IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL DIVISION

CRIMINAL APPEAL CAUSE NO. 24 OF 2019

(Being Blantyre First Grade Magistrate Criminal Case No. 195 of 2019)

BETWEEN:

RAPHAEL JOHN BANDA.....APPELLANT

AND

THE REPUBLIC.....RESPONDENT

CORAM: THE HON. JUSTICE MR. S.A. KALEMBERA

Mr Salamba, Assistant Chief State Advocate, of Counsel for the Respondent

Mr Maele, of Counsel for the Appellant

Mrs Chanonga, Official Interpreter

JUDGMENT

Kalembera J

The Appellant, Raphael John Banda, appeared before the First Grade Magistrate Court sitting at Blantyre, charged with the offence of theft by servant contrary to section 286 of the Penal Code. The particulars of the offence averred that Raphael John Banda between October 2017 to January 2019 at Chirimba Industrial site in the District of Blantyre being a servant employed by Mr Zagaf stole money amounting to MK10, 081,210.00 property of Mr Zagaf. He pleaded not guilty. After a full trial he was found guilty, convicted and sentenced to 5 years imprisonment with hard labour (IHL). The Appellant being dissatisfied with the conviction and sentence has brought this appeal against both the conviction and sentence.

The Appellant has filed the following grounds of appeal:

1. The lower court erred in law in allowing the Appellant to enter a defence when the Court had not made a finding that the Appellant had a case to answer.
2. The lower court erred in law in convicting the Appellant of the offence of theft by servant when there was no any evidence that the Appellant stole the money.
3. The sentence of 5 years is manifestly excessive.

This being an appeal from the subordinate court, I am mindful that it is trite that such appeals be dealt with by way of rehearing, that is, I must look at and analyze all the evidence in the court below. The Respondent paraded four witnesses to prove their case, and the Appellant testified in his defence.

PW I was Imtiaz Abdul Latif. It was his testimony that he works for Zagaf Transport as Workshop Manager. He knew the Appellant as their Accountant. In October 2017 an invoice was brought to his attention for him to identify. It was from Mr Jose, a co-accused of the Applicant in the lower court. A colleague had noticed that the signature on it was not his and some items on it had not been delivered. He also noted that it was a carbon copy and not original. It involved an amount of K900, 000.00. He reported the matter to his administration and they started investigating. It resulted in a figure of K10, 000,000.00 as having been paid on fake invoices. The matter was reported to the police upon realizing that the invoices involved were fake. His signature was forged.

In cross-examination he told the court that the invoices or documents were prepared by the Appellant. The boss promised to reward the Appellant for discovering the fraud but he later discovered that the Appellant was part of the fraud.

In re-examination he told the court that the Appellant was the Accountant and he was the one making payments.

PW II was Victor Nalikuta. It was his testimony that he works as an Accountant for Zagaf. He knew the Appellant as an accountant for the cement production section of the company. On the 8th day of February 2019 the police visited the financial controller and they were invited to the office of the Personal Assistant to the MD. When they got there they were informed that some invoices had forged signatures of the boss. Together with the Appellant they were taken to the police. They were each interviewed. He further informed the court that when vouchers had been transacted, the Appellant would call the 2nd defendant (accused) to meet him at NICO car park where he would share the money with the 2nd accused. The 2nd accused would then give him about four or five thousand.

It was his further testimony that he has accompanied the Appellant on such trips for over fourteen times. He started work in January but the vouchers were from November. He was aware that vouchers had been prepared and that the money would be given to the 2nd accused.

In cross-examination he denied that he was giving evidence in favour of the company in order to preserve his job. He further reiterated that it was the Appellant who uncovered the fraud. They started following up the matter and uncovered the fraud. It was him who was giving the invoices to the Appellant upon discovering them. It was him who prepared the schedule because the fraud was at Zagaf.

In cross-examination by the 2nd accused he reiterated that he was being given four to five thousand kwacha by the 2nd accused. The money was being taken from the company and was being given to the 2nd accused. It was from Zagaf. He did not know how they were sharing the money. They were sharing the money on the back seat. All the invoices he brought did not have his name but were written Nekisa. There was no proper way to know what goods had been brought.

PW III was Ram Mahindra. It was his testimony that he works at Zagaf as Workshop Supervisor. That he knows the Appellant as an accountant whilst the 2nd accused as supplier of spares at Zagaf Transport. On 30th January when the Appellant came with an invoice to check if he had received the spares from the 2nd accused he told him that he had not. When he looked at the signature he discovered that it had a fake signature and not that of Imtiaz the Workshop Supervisor. He went to Imtiaz who discovered the signature and ordered immediate investigation. He identified the invoice which was of K990 ,000 .00. Some of the items were also strange as they do not purchase from Ndirande. He also identified an invoice with the correct signature of the Workshop Manager.

In cross-examination by the Appellant he first told the Appellant that the signature was wrong and when the Appellant insisted he took it to inquire from the Workshop Manager. The Appellant had come to him to verify if there were spares from Ndirande. That the Appellant had never come to him to verify if spares had been delivered.

In cross-examination by the 2nd accused he told the court that he does not know him but knows that he is Lovemore. He further told the court that it was himself who noticed the signature and not that the Appellant came to report about it.

PW IV was Detective Sub/Inspector Henry Kakuya based at Chirimba C.I.D. He told the court that he knew the two accused because of this case. That it was on 8th January 2019 when Imtiaz Latif, a Workshop Manager at Zagaf lodged a complaint of theft of money through forgery. The complaint was against Joe Gwamba. He commenced investigations which led to the arrests of the Appellant and one Nalikata. During a confrontation the 2nd accused mentioned the 1st accused and exculpated Nalikata. He recorded caution statements from the Appellant and his co-accused. The Appellant denied the charge whereas the 2nd accused admitted the charge. He tendered all the invoices concerned.

In cross-examination by the Appellant he told the court that all the forged invoices were in the name of Nekisa and there is a phone number belonging to the Appellant. The invoice book was found in the vehicle the Appellant was using. He further informed the court that the Appellant hired the vehicle, dumped it and escaped. They seized the vehicle and the driver mentioned the Appellant as the one

who hired him. That the Appellant was the owner of the invoice book. He never assaulted the Appellant.

In re-examination he told the court that the phone number appearing on the invoices is for the 2nd accused.

DW I was Raphael John Banda. It was his testimony that it was end January 2019 when the 2nd accused brought him an invoice. He usually brought invoices. On a certain day he brought an invoice to him but because Mr Imtiaz was in the office he did not handover the invoice to him. He only handed it over when Imtiaz left. This surprised him and he went downstairs to ask Imtiaz but he found him busy. So he went to Ram Mahindra to ask him if the goods in the invoice were received. He told him that it was Imtiaz who received that sort of goods. Upon checking the invoice it was noted that the signature was not that of Imtiaz. They went to meet Imtiaz and handed the invoice over to him. Imtiaz was alarmed that the invoice was not his and it was a carbon copy.

It was his further testimony that he was mandated to call the 2nd accused on the pretext that his payment was ready. He called him and he indicated that he would come around past 5 pm. Whilst they were discussing the owner of the company Mr Aslam Gaffar was passing by and Imtiaz briefed him about the incident. He asked as to who had discovered the fraud and Imtiaz mentioned him. He undertook to give him a reward. The 2nd accused never appeared up to five days.

On 8th February 2019 at around 3 pm police officers from Chirimba came to their offices. Within the four days that the 2nd accused was not turning up they started searching for all invoices that were fake and they managed to get invoices that had a fake Imtiaz signature. He was the one doing the whole process. He was shocked that the one who was taking over the documents was Nalikuta (PW II). Him and Nalikuta were told to accompany the police to the police station. There he found Lovemore Nekisa. Nekisa was taken from the cell to the C.I.D office.

It was his further testimony that Nekisa was told to repeat the story he had earlier told the C.I.D. He told them that he got the invoices where he forged the signatures from the Appellant. He stated that whenever the money was cashed they shared the money and the Appellant got a bigger share. He further told the police that it was the Appellant who called him and alerted him that the fraud had been

uncovered. And he further stated that it was him who introduced him into the scam. He was not given a chance to question him. Nalikata was released the next day on a Saturday after he had also told the police that he had seen him sharing the money with the 2nd Accused.

In cross-examination by the 2nd Accused he denied calling the 2nd Accused to come as Imtiaz had gone out. That he did not know the signature of Imtiaz. He did not know how many documents by Imtiaz came into his office. That he was accountant for cement products and was not conversant with the signature of Imtiaz. That he was not the one paying.

In cross-examination by the Prosecutor he told the court that if a duplicate document is not properly checked it can be used to cash money. That the system at Zagaf was poor. He further told the court that he was not the one using forged invoices. It was brought to him by Lovemore Nikisa. Ram Mahindra is the one who realized that the signature was fake. He received about five invoices from Nikisa and some were original and some fake. He conceded that indeed Nalikuta said he was with him every time they went to share money with the 2nd Accused.

He further told the court that the money he shared with the 2nd Accused was in payment of his goods, and it did not matter where the payment was made. The invoices he received were processed and paid normally without suspecting any forgery.

DW II was Mercy Banda. It was her testimony that the Appellant came from work and told her that he was suspicious of Nikisa for failing to hand in an invoice. That he became suspicious and noticed that the signature was fake as it was from carbon copy and he decided to investigate if the goods had been delivered.

In cross-examination by the 2nd Accused she explained that she does not work at Zagaf. She could not tell if one can be paid on a fake invoice. She did not believe that her husband (Appellant) could lie.

In cross-examination by the Prosecutor she told the court that she did not know the charges; and that it was not the first time for the Appellant to save the company money.

DW III was Joes Mkwamba (also known as Nekisa). He told the court that he is a supplier to Zagaf Transport since 2015. He would bring goods from an order from Mr Imtiaz. In 2017 he met the Appellant who told him that he should find him an invoice book. That the Appellant told him that he would sign it and the 2nd Accused would enter the goods and they would cash. He did as agreed. He further told the court that the Appellant would call him when he felt that it was appropriate to go and deliver the invoice. He would hand over the invoice to the Appellant who would then do all the processes and arrange payments. He would then call him to get his share of the cash. He would go and meet him wherever he suggested and they would share the money.

On another day he phoned him to bring him an invoice. He went there with an invoice but found that Mr Imtiaz was in. The Appellant gave him a signed invoice and he went outside to wait. After a while he called him to go and deliver it and he did that. After three or four days he called him that he should go and get the payment. After about two hours he called him again and told him not to go to the company.

One particular day the police came looking for him. They recovered an invoice book in a car he was using. It had one leaf that needed him to fill in the items. On the second occasion the police found him at Mt. Soche and arrested him and told him that it was in respect of this case. They interrogated him and he explained just as he has done in court.

In cross-examination by the Appellant he reiterated that the court should believe him as he was confessing to what really happened.

In cross-examination by the Prosecutor he reiterated that from 2017 there were a lot of invoices that he delivered.

It is expected of the prosecution to prove the case against any accused person beyond any reasonable doubt. There is no burden laid on the accused person to prove his/her innocence except in exceptional circumstances. In the famous and commonly cited case of **Woolmington –v- DPP** (1935) AC 462 at pp 487 Viscount Sankey, L had this to say:

"But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence.

Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception.....No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the Common Law of England and no attempt to whittle it down can be entertained.....It is not the Law of England to say as was said in the summing up in the present case: 'if the Crown satisfy you that this woman died at the prisoner's hands then he has to show that there are circumstances to be found in the evidence which has been given from the witness-box in this case which alleviate the crime so that it is only manslaughter or which excuse the homicide altogether by showing that it was a pure accident...."

In the case of **Miller –v- Ministry of Pensions** (1947) 2 ALL ER 372 at 373 Denning, J buttressed the point as regards the burden of proof required when he stated as follows:

"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable' the case is proved beyond reasonable doubt, but nothing short of that will suffice."

This statement by Denning, J was approved by Smith, Ag. J. in the case of **Rep –v- Banda** (1968-70) ALR Mal. 96 at p. 98.

It is contended by the Appellant that PW 3 who was an accomplice, gave evidence that he took part in the theft of the cattle but the record is silent as to what happened to him. That is, the Appellant contends that there is no record that PW 3 was prosecuted or discharged or merely omitted from the indictment. I must admit, that I agree with the Respondent that at pages 53 and 54 of the lower court record the learned magistrate did state as follows:

"That the 1st and last accused with PW 3 who has been convicted and sentence on a plea of own guilty on a separate file, directly stole these cattle from the kraal of the complainant on the said particular night."

Other than what the learned Magistrate stated on record, there is no other contrary evidence to show that what the learned Magistrate said was untrue.

In the absence of any contrary evidence, I cannot disbelieve what the learned Magistrate said, though it would have been ideal to have evidence of the same. Although an accomplice is a compellable and competent witness for the prosecution, he should only be called when certain factors are satisfied. In the case of **Karima v Rep [1966-68] ALR Mal. 601, at p.607** Southworth C.J. had this to say:

"In the judgment of this court, the course taken here was wholly irregular. It may well be, and indeed it is admitted, that in strict law Swan was a competent witness, but for years now it has been the recognized practice that an accomplice who has been charged, either jointly charged in the indictment with his co-accused or in the indictment though not under a joint charge, or indeed has been charged though not brought to the state of an indictment being brought against him, shall not be called by the prosecution, except in limited circumstances. These circumstances are set out correctly in ***Archbold,*** *in paragraph 1297 of the current edition, where it is said that where it is proposed to call an accomplice at the trial, it is the practice (a) to omit him from the indictment or (b) take his plea of Guilty on arraignment or before calling him either (c) to offer no evidence and permit his acquittal or (d) to enter a nolle prosequi."*

In the first ground of appeal the Appellant contends that the lower court erred in law in allowing the Appellant to enter a defence when the Court had not made a finding that the Appellant had a case to answer. Section 254 of the Criminal Procedure & Evidence Code (CP&EC) provides as follows:

"s. 254 –(1) If, upon taking all the evidence referred to in section 253 and any evidence which the court may decide to call at that stage of the trial under section 201, the court is of opinion that no case is made out against the accused sufficiently to require him to make a defence, the court shall deliver a judgment in the manner provided for in sections 139 and 140 acquitting the accused.

(2) If, when the evidence referred to in subsection (1) has been taken, the court is of opinion that a case is made out against the accused sufficiently to require him to make a defence in respect of the offence charged or some other offence which such court is competent to try and in its opinion it ought to try, it shall consider the charge recorded against the accused and decide whether it is sufficient and, if necessary, shall amend the same, subject to section 151.

(3)……"

It is very clear the provision under section 254 (1) is mandatory and the court, when it forms an opinion that, on the evidence adduced by the prosecution, there is no case made out against the accused, the court shall deliver a judgment in the manner provided for under sections 139 and 140 of the CP&EC acquitting the accused. Thus, the judgment shall be pronounced in open court and it shall, except provided otherwise by the Code, be in writing and shall contain the point or points for determination, the decision thereon and the reasons for the decision and shall be dated and signed by the presiding officer.

On the other hand, it is not mandatory under section 254 (2) for the court to give detailed reasons as to why the accused has a case to answer. In **David Newman Manual of Criminal Procedure, K.E. Mapemba** at p.136 it was succinctly stated as follows:

"A ruling of no case to answer is one of law, not fact, and it is important, therefore, that the magistrate's reasons are recorded. Where a magistrate rules that a sufficient case has been made out for the accused to answer, he is not expected at this stage to express any opinion or to make any findings on the prosecution's evidence but may simply record: "Court rules that the accused has a case to answer and complies with section 254 (1) of the Criminal Procedure & Evidence Code."

It may well be the case that the evidence adduced by the prosecution is not sufficient to establish the Charge laid against the accused, but nevertheless is enough to show a prima facie against him with regard to a lesser offence. In such a case the magistrate should amend the Charge in accordance with section 151 of the Code,"

I fully subscribe to the views expressed by David Newman a ruling of case to answer or no case to answer. In the matter at hand, indeed the lower court did not make any ruling on whether the Appellant and his co-accused had a case to answer or not. And the Appellant rightly argues that it was an irregularity. However, the Appellant argues that such irregularity cannot be cured. The State on the other hand, relying on section 353 (2) (b) of the CP&EC contends that an appellate court has powers, in an appeal by any aggrieved person from any other order, alter or reverse such order. Thus the State contends that this court has powers to reverse the irregularity occasioned by the court below.

It is clear from the evidence adduced by the prosecution in the lower court that the Appellant was an employee of Zagaf Transport and that on behalf of the company he dealt with the co-accused who was a supplier of spares. It was also established by evidence that the Appellant was an accountant. It was further established by by evidence that the Appellant was responsible for processing invoices for payment. Some of the invoices had fake signature or in other words were forged and fake. Payments were effected on these fake invoices and the co-accused, who was the supplier, shared moneys cashed with the Appellant. Thus I am satisfied that on the evidence adduced by the prosecution a *prima facie* case was sufficiently made out against the Appellant requiring him to enter his defence.

Section 3 of the CP&EC provides as follows:

"The principle that substantial justice should be done without undue regard to technicality shall at all times be adhered to in applying this Code."

And section 5 of the said Code provides as follows:

"s. 5(1) Subject to section 3 and to 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."

In the matter at hand, did the failure by the by the lower court Magistrate to make a ruling on whether the Appellant had a case to answer or not, before calling him to

enter his defence lead to a miscarriage of justice? A court cannot definitely, call an accused person to enter his defence if in the mind of the court a prima facie case has not been sufficiently made out warranting the accused person to enter his defence. The mere fact of calling an accused to enter his defence entails that he has a case to answer. The Appellant ably made his defence. He understood what was required of him. I am satisfied that the Magistrate's failure to make the said ruling on whether the Appellant had a case to answer, and just calling him to enter his defence did not occasion a miscarriage of justice.

As earlier observed, the Appellant ably entered his defence, and went on to even call a witness as earlier intimated to the court. He was not prejudiced in any way. I am satisfied that this error by the Magistrate is curable under section 5 as read with section 3 of the CP&EC. Substantial justice must at all material times not suffer due to technicalities. All in all it is my finding that on the evidence available from the prosecution the Appellant had a case to answer and was rightly called to enter his defence. The first ground of appeal therefore has to fail and it is hereby dismissed.

In the second ground of appeal the Appellant contends that the lower court erred in law in convicting the Appellant of the offence of theft by servant when there was no any evidence that the Appellant stole the money. It was submitted that PW I did not give evidence that the Appellant stole money or that he received any money from the company or taking money from the company. It has further been submitted that his testimony was similar to that of PW III. Further, that although PW II said he witnessed the sharing of the money between the Appellant and the second accused, he did not say that the money they were sharing was stolen from Zagaf.

It has further been submitted that the Appellant is the one who uncovered the fraud and he could not do that if he was involved in the fraud.

On the other hand the State submits that the evidence was sufficient to warrant a conviction. The State submits that the co-convict (2nd accused) testified that it was the Appellant who was forging signatures and presenting the invoices for payment and the payments were being done. And that they used to share the money with the Appellant at various places in the presence of PW II. That even the co-accused

testified under oath that it was the Appellant who orchestrated the fraud. Thus the State submits that the evidence of a co-accused under oath in a court of law against another is evidence against the other subject to credibility and corroboration rules.

Section 242 of the Criminal Procedure & Evidence Code (Cap 8:01) of the Laws of Malawi (CP&EC) provides as follows:

"An accomplice shall be a competent witness against an accused person; and a conviction shall not be set be set aside merely because it proceeds upon the uncorroborated testimony of an accomplice:

Provided that the court shall take recognizance of the fact that it is unsafe to convict an accused on the uncorroborated evidence of an accomplice, and shall weigh the evidence, and if it comes to the conclusion that the evidence of the accomplice, although uncorroborated, is true, it may be used as a basis of a conviction."

In the matter at hand, the 2nd convict, as an accomplice, was therefore a competent witness against the Appellant. His evidence against the Appellant was rightly considered subject to credibility and corroboration rules. In the case of **Phiri and Others v Republic [1998] MLR 307 at p. 311** Mwaungulu J (as he then was) had this to say:

"Obviously, what a defendant in a criminal case says against another outside court is not admissible against the other. A confession is only evidence against the confessor unless the other adopts it. ***What a defendant, like what happened here, says on oath in a court of law against another is evidence against the other subject to credibility and the rules about corroboration. The court is bound to regard it and make findings on it."*** (emphasis supplied by me)

In the matter at hand the 2nd convict gave an elaborate explanation as to the originator of the fraud and how it was executed and the role he played. It was his testimony in essence, that the Appellant was the mastermind of the whole fraud using invoices which the 2nd convict provided at the request and direction of the Appellant. He further told the court about how and where they shared the stolen money after the Appellant had processed the invoices up to payment. And PW II told the court that he usually witnessed the Appellant and the 2nd convict sharing

the money at diverse places. And furthermore, PW III was adamant that he is the one who discovered the forged signature and that the Appellant did not come to him to report the fraud.

The Appellant did not dispute this but told the court that the money he shared with the 2nd convict was in payment of his goods, and it did not matter where the payment was made. The invoices he received were processed and paid normally without suspecting any forgery. One wonders how normal payment for supplies would be paid in such suspicious circumstances and not at Zagaf offices. According to PW II the said money was shared at the backseat of a car and PW II would be given K4,000 to K5,000. If these were normal payments for spares supplied why was PW II being given some money from the lot? And why was the money being shared between the Appellant and the 2nd convict if it was normal payment for spares supplied? This is a clear indication that whatever was being shared were proceeds from the fraud. A supplier who has properly supplied goods cannot be expected to share his payment with an employee of the paying company in a normal and ordinary sale of goods transaction. Thus the evidence of PW II corroborates that of the 2nd convict. It is even clear that PW II did not derive any benefit arising from his testimony. So too the 2nd convict did not benefit from his testimony which shows that it is unlikely that he colored his testimony.

It is clear that the money the Appellant and the 2nd convict shared belonged to Zagaf. It was obtained through fraud, hence it was stolen by the Appellant who was a servant or employee of Zagaf. The learned Magistrate looked at and analyzed the evidence before the court and came to the conclusion that the prosecution had proved to the requisite standard of beyond reasonable doubt the case against the Appellant and the 2nd convict. As regards the guilt of the Appellant on the evidence available the learned Magistrate found as follows:

"The witness told the court in further cross-examination that the 1st accused came to inquire from him if the goods on the invoice had been delivered and not about the dubious signature.

The 2nd prosecution witness told the court he used to accompany the 1st accused to divers places where he went to pay the 2nd defendant sums of money. It was his evidence that it was on numerous occasions.

This evidence corroborates with what the 2nd defendant stated, He was clear that the 1st defendant paid him the monies at various spots in the city of Blantyre and not at the company premises.

Perhaps all that being aside, one wonders how the signatures that were obviously forged were passing through him for payment without him noticing. No accountant would allow a signature that is in carbon without first seeing the original documents. Accountants deal with originals not duplicates. Duplicates are for their evidence of the transaction.

I have looked at the evidence of the 2nd accused in its totality and I find that it sufficiently corroborated by the other evidence from the other witnesses who came before me. I am satisfied that the 2nd accused, perhaps driven by his oath and conscience, told the court the truth. It is undoubted to me that the 1st accused withdrew huge amounts of money from Zagaf Transport which he then shared with the 2nd defendant for providing the invoices. This was a theft committed over a period of time. The 1st accused cannot claim to have been the one who uncovered it. The evidence shows collusion between him and the second accused. The 1st accused is not the hero that he would like the court to believe he was. The accused is a clever man who upon noticing that his scam had been uncovered tried to cover it pretending to assist in the investigations."

I have also looked at and considered the evidence before the lower court. And considered the findings of the lower court. I find no compelling reasons to depart from the said reasoning and findings of the lower court. Thus, on the totality of the evidence available, the decision of the lower court cannot be faulted. There is clear and sufficient evidence that the Appellant stole the money. The second ground of appeal must also fail and it is hereby dismissed.

In the third ground of appeal the Appellant contends that the sentence of 5 years is manifestly excessive. Further that the lower court went on to sign a warrant of commitment without a sentence. From the outset I must state that I found an order of sentence dated 17th June 2017 in the lower court record. In the case of **Rep v Madando [1995] 2 MLR 733 at p. 734** Mtambo J (as he then was) had this to say:

"Let me say generally that an offender who is convicted of theft of his employer's money or other property can always expect an immediate substantial custodial

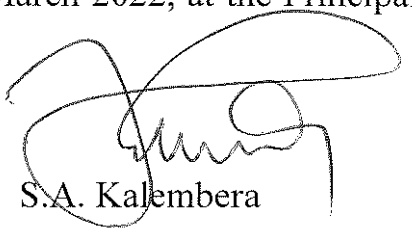
sentence in the Court, save, of course, in very exceptional circumstances or where the amount, or value of the property, stolen is small. And the factors to be considered in determining the length of the sentences are numerous, to say the least. In R v Barrick (1995) App. R 78, Lord Lane CJ mentions some of these to be the quantity and degree of trust reposed on the offender, including his rank, the period over which the fraud or theft had been perpetrated; the use to which the money or property taken was put; the effect on the victim; the impact of the offences on the public and public confidence; the effect on fellow employees; the effect on the offender, and so on and so forth..."

It must be noted that the maximum sentence for theft simpliciter under section 272 of the Penal Code is 5 years imprisonment. Whereas the maximum sentence for theft by servant under section 286 of the Penal Code is 14 years. It is clear that theft by servant is a more serious offence than theft simpliciter (simple theft). And according to the **Madando Case (supra)** the rank or position of the offender must be taken into consideration in considering the appropriate sentence to be imposed. Thus, where a messenger is convicted of this offence, the sentence imposed on him will be lesser than where an Accountant is convicted of the same offence. The trust reposed on an Accountant is higher than that reposed in an officer who does not look after the company's money. The trust in the Appellant, as an Accountant was very high. And yet he stole K10, 000,000.00 from the company. That was serious breach of the trust the company had in him.

Coupled with that, the said money was never recovered, meaning there was total loss to the company of such a substantial sum of money. The learned Magistrate considered the loss or breach of trust, the planning for the commission of the offence; and the fact that the Appellant wanted to further dupe the employer by holding himself out as the one who uncovered the fraud. Thus, the learned Magistrate was of the view that the sentence of 5 years imprisonment with hard labour was adequate in the circumstances. Although I could have imposed a higher sentence than the one imposed, it is trite that an appellate court must not just tamper with a sentence for the simple reason that it could have imposed a higher sentence. I therefore find no reason to tamper with the sentence of 5 years the lower court imposed on the Appellant. I therefore confirm the sentence as imposed by the lower court.

All in all, on the reasoning and observations herein, the Appellant's appeal is hereby dismissed in its entirety. The Appellant's conviction and sentence are confirmed.

PRONOUNCED this 28th day of March 2022, at the Principal Registry, Criminal Division, Blantyre.



S.A. Kalembera

JUDGE