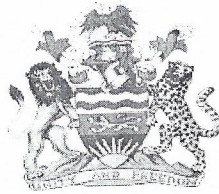


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IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION

sitting at Chichiri

CONFIRMATION CASE No. 360 of 2020

(being criminal case no. 168 of 2019, SGM, Nchalo Magistrates' Court)

REPUBLIC

v

LAMECK YUSUF SAIBU NGWALI

ORDER ON CONFIRMATION

nyaKaunda Kamanga, J.,

This criminal matter from Nchalo Magistrates' Court was remitted to the High Court for review in line with section 42(2)(f)(viii) of the Constitution, section 25 of the Courts Act and section 15(1) of the Criminal Procedure and Evidence Code (hereinafter the CP and EC) to enable the High Court of Malawi verify the legality of the proceedings and whether the defendant was subjected to a fair trial and sentencing by the subordinate court.

On 28th August 2019, the defendant, Lameck Yusuf Saibu Ngwali, appeared before the Second Grade Magistrate sitting at Nchalo where he pleaded guilty and was convicted of the offence of theft contrary to section 278 of the Penal Code. The defendant admitted that from January to August 2019 at Nchalo Trading Centre in Chikhwawa he stole 13 prepaid metres valued at K1,744,783.30 belonging to Nchalo ESCOM. The defendant was once engaged as a casual labourer for ESCOM and after his contract with ESCOM was terminated he continued to install and connect electricity with stolen cables and meter to the premises of those people who needed a quick and fast service.

In mitigation of sentence the prosecution called for a stiffer sentences as a lot of people were inconvenienced by the defendant's conduct and the fact that a lot of meters were stolen which the defendant then installed illegally. The 28 years old defendant requested for a lenient sentence based on the recovery of the meters. On 20th September 2019 the Second Grade Magistrate in sentencing considered the penal provision, the sentence guideline and the following mitigating factors in favour of the defendant: that he was a first time offender; he pleaded guilty and

the recovery of some of the stolen items. The court correctly noted that although the convict was a first offender he deserved a custodial sentence because of the following aggravating factors: the seriousness of the nature of the case; the high value of the stolen meters; the conduct of the offender which inconvenienced ESCOM customers who were plunged into unexpected and unplanned blackouts and generally the conduct of the offender which placed the lives of ESCOM customers at risk because he was not an accredited or a professional installer of electricity. The defendant was sentenced to 18 months imprisonment with effect from date of arrest.

As was noted by the Magistrate the main factors to consider in imposing punishment for offences of theft depend on the circumstances of the theft and the value of the property stolen. Generally, the courts impose stiffer penalties where the sum or value of the property is also greater. However, the circumstances of this case reveal that what the defendant did was not mere theft of public infrastructure in the form of prepaid meters and cables but he went further to illegally connect electricity to premises. His conduct was a criminal act which is appropriately addressed under sections 45 and 46 of the Electricity Act, chapter 73:01 of the Laws of Malawi. Notably prosecuting suspects who unlawfully interfere with the supply and installation of electricity under the offence of theft *simpliciter* is not the most viable legal means for addressing theft of public infrastructure such as electricity meters and cables. In this criminal matter the prosecutors should have exercised their prosecutorial discretion properly by proffering appropriate criminal charges under the relevant statute.

After examining the record of the case this court confirm the conviction of the defendant for the offence of theft contrary to section 278 of the Penal Code. In terms of sentencing, the maximum penalty for the offence is indeed 5 years imprisonment. The *Magistrates' Court Sentencing Guidelines* (Blantyre: Malawi Judiciary, 2007 at 29) suggests a starting point of 6 months imprisonment and the case of *Republic v Kotamu*, HC/PR Confirmation Case 180 of 2012 (unreported 27 June 2013), provides good guidance on how the punishment for the offence of theft should be calculated. In regard to sentences that have been imposed in similar cases, this court has in mind the cases of the *Republic v Raphael Janken*, HC/Mzuzu DR Confirmation Case no. 2 of 2013 (unreported 11 June 2015) and *Republic v Nelson Chiwangulunda and Jimmy Alli*, HC/PR Confirmation Case 375 of 2015 (unreported 19 July 2016).

In *Republic v Raphael Janken* the High Court was of the view that a sentence of 18 months imprisonment imposed on a defendant who stole cables belonging to Malawi Telecommunications Limited valued at K1,234,440.00 was manifestly inadequate. The said sentence was reluctantly confirmed because at the time of review the sentence had already expired.

In *Republic v Nelson Chiwangulunda and Jimmy Alli* the defendants were convicted of the offence of theft of 25 metres of cobra copper cables valued at K3,337,000.00 which belonged to Malawi Telecommunications Limited (MTL) contrary to section 278 of the Penal Code. On review of the criminal matter the High Court also reluctantly confirmed the inadequate sentences of 36 months imprisonment that were imposed on each of the offenders due to the offenders non-appearance in court for the confirmation hearing.

In the present case, a custodial sentence was an appropriate form of punishment for a first time offender who pleaded guilty to stealing 13 prepaid electricity metres valued at K1,744,783.30. However, the sentence of 18 months imprisonment which was imposed on him was manifestly inadequate considering the high value of the stolen property and the impact that the commission of the crime had on the quality of life of the several users of electricity who were suddenly exposed to blackouts as a result of the defendant's illegal connections.

Having made the above observations and noting that under paragraphs 4, 5 and 6 of the *Judiciary Measures on Coronavirus (COVID19)* of 27th March 2020 it would be a challenge for this court to set down this matter to consider enhancing the sentence at the earliest opportune time and that it would also not be appropriate to add to the prisoner population through this review process during the COVID 19 pandemic, this court proceeds to reluctantly confirm the sentence of 18 months imprisonment that was imposed on the defendant.

Dated this 20th day of April 2020 at Chichiri, Blantyre.



Dorothy nyaKaunda Kamanga
JUDGE

CASE INFORMATION:

The Prosecution	:	Absent
Defendant	:	Absent /unrepresented
Mr. Amos	:	Court Clerk