**IN THE REPUBLIC OF MALAWI**
**IN THE HIGH COURT OF MALAWI**
**MZUZU REGISTRY: CRIMINAL DIVISION**
**CRIMINAL APPEAL No. 122 of 2017**

*(Being Criminal Case No. 109 of 2017 before the First Grade Magistrate's Court sitting at Rumphi)*

**Dan Zgambo**

**V**

**The State**

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**CORAM:**

**THE HON. JUSTICE D. DEGABRIELE**

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| Mr. D. Shaibu | Counsel for the State |
| Mr. C. K. Phiri | Counsel for the Appellant |
| Mr. C. Chawinga | Official Interpreter |
| Mrs R. Luhanga | Court Reporter |

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***DeGabriele, J***

**RULING ON APPEAL AGAINST SENTENCE**

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1. The Appellant herein, Dan Zgambo was charged with the offence of House Breaking contrary to section 309(1)(a) on the first count; and theft contrary section 278 of the Penal Code on the second count. He denied the charges. He was convicted after a full trial and was sentenced to 8 years imprisonment with hard labour on the first count and 2 years imprisonment hard labour for the second count. The Appellant is appealing

against the sentence only, on the ground that the sentence was manifestly excessive in the circumstances and that the lower court did not take into account some mitigating factors.

2. The brief facts were that the Appellant, on or about the 23rd day of September 2016 broke into a house belonging to George Dyson and stole various objects of property valued at MK85, 000.00. The Appellant was apprehended after a bag which was believed to have been stolen was spotted in the possessions of another person. Further investigations as regard the bag, led the investigators to the Appellant as the one who committed the offence.

3. The Court is called upon to determine whether the sentence meted out to the Appellant by the lower court is manifestly excessive in the circumstances. Section 309(1)(a) states that ;

> *"(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"*

4. The offence of housebreaking attracts a maximum punishment of death or life imprisonment whereas the maximum punishment for the offence of theft is 5 years. This court is in agreement to the sentiments of Justice Mwaungulu as he was then, in the case of ***Bwanali Mwachikho v Rep, Confirmation Case No 828 of 2002***, that

> *"Generally, for an ordinary burglary or housebreaking where the defendant is young, offends for the first time and pleads guilty, this court approves of sentence of three years imprisonment. There could be other mitigating factors, so consequential, justifying a further reduction. A good example is where, in a mob justice, a defendant has been maimed during arrest. By and large, and subsequent sentences form this Court confirm this, three years is the sort of sentence approved in the circumstances described. The sentence may be aggravated by the extent of the actus reus or mens rea or other factors extraneous to the offence. If, for example, extensive damages to property or violence to victims or others accompanied the trespass the court may pass an enhanced sentence. These aspects display a high level of criminally that a court cannot ignore. Equally, if the*

*defendant disturbed occupants or occupants were young, elderly or vulnerable, the court may take a serious of the crime. These are things a court should regard when sentencing for burglary or housebreaking"*

It was held in the case of ***Ayami v Rep [1997] 13 MLR 19***, that in considering the appropriateness of the sentence it is imperative to evaluate the extent of the crime, the effect on the victim and the circumstances in which it was committed and come up with a sentence which is appropriate in that particular area.

5. The sentencing court must look at the mitigating and aggravating factors of the offence and weight the same in view of the circumstances under which the offence was committed. The mitigating factors herein were that the Appellant asked for leniency, that he was a first offender, and he was young, being 25 years old at the time of the commission of the offence. The aggravating factors are that the offence is serious, he stole 4 bags of maize during hunger season causing the family of the victim to suffer, all items were not recovered save the laptop bag, the commission of the offence was well planned, and the offence itself is very prevalent.

6. A sentencing court should take into consideration the age of the convict both at the time of committing the offence and at the time of sentencing. The Appellant was 25 years old at the time of the commission of the offence and sentencing. The law generally favours relatively young or old people in passing shorter custodial sentences on order to protect them from being in custody for longer periods, see ***Rep. v. Ng'ambi [1971-1972] ALR Mal 457***.

7. The sentence imposed on the Appellant as a first offender should be a sentence that fits the crime and the offender himself. As a matter of the general rule, maximum sentences should be reserved for the worst instances of the crime, *see* ***Rep v Chikakuda [1997]2 MLR 288 HC at page 293.*** The lower court passed the current sentence with regard to the fact that such cases were rampant in Rumphi as such the convict would serve as a deterrent. The passing of deterrent sentences on young first time offenders disregards the principle that the sentence passed by the sentencing court must be equal to the crime. A lengthy deterrent case would be manifestly excessive and might be a violation of the accused persons fundamental right not to be subjected to cruel, inhuman and degrading treatment or punishment, see ***Rep v Pose [1997]2 MLR 95 HC.*** Long sentences as was passed in this case

only leads to the offender being exposed for a long periods of time to hardened criminals, see ***Republic v Mwachangu Confirmation Case No 653 of 1997 (unreported)***.

8. In this case the Appellant was handed down eight (8) years for housebreaking and two (2) years for theft to run concurrently. Considering the discussion above, this Court finds that the sentence of 8 years imprisonment on the 1st count was excessive. The sentence on the first count is hereby set aside and is substituted with a sentence of 4 years imprisonment with hard labour. The sentence on the second count is confirmed. The sentences to run concurrently with effect from 13 June 2017.

**Pronounced in OPEN COURT at Mzuzu Registry this 8th day of January 2020**

**Honourable D. A. DeGabriele**

**J U D G E**