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HIGH COURT OF MALAWI  
CRIMINAL REGISTRY  
16 DEC 2021  
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ZOMBA

REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI  
ZOMBA DISTRICT REGISTRY

CRIMINAL APPEAL CASE NUMBER 16 OF 2021

(Being Criminal Case Number 353 of 2017 before First Grade Magistrate's Court Sitting at Liwonde)

(Before Honourable Justice Mzonde Mvula)

BETWEEN

UGENIYO YOHANE.....1<sup>ST</sup> APPELLANT

GEORGE TAMBWALI.....2<sup>ND</sup> APPELLANT

AND

THE REPUBLIC.....RESPONDENT

Coram

HONOURABLE JUSTICE MZONDE MVULA

Mr. I. Twea, Of Counsel for the Appellants;

Ms. L. Kulesi, Senior State Advocate, for the Respondent;

Mr. C. Tweya, Court Clerk and Court Interpreter.

ORDER

(Made under section 350(1) of the Criminal Procedure and Evidence Code)

Mvula, J.

1.0 Introduction.

1.1 The two appellants were convicted on 22<sup>nd</sup> December 2017 for (i) unauthorized entry into a National Park, (ii) Conveyance of a weapon into a National Park, (iii) Killing a protected animal, and (iv) Illegal possession of game meat contrary to sections 32, 33, 35 and 86 of the National Parks and Wildlife Act, respectively. They were sentenced to 6 years each on the first two counts, 12 years on the third count and 2 years imprisonment on the last count. The sentences run concurrently.

1.2 The appellants advance four grounds of appeal as follows:

**2.0 The grounds of appeal**

2.1 The First Grade Magistrate erred in law when he failed to pay due regard to the triad of punishment in working out the appropriate punishment for both appellants;

2.2 The First Grade Magistrate erred in law in so far as he failed to take into account the appellant mitigating circumstances in imposing his sentence;

2.3 The First Grade Magistrate erred in law in that he failed to pay due regard to the provisions of section 13(m) of the Constitution in imposing his sentence; and

2.4 The First Grade Magistrate erred in law when he meted out a sentence that is manifestly excessive in the circumstances.

2.5 The appellants pray for a reduction of the sentence to 7 years.

**3.0 Position by the Respondent**

3.1 This court should only interfere with the sentence if it was based on the wrong principles of law or was manifestly excessive.

3.2 Under section 110A of the National Parks and Wildlife Act, looking at the value of the animals, the sentence in the court below is in line with sentencing guidelines.

3.3 The sentence passed is not manifestly excessive, neither was it arrived at by wrong principles of law, nor is it shocking.

3.4 A Buffalo and Waterbuck are protected species under the Act in question. The proper sentence should have been under section 110A (d) which a custodial sentence of 30 years. Their position is that the appellants were sentenced properly and therefore this appeal should be dismissed.

#### 4.0 **The law on sentencing**

4.1 Section 12 of the Criminal Procedure and Evidence Code, herein after the Code, is point of departure in such matters. It allows a court, subject to section 14 of the same Act, to pass a lawful sentence combining any of the sentences it is authorized to pass by law. A court may impose consecutive sentences by law where the undertaking demands.

4.3 Where the offences are committed in the same transaction, a series of transactions, or within a short period, courts order sentences to run concurrently. See **Rep v Kamwendo 6 ALR Mal 379**, applied in **Rep v Sozinyo and Another [1997] 2 MLR 16**. The only time a court may depart from the above mentioned principles, is to protect the public interest. In that case, ordinary concurrent sentences run consecutively. Departure from stated legal position should have accompanying reasons. See **Banda and Others v Republic [1990] 13 MLR 56**.

#### 5.0 **Exposition and duty of the High Court on appeal to sentence**

5.1 In the case of **Mapopa Nyirenda v Republic Criminal Appeal 6 of 2011** from Mzuzu Registry, it was said:

On appeal, it is not the business of the upper Court to tamper with sentence **unless it can be shown that the same was wrong in law or that it was manifestly excessive**

[Emphasis supplied]

- 5.2 This Court will only vary, alter, or otherwise deal with the finding of the Court in Liwonde, under section 353(2) (a) (iii) of the Code, if the sentences appear manifestly excessive.
- 5.3 This court takes great care for the present category of offences, because of these reasons. Governments of Kenya and Tanzania receive thousands of Tourists who go to visit their wildlife. This venture brings the much needed forex reserves to bolster the economy. Flora and fauna (plants and animals), are make these places, hot tourist destinations. The Malawi Government has singled out tourism sector, as an engine for economic development. Those given concessions to run nature sanctuaries, have fenced all protected reserves so that wild plants and animals are meaningfully protected. Game rangers who put their lives at great risk of snakes and other dangerous animals are deployed into these protected reserves so that the wild animals remain safe.
- 5.4 Rhinos, buffaloes, waterbuck and elephants remain at risk because of their own existence. They are mercilessly killed for their tasks and not necessarily for their meat. Notable places where these animals are butchered are Liwonde, Kasungu, Rumphi and Chikwawa. Persons like the appellants enter the protected areas, to kill without winching the game, without any sober reflection on these beautiful creatures. After slaughter, trophies are removed from their carcasses for export.
- 5.5 Appellants in my view, are part of wider criminal syndicate, cashing in on this unfortunate arrangement. While others do the actual poaching, others find markets, while others export the listed species. This has put their numbers at great risks. Therefore there is every reason, that assault of animals listed as protected species under the Act, should attract stiff punishment against perpetrators of this highly organized crime. It must be remembered that these animals are listed as protected species because their numbers are seriously under threat of extinction. They are vulnerable to poaching, not just in Malawi but in the world at large.

- 5.6 We owe posterity a duty of care. We do not want our children to spend a fortune to travel thousands of kilometres to other distant regions to see these animals which were ordinarily present in our country. The Court plays a critical role in the regulation and enforcement of legislation against wildlife under the National Parks and Wildlife Act. It supplements the efforts of central Government and the intention of Malawi Parliament alike, to preserve flora and fauna, and give stiff penalties, to those caught on the wrong side of the National Parks and Wildlife Act. In this case, the appellant entered the protected area to disturb animals in the only environment they are supposed to be free.
- 5.7 Entering protected areas to kill these harmless animals is defilement of these protected species. Since these animals cannot speak, the Malawi society has chosen to speak for these animals by imposition of meaningful sentences in the courts. This effort is meaningless if the same courts allow misguided applications of appeal to sentences when the legislature intended tough sentences. The interests of justice and indeed section 13(m) of the Constitution of Malawi demand that we balance right to fair sentence and the need to protect the flora and fauna alike. Maximum of a 30 year sentence, under section 110A (d) of the Act which the appellants were convicted of, tidily spells out the intention of the legislature on the category of offences the appellants face.
- 5.8 The Government and related stakeholders are spending sleepless nights, to channel energy and resources to protect these animals. It would be folly to pass sentences that do not make hairs stand at an end for this class of offences. The offenders voluntarily left their human habitats, entered the protected areas, to mercilessly kill the animals, in a place they should be safe from poachers. This act is unforgivable. No amount of money would be wagered on the value of these animals as argued by appellants, in the ecosystem, being alive. Dead animals are a total loss to the ecology. The concurrent sentence order of 12 years on the third count being more the serious of the offences therefore, is "generous" in the circumstances.

5.9 In determining his sentence, the trial magistrate considered the fact that the pair were first offenders who despite section 340 of the Code. He sent them to prison because of prevalence of such offences in Malawi. Therefore, meaningful sentences are called for. He did not want them to exit the courts by payment of a fine. In any event, this Court dares to add that grave moral turpitude should never be pegged at the value of money.

#### 6.0 The Decision

6.1 This Court find no evidence that the Court below failed to pay due regard to the sentencing trends to arrive at this punishment. The sentencing guideline for such offences in Malawi, is 6 years. Then up and down due to aggravating and mitigating circumstances, respectively. The prevalence of these offences as aforesaid, importance of such fauna to the environment, and their death outweighs the fact that appellants are first offenders. The mitigating factors were considered. The offence is serious. The sentence order, in my view, is in fact, on the lower side owing to the exposition this court has provided. Therefore, the respective sentences stand because after 12 years sentence, the appellants would have had enough time in prison to reflect if it was worth leaving their homes to offend nature as aforesaid.

6.2 This court finds for the respondent by dismissing the appeal.

Made in Court at Zomba this 16<sup>th</sup> day of December 2021



**JUDGE**