IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY
CRIMINAL APPEAL NO. 5 OF 2019
(Being Criminal Appeal No. 345 of 2017)

(In the First Grade Magistrate Court Sitting at Liwonde)

ROBERT MISANJE	1ST APPELLANT
ELLAIJAH MAKHALILA	2ND APPELLANT
ALICK MWALE	3RD APPELLANT
MCCATHY ALEXANDER	4TH APPELLANT
ANDERSON PHIRI	5TH APPELLANT

AND

THE REPUBLIC — RESPONDENT

Ntaba, J

CORAM : NTABA, J.
: Mr. N. Mdazizira, Counsel for the Appellants
: Mr. S. Chisanga, Counsel for the State
: Mr. Davie Banda, Official Interpreter and
: Mr. G. Chilombo, Court Reporter

Ntaba, J.

JUDGMENT

1.0 BACKGROUND

1.1 The First Grade Magistrate sitting in Liwonde convicted the five (5) Appellants of the offence of theft by servant contrary to section 286(1) of the Penal Code (hereinafter referred as 'the Code'). The said Appellants before their conviction were all employed as security guards at Malawi Fertilizer Company. The Appellants pleaded not guilty and after a full trial, they were convicted and sentenced to three (3) years imprisonment with hard labour effective from 22nd February, 2019.

1.2. The Appellants brought an appeal against the conviction and sentence. They

raised the following as grounds of appeal –

1.2.1 the learned Magistrate erred in law in applying selective and unfair test to the evidence by the defence as contrasted with that given by the prosecution;

1.2.2 the learned Magistrate erred in law in accepting wholesale the evidence submitted on behalf of the Respondent without applying his mind as to whether that testimony was true or not;

1.2.3 the learned Magistrate erred in law in making its finding without strictly applying the right standard of proof and failing to satisfy himself that the Appellants were indeed seen taking the bags of fertilizer;

1.2.4 the learned Magistrate erred in law in finding that the prosecution had proven its case beyond reasonable doubt when in fact there was so much doubt as to who might have stolen the bags of fertilizer between the Appellants and those who have been acquitted, since all had been security guards at the company in the period in question;

1.2.5 the learned Magistrate erred in law and misdirected himself when he found that it was only the Appellants who were in control and custody of all the materials when in fact the other security guards too (employees) had access to the office separately when other were not on duty or on off duty (shift);

1.2.6 the Magistrate failed to consider the alternative non-custodial sentences before imposing a sentence of imprisonment on the Appellants who have not previously been convicted of any offence and thereby failed to comply with section 340 of the Criminal Procedure and Evidence Code (hereinafter referred as the 'CP & EC');

1.2.7 in all circumstances of the case the sentence of 3 years imprisonment was manifestly excessive and wrong in principle;

1.2.8 the learned Magistrate erred in law by disregarding the circumstances of the offence that it did not result in a huge loss or damage to the complainant company;

1.2.9 the learned Magistrate erred in law in failing to use more up to date sentencing trends by relying on outdated sentencing guidelines without considering the devaluation of Kwacha currency over the years;

1.2.10 the learned Magistrate erred in law and misdirected himself when he found that were aggravating circumstances without considering mitigating factors put before the court; and

1.2.11 the learned Magistrate erred in law when he passed a sentence that was manifestly excessive, cruel, inhumane and degrading punishment in the circumstances.

1.3 The Appellants supported their appeal with two sets of skeleton arguments and on their argument that the charge sheet was defective in form and substance, they cited *Nyamatcherenga v Republic,* Criminal Appeal No. 56 of 2000 (HC)(PR)(Unrep) where Justice Twea (as he then was) stated that section 286 of the Penal Code does not create an offence. It is just an aggravated from of theft. The law makes a special provision for theft by servant or clerk by making such theft more serious. The proper way of charging thus aggravated from of theft is to cite section 278 of the Penal Code as read with section 286(1) of the Penal Code. They further argued that the charge was defective because in their reading of the elements of the offence together with the

evidence adduced in court tthe items stolen were not in the possession of the Appellants as per ***Michael Chanza v Republic,*** Criminal Appeal No. 170 of 200 5(HC)(PR)(Unrep) meaning they should not have been found guilty.

1.4 They further argued that the State failed to prove the case against the Appellants beyond reasonable doubt as is required in criminal matters. It was their contention that even if in the lower court, the State had managed to discharge the standard, according to ***R v Msosa*** [1993] 16 MLR 734 where Justice Chatsika stated that even where all the elements required to be proved by the prosecution have been proved beyond reasonable doubt, the court must consider the evidence in defence. If such evidence reaches a point where in must be exercised in favour of the accused and must result in his acquittal. The Appellants argued that the evidence from the CCTV footage is inconclusive as to the identity of the people responsible for the stealing the fertilizer from Malawi Fertilizer Company. Further, the company had 48 guards in total at the branch where the Appellants worked in Liwonde and they worked in shifts. Accordingly, any person who was duty during the time of the theft could have stolen the 25 bags of fertilizer. Further, the CCTV does not clearly indicate that it was the Appellants stealing. Additionally, they argued that the State did not produce evidence that they were on duty during the time of the theft nor whether a stock taking was undertaken to ascertain that the 25 bags as such was done without any documentary evidence. Lastly, they argued that in terms of the fertilizer, control of the same and access to was with other guards as well including those working in the afternoon. They prayed that the lower court decision should be faulted for the lack of evidence as such they conviction should be quashed, and sentence set aside.

1.3. The State in their response to the appeal, argued that the Appellants were present on 25th and 27th November, 2018 and that their guard office is by the gate as such they had opportunity to see the person leaving with the bag of fertilizer on the bicycle. Further they argued on a number of occasions for instance on 4th December, 2018, footage showed Gift Kaombe trying to cover the camera whilst Wille Zalimba passed by and the camera was covered after which a man is seen carrying a bag of fertilizer. It was the State's contention that despite the CCTV footage not showing the Appellants taking the fertilizer but they could not provide evidence as to their reason for covering the cameras if not for nefarious reasons. The State also indicated that in terms of the period indicated in the charge sheet that the Appellants were all present on duty including when the above dubious issues were happening.

1.4 In terms of the defective charge, they argued that *Nyamatcherenga* case does espouse that principle that section 286 does not create an offence however it was their contention that such error in the charge sheet could be remedied by section 3 of the CP & EC because no miscarriage of justice was occasioned by them being charged with an aggravated form of theft because the *Nyamatcherenga* case stated that after due consideration of the above defects and taking into account that the appellant never objected to the charge at trial and that he never argued the said point at appeal. The court found that he had not been prejudiced at all by these defects. It found that section 3 and 5 of the CP & EC could be properly invoked as such it upheld the substance of the charge answered by the appellant in the lower court as well as High Court.

1.5 The State argued that a miscarriage of justice occurs where by reason of mistake, omission or irregularity in the trial the accused has lost a chance of acquittal which was fairly open to him. The State also argued that since the trial in the lower court had concluded as such section 254 of the CP & EC could not be invoked. Lastly, it was the State's assertion that in terms of the sentence, the lower court had considered the issues of a non-custodial sentence including the Appellants being first offenders and that the sentence of 3 years was not excessive since they had breached a position of trust and the maximum sentence was 14 year. The State prayed that the appeal should be dismissed and the sentence upheld.

2.0 THE LAW

2.1 Firstly, let us get the formalities of how this court is seized of the matter through an appeal. It is therefore seized by operation of law, under sections 42 (2) of the Constitution, 25 and 26 of the Courts Act as well 346 of the CP &EC. In determining, this Court is requested to examine the record of any criminal proceedings before any subordinate court for the purpose of ensuring that the trial at the lower court was correctly handled, legal or proper in terms of procedure as well any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such subordinate court.

2.2 Malawian criminal law has made it fundamental that substantial justice should always be done without undue regard for technicality shall always be adhered to in all criminal matters as stipulated under section 3 of the Code. This issue is what this court has principally adhered to in the examination of this appeal. However, this Court also acknowledges that where a finding by a lower court results in a failure of justice, such failure must be rectified. The rectification should done at the earliest possible time as per section 5 of the Code.

2.3 The offence of theft by servant is defined under section 286(1) of the Code and the main charging is section 278 of the Code. In ***Rep v Sydney*** 1 ALR MAL 143 where it was stated that in the offence of theft by servant, the prosecution must prove the following (1) the employer-employee relationship, (2) that the stolen property is the property of the employer or that the property came into the employees possession on account of his employment and (3) that the employee did steal the stated property. Whilst the case of ***Kajuma v Republic*** 8 ALR Mal Series 235 stated that a person is deemed to have acted fraudulently if they have an intent to permanently deprive the general or special owner of the thing. Interestingly, in ***Mapopa Nyirenda v The State***, Criminal Appeal No. 6 of 2011 (HC)(PR)(Unrep) stated that the elements the State is always burdened to prove in a theft charge are always - (a) the taking of property capable of being stolen. (b) The taking should be without the consent of the owner (c) the taking should be with the intention of permanently depriving the owner of the thing capable of being stolen. The court went further to state that evidentially, the state must prove that the accused is the one who satisfied all the elements of the offence. In this case, the above aspects of the offence's elements were satisfied by the State.

2.4 Furthermore, in the present case, that there was a taking of fertilizer bags is

not in contention. That the taking was with the intention of permanently depriving the owners of the fertilizer is also not in contention. In fact, it is not in contention that fertilizer is a thing capable of being stolen. It is also not in contention that the alleged bag belonged the Appellants' employers, Malawi Fertlizer Company. What this Court was being asked to determine was whether the State had proven that it was the Appellants that had stolen the fertilizer, that is, it was them who were seen on the CCTV cameras carrying bags of fertilizer from Malawi Fertilizer Company premises or any other evidence proving the same.

2.4 It is trite law that unless otherwise provided by statute, the burden of proof at all material times remains on the prosecution as per s. 187 of the CP & EC as well as the landmark case of ***Woolmington v DPP*** [1935] AC 462. It has further been held that any doubts that a Court entertains in respect of the guilt of the accused must be resolved in favor of the accused. Arguably, the State's evidence on the Appellants is that they were present during the nights that bags of fertilizer were seen leaving the premises as night and that they were tampering with the cameras to conceal something. It is also clear that the CCTV footage relied upon by the State did not definitively and conclusively identify the five Appellants as the people who were captured on camera carrying bags out of the company's Liwonde branch. Further in ***Republic v Msosa***, the court therein stated where there is some doubt being created in the evidence even if the burden has been discharged, the same must be exercised in favour of the accused. In this case, that doubt was present in this case should have been exercised in favour of the Appellants.

2.5 Turning to defective pleas or charges, Malawian courts have ruled on various occasion on the effect of defective indictments *viz-a-viz* a court's finding. Such decisions have at most times been that defective indictments have been held to invalidate the trial court's decision. Courts have held so because a defective charge means the person did not get a fair trial especially in terms of section 42 of the Constitution. For instance, in ***Rendall-Day v Republic*** [1966-68] ALR Mal. 155 which upheld the principle that the particulars of the offence are meant to bring sufficiently to the notice of the accused the precise nature of the charge against him so that he or she is able to prepare his defence. In recent times, Justice Chikopa (as he then was) in ***Gusto Daston Ndalahoma v the Republic***, Criminal Appeal Number. 2 of 2008 (HC)(MZ)(Unrep) stated that the court's duty is to ensure that the accused is tried before an impartial and independent court and not to assist the prosecution in fixing defective charges by amending them. He observed as follows –

> *"Regarding the latter entitlement we also are of the view that an accused must in reasonable time before commencement of trial be given sufficient particulars of the charge against him. Such particulars as will enable him know the nature of the case against him and prepare his defence accordingly. In the Visomba case we said a mere mention of the actual charge is not enough. The accused should be given inter alia a list of the witnesses and a summary of their expected testimonies. Talking specifically about particulars of an offence charged it is essential that they give as accurate a picture of the allegations against an accused as possible. This is not just because you want to inform the accused of the allegations against him with sufficient particularity but*

because it is only on the proof of the particulars as stated that an accused is convicted..

It is vital therefore that any decision to amend the particulars should be the exclusive preserve of he who brought them to court that is the prosecution. Equally important is the fact that such amendment should be as permitted under section 151 of the CP&EC but within the context of the right to a fair trial."

3.0 ORDER

3.1 This Court declares that the proceedings in the lower court had doubt which should have been resolved in favour of the Appellants. Additionally, the procedural irregularities that were present including the defective charge sheet which this Court tasked with upholding the constitutional freedoms and rights which the Appellants are guaranteed as well as recognizing the fundamental principles of criminal law espoused in section 3 and 5 of the Criminal Procedure and Evidence Code cannot uphold the same to be legal.

2.2 Accordingly, this Court orders that the conviction and the sentence imposed are hereby set aside which results in the Appellants immediate release.

I order accordingly.

Made in Open Court this 31st March, 2022.

Z.J.V. Ntaba
JUDGE