



IN THE PRINCIPAL RESIDENT MAGISTRATE COURT SITTING AT LILONGWE

Criminal case no 1082 of 2020

Republic

Vs

Gerald Viola -----1st Accused

Chispine Chingala -----2nd Accused

CORAM:	VIVA NYIMBA	PRINCIPAL RESIDENT MAGISTRATE
	Victor Chiwala	counsel for ACB
	Benard Mloza Phiri	Counsel for ACB
	Miss Nundwe	Counsel for ACB
	Luciano Mickeous	Counsel for Convicts
	Itai	Court clerk

RULING ON SENTENCE

Introduction

1.0 This is the sentence following conviction by court.

The two convicts were convicted by this court as follows:

1.1 **1st Convict** was found guilty and convicted of misuse of public office contrary to section 25B (1) of the Corrupt Practices Act.

1.2 **2nd Convict** was found guilty and convicted of influencing a public officer to misuse a public office.

2 **EVIDENCE REQUIRED FOR ARRIVING AT PROPER SENTENCE**

Section 260(1) of the criminal Procedure and Evidence Code Procedure:

“The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the sentence proper to be passed”

Section 260(2) provides:

“Evidence that the court may receive under subsection (1) may, in relation to the evidence of the accused or the prosecution include the evidence by or on behalf of the victim of the offence and any relevant reports to enable the court assess the gravity of the offence.”

I am most grateful for the written submissions that were filed both counsel. These submissions have helped the court to inform itself as to the sentence proper to be passed. I have balanced the opinions from the prosecution and the defence.

3. Brief Background of the case

- a. The first convict, Mr. Gerald viola was convicted with the offence of misuse of Public Office contrary to Section 25B(1) of the Corrupt Practices Act.

Particulars of the offence

Gerald Viola being employed as Deputy Chief Executive Officer for the National Food Reserve Agency (NFRA) on or about 22nd day of January, 2020 at National Food Reserve Agency Headquarters in Lilongwe abused his public position by unilaterally issuing LPO No 6750 for Missies Trading to supply 10, 000 metric tons of maize valued at K3,330,000,000.00 (Three Billion Three Hundred and Thirty Million Kwacha) to National Food Reserve Agency (NFRA) for the business interest of Mr. Chrispine Chingola of the said Misses Trading .

The first convict had confessed that he had taken a photograph of the LPO 6750. He imitated it and emailed it to the Second Accused following the request by the second accused person. His action amounted to misuse or abuse of public office, because the issuance of the LPO in the manner it was done was contrary to the set procedures of issuing the LPO.

His intention was for the advantage or benefit of the 2nd convict person and Missies Trading to supply 10,000 metric tons of Maize worth K3,330,000,000.00(Three Billion Three Hundred and Thirty Million Kwacha)

Fortunately, a whistle blower namely PW4 Mr M'baya came across the said photocopy of the LPO 6750 and reported the matter to NFRA authorities who took action and dismissed the 1st Accused as DCEO.

The deal of borrowing money using the LPO 6750 from other business persons did not materialize and therefore the deal of supplying maize to NFRA aborted accordingly.

2) The 2nd convict was convicted of influencing a public officer to misuse a public office contrary to section 25(2) of the Corrupt Practices Act.

Particulars of the offence

Chrispine Chingola on or about 22nd January 2020 at National Food Reserve Agency (NFRA) Headquarters in Lilongwe influenced Gerald Viola being a person employed in the public service as Deputy Chief Executive Officer to use his public office for the advantage of this Chrispine Chingola by unilaterally and arbitrarily issuing LPO 6750 to Missies Trading for Missies Trading to supply 10,000 metric tons maize valued at K3,330,000,000.00(Three Billion Three Hundred and Thirty Million Kwacha) to National Food Reserve Agency (NFRA).

There is evidence that the 2nd Accused did influence, collect or receive copy of the said LPO through his phone email sent to him by the 1st Convict, following a visit the 2nd convict had made to the 1st convict's office, and the 2nd Convict dictated the price of K330 per kg because the price of K250 per kg would not make him profit.

The 2nd convict therefore did influence or persuade the public officer who is the 1st convict. He the 2nd convict was therefore using the copy of LPO as proof that he had a contract to supply maize at NFRA as he went around soliciting funding from his colleagues. The funding or money sought was an advantage as per provisions of the Corrupt Practices Act.

Fortunately, the funding or money that was being sought did not even materialize since the deal was discovered to be fake and abandoned.

4. Mitigating and Aggravating Factors in the Case

1) First Convict

Mitigating Facts are as follows:

- The the1st convict is the first offender;

- He has already suffered dismissal from work as Deputy Chief Executive Officer at the National Food Reserve Agency (NFRA);
- His reputation to run for political office has dented immediately;
- He has not gained any economic or financial advantage from the offence committed.
- NFRA did not suffer any loss or harm to society;

Aggravating Factors are:

- The offence which the the1st convict committed is serious carrying punishment for 12 years imprisonment under section 34 of the Corrupt Practices Act;
- He planned the offence by taking a picture of the LPO 6750 sent copy to second convict and leaving the LPO booklet intact;
- He breached the trust of his office as Deputy Chief Executive Officer;

2) 2nd Convict

Mitigating Factors:

- The Second convict is a first offender;
- His reputation in business has suffered because of the conviction for the case;
- He has not gained any economic or financial advantage from the crime;

Aggravating Factors:

- The offence which the 2nd Convict committed is a serious one attracting punishment of 12 years' imprisonment under section 34 of the Corrupt Practices Act;
- The offence was planned by influencing, collecting or receiving the LPO 6750 and showing it to his colleagues as if he had a contract to deliver 10,000 metric tons worth K3,330,000 to NFRA;

Precedence in Sentencing

In the recent case of **Republic Vs Rev. Daniel Mhone and Mlenga Mvula**, criminal case **No.18 of 2018**, Justice Kalembere now Justice of Appeal quoted with approval, the decided cases of **RV Savala** Criminal Case **No.28 of 2013** and **Rep.V. Angella Katengeza**,criminal case **No. 23 of 2018** as decided by Lady Justice Mwale citing the case of **Rep V Shauti 8MLR 69**, which held as follows:

“Generally, in deciding an appropriate sentence, the court is obliged to consider the defendant capability as well as the harm caused by the crime so that the sentence satisfies the principles that: punishment must fit the criminal as well as the crime, be fair to society, and blended with a measure of mercy according to the circumstances.

The Judge was further mindful that maximum sentences must be reserved for the worst of offenders. He was also mindful of how the court must treat first offenders as held in the case of **R.V. Manyamba [1997]2MLR 39**, where the learned Judge stated as follows:

“A sentence[r] faced with a first offenders must just decide whether a prison sentence is appropriate. To arrive at that conclusion, the court must by a process of elimination, decide that the other non-custodial sentences are not the appropriate way of dealing with the offence. The court must rule out non-custodial sentence such as fine, probation, absolute or conditional discharge and the like....Once the court concludes that a prison sentence is deserved it must pass a prison sentence that fits the crime, the offender, the victim and public interest”

Justice Kalembere also cited with approval the case of **Steven Mbewe V. Rep**, Criminal Appeal case **No. 48 of 2006**(un reported) in which Chikopa J,(as then was) cited the words of Lord Denning who stated that every sentence must “adequately, reflect the revulsion felt by the great majority of citizens”

In the case of **The Prosecutor of the Tribunal V. Jean-Paul Akayesu** case **No OCTR-96-4**, it was stated as follows:

“The Degree of magnitude of the crime is still an essential criterion for evaluation of sentence. A sentence must reflect the predominant standard of proportionality between the gravity of the offence and the degree of the responsibility of the offender. Just sentences contribute to respect for the law, and maintenance of a just, peaceful and safe society.”

The cited cases do provide good sentencing guidelines which may be applied in this court. This court does observe that the convicts were not worst offenders, and they were first offenders.

6) Relevant Provisions of the written Law

I have also looked at sections **339** and **340** of the Criminal Procedure and Evidence Code which provides as follows:

“S.339 (1) – When a person is convicted of any offence, the court may pass sentence of imprisonment but order the operation thereof to be suspended for a period not exceeding three years, on one or more conditions, relating to compensation to be made by the offender for damage or pecuniary loss or good conduct, or to any other matter whatsoever, as the cases court may specify in the order.”

“(2) Whether a person is convicted of any offence, not being an offence the sentence for which is fixed by law, the court may, if it is of the opinion that the person would be adequately punished by fine or imprisonment for a term not exceeding twelve months, fine the person or sentence the person to a term of imprisonment not exceeding twelve months but the court may ,as the case may be, order the suspension of the payment of the fine or operation of the sentence of imprisonment on condition that the person performing community service for such number of hours as the court may specify in the order.”

“S.340-(1) where a person is convicted by a court of an offence and no previous conviction is proved against him, he should 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 dealing with him.”

(2) The provisions sections 15 and 16 shall apply to a sentence of imprisonment imposed by a subordinate court under subsection (1) to the extent specified in such sections.”

Distinguishing of case Authority

I should also mention it that this court is generally bound by decision of the High Court unless a High Court decision is distinguished.

In the case of **Rep. v Reverend Daniel Mhone and Mlenga Mvula (supra)**, it will be noted that Mlenga Mvula was sentenced to custodial sentence of 30 months imprisonment for the offence of Misuse of Public Office on account that “he held a position of trust in the Judiciary as he was face of the said Judiciary.” And yet he conducted himself in a manner which was unacceptable as he abused his public office and position to advance personal interest in the process tarnishing not only the names of the said justices but of the institution as well. That is abtrompt and should not be condoned regardless of the fact that he is a first offender relatively young and remorseful.” The Judge said.

The Mlenga Mvula case is however distinguished to the present case.

The factor that he had tarnished the names of justices in order to obtain money to his benefit was not obtained in the present case. There was no individual that was harmed in the present case.

Position of state and Defence

The state is asking for 5 years imprisonment considering the gravity of the offence.

On the other hand, the defence is asking for suspension of sentence basing on the fact the convicts never benefited from the crime, and never put anyone in trouble of any loss or liability. They have learnt their lesson and will henceforth know their limits.

7. Conclusion

Having carefully considered the above decided cases as guidelines on sentencing, the law and the facts and factors obtained in the present case, the following sentences are given as appropriate:

- 1) In count 1, the 1st convict has been charged and convicted of misuse of Public office which is a felony attracting a maximum of 12 years. I have considered the mitigating and aggravating factors. Yes he breached the trust reposed in him as Deputy Chief Executive Officer by taking a photograph of LPO 6750 and give to the 2nd Convict. But there was not loss of money or maize. The LPO booklet is intact. He was dismissed from the job as Deputy Chief Executive Officer. He deserves a measure of mercy by this court in exercise of its discretion.

Pursuant to Section 340 of Criminal Procedure and Evidence Code, first convict is therefore sentenced to 3 years imprison sentence but I order the operation of sentence to be suspended for a period not exceeding two years, on the condition that he does not commit any offence of dishonesty and of similar nature.

- 2) 2nd Convict has been charged and convicted of influencing a public officer to misuse his public office attracting a maximum of 12 years imprisonment. Yes he did influence the public officer and he received and collected the LPO 6750 and tried to convince his business colleagues to get money based on the LPO. But one of his colleagues was not convicted and the deal did end there. There was no harm done to NFRA or anybody.

I would likewise pursuant to Section 340 of the Criminal Procedure and Evidence Code, sentence 2nd Convict to 3 years imprisonment whose operation should be suspended for a period of two years on condition that he does not commit any offence of dishonesty and similar nature.

Any person not satisfied with the Judgment and sentence may appeal to the High Court under Section 346 of the Criminal Procedure and Evidence Code.

Dated this 27th of February 2023

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V. Nyimba

AS THEN PRINCIPAL RESIDENT MAGISTRATE