that end mandatory that any sentence of imprisonment for a first offender must be on good grounds which must be shown in the analysis of the sentence. Our Criminal Procedure and Evidence Code, in sections 339 and 340, makes this very clear. Furthermore, ***Republic v Sakhwinya***, Confirmation Case No. 359 of 2013, highlights this principle effectively -

> *"Moreover, the accused is a first offender. For first offenders, sentences can only be as fit the offence and only for the purpose of reforming or preventing the offender from committing offences in the future. Imposing sentences for general deterrence is wrong in principle because it is tantamount to using (or is it abusing) humans as means to an end. Such sentences would be degrading cruel and inhuman(e) punishment or treatment. Generally, for first offenders, it is the likelihood that the sentence will be passed rather than the length of the sentence that may reform or dissuade or persuade the offender from future crime. Consequently, a short, sharp and quick sentence may just be as effective as a longer one. In those circumstances, opting for a longer sentence as against a shorter, quicker and sharper sentence might be in principle a wrong exercise of the discretion.*"

2.8 The circumstances in this case demanded leniency and this Court was also very concerned with the magistrate in that she makes no mention of the provisions of sections 339 and 340 Code on whether to pass a suspended sentence or not. Her passing a custodial sentence taking into account the aggravating and mitigating factors as well as the law in this case was unjustified. It is this Court's considered opinion that our main function is to ensure the administration of justice within the context of the law and with regard to the Constitution. Furthermore, apart from sections 339 and 340 of the Code, it is important this Court reminds magistrates of the variety of sentences available to them under

section 25 of the Penal Code and their need to pass such appropriately. Particularly, looking at the case herein, the convict is one who should have benefitted from section 337 of the Code which provides -

> (1) Where in any trial for an offence, the court thinks that the charge is proved but is of the opinion that, having regard to the youth, old age, character, antecedents, home surroundings, health or mental condition of the accused, or to the fact that the offence has not previously committed an offence, or to the nature of the offence, or to the **extenuating circumstances** in which the offence was committed, it is inexpedient to inflict any punishment, the court may—
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> (a) without proceeding to conviction, make an order dismissing the charge, after such admonition or caution to the offender as to the court seems fit;
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> (b) convict the offender, and if probation is not appropriate, make an order either discharging him absolutely or, if the court thinks fit, discharging him subject to the condition that he commits no offence during such period, not exceeding twelve months from the date of the order, as may be specified therein;
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> (c) where the court considers it expedient to release the offender on probation—
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> (i) if the offender express his willingness to comply with the order, after or without convicting the offender, make a probation order; or
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> (ii) convict the offender and direct that he be released on his entering into such bond as is referred to in section 53, with or without sureties, and, in addition to any other condition, subject to the condition that, during such period (not exceeding three years) as the court may direct, he shall appear and receive sentence when called upon and in the meantime shall keep the peace and be of good behavior.
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> (2) An order made under subsection (1) (a) shall, for the purpose of reverting or restoring stolen property and of enabling the court to make any order under sections 147 and 148 have the like effect as a conviction.
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> (3) An order discharging an offender conditionally under subsection (1) (b) is in this Code referred to as an order for conditional discharge, and the period specified in any such order is referred to as the period of conditional discharge.
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> (4) A probation order made under subsection (1) (c) (i) shall be made in accordance with section 4 of the Probation of Offenders Act and shall have effect in accordance with that Act. In this Code a bond entered into under subsection (1) (c) (ii) is referred to as a probation bond and the period of a probation order or probation bond is referred to as the probation period. The provisions of sections 123 and 125 shall, with any necessary modifications, apply to probation bonds. Cap. 9:01
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> (5) Before making an order for conditional discharge or acting under subsection (1) (c) the court shall explain to the offender in ordinary language that—
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> (a) if he commits another offence during the period of conditional discharge or the probation period; and
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> (b) in the case of a probation order or probation bond, if he fails in any respect to comply therewith,
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> he will be liable to be sentenced or convicted and sentenced for the original offence.

> (6) Where, under section 341, a person conditionally discharged is sentenced for the offence in respect of which the order for conditional discharge was made, that order shall cease to have effect.

2.9 The custodial sentence for a pregnant person also raises a major issue and should be concerning for every judicial officer when it comes to sentencing. It has been highlighted by prison inspectorate reports including myself in the ***E L v The Republic***, Criminal Case No. 36 of 2016 (HC)(ZA)(Unrep) that incarcerating a woman with her child should always be the last resort for any court. Let me reiterate the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders ('the Bangkok Rules'), December 2010 which clearly state the preference for non-custodial alternatives to pre-trial detention and prison sentences for women offenders in general. In terms of pregnant women and mothers, Rule 64 specifies that non-custodial sentences for pregnant women and women with dependent children shall be preferred where possible and appropriate, with custodial sentences being considered when the offence is serious or violent or the woman represents a continuing danger, and after taking into account the best interests of the child or children, while ensuring that appropriate provision has been made for the care of such children. The facts herein did not justify a custodial sentence for Ms. Victor especially taking into account her advanced pregnancy.

2.10 Let it be added that Malawian prisons do not have a policy albeit proper health care facilities for dealing with pregnant women or infants. Evidence has shown that they also struggle when it comes to women who are incarcerated with their children. Courts are reminded that in Malawi, we are still struggling with infant mortality rates as well as maternal mortality rates and the numerous health challenges for women are further exacerbated by imprisonment. The Court also takes judicial notice that there are issues with incarcerating children with their mothers, effects of such are still being studied and it is imperative that as Malawian courts we do not forget the best interests of the child. Therefore, courts when dealing with caregivers like mothers have highlighted the need for special considerations to be examined like in ***R v Rosie Lee Petherick*** [2012] EWCA Crim 2214 where a 22 year old single mother of a 16 month old son who appealed against a sentence of four years and nine months imprisonment for causing a passenger's death by dangerous and drunken driving. She was the single mother of a 16 month old son. The Court took special consideration of the sentiment of Lord Justice Hughes' where he quoted Lady Hale in her speech in HH vs. Deputy Prosecutor of the Italian Republic, Genoa [2012] UKSC 25. Although she was in the minority as to the outcome in relation to one of the persons sought for extradition, she gave at paragraph [30] this analysis with which there was general agreement. That approach is as true of sentencing as of any other kind of case in which family life is in question. Of course in sentencing, the first two questions will usually be straightforward. There will

almost always be some interference with family life and it will be in accordance with law and due to legitimate aims. It is the third question which may call for careful judgment. Third, long before any question of article 8 or of the Human Rights Act 1998 was thought of, sentencing practice in England and Wales recognised that where there are dependent children that is a relevant factor to sentencing. That is most conveniently to be extracted from the careful words of Lord Judge, CJ, in HH at paragraphs 126 to 130, to which reference should be made if this point is taken. In particular, at paragraphs 128 and 129 he said that in sentencing mothers

> "128. The continuing responsibility of the sentencing court to consider the interests of children of a criminal defendant was endorsed time without number over the following years. Examples include Franklyn (1981) 3 Cr App R(S) 65 Vaughan (1982) 4 Cr App R(S) 83, Mills [2002] 2 Cr App R (S) 229, and more recently Bishop [2011] EWCA Crim 1446 and, perhaps most recently in Kayani; Solliman [2011] EWCA Crim 2871, [2012] 1 Cr App R 197 where, in the context of child abduction, the court identified '… a distinct consideration to which full weight must be given. It has long been recognised that the plight of children, particularly very young children, and the impact on them if the person best able to care for them (and in particular if that person is the only person able to do so) is a major feature for consideration in any sentencing decision.' 129. Recent definitive guidelines issued by the Sentencing Council in accordance with the Coroners and Justice Act 2009 are entirely consistent. Thus, in the Assault Guideline, taking effect on 13 June 2011, and again in the Drug Offences Guideline, taking effect on 29 February 2012, among other features the defendant's responsibility as the sole or primary carer for a dependant or dependants is expressly included as potential mitigation."

2.11 Adding to this position, as fourth factor it follows that a criminal court ought to be informed about the domestic circumstances of the defendant and where the family life of others, especially children, will be affected it will take it into consideration. It will ask whether the sentence contemplated is or is not a proportionate way of balancing such effect with the legitimate aims that sentencing must serve.'Fifth, in a criminal sentencing exercise the legitimate aims of sentencing which have to be balanced against the effect of a sentence often inevitably has on the family life of others, include the need of society to punish serious crime, the interest of victims that punishment should constitute just desserts, the needs of society for appropriate deterrence (see section 142 Criminal Justice Act 2003) and the requirement that there ought not to be unjustified disparity between different defendants convicted of similar crimes. Moreover, as Sachs J pointed out in the South African Constitutional Court in N v The State [2007] ZACC 18, in a case in which there was under consideration a specific provision in the Constitution which required the interests of an

affected child to be "the paramount consideration", not only society but also children have a direct interest in society's climate being one of moral accountability for wrongdoing. It also needs to be remembered that just as a sentence may affect the family life of the defendant and of his/her innocent family, so the crime will very often have involved the infringement of other people's family life.

2.12 It is imperative therefore that courts show leniency as noted in ***Flora Jeke v The Republic*** Crim. Appeal No. 139 of 2008 (HC)(LL)(Unrep) where the court considered an 18 month's custodial sentence of a woman, with a small child who had pleaded guilty to the charge of unlawful wounding contrary to section 241(a) of the Penal Code. The charge attracted a maximum of 7 years imprisonment with hard labour. The High Court substituted the custodial sentence to one that secured the immediate release of the Appellant based on the above factors as well as 'humanitarian grounds'.

3.0 CONCLUSION

3.1 At this point, it is necessary to admonish the magistrate for ignoring the prescripts of section 339 and 340 of the Code. This issue of ignoring the prescripts of the Code have become commonplace and therefore the magistrate is called to take note of this judgment and do better in future. This admonition should also go to other magistrates who are also doing similarly that they need to better in adhering to the rule of law. In conclusion, it is this Court's considered opinion that the fact that the magistrate in the lower court did not justify the imposition of a custodial sentence taking into consideration the prescripts of sections 339 and 340 of the Code rendered the sentence herein ineffective.

3.2 Turning to the convict herein, it is important that this observation is made, her conduct in stealing was unconscionable and inconsistent with the conduct one would expect of a responsible expectant mother. It is my hope that this will be the only time to find herself in the criminal justice system.

3.3 This Court having reviewed the case herein orders that the conviction is hereby confirmed however the sentence is reduced to time served because it should have been a suspended one and therefore, Ms. Ndalakwanji Victor shall immediately be released.

I order accordingly.

Made in Chambers on this 27th day of March, 2020.

Z.J.V. Ntaba
JUDGE