

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CONFIRMATION CASE NO. 554 OF 1996
THE REPUBLIC
VERSUS
MWENYE NKHOMA

In the First Grade Magistrate Court at Nkhonkhotakota Criminal Case No. 88 of 1996

Coram: MWAUNGULU, J

Kalolokesya (Miss), State Advocate, for the State

Accused, Unrepresented

Chilunga, Official Interpreter

Mwenyeidi, Recording Officer

JUDGMENT

This case was set down by the Reviewing Judge to consider the sentence. Two points are raised by the Reviewing Judge. He thought that in view of the age of the defendant, the fact that he was a first offender and the circumstances in which the offence was committed, there should have been an unconditioned discharge. He also thought that the sentence of 36 months should have been suspended. I and the State Advocate thought differently. It was important, therefore, to spend some time on the matter.

The man, Mr. Katema, whose house was broken into, is seventy years old. On 19th May 1996 he left briefly for an hour or two. The house was locked. When he came back at around 1.00 o'clock in the afternoon the door was open and the lock was broken. Inside the house, he noticed that his bag of maize was stolen. He went to check on his son next door. The complainant's son had seen the defendant come from the house with a bag of maize. He thought that the complainant had sold the bag to the defendant. The defendant was followed to the house. He admitted breaking into the complainant's house and stealing the bag of maize. He admitted the charges at

the police. He was convicted by the Court below after trial for the offences of housebreaking and theft contrary to sections 309 and 278, respectively, of the Penal Code. He was sentenced to three years imprisonment with hard labour and nine months imprisonment with hard labour respectively. The sentences were ordered to run concurrently. . It is this order which has attracted the comments of the Judge.

In the judgments of this Court for an offence as grave as this it should be in very rare circumstances that a Court would order a non-custodial sentence. The trend in this country and elsewhere is for immediate and longer custodial sentences (**Republic v. Chizumila**(1994) C.C. No. 316). The Judge was animated by the age of the defendant and the fact that this was the defendant's first offence. These alone do not justify a non-custodial sentence for this nature by the offence. Even in England these offences even if committed by adolescents must involve loss of liberty. Lord Justice Lawton said in **R v Smith and Woollard** (1978)67 Cr. App. R. 211:

“This Court, for some months, has been pointing out to trial judges, and it does so again, that burglary in the form of housebreaking is a very serious crime indeed. The public are entitled to be protected against burglars. In the opinion of this Court they are not likely to be protected if lenient sentences are passed. Unfortunately it is a matter of experience that nowadays a large number of housebreakers are adolescents and that when they break into houses, as in this case, the house is frequently turned upside-down. Adolescents have got to be discouraged from housebreaking and , in our judgment, they are not likely to be discouraged by sentences which do not involve loss of liberty.”

In England the maximum sentence for burglary in a dwelling house is fourteen years imprisonment with hard labour. Aggravated burglary attracts life imprisonment, the death penalty has been abolished. In Malawi burglary on housebreaking are punishable with death. These offences are in the top bracket of offences in the Penal Code considered very grave. The Court cannot easily resort to non-custodial sentences. On the same reasoning and based on the same authorities, suspension of a prison sentence has not even been encouraged in cases of burglary or housebreaking.

The sentence of three years imprisonment with hard labour is the sort of sentence that this Court would want to see for this offence. The reasons for this are amply explained in so many decisions after the decision of this Court in **Republic v Chizumila** (1994) CC. 1236.) The sentences imposed by the Court below cannot be faulted. They are confirmed.

Made in open Court this 1st day of November 1996 at Blantyre.

D.F. Mwaungulu
JUDGE