IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION
Criminal Appeal No. 21 of 2012
(being criminal case No 1 of 2011, FGM, Liwonde Magistrates' Court)

AMOS MALAVA
v
THE REPUBLIC

JUDGMENT

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nyaKaunda Kamanga, J.,

The appellant, Amos Malava, was charged, tried and convicted by the First Grade Magistrate sitting at Liwonde of the offence of theft by servant contrary to section 286(1) of the Penal Code. The appellant and his co-accused, Cosmas Nicholas, who was acquitted of the charge, used to work for *Ulemu ndi Chuma Trading* Airtel distributor as a cashier and was found guilty and of convicted of stealing the sum of K2,115,000.00 on 27th December 2012. The appellant was sentenced to six years imprisonment. This is a judgment following the hearing of the appeal against conviction and sentence.

The Grounds of Appeal

In appealing against the whole judgment the grounds of appeal filed on 20th August 2013 are listed below as put forward by the legal practitioner for the appellant.

The Grounds of Appeal against Conviction:

1. The learned Magistrate erred in law in applying selective and unfair test to the evidence submitted by the defence as contrasted with that given by the prosecution.
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.

3. The leaned Magistrate erred in law in making its finding without strictly applying the right standard of proof and failing to satisfy himself that the appellant was indeed seen taking the money.
4. The learned Magistrate erred in law in making his finding against the Appellant based on alleged change in the Appellant's life style without any evidence connecting the same to the alleged theft.
5. The learned Magistrate erred in law and misdirected himself when he went on a self-fulfilling fact finding mission by making inferences from the prosecution evidence without any proof of the same stating that the money could only be stolen on the Sunday and not on the Monday in issue.
6. 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 money between the Appellant, PW2 and DW2 since all had access to the keys to the office in period question.
7. The learned Magistrate erred in law and misdirected himself when he found that it was only the Appellant who was in control and custody of all the case and materials when in fact the other employees had access to the office separately where the cash was kept.

The Grounds of Appeal against Sentence

8. The learned Magistrate erred in law and misdirected himself when he disregarded the circumstances of the occurrence of theft by failing to factor in negligence with regard to the storage of the money.
9. The learned Magistrate erred in law by disregarding the circumstances of the appellant in that he is young and first offender.
10. 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.
11. The learned Magistrate erred in law in failing to use more up to date sentencing trends by relying on outdated sentencing guide lines without considering the devaluation of Kwacha currency over the years.
12. The learned Magistrate erred in law and misdirected himself when he found that there were aggravating circumstances without considering mitigating factors put before the court.
13. The learned Magistrate erred in law when he passed a sentence that was manifestly excessive, cruel, inhuman and degrading punishment in the circumstances.
14. The learned Magistrate erred in law and misdirected himself when he passed a sentence of six years with hard labour without considering the period spent in custody before conviction.

The Evidence

The brief facts in the lower court were that the appellant and his co-accused were employees of *Ulemu ndi Chuma Trading* Airtel distributor as cashier and salesperson, respectively. The appellant was also the supervisor of the depot. The shop was always opened and closed by the guards. The prosecution called six witnesses while the accused persons testified on their own behalf. The summary of the testimonies of the witness has been summarised below.

Prosecution Witness 1 was Stanley Phoya, an Assistant Accountant for *Ulemu ndi Chuma Trading* who was based in Blantyre. He stated that the appellant was the supervisor for the Balaka shop and he was responsible for controlling stock, custodian of receiving of goods and cash and doing banking of cash realised from all sales. PW1 visited Balaka when he learned of the theft incident and an inspection of the shop showed that there was no forced entry. After reconciliation and auditing in the presence of the two accused persons he discovered that about K2,115,000.00 cash was missing. The appellant confirmed that this sum was missing from the bags of Cosmas which had been handed over to the appellant. The witness mentioned that not all denominations missed but the K500 notes whilst the small notes were still in the bag. PW1 stated that Malava was the custodian of the keys and he had a tendency of opening the shop earlier than anyone. PW1 did not believe that the money missed mysteriously but that it was the two accused persons who stole the money. It was his evidence that only the appellant and his co-accused knew how much was made in terms of the sales and where the money was kept and his conclusion was that the money was stolen by them. He stated that the shop was a secure as it was a container of steel which was surrounded by a fence, near Balaka Police Station and there were three guards during day and night. He also informed the court that during the night of 27th December 2010, the appellant visited the Balaka shop during the night. In cross examination PW1 insisted that Malava was the custodian of the money. PW1 stated that the money from the sales of 24th to 27th December 2010 are what went missing. He stated that in the shop the money was kept in bags, locked in another place ('cupboard more a safe' made from strong steel) and the keys were kept with the appellant. The witness insisted that the appellant would visit the shop at odd hours, Sundays, evenings and at night. The money missed during the night of 27th to 28th December. He stated that the appellant came twice on Sunday, in the morning and 9 am and around 12 noon and the same security guard was on duty.

Prosecution Witness 2 was Miracle Mangiliza, a newly recruited sales representative for *Ulemu ndi Chuma Trading* shop. She stated that on 24th

December, 2010 after counting she made about K1,300,000.00 and gave it to the cashier, who happened to be the appellant. Mr Cosmas was also available. PW2 stated that she was responsible for sales while the cashier was keeping the money. On 25th December, 2010 she made K300,000.00 which she gave to the cashier. The money for this day was not deposited. She stated that she did not go to the shop on Sunday the 26th December, 2010 as they never conducted any business on this day. On Monday, they all arrived and the cashier gave the keys to the guards to open for them and she sold about K1,100,000.00 of units. PW2 stated that it was always the cashier Mr. Amos who was in custody of the keys. On 28th December 2010 when the cashier counted the money for the previous days, 24th and 25th, he discovered that some money was missing. She stated that there was no break in into the shop. At the scene visit, PW2 informed the court the set up arrangement in the room and stated the there was a safe but it had no keys. She stated that whenever they were leaving the shop it was Mr. Amos Malava, the cashier who would close it and that he was always in the room. In cross examination she stated that once she counts the money and hands it over to the cashier she had nothing to observe in terms of where he would keep it. She did not know where exactly the cashier kept the money. But it was in a separate room from her office and that this room was closed by the cashier. She stated that when on 28 December they found the same guards, Mr. Jentala and Mr. Makiyi, who were on duty on 27th December. She stated that the guards came to know of the missing money because the appellant and the co-accused were complaining of the missing money. She state that she had never seen the money kept in the safe as they left the office. She insisted that she did not know where the cashier was keeping the money and that she only saw him pulling out the money and recounting it the next morning. She stated that when the auditor came to do the recounting the appellant was in handcuffs. In re-examination the witness stated that she had never kept the keys and that it was the appellant who was keeping the keys and at times Cosmas could keep the keys.

Prosecution Witness 3 was Standford Chinzinga who used to work as a guard for the premises. He stated that he never knew what was inside the shop. He stated that during the period of 24th to 28th December he was on night shift. He also explained the procedure for locking the main door and that the appellant would always confirm the locking of the building. He stated that none of the guards knew what was inside the room and their duties was to ensure external security. He stated that on 26th December he was on day shift and there was no business on this day. That on 26th December 2010 at around 8:00 am the appellant came alone to the shop on a motorcycle that a man at the railway wanted units. He entered and stayed in the room for not less than 10 minutes. The witness stated

that he did not see the appellant carry anything in his hands as he left the shop. PW3 stated that the appellant came back around 9:00 hours on the same day entered the shop and stayed for not more than five minutes. The witness was surprised with the appellant's visits to the shop as it was a holiday. The witness stated that in the past when he was on night shift he noticed that the appellant had similar movements and that at times he would also come on Sundays. PW3 stated that on 27th December 2010 he was on day duty and the bwana was not present in the morning until 12 noon. Cosmas came with other staff members and the brought keys for opening the shop and they worked until knocking off. On 28th December the witness arrived early in the morning, after the bwana came he was given the keys to open the shop. The witness did not notice any signs of breaking in. As he was in the processing of taking out motor cycles he learned that money had been stolen and the witness was surprised as there was no breaking into the building.

In cross examination PW3 stated that he was on 26 December was a public holiday and that while he was on day duty Mr. Malava came in the morning hours and the witness confirmed the number of times that he came. That Malava told the witness that he was collecting some units for sale. The witness was not surprised to see Malava as he was the bwana and this was not his first time. But was surprised to see him at the shop on this day because it was a public holiday and he was dressed in a short trouser with balloon pockets. The witness expected the appellant come out of the shop with units in his hands or in something. In re-examination PW3 stated that when the appellant came to the shop on 26th December the witness stayed outside behind the shop and he did not watch the movements of the appellant.

Prosecution Witness 4 was Anjiru Makiyi, another guard for the premises who explained how they perform their duties and where they are positioned whilst on duty. He stated that on 28th December he is the one who assisted the bwana to open the main door and that soon after they had entered the shop they learnt that there had been an incident of a theft yet there had been no breaking in. PW4 mentioned that Mr. Amos could come to open the shop at night and the witness would be surprised that the appellant could work in the absence of light, as there was no electricity in the building. PW4 also stated that he did not see the appellant carrying anything in his hands. In cross examination PW4 stated that on 24 and 25th December he was on day duty while on 26th to 27th December he was on night duty. That the shop was not opened on Sunday. PW4 stated that the appellant had a habit of coming to the shop at night and the appellant would use his phone light. The witness was not re-examined.

Prosecution Witness 5 was Leonard Chikadya the Director of *Ulemu ndi Chuma Trading* and that he had two other business partners. He stated that the appellant was the supervisor and controlling cashier of the Balaka depot where they distribute Airtel units. His salary was K22,000. He stated that the appellant was the one receiving the money before banking it. The witness learned about the incident at Balaka involving loss of cash in excess of K2m in the form of K500 notes whilst he was at his workplace in Blantyre. PW5 told the court that Amos informed him that the money had been stolen through magical means. The witness stated that he did not believe in superstition and the story about theft through magic. The witness was surprised and wondered how Amos knew about this since the cash was in his control and custody. PW5 directed an auditor to conduct an audit and reconciliation at the shop. PW5 stated that investigations established that the appellant was depositing money in his personal account that was in excess of his salary from *Ulemu ndi Chuma Trading* yet he did not operate any business. The bank statement were tendered in court which showed that during the period from July to October 2010 he had deposited more money than his salary in his account. The witness stated that he tried to discuss the matter with the appellant and his relations so that they could settle it amicably. In cross examination PW5 state that the newly recruited lady was a trainee and was not responsible for completing the daily cash summaries which was supposed to be done by the appellant. He stated that these were not prepared at the material time due to negligence. The witness was very suspicious and did not believe the claims by the appellant of how the money was stolen through magical means. The witness was not re-examined.

The sixth prosecution witness, PW6, was Detective Sub-inspector Gausi of Balaka Police Station who explained the investigations that he carried out. He stated that a scene visit indicated that there was no physical break in to the building. The appellant was suspect because he was the one responsible for the cash, that he used to visit the office at night time and that on 26th December the appellant left for Lilongwe. The witness cautioned the appellant and his co-accused and their statements were tendered in evidence as well as the two K500 torn leaf notes that were found in the two bags where the money missed from were tendered in evidence. There was no recovery of the stolen money. One thing he raised in n cross examination was that the witness could not tell the dates when the appellant went to the office at night. The witness was not re-examined.

The Defence Case

The appellant and his co-accused testified on their own behalf. The legal practitioners requested that the second accused be the first to give evidence in defence. Cosmas Nicholas stated that he was employed as a salesman and described his duties. After completing his sales he would hand over to his supervisor, cashier for the shop and controller of keys to the office, Mr. Amos Malava. He mentioned that the shop had three guards who were on duty for 24 hours. Cosmas stated that on 24 December 2010 when they arrived at 6 am, 'the supervisor gave the keys to the guards to open the shop.' On this day he did not sell the products outside the shop as he had to orient the new lady. On 25th December the witness repeated the procedure for opening the shop, 'the supervisor came, gave the keys to the guards to pen and we all entered.' On this day he also did not travel outside. After receiving his salary he went home to visit his family and came back on the evening of 26 December. At home he found the nephew of the supervisor with whom they were staying who informed Cosmas that Malava had travelled to Lilongwe. At dawn on 27th December Malava called Cosma instructing him to go to Ntcheu to get new stock. The nephew to Malava gave Cosmas the keys to the office he went to the shop where he found two guards on duty, he asked them to open the shop and give him a motor bike. After removing the motor bike the keys were given back to Cosmas. Cosmas gave the keys to the lady and proceeded to Ntcheu from where he returned at 8 am. He found Miracle at the shop with a lot of customers and the supervisor had not yet returned. He then went to Phalula and on returning at 3 pm he found Miracle and the supervisor who were all busy counting money. The shop was locked and the supervisor went away with the keys. On the morning of 28 December they arrived at the shop, the supervisor gave the keys to the guards to open and they all entered. Cosmas was instructed to help in straightening the notes before banking them. When he opened the bag, he realised that the K500 bank notes were not there, apart from one which was torn into pieces, but the smaller denominations were intact. The finding was verified by the supervisor. The witness was overpowered with shock as nowhere was the shop broken and he did not understand how the theft took place. The police told them that the two people responsible. Cosmas was surprised with the evidence of the prosecution that his lifestyle had changed as he had always been properly dressed at his previous job and at the seminary. In term so security the witness stated that the office had double locks and there was a fence surrounding it. The guard well conversant in opening and locking the shop. The money was banked by the cashier on the following day after sales.

In cross examination he stated that he was staying with the supervisor who was also working as cashier in the same house. That the keys were kept by the

appellant. He gave the cashier the money with the breakdown. That there was a period when both the accused were not in Balaka. The witness did not know where the appellant kept the money as the custodian. He took the money from wherever he had kept it for straightening. He confirms that they did not work on Sunday and that he never visited the office at night. He did not know why the appellant went to work on Sunday. Although he was in Lilongwe on 26th December, he was also at the office on that day. That the six of them knew that the money was not banked, but they did not know how much of it. The witness denied being involved in the crime. In re-examination he stayed that he worked for 5 months and stayed with the appellant for 3 months. That the money was given to the cashier with a breakdown but there was nowhere to sign. That the money was straightened every morning in preparation for banking. That he money for the 24th to 27th December were not banked as the banks were closed for Christmas holiday.

The second defence witness was, Amos Malava, the first accused person and appellant herein. He stated that he worked for *Ulemu ndi Chuma* as a cashier as well as a supervisor and he was the most senior member at Balaka depot. He received money from sales people and banked it. He was verifying the cash summary analysis of the sales person. He said he was putting the money in a travel bag as there was no safe then place it in a simple drawer. He stated that the guards were the ones closing to ensure that there was proper closing and security and he would go away with the keys to his house. That at home he kept the keys in his bedroom and that his room was never locked. He also lived with a niece. That on 26 December he left for Balaka while Cosmas was at Thondwe. He proceeded to Lilongwe. Early on 27th December he called Cosmas instructing him to take the keys to collect new stock. When he arrived at the shop he found the saleslady with customers while Cosmas was in the field. He balanced the money for the 24th and 25th and all was intact.

On 28th December he advised Cosmas to recount his cash and that when he opened the travel bag he found that there was no K500 bank notes except the one which was torn. He verified that indeed money was missing. The cash for the 24th also had K500 notes missing. He confirmed that there were no signs of a break in. The appellant reported the matter to one of the partners, Mrs. Hara, who in turn advised him to report to police. After investigations arrests were made. The appellant denied that he had a life style change as he claimed that he used to work at TL Consulting in Blantyre and that he was using the same things that he bought while working there. On the money that he deposited in the bank he claimed that he borrowed money amounting to K100,000 from his brother Martin from Kasungu as his business of selling soft drinks. As was noted by the trial magistrate

there were no documents to support these statements so such assertions were properly dismissed. That he was not found with a shortage or misuse of money. He stated on page 467 of the record of the case that the guards were always there and 'there was no one who could enter without me'. He suspects the guards could have entered since they knew all the keys and locks.

In cross examination he said that he was in custody of cash while working at *Ulemu ndi Chuma*. He also suspected that ex workers had access to the shop. His statement that all cash was put in a travel bag and that all workers knew where this kept is not corroborated by any of the prosecution witnesses or the co-accused. That is why he states that 'possibly the second accused didn't know but knew that cash was at such place.' He stated that on 26 December he went to Lilongwe without telling anyone. That he was the one keeping the keys at his home but he did not hide them. He confirmed that he instructed his co-accused to take the keys to the office. That on Sunday he went to the office to take units to sell and went back to leave the money that he had realised, although he did not have evidence to support this assertion. In re-examination he stated that Cosmas and Miracle had keys to the office on 27 December.

The Appellant's Arguments

The appellant's filed skeleton arguments in which they raise the following issues:

1. The appellant contends that the prosecution in the court below did not establish the defendant's guilt beyond reasonable doubt.
2. That the conviction of theft by servant was not established as the state failed to proven beyond reasonable doubt that the appellant was the one that actually stole the money and the evidence fell short of that.
3. That the trial Magistrate misdirected himself on the burden of proof and standard of proof and he made a presumption against the appellant.
4. That the lower court erred in applying selective and unfair taste to the evidence in that there was no conclusive proof that the appellant took the money. According to the appellant the only proof that was provided was the fact that he had gone to the shop on the 26th December, 2010 to get air time to sell to customers. No money in the sum of K2000,000.00 was found on him, in his bank account or anywhere connected with him.
5. That the court believed everything that the guards, PW3 and PW4 stated that they saw him come in and go out was not a secret and there was actually nothing stopping him from going there on the stated day in fulfilment of his duties, i.e. to collect airtime to sell to customers.
6. That the two witnesses as guards were the ones who used to close and open the locks to the shop including on this particular day. That the court

proceeded to accept wholesale the evidence of the two guards without applying his mind whether their evidence was true or not, whether they were certain the money was taken by the appellant or not.

7. That the trial magistrate's decision was also influenced by the evidence that the appellant's lifestyle had changed when in fact the same had no bearing on the case at hand, the money went missing between the 25th and 28th December, 2010. Any issues before that should not have been taken into consideration in the case before the court. That this was the first time money had gone missing and that no shortages were mentioned in earlier transaction the whole time the appellant had worked for the complainant.
8. That the court also went on a self-fact finding mission and came up with a conclusion that the theft happened on a Sunday and not Monday and the court based its findings on an inference not facts.
9. The appellant asserts that there was ample evidence to show that there was reasonable doubt as to when the money could have gone missing. In as much as the appellant went to the shop on Sunday 26th December, 2010 but the 2nd accused also had access to the shop before anyone else as he had gone to collect a motor cycle.
10. That there was also a possibility that the guards may have either left the locks open or had a copy of keys and opened since they also used to handle them all the time when opening and closing the shop. The appellant is of the view that there was so much doubt in the prosecution's case that a conviction was unsafe.
11. That the finding that the appellant was the only one who was with custody and control of the cash was also erroneous as the evidence showed that the money was only kept in a mere bag and placed somewhere in the shop, a place where all the three workers in the shop knew about. There was no locked safe box and that the appellant's colleagues had access to the shop at separate times.

In regard to the sentence the appellant has advanced the following arguments:

12. That the court failed to consider the circumstances of the case in that it may have occurred mainly due to the negligence of the complainant in failing to procure a safe box for the employees to keep the money on days when there were no banking services.
13. That the court did not consider the fact that the appellant is a young and first offender. That the court did not consider the circumstances of the offence that it did not result in huge loses to the complainant company in that it was capable to make that kind of money in just a few days of trading and it surely recovered pretty well within a few days afterwards.

14. That this offence did not amount to gross abuse of trust as was held in the case of *Edward Nyamatcherenga v Rep*, Criminal Appeal No. 56 of 2000.
15. That the sentence for theft by servant depends on the amount of property stolen: *Charles Malinga v. Rep*, Criminal Appeal No. 22 of 2002.
16. That the court was wrong in relying on outdated sentencing guidelines without considering the passage of time and devaluation of the Malawi Kwacha currency over the years which if that was taken into consideration, then the court could not have found that there were any aggravating factors.
17. That the court could then have passed a more realistic sentence of at least two years imprisonment with hard labour and not the six year that was passed which to say the least was manifestly excessive, cruel, inhuman and degrading to the appellant. That the said sentence did not even take into consideration the period he already spent in custody before judgment.

In his arguments the appellant has cited the following case authorities: *Chafungatira v Rep*, Criminal Appeal No. 35B of 2000, *Nyamizinga v Rep* [1971-72] 6 ALR 258, *Dickson v Rep* [1961-63] 2 ALR, *Banda v Rep* [1971-72] 6 ALR 383 on the issue of circumstantial evidence. On sentencing the appellant has referred to the cases of *Rep v Adam Ajibu,* Confirmation Case No. 1011 of 1997, *Rep v Symon Kamuna* Confirmation Case No. 669 of 2002, *Rep v Kwalala and Mataula* Confirmation Case No. 6 of 1996, *Bobat v Rep* Criminal Appeal Case No. 29 of 1994, *Rep v Miss Manyozo* confirmation case No. 431 of 2002, *Rep v Chrostopher Mofolo* Confirmation Case No. 651 of 1999, *Rep v Missiri* Criminal case No. 1392 of 1994 and *Republic v Matebule Batson* confirmation case No. 150 of 1997.

The Respondent's Arguments

The respondent opposes the appeal by way and filed skeleton arguments raising the issues discussed below and requests the Court to uphold the convictions while reducing the sentence. In responding to grounds 1, 2 and 3 the respondent opines that the Prosecution in the lower court proved the offence against the Appellant beyond reasonable doubt. The respondent points out that it is not in dispute that the Appellant was employed by the complainant company and that he was the supervisor and the most senior employee at the company. The appellant contends that it is on record from the evidence of the Appellant himself that he put the cash in a travel bag and kept it in a room where none of the sales representatives had access. That there is evidence that the Appellant went to the office on the 26th on two occasions and he therefore had an opportunity to commit the offence. The respondent argue that the evidence of PW6 that in the course of his investigations he established that the Appellant had a tendency to go to the office premises at

night was not disputed in cross examination. The respondent agrees that no one saw the Appellant take the money but all the circumstantial evidence that was adduced in the court below points to the guilt of Appellant. The respondent submit that according to the decided cases on circumstantial evidence the accepted and logical approach is by way of elimination, that is, by negating all possible hypotheses of innocence. The Appellant argues that the circumstantial evidence herein does not connect him to the offence when in fact other employees had access to the office and separately where the cash was kept. The respondent notes that as for the Appellants co-accused, it is on record that he was instructed by the Appellant on the morning of 27th December 2010 via telephone to get the keys of the office from his niece, go to the office to get the motor cycle and travel to Ntcheu and get more supplies for the shop. Cosmas did exactly as he was instructed. At the office the guards helped the appellant to open the office from where he took the motorcycle and left. There is no evidence that he ever had access to the room where appellant left the cash. As the co-accused was on his way to Ntcheu he went to PW2 and left the keys in her custody and instructed her to go open the shop since the appellant was in Lilongwe and he himself as travelling to Ntcheu. The respondent contends that the co-accused did not commit the offence and was rightly acquitted by the lower court.

As regards PW2, the respondent contends that she also did not commit the offence. It is true that she had custody of the keys to the office on the 27th of December 2010 as she was given the keys by the appellant's co-accused to go and open the shop. That when co-accused came back from Ntcheu he found PW2 in the company of many customers who were waiting for the shop's supplies to arrive from Ntcheu. There is no evidence that she ever had access to the room where the cash was kept by the Appellant. There is also no evidence on record of the case that she left the shop when the appellant and his co-accused were not there nor that she accessed the room where cash in the travel bag was kept. Under these premises the respondent correctly submits that PW2 did not commit the offence.

On the contention by the appellant that the guards may have left the locks open or had the keys and may have opened the shop and stolen the money this court agrees with the arguments of the Respondent that the guards could not have left the locks open because there was a verification process as to whether the locks were indeed open or closed. The evidence from both the prosecution and defence witnesses was that when closing the shop one guard locked the locks and the appellant had to verify if indeed the shop was locked. After this process another guard had to verify if the same was locked. With this process it was impossible for the guards to leave the locks open so as to gain entry into the shop. As has

been noted by the respondent the Appellant's contention that the guards had copies of the keys to the shop is farfetched because it was the appellant who had control and custody of the keys and not the guards. The respondent rely on the case of *Chidothi and another v Rep* [1992] 15 MLR 51 and *Charles Banda v Rep* Criminal Appeal no. 104 of 1996 to contend that the guilt of an accused person may be established by circumstantial evidence as it is rare to prove a case by direct evidence.

The Determination

In order for the prosecution to prove its case against an accused person, it must establish the elements of the offence of theft by servant through direct or indirect evidence (circumstantial evidence). Most often times it is difficult to prove a criminal charge through direct evidence and the prosecution will rely on circumstantial evidence. As has been noted by the respondent, the prosecution case largely rested on circumstantial evidence since there was some cogent link between the appellant and the theft of the money. The inference of guilt of the appellant is supported by evidence on the record which is incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt. The following facts help in understanding the organisational set up at the complainant company and the responsibilities of the appellant which provided him an opportunity to steal the money: that the appellant was the supervisor and the most senior employee at the company; that he was in control and custody of the keys, cash and materials. This court is of the considered view that the appellant had the opportunity to commit the offence after considering the following facts and circumstances: the evidence that it was only the appellant who was in control and custody of all the cash, the keys and materials of the company and on the protocol that was followed when the guards were helping the appellant to open the shop using the keys that were brought by the appellant himself; the fact that the guards would sit on the bench outside the shop and had no knowledge as to what the appellant was doing inside the shop; the fact that on the 26th December 2010, which was a public holiday and not a working day at the shop, the appellant visited the shop twice under what PW3 described as suspicious circumstances; the fact that the appellant went to Lilongwe on 26th December and only informed his colleagues on Monday the 27th December; the fact that appellant instructed his co-accused on the morning of 27 December 2010 via telephone to get the keys of the office from his niece in order to collect the motor cycle and travel to Ntcheu and get more supplies for the shop; the fact that there was no evidence that the co-accused had access to the room where the appellant kept the cash; the fact that two of the guards of the complainant company, PW3 and PW4, and the police officer PW6 all mentioned

about the habit of the appellant visiting the office at night, despite the fact that there was no electric power connected to the building which he could use when working late; the undisputed fact that the appellant admitted to have had the money in his possession and his immediate surprising explanation to the proprietor of the shop, PW5, that it must have been stolen through magical means.

After thoroughly considering the record of the case, the grounds of appeal and arguments in support of the appeal and in opposition to the same this court is of the view that the grounds of appeal against the conviction of the Appellant have no merit and are dismissed. This court agrees with the respondent that although no one saw the appellant take the money but all the circumstantial evidence that was adduced in the court below point to the guilt of the appellant. The fact that the appellant was in control of the money gave him a higher responsibility than the other employees. If the money was not stolen by him then he should have proffered a plausible explanation of its whereabouts other than informing PW5 that it was stolen through magical means. The evidence shows that the appellant created a set up where his two colleagues had the opportunity to have custody of the keys on 27th December and open the shop when the appellant was not there. As has been argued by the respondent the appellant's allegation that the guards may have left the locks open or had copy of the keys and may have opened the shop and stolen the money is mere speculation and difficult to believe since the guards could not have left the locks open because there was a verification process as to whether the locks were indeed open or closed. This court further agrees with the respondent that the appellant's contention that the guards had copies of the keys to the shop was indeed far-fetched as the evidence shows that it was the appellant who had control and custody of the keys and not the guards. This court is of the considered opinion that the conviction of the appellant for the offence of theft by servant contrary to section 286 of the Penal Code was appropriate and correctly arrived at by lower court and it is confirmed. In the findings on the separate grounds of appeal can be summarised as follows:

1. on whether the learned Magistrate erred in law in applying selective and unfair test to the evidence submitted by the defence as contrasted with that given by the prosecution- this court is of the view that it is not clear what this 'selective and unfair test' the appellant is referring to. The record of the case shows that the magistrate gave weight to all the evidence that was before the lower court and the appellant can only speculating.
2. on whether 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 - this court is of the view that the magistrate did assess the truthfulness of all the evidence and he

correctly found that the prosecution witnesses were truthful. The appellant also had the opportunity to cross examine the witnesses as to their credibility.

3. On whether the leaned Magistrate erred in law in making its finding without strictly applying the right standard of proof and failing to satisfy himself that the appellant was indeed seen taking the money- this court finds that magistrate did apply the right standard of proof beyond reasonable doubt in this criminal matter. That in order to satisfy the elements of the offence of theft by servant there is no legal requirement that the appellant should have been seen taking the money as put forward by the appellant. It has already been explained above that the elements of the offence can be established through indirect evidence.
4. On whether the learned Magistrate erred in law in making his finding against the Appellant based on alleged change in the Appellant's life style without any evidence connecting the same to the alleged theft- this court finds that there is nowhere on the record of the case where the magistrate states that he found the appellant guilty because of his changes in life style in as much has the issue of life style change was mentioned by the prosecution and responded to by the appellant.
5. On whether the learned Magistrate erred in law and misdirected himself when he went on a self-fulfilling fact finding mission by making inferences from the prosecution evidence without any proof of the same stating that the money could only be stolen on the Sunday and not on the Monday in issue - The record shows that the trial magistrate critically analysed the evidence that was before his court before he arrived at his finding of guilty. This analysis was based on an examination of the evidence that was adduced by both the prosecution and defence. Unfortunately there is nowhere on the record of the case where the magistrate states that 'the money could only be stolen on the Sunday and not on the Monday' as put forward by the appellant.
6. On whether 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 money between the Appellant, PW2 and DW2 since all had access to the keys to the office in period question - The uncontroverted evidence from the prosecution pointed to the appellant as the one who had custody and control of the keys, while the other staff operated under his instruction in terms of gaining access to the office. The totality of the evidence shows that the prosecution proved beyond reasonable doubt that the appellant as the officer who had custody and control of the keys is the one who stole the money.

7. on whether the learned Magistrate erred in law and misdirected himself when he found that it was only the Appellant who was in control and custody of all the cash and materials when in fact the other employees had access to the office separately where the cash was kept - The finding of the magistrate was based on the prosecution and defence evidence which clearly showed that the Appellant was the one who was in control and custody of all the cash and materials. The other employees could only gain access to the keys and premises under the appellant's authority.

Sentencing guidelines and the case law on theft by servant

Section 286 of the Penal Code provides for the offence and punishment of stealing by clerks and servants, as follows,

'(1) If the offender is a clerk or servant, and the thing stolen is the property of his employer, or came into the possession of the offender on account of his employer, he shall be liable to imprisonment for fourteen years.

(2) Where a court convicts a person to whom subsection (1) applies, the court shall make an order for the seizure of any money and for the seizure and sale of any other property of that person, or any member of his household whom the court is satisfied has been fraudulently enriched from the proceeds of the theft, sufficient to realize an amount equivalent to the amount or value of the money or property proved to have been stolen, less the amount or value of any part of such money or property restored to his employer, and the court shall order the amount realized as aforesaid to be paid forthwith to his employer.'

The maximum penalty for committing the offence of theft by servant is imprisonment for fourteen years and the *Magistrates' Court Sentencing Guidelines* (Malawi Judiciary, May 2007 at 34) suggests the starting point sentence of two years sentence of imprisonment. In *Rep v Kotamu,* HC/PR Confirmation case no. 180 of 2012 (unreported 27 June 2013), the defendant stole property valued at K141,000 from his employer. He pleaded guilty and the lower court sentenced him to nine months imprisonment with hard labour. This sentence was confirmed by the High Court. The case of *Rep v Kotamu* proposes the use of the time taken to replace the stolen property, based on the national minimum wage, as a tool for determining the appropriate punishment for the various offences involving dishonesty. The case law provides guidance on appropriate punishments that are actually imposed in cases of similar nature. The case of *Rep v Kampango* [1991] 14 MLR 432 (HC), held that immediate imprisonment is appropriate for theft by servant because the offence is more serious than theft *simpliciter* and involves breach of trust. In *Rep v Kampango* a sentence of 12 months' imprisonment with hard labour was confirmed as been proportionate punishment for a servant who had stolen 15 planks and half a bag of pigeon peas.

The case of *Rep v Koloko* [1995] 2 MLR 723 (HC) at 724 notes that theft by servant involves breach of trust, which factor is included in the aggravated sentence of theft by servant, although it has generally been regarded as an aggravating circumstance. In *Rep v Koloko* the High Court confirmed a 15 months sentence of imprisonment a domestic servant who stole from his employer the sum of K299 cash.

In the present case the appellant argues that the court failed to consider the circumstances of the case in that it may have occurred mainly due to negligence of the complainant in failing to procure a safe box for the employees to keep the money on the days when there were no banking services. It is submitted by the appellant that the court did not consider the fact that the appellant is a young and first offender and that the circumstances of the offence did not result in huge loss to the complainant company in that it was capable to make that kind of money in just a few days of trading. Further the appellant submits that the offence did not amount to gross abuse of trust as was held in the case of *Edward Nyamatcherenga v Rep* Criminal Appeal no. 56 of 2000 where there was gross abuse of trust after more than ten years of service. The appellant correctly observes that the sentence for theft by servant depends on the amount of property stolen was noted in the case of *Charles Malinga v Rep* Criminal Appeal no. 22 of 2002. In concluding their skeleton arguments the appellant submits that the punishment of six years that was imposed on him was manifestly excessive, cruel, inhuman and degrading to the appellant and did not take into consideration the period of time the appellant had spent in custody before judgment and suggests that a sentence of at least two years imprisonment would be more appropriate. The appellant places much reliance on the case of *Rep v S. Kamuna.*

The respondent submits that a custodial sentence was merited due to the following aggravating factors: none of the stolen huge sum of money was recovered and there was breach of trust on part of the appellant as an employee. The appellant was someone whom PW5 trusted as he was recruited through a personal friend of PW5. However the respondent agrees with the appellant that the punishment imposed on him was excessive regard being had to the following mitigating factors: that the appellant was a young first time offender. It is the considered view of the respondent that the sentence should be reduced to four years imprisonment. The respondent rely on the case of *Rep v Charles Chizenga* Confirmation Case Number 297 of 2007, the accused pleaded guilty to the offence of breaking and entering a building and committing a felony therein. All stolen goods were recovered. These factors prompted the court to reduce a 4 years sentence to 3 years IHL. The respondent agrees with the appellant that the sentence that was imposed on him was excessive regard being had to the

mitigating factors. The respondent thus submits that the sentence should be reduced to 4 years imprisonment.

This court agrees with the appellant and respondent that the sentence of 6 years imprisonment that was imposed on the appellant for committing the offence of theft by servant was manifestly excessive considering the mitigating factors that were in favour of the offender, the sentencing guideline starting point of two years imprisonment and the sum of K2,115,000.00 that was stolen by the appellant. However, after noting that the sentence that was imposed on the appellant must have expired, it is hereby ordered that the sentence of 6 years imprisonment for the offence of theft by servant be and is hereby reluctantly confirmed since it has already been served.

Pronounced in open court this 22nd day of June 2018 at Chichiri, Blantyre.

Dorothy nyaKaunda Kamanga
JUDGE

Case information	:	
Ms. Kaukonde	:	Counsel for the appellant
Mr. Salamba	:	Senior State Advocate for the respondent.
The Defendant	:	Absent /represented.
Mr. Phiri /Ms. Million	:	Court Clerks