



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL DIVISION

CONFIRMATION CASE NO. 512 OF 2020

**(Being Criminal Case No 62 of 2020 in the First Grade Magistrate Court sitting at
Chikwawa)**

THE REPUBLIC

-V-

PETRO DAMIANO

CORAM: HON. JUSTICE AGNES PATEMBA

Mr. Salamba, Counsel for the State

Mr. Panyanja, Counsel for the Accused

Mrs. Msimuko, Court Reporter

Mr Amos, Official Interpreter

ORDER ON CONFIRMATION

1. Petro Damiano, from Mbendelana village, Traditional Authority Kasisi in Chikwawa district was convicted by a First Grade Magistrate on two counts. The first count was that of burglary contrary to section 309 of the Penal Code and the second count was that of indecent assault contrary to section 133 of the Penal Code. He was sentenced to 2 years IHL on the first count of burglary and 2 years IHL on the second count of indecent assault.
2. Upon review, the reviewing judge was of the considered view that the sentence imposed by the lower court on the first count of burglary was on a lower side and ordered that the matter be set down to consider enhancement of the sentence on the offence of burglary.

3. The brief facts of the case are that on the 4th April 2020 at Mbendela village in the district of Chikwawa, the convict broke and entered the dwelling house of Madalitso Phiri with intent to commit a felony therein. While in the house, the Convict indecently assaulted the victim.
4. At the hearing, it transpired that the convict was released upon the expiry of 12 months, being the maximum period of length where any person convicted by a First Grade Magistrate can spend in prison if the sentence is not confirmed by the High Court.
5. The Court ordered that for purposes of setting the record right the hearing should proceed.
6. The State argued that the sentence should be enhanced from two years to four years considering that there was breaking into a building and the extent of damage that was caused by the said breaking. While defence counsel argued that considering that the convict was the first offender in his view two years was adequate and should be confirmed.
7. Section 309 of the Penal Code provides 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.

8. The penalty imposed under the law shows the seriousness of the offence and as such the court's decisions should reflect this seriousness by imposing meaningful sentences. For an offence which attracts a maximum sentence of life imprisonment, sentencing someone to 2 years is a mockery to justice and perpetrates impunity on offenders. The courts should ensure they implement the wishes of Malawians as expressed through legislation.

9. In the case of **Republic v. Bright Jamali** Confirmation Case No 421 of 2013 (HC) (PR) Mwaungulu J, (as he then was) laid down important sentencing guidelines in cases of defilement. He stated that;

The starting point for defilement should, therefore, based on the maximum sentence of life imprisonment, be fourteen years imprisonment. Sentencers at first instance must then scale up and down the starting point to reflect mitigating and aggravating circumstances and that the sentence must fit the offender.

10. The offence of defilement attracts a maximum sentence of life imprisonment and the Judge suggested 14 years as a starting point. Burglary is more serious as it attracts death penalty as a maximum sentence and hence need for stiffer penalties. When imposing penalties, the courts should ensure they enforce the intention of legislators. The courts should not be the first ones to frustrate the intentions of the legislators. The three arms of the government are there to ensure there is no lapse of security in our nation. If courts impose 2 years imprisonment for offences which attracts death penalty, the courts are sending a message to the society that the offence of burglary is not a serious offence. The offence of burglary puts the victim in a physical, emotional and physiological trauma considering that the victim is attacked at night when one is vulnerable. The victim is at the mercy of the attacker who often come to the house of the victim prepared to execute their criminal plan.

11. *The Magistrates' Court Sentencing Guidelines*, (Blantyre: Malawi Judiciary, 2007 at 38) suggests the starting point for the punishment of the offence of housebreaking and burglary be six years imprisonment. In the case of **Republic V. Pilirani Kalanje** Confirmation case No. 297 of 2017, (HC) (PR) the Court reduced the sentence of 7 years which was imposed by a lower court to 5 years IHL. In the case of **Republic v. Fatsani Sakhwiya** (HC) (Unreported) the High Court agreed with the reviewing judge that 2 years imprisonment that was imposed on the accused person for committing the offence of burglary was manifestly inadequate for the offence that he committed.

12. Having in mind the maximum penalty for the offence of burglary that it is death penalty, considering the sentencing guidelines that the starting point is 6 years, considering the seriousness of the offence that the Convict committed, considering the trauma that he had put on the victim when committing this offence, the Court agrees with the reviewing judge that the sentence of 2 years that was imposed by the lower court was a mockery to justice.
13. In conclusion, since the Convict already served a sentence that was imposed by the lower court this Court will therefore confirm the lower court sentence of 2 years IHL. Otherwise this Court would have enhanced the sentence from 2 years imprisonment to 6 years imprisonment with hard labour.
14. So I order.

Delivered this 14th Day of June 2021

AGNES PATEMBA,
JUDGE

