IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 19 OF 2021

(Being Criminal Case No. 663 of 2020 before the Senior Resident Magistrate Court sitting at Mulanje)

LIKE PANGANI AND ELEVEN OTHERS
V
REPUBLIC

Coram: Justice Vikochi Chima
Mr Charles Chayekha, Counsel for the defendants
Mr Mphepo, Counsel for the State
Mrs Moyo, Court Clerk

SENTENCE

Chima J

The twelve appellants, Like Pangani, Frank Lenard, Layton Harry, Haliliya Darson, Gift Kadzuwa, Friday Sikoti, Jubeck Charles, Fatsani Adam, Raphael Masasa, Crispin Pindala, Facio Sailes and Patrick Chikonyo, together with twelve others were charged with destroying forest produce (contrary to section 64 (1) of the Forestry Act) and squatting (contrary to section 64 (1) (c) of the Forestry Act). Like Pangani, Frank Lenard and Friday Sikoti were convicted of only the offence of squatting contrary to section 64 (1) (c) of the Forestry Act on their own pleas of guilt. The rest of the appellants were convicted of both offences, also on their own pleas of guilt.

On the first count, Haliliya Darson, Gift Kadzuwa, Fatsani Adam, Facio Sailes, Patrick Chikonyo, Raphael Masasa were sentenced to 48 months imprisonment with hard labour. On the same count, due to their young ages, Crispin Pindala, Layton Harry and Jubeck Charles were sentenced to 24 months imprisonment with hard labour. On the second count, all the appellants except Like Pangani, Friday Sikoti, Jubeki Charles, Frank Lenard, Crispin Pindala and Layton Harry were sentenced to 48 months imprisonment with hard labour. The said Like Pangani, Friday Sikoti,

Jubeki Charles, Frank Lenard, Crispin Pindala and Layton Harry were due to their young or old age sentenced to 24 months imprisonment with hard labour on the second count, for Layton Harry was 66 years old at the time and the other five convicts, some were 19 years old and others were 20 years old.

The appellants are appealing against the sentences as being on the higher side considering that the appellants are first offenders who could be availed a suspended sentence under sections 339 and 340 of the Criminal Procedure and Evidence Code; and also considering that the provisions under which they were convicted give the option of a fine. The appellants also argue that the court below did not weigh properly the gravity of the offence that each of the appellants committed.

Section 64 (1) (a) of the Forestry Act as amended by the Forestry (Amendment) Act 2019 states as follows:

> 'Any person who fells, takes, cuts, removes, collects, uproots any tree and other vegetation or forestry property in a forest reserve or protected area commits an offence and shall upon conviction be liable to a fine of K5, 000, 000 and to imprisonment for a term of ten years.'

And section 64 (1) (c) of the same states:

> 'Any person who squats, resides, erects a building, hut, livestock enclosure or any structure in a forest reserve or protected area, commits an offence and shall be liable to a fine of K5, 000, 000 and to imprisonment for a term of ten years.'

It is true that first offenders must not be sentenced to custodial sentences unless for good reasons.[1] It is also true that where the law gives an option of a fine, the offender should first be considered for the fine.[2] The magistrate in the instant case outlined the aggravating and mitigating factors that led him to impose custodial terms. These were that:

1. The government spends a lot of money in ensuring that forests are protected to the extent of involving the army to come to its rescue.
2. The forest department also loses income when people destroy forests which are meant for its revenue.
3. These forestry offences are rampant across the country and there is need to protect forest reserves.
4. The offences are felonies.
5. The offences were committed in a group.
6. The offences were premeditated and well planned.
7. Some army officers were injured in the process of apprehending the offenders.

He isolated the fact that the convicts were all first offenders, that they had all pleaded guilty and also that some individuals were young while some were quite old, as mitigating factors. I agree with the analysis that the magistrate made on the factors that were to influence the sentence. Counsel for the appellants argued that the magistrate did not assess the gravity of the offence of

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[1] Sections 339 and 340 of the Criminal Procedure and Evidence Code
[2] *Rep v Kaleso* 12 MLR 354

each convict individually but that he imposed a rather wholesale kind of sentence for the convicts. That is not entirely true. For, clearly, the learned magistrate made distinctions in the sentences, with the young and the old receiving lesser sentences than their counterparts. The court below visited the sight and appreciated the damage. The state estimated that the trees lost were in the region of two hundred million kwacha. These offences were committed in a group. This court cannot impose on the state the impossible task of ascertaining how many trees each of the convicts fell. Obviously some of the convicts destroyed more trees than others. It is even possible that some of the trees were felled by other people or even prior to the convicts coming on the scene. There are many possibilities indeed. Yet, even in this situation where the state could not establish the extent of each man's offence, the fact is these offenders were cutting down trees and some had even squatted there the previous night for this purpose. These offences were premeditated indeed and well planned. These offenders were in a group and they sought to harm the army officers who came to stop their illegality. Taking into account all the circumstances of this case, I find the the aggravating factors far outweigh the mitigating ones and I consider the sentences very much in order. I dismiss the appeal.

Made in open court this day the 26th of January 2022

Chima J