

HIGH COURT  
LIBRARY



REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI  
MZUZU REGISTRY: CRIMINAL DIVISION  
CRIMINAL APPEAL NO. 44 of 2017

*(Being criminal case No. 636 of 2016 in the Chief Resident Magistrate Court Sitting at Mzuzu)*

Tryson Gondwe

-v-

The Republic

---

**CORAM:**

**HONOURABLE JUSTICE D. A. DEGABRIELE**

Mr. D. Shaibu

Mr. C. Duke

Mrs. C. Chawinga

Mrs. J. Chirwa

Counsel for the State  
Counsel for the Appellant  
Official Interpreter  
Court Reporter

---

*DeGabriele, J*

**JUDGEMENT ON APPEAL**

---

**Introduction**

The appellant was charged with two others on three counts of offence. The 1<sup>st</sup> count was being found in possession of protected species without a license contrary to section 110 (b) and (d) of the National Parks and Wildlife Act, the 2<sup>nd</sup> count was being found in possession of prohibited weapon contrary to section 16 (2) of the Fire Arms Act and the 3<sup>rd</sup> count was being found in possession of ammunition contrary to section 12 (1) and (2) of the Fire Arms Act. All three offenders pleaded guilty and were convicted and were all sentenced to 24 months imprisonment with hard labour on the 1<sup>st</sup> count, 36 months imprisonment with hard labour on the 2<sup>nd</sup> count and three months imprisonment with hard labour on the 3<sup>rd</sup> count. The sentences were ordered to run concurrently.

The appellant herein appeals against the sentence passed by the lower court. There are two grounds of appeal as follows;

- a. The lower court erred in law and in principle in imposing outright custodial sentence on the appellant who is a first offender, pleaded guilty and cooperated with authorities.
- b. In the alternative the sentences were manifestly excessive regard being had to the circumstances of the offences and the appellant.

### The Law

The laws under which the appellant pleaded guilty outlines the maximum sentences to be imposed where a person has been found guilty of the offence. Section 110 of the National Parks and Wildlife Act provides that;

*“Any person who is convicted of an offence involving*

*(b) possession of selling, buying, transferring or accepting in transfer any specimen of protected species other than Game species*

*(d) contravention of sections 32, 33 and 35 of this Act*

*shall be liable to a fine of K100, 000 and to imprisonment for a term of ten years, and in any case the fine shall not be less than the value of the specimen involved in the commission of the offence”.*

It must be noted that the sections referred to in section 110 (d) involves various prohibited activities concerning the National Parks, Wildlife Reserve or nature sanctuaries. If a person is engaged in those activities without authority, that person commits an offence. The prohibited activities include entering or residing, possession or use of weapons, traps, explosives or poisons, brining domesticated animals and other activities.

Section 16 (2) of the Fire Arms Act provides that;

*“A person who carries or has his possession a prohibited weapon shall be liable to imprisonment for fourteen years”.*

Section 12 of the Fire Arms Act provides that;

*“(1) No person may, otherwise than in accordance with the conditions of a fire arm permit or an annual license, carry or have in his possession or under his control any firearm or ammunition.*

*“(2) A person who contravenes any of the provisions of subsection (1) shall be liable to a fine of 100 pound and imprisonment for six months”*

The High Court will only interfere with a sentence if it is proved that the sentence was wrong in law and it was manifestly excessive, see *The Republic v Makanjila [1997] 2MLR 150 HC*. However, the court must consider and examine the mitigating factors and aggravating factors and weigh them to come to an appropriate and meaningful sentence, see *The Republic v Phiri [1997] 2 MLR 92 HC*. It was held in the case of *The Republic v Shauti Confirmation Case No 175, 1975* that the guiding principle in sentencing is that the punishment should fit the criminal as well as crime, be fair to society and be blended with a measure of mercy according to the circumstances. This means that courts must pass meaningful sentences, which will not generate contempt in the eyes of the public or indeed even in the eyes of the defendant. Courts must pass sentences that will fit the crime, the defendant and also satisfy the legitimate expectations of the public. The law does call upon the courts to consider non-custodial sentences. Under section 340(1) of the Criminal Procedure and Evidence Code the law provides that first offenders must be considered for non-custodial sentences as outlined under section 339 of the criminal procedure and Evidence Code, unless such a non-custodial sentence is not the appropriate means of dealing with the convict. The reasons for deciding on a custodial sentence must be well articulated in the record. The lower court examined all the necessary areas and decided to impose a short, sharp and quick sentence, bearing in mind that the offences are serious and are punishable by maximum prison terms of 10 years, 14 years and 6 months. I find that the lower court did take into account the mitigating factors herein are that the appellant pleaded guilty, was a first offender and the weapons they had in their possession were confiscated. However

The appellant argues that the summation by the lower court of his butchering animals was wrong as the appellant was only found with certain items and had not killed or butchered animals. The appellant also argues that the lower court did not specify which


drugs were bought with the money, but eventually used the information to impose a custodial sentence on the appellant.

I have read the record of the lower court. First, appellant pleaded guilty to the charges as read and put to him and there was no need to prove elements of the offence. Whether or not he butchered the animal should have been brought in as evidence in a full trial. Secondly, the appellant was also found in possession of a gun without licence. This coupled with the being found with the prohibited species of game, whether parts of an animal or the whole, leads to an inference that he was involved in killing the same. The lower court was therefore right in using this information to add weight to the aggravating factors. Thirdly, the lower court was not wrong in concluding that tourists come to Malawi to see in part the diverse heritage which includes animals, pay forex and the forex is in turn used to buy drugs for the hospitals, construct schools build roads among other things. I agree with this conclusion and find that the lower court was right use this information to add weight to aggravating factors of the offence.

Having looked at the above, I find that the sentences were not manifestly excessive. I find that the sentences were just in the circumstances of this case. I confirm the sentences as passed by the lower court. The Appellant will serve 24 months imprisonment with hard labour on the 1<sup>st</sup> count, 36 months imprisonment with hard labour on the 2<sup>nd</sup> count and three months imprisonment with hard labour on the 3<sup>rd</sup> count, with the sentences were ordered to run concurrently with effect from the date of arrest which was the 18<sup>th</sup> of October 2016.

The appeal fails in its entirety.

Made in Chambers at MZUZU REGISTRY this 10<sup>th</sup> day of April 2018

  
D.A. DECAVRIELE  
JUDGE