



**IN THE REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY: CRIMINAL DIVISION  
Criminal Case No. 7 of 2020**

The Republic

-v-

Thomson Frank Mpinganjira

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**Coram:**

**Honourable Lady Justice D.A. DeGabriele**

Mr. R. Matemba	Director General for ACB, for the State
Mr. Nkhono, SC	Counsel for the Accused
Mr. Maele	Counsel for the Accused
Mr Chokotho	Counsel for the accused
Mr. Amosi	Court Clerk
Mrs Msimuko	Court Reporter

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**DeGabriele, J**

**SENTENCE**

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1. Following a full trial, Thomson Frank Mpinganjira, has been found guilty and convicted on 2 out of the 6 counts of offence he was charged with. He has been convicted on the 1st count, which is Offering an advantage to a public officer, namely Justice Michael Atanazio Tembo, contrary to section 24(2) of the Corrupt Practices Act; and the 4th count, which is Offering an advantage to a



public officer, namely Justice Healey Potani, contrary to section 24(2) of the Corrupt Practices Act.

2. Section 321J of the Criminal Procedure and Evidence Code (CP&EC) empowers the Court to receive evidence in the process of considering an appropriate sentence to be imposed on a person convicted of an offence. In this case, both the State and Counsel for the convict made their submissions for purposes of sentencing immediately after the judgement was delivered. Now the Court proceeds to render the sentence accordingly.

### **Convict's submissions**

3. In mitigation, Counsel for the convict stated that the convict was a first offender. Counsel reminded the Court that in their evidence PW1 and PW2 had stated that they had held the convict in high regard hitherto. The convict is 60 years old, and this shows that he was an upright person, and of good character until this conviction. The convict is a family man, a widower and is looked after by his children and grandchildren. He has social responsibilities which include building and supporting a number of churches, paying fees for disadvantaged persons, helping a number of Seventh Day Adventist hospitals and other mission hospitals, as well as Government central/referral hospitals. The convict is a founding member of the Thomson and Babra Foundation through which he funds and solicits funds for a project dealing with cervical cancer which he says benefits many women. He also works with MAP, as well as the college of health sciences on Covid19 interventions.
4. Counsel further submitted that the convict is an investor and entrepreneur and employs hundreds of people who will suffer together with their families if he is handed down a custodial sentence. The convict has recently begun sponsoring the oldest football club, Mighty Wanderers. The convict is expected to travel around while soliciting funds for the Thomson and Babra Foundation. The convict's health has been compromised as he has suffered from a Covid19 infection. Counsel has submitted that the convict has already demonstrated his abhorrence for corruption by reporting to the police and the Anti-Corruption Bureau attempts made to corrupt him. Counsel stated that the act of reporting



these attempts demonstrate remorse and intolerance to corruption, and even the acts he was engaged in which led to his conviction.

5. As regards the law on the sentencing process, Counsel for the convict submitted that the Court should consider applying section 339 and section 340 of the CP&EC and impose a non-custodial sentence because sentences for the offences he has been convicted of are not fixed by law. The 2 counts of offence he was convicted of have no minimum sentences, hence it is open for the court to impose a suspended sentence. Counsel reminded the Court that the purpose of sentencing is to reform a convicted person and sentences must deal with offence and offender proportionately. Counsel also submitted that the arrest and conviction for a person in his calibre is a huge punishment as it shall be met with sanctions from professional accounting bodies which will affect him adversely and significantly, for the rest of his life. The convict's business reputation locally and internationally has been negatively affected. Counsel pleaded for mercy because the outcome of the ***Constitutional Reference Case Number 1 of 2019*** was not affected by the conduct and actions of the convict.

#### **The State's submissions**

6. The State submitted that the Court should not be persuaded by the plea in mitigation Counsel for the convict outlined. The convict should have known that he was a family man, running businesses and helping the less privileged before he voluntarily embarked on committing the offences he is convicted of. As a 60-year-old man, he should have been aware of consequences of offending in such a manner. The State agreed that indeed the offences he has been convicted of did not affect the result of the ***Constitutional Reference Case Number 1 of 2019*** because the Judges refused to be bribed. However, the State submitted that the central question which is, what if the convict had succeeded, remains and needs to be pondered. The State submitted that if he had succeeded in his actions, the convict would have caused a bloodbath in Malawi because of the tense environment that existed at the time the ***Constitutional Reference Case Number 1 of 2019*** was being heard. The intention of the convict was to defeat the course of justice in one of the most



critical and divisive cases in Malawi, and to do so using his wealth, power and influence. The uprightness of the convict has been erased by this conviction.

7. The State further submitted that while there is no sentence attached to each count of offence, offences under Part IV of the Corrupt Practices Act, under which the convict was charged and convicted, are punishable by imprisonment for 12 years. The State submits that section 339 of the CP&EC is not applicable in this case since the offence he is convicted with is fixed by law being imprisonment for 12 years. The State requests the Court to impose a custodial sentence that will reflect the seriousness of the offence, and a sentence that reminds all, that actions intended to defeat the course of justice will not be tolerated in this country.
8. The State argues that the convict has not shown any remorse because from the word go, he started machination to defeat the ends of justice by the night-time application for bail, the High Court Civil Division application for Judicial review, a number of applications in the Supreme Court, and several applications made before this Court, including the application for recusal, to have this Court recuse itself after making allegations of impropriety against this Court and Justice Kalembera. The convict has also made accusations of corruption against other serving Judges. Initially, the convict requested a plea bargain process, which failed due to the actions of the convict. The conduct of the convict has wasted the court's time, resources on all concerned, as he could have taken the advantage to plead guilty earlier in the process, which he did not do. The State submits that if this was a show of remorse, then it is imaginary remorse.
9. The State further submits that the convict retired as a Chief Executive Officer/Managing Director of the FDH Bank which is listed on Malawi Stock Exchange and the TFM trust established by the convict has duly appointed trustees. All these institutions, which are separate legal entities have been running independent of him, and as such no employee will lose their jobs. The convict has only been involved in the Mighty Wanderers Football Club for a period of 2 months.



### **The convict's response to the State's submissions**

10. In response, Counsel for the convict submitted that the Court has discretion to decide the length of sentence up to 12 years. Counsel gave an example of a sentence fixed by the law, as contained in section 283(4) of Penal Code where the law states that the sentence to be imposed should not be less than 2 years and maximum sentence to be imposed is life imprisonment. In such cases, the Court has no discretion to impose a sentence lower than 2 years. The age of the convict should not be disregarded as it is crucial because he lived up to 60 years without breaking the law. It remains the policy of the law to exercise leniency. The fact of the convict's sickness due to Covid19 is on court record. Counsel reminded the Court that while a plea of guilty is a mitigating factor, a plea of not guilty is not reason for passing a higher sentence.
11. Counsel also submitted that the convict should not be seen in a negative light by this Court because he used the rights the law provided to him, and the applications made before the Court should not be used against him. The fact that the plea bargain did not work should not be used against him as doing so will remove the exercise of such rights. The convict is personally doing the work of the foundation. Counsel also emphasized that the Court should consider the manner in which the offence was committed, in that the convict did not commit the offence in a brazen manner and there was no arrogance in the process. The reports made to Anti-Corruption Bureau (ACB) are sometimes proved and sometimes not, but a citizen has a right to report corruption.
12. The convict then took an oath and confirmed the facts as outlined by his two Counsels, on age, family and business. In cross examination by the State, the convict confirmed that he had not brought any evidence to prove the facts in mitigation as outlined by his Counsel.

### **The Sentence**

13. The offences the under Part IV of the Corrupt Practices Act, to which the offences the convict has been found guilty are punishable by a term of 12 years imprisonment. Section 34 of the Corrupt Practices Act, which is under Part IV, states that,



*"Any person who is guilty of an offence under this Part shall be liable to imprisonment for a term of twelve years".*

It must be recalled that the conviction is on two counts of offence of offering an advantage to a public officer, and it is those two offences which are being punished with a term of 12 years imprisonment each.

14. In statutory interpretation, the sentence that is indicated in the law is usually the maximum sentence available to the sentencing court. The sentencing court imposes a sentence in its discretion within that maximum sentence, although the imposition of the full maximum sentence remains open to the sentencing court. However, it is understood that the imposition of the maximum sentence is reserved for the worst offender, as was held in the case of ***Kamil & Yaghi v Republic [1973-74] 7 MLR 169***, that maximum sentences are intended for use in the worst instances of the offence. In that case, after weighing all the evidence, Chief Justice Skinner stated when passing a maximum 5-year sentence for the offence of *demanding property with menaces*, that;

*"I bear in mind that they are men of previous good character, but people who do desperate things like this are likely to do it again, and the public must also be protected from others who may be tempted to emulate their example".*

15. This Court subscribes to the words of the then Chief Justice Skinner as quoted above. Indeed, regardless of the convict's uprightness and his being a first-time offender, his actions showed a desperate streak, coupled with impunity and use of power, influence and wealth, which shows that there is a high likelihood that he may do the same again. The public and society at large needs to be protected from actions of such persons as the convict herein, who, if their actions succeed, would cause a catastrophic constitutional crisis. Counsel for the convict has submitted that the offence was not committed in a brazen or arrogant manner. This Court disagrees. The actions of the convict were calculated and were brazenly and arrogantly executed as will be seen below.

16. In mitigation, Counsel for the convict has submitted that due to the existing mitigating factors, the convict should be considered for a non-custodial



sentence. The mitigating factors in brief are to do with the fact that the convict is a first-time offence, he is 60 years old, the effect of the conviction means that his character and businesses are negatively affected, his health being compromised because he suffered from a Covid19 infection, and that his social responsibility activities will adversely be affected, both locally and internationally. Section 339(1) of the CP&EC provides that;

*"When a person is convicted of any offence (not being an offence the sentence for which is fixed by law) the court may pass sentence of imprisonment but order the operation thereof to be suspended for a period not exceeding 3 years, on one or more conditions, relating to compensation to be made by the offender for damage or pecuniary loss, or to good conduct, or to any other matter whatsoever, as the court may specify in the order."*

17. The above section does not make the imposition of a suspended sentence mandatory, but discretionary. The law gives a sentencing court discretion to pass a sentence within the stipulated maximum sentence outlined by the law. In this case, regardless of the fact that the sentence is not fixed by law, each of the counts of offence are punishable by a term of 12 years imprisonment and this Court has discretion in passing an appropriate sentence up to 12 years imprisonment.

18. The convict has been convicted of a felony. Felonies are offenses which are serious in nature, and a felony is defined in section 4 of the Penal Code as an 'offence, which is declared by the law to be a felony, if not declared to be a misdemeanor, is punishable, without proof of previous conviction, with death or with imprisonment with hard labor for three years or more'. Section 340(1) of the CP&EC states as follows terms:

*"(1) Where a person is convicted by a court of an offence and no previous conviction is proved against him, he shall not be sentenced for that offence, otherwise than under section 339, to undergo imprisonment, not being imprisonment to be undergone in default of the payment of a reasonable fine, unless it appears to the court, on good grounds, which*



*shall be set out by the court in the record, that there is no other appropriate means of dealing with him”.*

Looking at the circumstances these offences and the environment under which they were committed and the goal for the commission of these offences, this Court concludes that these offences are indeed felonies that ought to be punished by a custodial sentence of more than 3 years imprisonment.

19. While the general principle is a sentencing court should be slow in sentencing a first-time offender to a custodial sentence. However, the law allows such first-time offenders to be sentenced to a term of imprisonment, where it is clear that there is no suitable way of dealing with the offender. Since these offences are felonies, it would not be appropriate for this Court to impose a non-custodial sentence regardless of the fact that the sentence is not fixed by the law. Looking at the aggravating factors discussed below, the appropriate sentence is a custodial sentence.
20. This Court notes that while it is on record that the convict tested positive to Covid19 around March 2021, there is no medical report that shows that the convict's health has been compromised, and to what extent it has been so compromised. Counsel made submission of fact and the convict confirmed the facts under oath, but what is missing is a clear medical report that would persuade this Court to impose a sentence with the health issue in consideration. The burden of proof is on the convict to satisfy this Court on a balance of probabilities that his health is really compromised. Furthermore, the convict can still access medical help to deal with any health issue while he is in custody. Indeed, the Constitution of the Republic of Malawi stipulates that every sentenced prisoner shall have the right to medical treatment at the expense of the State, see section 42(1)(b) of the Constitution.
21. Counsel for the convict made submissions of the social responsibilities that the convict has. This Court finds that the fact that the convict has involved himself in social responsibility programs or supporting football clubs does not absolve him of his guilty and does not excuse him from committing acts of corruption. It can be seen in his own evidence in court that the convict liked to give his money



away, but he did so in disregard of the laws that separate individuals and their companies.

22. While the major mitigating factors is that the convict is a first-time offender and his age as seen above, there are a number of aggravating factors in the commission of this offence. Firstly, the circumstances under which the offence was committed and the intention for committing such an offence, points to the seriousness of the offence. This was not a mere offence involving dishonesty, but an offence committed brazenly and with impunity, and aimed at hijacking the democratic and rule of law process. The circumstances were such that if he had succeeded, the resultant atmosphere in the country would have descended into untold strife.
23. Counsel for the convict has entreated this Court to exercise mercy, mostly because the outcome of ***Constitutional Reference Case Number 1 of 2019*** was not affected by the conduct of the convict. It is trite and it was also held in the case of ***Republic -vs- Shauti (1975-77)8 MLR 69***, that the punishments the courts pass in any case must fit both the criminal and the crime and that they be fair to society, while at the same time be blended with a measure of mercy. This measure of mercy does not operate in a vacuum but depends greatly on the circumstances under which the offence was committed, and the full consideration of all the relevant circumstances surrounding the offence. Sentencing courts must always be on guard in considering that measure of mercy, and, in the words of Chombo J (as she was then) in the case of ***Republic vs Masula & Others, Criminal Case No. 65 of 2008 (unreported)***, courts must still pass sentences that are meaningful, reflecting the gravity of the offence; and if courts fail to do so, members of the public could start asking themselves whether 'something has gone wrong with the administration of justice'. In this case, the purpose of the offence is to both reform the offender and also deter others who may be influenced to commit similar offences and protect and preserve the course of justice and integrity of the whole judicial system.
24. Secondly, the evidence clearly shows that, contrary to the claims that the convict was an upright person, he was intending to manipulate and defeat the



course of justice at the most of tense periods in the history of Malawi. Not only that, but the convict was also desperately intending to soil and compromise the integrity of the panel of the Judges hearing the case, in particular Justice Michael Atanazio Tembo and Justice Healey Potani. As stated above, a desperate man who goes about wanting to get his selfish wishes and compromises other persons in the process without any regard to the consequences of his actions, and how such actions would destroy those he sets out to corrupt or accuse falsely, is likely to do so again. At his age, the convict did this brazenly and arrogantly, with the comfort and familiarity of one who may have done the same before.

25. Thirdly, this Court is very much aware of the far-reaching effects of corrupt practices. Many have written on the ills of corruption. This Court agrees with the description of corruption in the report of the Secretary General to the United Nations compiled by the Commission on Crime and Prevention and Criminal Justice, 10th Session, Vienna, May 8 – 17, 2001 (United Nations, E/CN.15/2001/3), as cited in the case of ***Jumbe and Another v Attorney General Constitutional Cases Nos. 1 and 2 of 2005 (unreported)*** that

*“Corruption is multifaceted and affects every Society regardless of its level of development and the sophistication of its organization. The effects of corruption vary, as do its manifestations. While underlying causes may range from the societal to the institutional, one clear conclusion is that corruption exacerbates other problems and derails development efforts while it wreaks havoc on efforts to build and consolidate or further develop democratic institutions. Another key element of the phenomenon is its progressively increasing complexity, as the stakes get higher”.*

26. In this case, the stakes were so high, and the convict's actions were aimed at derailing, defeating and compromising the course of Justice, as well as defeat the process of building, developing and consolidating the gain in the democratisation process in Malawi. Further, the intended act was meant to compromise governance and rule of law institutions, with an almost certainty of curtailing the rights and freedoms of Malawians in exercising various rights



enshrined in the Constitution. The ramifications and effects of a corrupted or perceived to be corrupt judicial system would rob the citizenry of the only safeguards they have against abusers of power.

27. The seriousness of the crime, in this Courts view, outweighs the mitigating factors presented by the convict. The convict was adamant to succeed in his actions without any consideration of the consequences. This Court agrees with the State that the convict was sure that he could use his money, position and influence to subvert the course of justice without any consequences attaching to his actions. The brazen manner in which he discussed his venture in the Audios/Transcripts shows a person who voluntarily planned and intended to commit a crime with impunity. We all know that corruption breeds impunity: impunity to do, act, and engage in criminal activities without the fear of consequences, and impunity to consider oneself as being above the law. If no adequate action or penalties are meted out, the judicial system and the rule of law would not be able to protect the rights of the citizens, nor would democratic and governance institutions be able to function properly.

28. Accordingly, and after considering both the mitigating and aggravating circumstances, and concluding that the aggravating factors outweigh the mitigating factors, this Court imposes a custodial sentence of 9 years imprisonment with hard labour on the 1<sup>st</sup> count and 9 years imprisonment with hard labour on the 4<sup>th</sup> count. Since the offences were committed in one transaction, the sentences will run concurrently with effect from the date of conviction, which is the 10<sup>th</sup> day of September, 2021

It is so ordered.

**Pronounced in Open Court at the Principal Registry in Blantyre this 5<sup>th</sup> day of  
October 2021.**

  
**D. A. DeGabriele**  
**J U D G E**