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JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION
CONFIRMATION CASE No. 275 OF 2017

[Criminal case no. 227 of 2017, FGM, Mulanje Magistrates' Court]

THE REPUBLIC

versus

MIKE LUKA

ORDER ON CONFIRMATION

nyaKaunda Kamanga, J.,

The defendant, Mike Luka, appeared before the First Grade Magistrate sitting at Mulanje Magistrates' Court where he pleaded guilty to committing the offences of housebreaking and theft contrary to ss 309 and 278 of the Penal Code, respectively. The brief facts of the case are that on 31st March 2017 at Kanyadula Village in Mulanje district the 29 year old accused person broke and entered the dwelling house of his mother in law and stole a mattress valued at K19,500. On 3rd day of April 2017 the trial magistrate imposed concurrent punishments of sixty (60) months imprisonment for the first count of the offence of housebreaking and six (6) months on the second count of the offence of theft.

This matter is being reviewed in accordance with s 42(2)(f)(viii) of the Constitution and s 15(1) of the Criminal Procedure and Evidence Code (hereinafter the CP and EC) confirms whether the defendant was subjected to a fair trial by the subordinate court.

This court is of the view that the finding by the lower court of guilty and the conviction of the defendant for the offences of housebreaking and theft following the pleas of guilty were well proper and are hereby confirmed.

Guideline for sentencing housebreaking offenders

Section 309(1) of the Penal Code provides for offence and penalty for housebreaking and states that,

'Any person who—

- (a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or

- (b) having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof,

shall be guilty of a felony termed "housebreaking" and shall be liable to be punished with death or with imprisonment for life.

The maximum penalty for committing the offence housebreaking is death or imprisonment for life and housebreaking being a serious offence long and immediate sentences of imprisonment are usually imposed on convicted offenders. The *Magistrates' Court Sentencing Guidelines*¹ suggest the starting point for sentencing of housebreaking offenders as a sentence of six years imprisonment. The cases which are outlined below provide guidance on appropriate punishments that are actually imposed in cases of a similar nature.

In *Republic v Binwell Foster Kafwambira*² the defendant was convicted of housebreaking and sentenced to 60 months IHL. On confirmation of the criminal matter and after the court had taken into consideration the fact that the defendant was a young first time offender the sentence was reduced to three and half years IHL. In *Republic v Fadiweck Guta*³ a first-time young offender of 23 years old who was found guilty of housebreaking and stole assorted property items valued at K9,000 was sentenced to three years imprisonment for housebreaking. On confirmation of sentence, the High Court was of the opinion that the punishment was lenient as offenses of this nature are common both in urban and rural areas. Accordingly, the sentence of three years imprisonment was enhanced to 48 months imprisonment to suit the prevailing trends at that time of sentencing for such offenses. In *Republic v Genazio Ganeti*⁴ the High Court confirmed a punishment of three years imprisonment for a first-time offender who committed the offence of housebreaking by breaking and entering a house and stealing various items and the sum of K2,400. In *Republic v Manda*⁵ the High Court confirmed a custodial sentence of 30 months imprisonment for the offence of housebreaking that was imposed on a young offender who pleaded guilty to breaking and entering a dwelling house from where he stole electronic equipment valued at K61,750. In *Republic v Willard Mkudzula*⁶ the High Court confirmed a custodial sentence of 24 months imprisonment for the offence of housebreaking that was imposed on a young first-time offender who was found guilty of breaking and entering a dwelling house from where he stole a radio valued at K7,000.

Sentencing guidelines and case law on theft

The offence of theft is defined in s 271 of the Penal Code and the penalty is provided for in s 278 of the Penal Code where it is stipulated that,

'Any person who steals anything capable of being stolen shall be guilty of the felony termed theft and shall be liable, unless owing to the circumstances of the theft or the

¹ Registrar (2018) at 37.

² Conf. Case 37 of 2008.

³ HC/PR Confirmation Case No. 904 of 2009.

⁴ HC/PR Confirmation Case No. 237 of 2013 (unreported 11 July 2013).

⁵ HC/PR Confirmation Case No. 83 of 2011 (unreported 11 July 2013).

⁶ HC/PR Confirmation Case No. 100 of 2012 (unreported 11 July 2013).

nature of the thing stolen some other punishment is provided, to imprisonment for five years’.

The maximum penalty of five years imprisonment for committing the offence of theft is reserved the worst instance of the crime and the *Magistrates’ Court Sentencing Guidelines*⁷ suggests the starting point for the punishment of theft as a six months sentence of imprisonment. Generally, the factors to consider in imposing punishments for the offence of theft depend on the circumstances of the theft and the value of the property stolen.

The case of *Republic v Francis Kotamu*⁸ 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.⁹ In addition reference is be made to case law that provides guidance on appropriate punishments that are actually imposed in cases of similar nature. These include the cases of *Chitsonga v Republic*¹⁰ where a defendant who stole household items valued at K390 had his punishment reduced from 12 months IHL to three months imprisonment with hard labour on appeal, due to the low value of the property that was stolen. In the case of the *Republic v Lawrence Josephy*¹¹ the defendant pleaded guilty to stealing one cell phone worth K8,000. The defendant was sentenced to twelve months imprisonment. The custodial punishment was suspended on condition that the defendant performs community service work. On reviewing the criminal matter the High Court was of the opinion that the sentence of 12 months imprisonment was manifestly excessive as the sentence should have been informed by the value of the technological device, in the absence of a penal provision on aggravated theft of technological devices. The High Court was of the view that an appropriate punishment would have been the imposition of a fine. In the case of *Republic v Ananiya Panja*¹² the defendant was convicted of stealing the sum of K54,000 from a fellow Christian. The High Court found the punishment to be manifestly excessive as the stolen sum of K54,000, was about eight months’ wages on the reigning minimum wage at the time of committing the crime. The custodial sentence of 18 months imprisonment for theft that was imposed on the defendant by the lower court was only confirmed because the defendant has already served the sentence.

Consideration of aggravating and mitigating factors

In terms of the level of trespass on the count of housebreaking, the court finds that the offender did cause damage to the victim’s house as the offender had to remove six bricks from one of the walls of victim’s house for him to gain access as the doors of the house were locked. It is an aggravating factor that the offender breached the trust of his mother in law by invading her house while she was meeting with the village headman; the offender must have planned the commission of the offence as he was monitoring the movement of his mother in law and committed the offence when he knew that she gone away; the offender also left the items that were in the bedroom of his mother in law in disarray. The mitigating factors are the fact that the defendant was a first-time offender who pleaded guilty to both counts of housebreaking and theft

⁷ Registrar (2018) at 29.

⁸ High Court PR Confirmation case no. 180 of 2012 (unreported 27 June 2013).

⁹ High Court PR Confirmation case no. 180 of 2012 (unreported 27 June 2013) at 6.

¹⁰ [1995] 1 MLR 86 (HC).

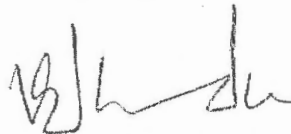
¹¹ HC/PR confirmation case no. 261 of 2013 (unreported 21 August 2013).

¹² High Court Mzuzu DR, Confirmation case no. 331 of 2012 (unreported 14 April 2014).

and the recovery of the mattress since he dropped it in the course of running away from the children who were pursuing him after a woman had started shouting 'wakubayo' (thief).

After a consideration of the record of this criminal matter, the aggravating and mitigating factors this court is of the view that the sentence of 60 months imprisonment that was passed by the lower court for the offence of housebreaking was manifestly excessive and is reduced to 48 months imprisonment. Similarly, the sentence of 6 months imprisonment that was imposed on the count of theft is also manifestly excessive and is reduced to one month imprisonment. The sentences are to operate concurrently as was order by the magistrate with effect from the date of arrest, the 31st day of March 2017.

Dated this 21st day of May, 2018 at Chichiri, Blantyre.



Dorothy nyaKaunda Kamanga
JUDGE

Case information:

The prosecution

Absent.

Defendant

Absent.

Ms. Million

Court Clerk.