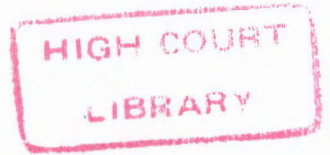


Chief State Advocate

Rep v Kubwalo
Conf. 246/17



JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION
CONFIRMATION CASE No. 246 OF 2017
[being Criminal Case No. 416 of 2017, SRM, Blantyre Magistrates' Court]

THE REPUBLIC

versus

PRINCE KUBWALO

ORDER IN CONFIRMATION

nyaKaunda Kamanga, J.,

The defendant, Prince Kubwalo, appeared before the Senior Resident Magistrate sitting at Blantyre where he was charged and convicted of four counts of the offences of housebreaking (on counts 1 and 3) and theft (on counts 2 and 4) contrary to sections 309(1)(a) and 278 of the Penal Code, respectively. The 21 years old defendant pleaded guilty to all the four counts that he was charged with. The brief facts of the criminal matter in support of the 1st and 2nd counts are that the defendant and another between the month of November 2016 and March 2017 at Chinangwa residential area in the city of Blantyre broke and entered a dwelling house belonging to Mrs. Grace Mtonga from where they stole one Senotech TV, one Sony DVD player, one free to air decoder, six boxes of tiles, two bags of cement, four window frames and adhesive all valued at K1,164,000.00. In regard to the 3rd and 4th counts, the defendant admitted that on the 13th of March 2017 at Chinangwa residential area in the city of Blantyre, he broke and entered the dwelling house of Mrs. Grace Mtonga and stole one play station, one DVD player, assorted clothes and shoes and one spare car key all valued at K150,000.00. On 27th of March 2017 the defendant was sentenced to 12 years imprisonment with hard labour, effective from the date of arrest. The Senior Resident Magistrate came up with the penalty of 12 years by cumulatively

adding the sentences that he had imposed on the four counts of the offences which were broken down as follows: on counts 1 and 3 which were offences of housebreaking the magistrate imposed 5 years imprisonment on each count while for the offence of theft, on counts 2 and 4, the magistrate imposed 12 months imprisonment on each count.

The power to review criminal matters

This matter is being reviewed in accordance with the provisions of s42(2)(f)(viii) of the Constitution and s15(1) of the Criminal Procedure and Evidence Code, hereinafter CP and EC, in order to verify if the defendant was subjected to a fair trial and punishment. Generally, the law provides that none of the parties are entitled to be heard when the court is exercising its powers of review. The court has exercised its discretion to proceed with reviewing the criminal matter after regarding the objective of review: *Republic v Pitasoni*, HC/PR confirmation case no. 1143 of 2001. Criminal matters are supposed to be reviewed speedily and a court can proceed in the absence of a defendant as long as it is not contemplating an order that is adverse to the defendant: *Republic v Malifa* [1993] 16(2) MLR 729 (HC).

In regard to the conviction this court is of the view that the findings by the lower court of guilty and the conviction of the defendant on the four counts following the defendant's own pleas of guilty and admission of facts in support of the offences of housebreaking and theft were well founded and are hereby confirmed. The subsequent paragraphs will discuss the fairness of the sentences that were imposed on the defendant.

Sentencing guidelines for housebreaking and theft

Under section 309(1)(a) of the Penal Code the maximum penalty for committing the offence of housebreaking is death or imprisonment for life. In principle maximum penalties are reserved for the worst instance of the crime. However, housebreaking being a serious offence, long and immediate sentences of imprisonment are usually imposed on convicts. The *Magistrates' Court Sentencing Guidelines* suggests the starting point for sentencing of offenders of housebreaking as a sentence of six years imprisonment. The following cases provide guidance on appropriate punishments that are actually imposed in similar cases. In *Republic v Faduweck Guta*, HC/PR Confirmation Case No. 904 of 2009, a first-time young offender of 23 years who was found guilty of housebreaking and stole assorted property items valued at K9,000 was sentenced to three years 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 was enhanced to 48 months to suit the prevailing trends of sentencing for such offenses at that time. In *Republic v Genazio Ganeti*, HC/PR

Confirmation Case No. 237 of 2013 (unreported 1 July 2013), the High Court confirmed a punishment of three years for a first-time offender who committed housebreaking by breaking and entering a house and stealing various items and the sum of K2,400. In *Republic v Manda*, HC/PR Confirmation Case No. 83 of 2011 (unreported 11 July 2013), the High Court confirmed a custodial sentence of 30 months imprisonment for 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*, HC/PR Confirmation Case No. 100 of 2012 (unreported 11 July 2013), the High Court confirmed a custodial sentence of 24 months imprisonment for 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.

The offence of theft is defined in s 271 of the Penal Code and the maximum penalty of 5 years imprisonment is provided for in s 278 of the Penal Code. The *Magistrates' Court Sentencing Guidelines* 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: *Republic v Francis Kotamu*, High Court PR Confirmation case no. 180 of 2012 (unreported 27 June 2013). In the present case, the value of the stolen property was high on the 2nd count at the sum of K1,164,000.00 and slightly moderate on 4th count at the value of K150,000.00.

Consideration of aggravating and mitigating factors

The main aggravating factors in the circumstances of this case were that the defendant planned the commission of the offence in that he committed the offences on the 1st and 2nd counts with an accomplice and at the house of a relative. There was repeat victimisation of the complainant as the defendant revisited the home of the complainant alone to commit the offences on the 3rd and 4th counts. The offender derived economic benefit from the commission of the criminal acts as most of the stolen items were not recovered as they were sold by him whilst the victim suffered loss.

On the other hand, the main mitigating factors in this criminal matter were the fact that the defendant pleaded guilty to all the four counts of the offences that he was charged with. As a general principle of sentencing it has been established that, subject to other prevailing circumstances, a timely plea of guilty ought to reduce the appropriate sentence by a third: *Republic vs Kachingwe* [1997] 2 MLR 111 (HC). Secondly, the defendant was youthful at 21 years of age and it was inappropriate to sentence him to a long prison term of 12 years: *Republic v Felix Madalitso Keke* High Court / PR, Confirmation case no. 404 of 2010 (unreported 18 June 2013). Thirdly, since the defendant was a first time offender there was need for the court to be

seen to be in compliance with the penal practice that such offenders should be subjected to shorter and quicker sentences: *Republic v Fatsani Sakhwinya*, High Court PR Confirmation case no. 359 of 2013 (unreported 24 July 2013)

In terms of the level of trespass on the two counts of housebreaking, the court finds that there is no evidence that the offender caused any damage to the victim's house which should be considered in favour of the defendant.

As has been earlier noted, the Resident Magistrate imposed a cumulative sentence of 12 years imprisonment on the defendant. The sentences which were ordered to operate consecutively were of 5 years imprisonment on each of the 1st and 3rd counts of housebreaking and 12 months imprisonment on each of the counts of theft. The imposition of combination of sentences is provided for under section 12 of the CPE and EC as read with section 14 of the CP and EC. Section 17 of the CP and EC provides that where there is a conviction of several offences in one trial, a court is allowed to impose sentences which run consecutively provided it is within one's jurisdiction. The general principle under section 17 of the CP and EC is that sentences should run consecutively where the offences are committed separately. In practice where the offences are committed in the same transaction, a series of transactions or within a short period courts order sentences to run concurrently. Courts depart from the abovementioned general principles where they are satisfied that in order to protect the public interest it is proper to make the sentences to run consecutively where normally they would be ordered to run concurrently. Similarly, a court would be entitled to order sentences to run concurrently when it is clear that if they were ordered to run consecutively they would result in an extraordinarily excessive sentence. The court is required to give reasons for departing from the general rule: *Banda and others v Republic* [1990] 13 MLR 56 (SCA).

The fact that the Senior Resident Magistrate did not record any reason for ordering the consecutive operation of the sentences is an irregularity which this court on review will have to rectify. The order for the consecutive operation of sentences should be given much thought and consideration by magistrates before they make such a determination and it should not just be reduced to mere basic arithmetic by simply adding up all the sentences that have been imposed on a defendant.

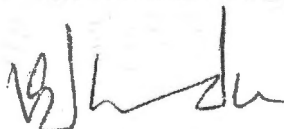
After considering the aggravating and mitigating factors and the circumstances of this criminal matter this court finds that, first, the order for consecutive operation of the sentences on the 1st and 2nd counts as well as on the 3rd and 4th counts was wrong because the offences of housebreaking and theft on each occasion were committed in a single transaction. The charge sheet is very clear that the offence on the 2nd count was committed 'at the same time and place

stated in the first count'. Similarly, the offence on the 4th count was committed 'at the same time and pace as stated in the third count'. Secondly, the order for the consecutive operation of sentences was not appropriate as the offences on all the counts were a series of transactions and were committed within a short period of each other. The closeness in time in committing the offences is revealed in the charge sheet where it is recorded that the 1st count of housebreaking was committed 'between the month of November 2016 to March 2017' while the 3rd count on housebreaking was committed 'on the 13th March 2017'. Thirdly, the sentence of 5 years IHL that was imposed by the lower court on each of the counts of the offences of housebreaking was manifestly excessive considering the strong mitigating factors in favour of the defendant which have been highlighted above. Fourthly, it was unreasonable for the court to impose the same sentence on each of the two counts of theft when the value of the property that was stolen on each count was not the same. Fifthly, the sentence of 12 months imprisonment that was imposed on the 4th count of theft was manifestly excessive and not proportionate to the value of the stolen property.

In view of the above observations, the sentencing guidelines and principles, this court is of the opinion that the defendant in this matter was not subjected to a fair punishment and that the 12 years consecutive term of imprisonment that he was ordered to serve is too harsh for such a young offender. While the sentence of 12 months imprisonment on the 2nd count of theft should and is hereby confirmed this court exercises its discretion and proceeds to set aside the three other sentences and substitutes with them the following sentences: on each of the 1st and 3rd counts of housebreaking the sentences are reduced from 5 years to 4 years imprisonment and on the 4th count of theft the sentence is reduced from 12 months to 4 months imprisonment. This court also sets aside the order for consecutive operation of all the sentences and orders that all the sentences on the four counts should run concurrently, therefore the total custodial term is reduced from 12 years imprisonment to 4 years imprisonment. The operation of the sentences will commence from the date of arrest as was ordered by the Senior Resident Magistrate.

Any party dissatisfied with this order is at liberty to appeal.

Dated this 7th June 2018 at Chichiri, Blantyre



Dorothy nyaKaunda Kamanga
JUDGE

Case information:

Prosecution
Defendant
Mr. Miss Million

Absent.
Absent/unrepresented.
Court Clerk.