

JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION

CONFIRMATION CASE No. 149 OF 2015

[being Criminal Case No. 324 of 2014, SGM, Nchalo Magistrates' Court;
CSA/HC/CC/108/2017]

THE REPUBLIC

versus

KARONGA WATSON

ORDER IN CONFIRMATION

nyaKaunda Kamanga, J.

The defendant, Karonga Watson, appeared before the Second Grade Magistrate sitting at Nchalo Magistrates' Court where he was charge with four counts of theft of cattle contrary to section 281 of the Penal Code. The court on the 6th day of October, 2014 sentenced the accused person to 12 months imprisonment for the first count, 24 months on the second count, 12 months on the third and 10 months on the fourth count of theft of cattle with effect from the 6th day of October, 2014. The sentences were order to operate consecutively, resulting in a 58 months custodial punishment. The 26 years old defendant admitted and confirmed the facts from the prosecution as correct that during the night on 25th day of September, 2014 at Tonkhwe village in T/A Chapananga, Chikwawa district he stole the following 6 herds of cattle: on the 1st count one cattle valued at K100,000.00 of Madalitso Khaundani; on the second count two herds of cattle valued at K220,000.00 of Wilson Phungwe; on the third count, two herds of cattle valued at

K120,000.00 of Kenneth Maston Nyawhove and the 4th count, one cattle valued at K100,000.00 of Lettus John Dwenga. The defendant who was a vegetable farmer was arrested on 29th September 2014 as he was about to sell the cattle around Nchalo Trading Centre so that he could raise transport money to travel to Johannesburg.

This matter is being reviewed in accordance with section 42(2)(f)(viii) of the Constitution and section 15 (1) of the Criminal Procedure and Evidence Code, hereinafter the CP and EC, to verify whether or not the offender was subjected to a fair trial by the subordinate court. When the matter was set down for hearing on 25th January 2018 the court proceeded to confirm the convictions on all the counts, as well as the sentences but made an order varying the operation of the sentence from consecutively to concurrently. Such that the maximum prison sentence would be 24 months imprisonment which resulted immediate release of the offender from custody. The reserved reasons for the above order are outlined subsequently.

Upon examining the subordinate court's record of the case of this criminal matter in the process of reviewing the conviction this court finds that the convictions on all the counts were well founded and are hereby confirmed.

The submissions from the prosecution and the defence

The Senior State Advocate rely on the case of *Rep v Kamwendo* [1971-72] 6 ALR Mal 379 to argue that the offences committed by the defendant were similar in nature and that they were committed on the same day and place and there was no justification for the lower court to impose consecutive sentences on the defendant. The prosecution submits that the sentences imposed on the defendant should run concurrently.

The Senior Legal Aid is of a same view as the prosecution that the sentences should run concurrently as there was no sufficient justification to impose a consecutive order. In support of their arguments the defence cite the cases of *Rep v Phiri and another* [1966] MLR 365, *Rep v Sozinyo and another* [1997] 2 MLR 16 and *Idi v Rep* [1991] 14 MLR 103.

Sentencing guidelines for theft of cattle

Theft is defined in s 271 of the Penal Code. The punishment for stealing cattle is provided for under s 281 of the Penal Code, where it is stated that,

'If the thing stolen is any of the things following, that is to say: a horse, mare, gelding, ass, mule, bull, cow, ox, ram, ewe, wether, goat, pig, or

ostrich, or the young of any such animal, the offender shall be liable to imprisonment for fourteen years.'

The maximum penalty for committing the offence of theft of cattle is imprisonment for fourteen years and the *Magistrates' Court Sentencing Guidelines* Malawi Judiciary (Blantyre: 2007 at 31) suggests the starting point for the punishment of theft of cattle as a 12 months sentence of imprisonment. The case of *Republic v Zomwela Ndonga* HC/PR Confirmation case no. 297 of 2013 (unreported 16 September 2013 at 9) suggests that the sentences for this aggravated theft should be above the guidelines for theft *simpliciter*. The case of *Republic v Kotamu* HC/PR Confirmation case no. 180 of 2012 (unreported 27 June 2013) 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, HC/PR Confirmation case no. 180 of 2012 (unreported 27 June 2013 at 6) apart from other circumstances integral to punishment. In terms of the guidelines where the value of the stolen is equivalent or above one and one half years salary at the minimum a sentence of up to one year imprisonment would be appropriate: *Rep v Zomwela Ndonga* HC/PR Confirmation case no. 297 of 2013 (unreported 16 September 2013 at 7). While a sentence of two years imprisonment would be appropriate for theft of property valued from one and half years to four years minimum wage: *Rep v Zomwela Ndonga*. The approach of assessing the time taken to replace the stolen property, based on the national minimum wage has the potential to produce a more uniform approach that can help with developing consistency and uniformity in sentencing.

The cases discussed below are an illustration of the sentences that the High Court has approved in cases of similar nature:

- I. In the case of *Republic v Chisale*, [1997] 2 MLR 228 (HC), where the defendant stole two head of cattle and was sentenced to two years IHL. The High Court was of the view that that two years' imprisonment with hard labour for the theft of two heads of cattle was manifestly excessive and reduced the punishment to one year IHL.
- II. In the case *Republic v Phiri and another*, [1997] 2 MLR 92 (HC), the defendants were charged with the theft of seven heads of cattle but they admitted to stealing three. The subordinate court thought that "a reformatory" sentence of seven years' IHL was appropriate in the circumstances. The High Court was of the view that the punishment imposed ignored several principles of sentencing and circumstances that were pertinent to the sentence that should have been imposed. The High Court found the punishment of seven years IHL

disproportionate to the personal circumstances of the defendants and set it aside so that the defendants could serve a sentence of one year IHL.

- III. In the case of *Republic v Maxwell Lameck*, HC/PR Confirmation case no. 320 of 2011 (unreported 16 September 2013), the court was of the opinion that the imposition of a punishment of 36 months IHL for theft of a cow valued at K27,000 in 2011 was excessive punishment and should have been reduced to a sentence of four months imprisonment, suspended generally or on condition that the defendant completes a community service order.
- IV. In *Republic v Stephano Watson*, HC/ PR Confirmation case no. 25 of 2012 (unreported 16 September 2013), the defendant was convicted of theft of three head of cattle valued at K260,000. In May 2011 the Second Grade Magistrate sitting at Nchalo Magistrates' Court imposed a punishment of 30 months imprisonment on the defendant. The High Court confirmed the punishment of 30 months imprisonment which was imposed by the subordinate court for a first time youthful offender who pleaded guilty to the charge of theft of cattle.
- V. In *Republic v Edward Goba*, HC/ PR Confirmation case no. 475 of 2009 (unreported 16 September 2013), the High Court was of the opinion that the excessive punishment of 18 months imprisonment which was imposed by the subordinate court should have been reduced to 15 months imprisonment, for a first time offender who pleaded guilty to stealing a cow in November 2008 which was valued at K40,000. However, the punishment of 18 months imprisonment was confirmed because the defendant had already served the punishment at the time the procedure of review was being conducted.
- VI. In the case of *Republic v Francis Rayiden and three others*, HC /PR Confirmation case no. 583 of 2011 (unreported 16 September 2013), the defendants in July 2011 were convicted of stealing nine cows valued at K485,000. The High Court confirmed a punishment of 72 months imprisonment which was imposed by the lower court.

The main aggravating factors in this criminal matter are that the defendant stole several herds of cattle from several victims which in total were valued at K540,000; the cattle were stolen at night; the defendant had coordinated and planned the commission of the offence. On the other hand, there are several mitigating factors in favour of the offender including the following: that the defendant was a first time offender, he pleaded guilty to all the counts on the charge sheet and all the stolen cattle were recovered to the sigh of relief of the victims. A general principle for punishing first-time offenders noted in *Republic v Fatsani Sakhwinya*, HC/PR Confirmation Case No 404 of 2010, is that they should not be subjected to long prison terms as short, quick and sharp sentences can just be as effective in achieving the ends of justice. When dealing with guilty pleas, the

case of *Republic v Kachingwe*, (1997) 2 MLR III (HC), reminds sentencers that “a timely plea of guilty” ought to reduce the appropriate sentence by a third. Considering the aggravating and mitigating factors and circumstances in which the offences were committed, this court uphold the sentences that were imposed on all the four counts.

What is problematic with the sentencing judgment of the magistrate is the order for consecutive operation of the sentences which does not comply with sentencing principles and practice and has the overall negative impact of condemning the defendant to serve a manifestly excessive sentence. The magistrate imposed a cumulative sentence of 58 months imprisonment on the defendant. It was appropriate that the defendant to be sentenced for each count and 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 and as has been noted by the prosecution and the defence where the offences are committed in the same transaction, a series of transactions or within a short period courts order sentences to run concurrently: *Rep v Kamwendo* [1971-72] 6 ALR Mal 379, *Rep v Phiri and another* [1966] MLR 365 and *Rep v Sozinyo and another* [1997] 2 MLR 16. 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).

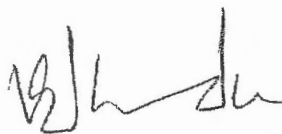
The Second Grade Magistrate recorded the reason for ordering the consecutive operation of the sentences to be as follows: ‘the manner all the six herds of cattle were stolen, how all the four counts were committed by the accused person and the provisions of the law under section 17 of the Criminal Procedure and Evidence’. This court agrees with the defence that the above reasoning was not sufficient justification for making the order for the consecutive operation of sentences. This court finds that the order for consecutive operation of the sentences on all the four counts was wrong because the offences of theft of cattle on all the count were all committed in a single transaction on the same day. The charge sheet discloses that the offence on all the four count were committed ‘on 25 day of

September 2014 at Tonkhwe Village'. All the offences having been committed on the same day the order for the consecutive operation of sentences was not appropriate.

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 58 months cumulative term of imprisonment that he was ordered to serve is too harsh for the offender. While the sentences of imprisonment on all the four counts are confirmed, this court exercises its sentencing discretion and proceeds to set 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 58 months imprisonment to 24 months imprisonment. The operation of the sentences having being confirmed to commence from the date of arrest, 29th September 2014, as was ordered by the Second Grade Magistrate, this order results in the immediate release of the defendant from custody.

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

Dated this 8th June 2018 at Chichiri, Blantyre



Dorothy nyaKaunda Kamanga
JUDGE

Case information:

Date of hearing	25 January 2018
Mr. Chisanga	Senior State Advocate for the prosecution.
Mr. Panyanja	Senior State Advocate for the Defendant.
Defendant	Absent.
Mr. Amos & Miss Million	Court Clerks.