IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL APPEAL NO. 44 OF 1995

WYCLIFF JOE MUSSA

VERSUS

THE REPUBLIC

In the First Grade Magistrate's Court at Limbe
Criminal Case No. 413 of 1994

CORAM: MWAUNGULU, J

Chipeta, Chief State Advocate for the State
Accused, present and unrepresented
Marsen, Official Interpreter
Mwenyeidi, Recording Officer

Mwaungulu, J

JUDGMENT

This is an appeal against the sentence of five years imprisonment with hard labour which the First Grade Magistrate at Midima in Limbe passed when he convicted the appellant, Wycliff Joe Moyo, of the offence of breaking into a building and committing a felony therein contrary to section 311(1) of the Penal Code. It is not un unoften these days that shops are broken into with considerable loss of property and, at times, as happened here, personal injuries. It is now known that these offences are committed by debutantes. It is also now known that these offences are committed by young men, ranging between eighteen and twenty-five years. The gruesome

problem that sentencers face today is how to balance between the rise in the wave of these violent and serious crimes and the peculiar situations of the offenders. That is the problem here too.

On the night of 9th of August 1993 Mr. Kapolo was watching on the premises of his employer, Rerani Machamisanto, at Maselema, here in Blantyre. A motor vehicle drove straight into the premises. A group of people arrived with panga knives stormed off the motor vehicle. They attacked Mr. Kapolo. He was severely injured. They stormed the premises and stole property worth K39, 897.43.

The appellant was one of the group. He, with other three, pleaded guilty. The four were sentenced to five years imprisonment with hard labour. The other pleaded not guilty and was sentenced to six years imprisonment with hard labour. The appellant appeals against the sentence meted to him. He contends that the sentence of two years imprisonment with hard labour imposed on him is severe. He has raised two ground of appeal. First, he says that the Court should take into account the fact that he was shot at and maimed by the police during arrest. Secondly, he says that the Court should have taken into account the fact that he pleaded guilty to the charge and was cooperative to the police.

On the injury he alleges he sustained at the police, it is correct, as Mr. Chipeta, Chief State Advocate, ha pointed out, that the issue was not put to the sentencing Court below. It is raised for the first time in this Court. It puts the State in a very difficult position to have to answer to the ground. As a matter of course the appellant, if he was represented, would have applied to this Court, to lead additional evidence on appeal on the matter. If allowed to do so, the State would have been allowed to rebut the evidence. I share the problem expressed by the State on the matter. On the other hand, there is the very danger that the appellant, who is not represented by Counsel, will be denied the opportunity to put an assertion which he is really entitled simply because he was unaware of his rights. When it comes to evidence on matters in mitigation the rules (of evidence) are slightly relaxed in favour of the defendant unless there is objection to the matters by the state.

A Court should discount a sentence that it would normally pass on an offender if it is shown that during arrest, out of vengeance or use of excessive force the offender has been injured. The principle is not meant to encourage mob justice or use of excessive force by arresting officers in the hope that the Court will give an appropriate sentence. Any of these acts could result in prosecution of the perpetrators. The principle is based on the wider consideration that when passing a sentence, the Court must consider all the circumstances at the time of sentence. It is a matter in the discretion of the Court whether to consider the injuries. The discretion is used after taking into account all the circumstances of the case. The Court can very well ignore pertinent mitigating factors. In **R vs Inwood** [1974]60 Cr. App. R. 70, Lord Scarman said:

“We have listened, I hope with sympathy and understanding, to the mitigating factors urged upon

us by Mr. Buckley. But in the balance that the Court has to make between the mitigating factors and society's interest in marking its disapproval for this type of conduct, we come to the irresistible though unpalatable conclusion, that we must not yield to the mitigating factors."

The second ground of appeal is that the appellant pleaded guilty to the charge and was therefore helpful to the Court. Much in every way, the defendant was helpful to the Court. His plea dispensed with proof, saved Courts time and expense. I have said several times now that such a plea should result in a reduction of up to one third of the sentence. The Court below, however, considered this aspect. It reduced the sentence of those who had pleaded guilty by a year. I have no basis for interfering with the reduction that the Court below thought was appropriate for the plea of guilty by the appellant.

Mr. Chipeta, however, did refer to statements that I have made on sentences in relation to burglary and housebreaking charges. I have said that the staring point for burglary and housebreaking should be six years imprisonment with hard labour. The sentence should be downgraded or upgraded, respectively, to reflect mitigating and aggravating circumstances. The starting point for the offence of breaking into a building and committing a felony therein should be much lower than for burglary and housebreaking. The maximum sentence for the latter is death or life imprisonment. The maximum sentence for the former is ten years imprisonment. The starting point for breaking into a building and committing a felony therein should be three years.

The usual mitigating factors are age, antecedents and the ameliorating circumstances around the offence, the offender and the victim. Here the appellant is a first offender. He is young. In **R. v Richardson and others**, 'The Times',February 10, 1988, Ewbank, J., said some crimes were so heinous that a plea of youth, a plea that the crime was a first offence or that the offender has never been in prison before was irrelevant. Those who participate in such crimes should know that they will be subjected to long and immediate imprisonment, though they are young, even if they pleaded guilty, even if they had no previous convictions, even if the victims were neither young nor infirm. Courts will not readily accede to pleas of guilty or the age of the defendant where offences are very serious and committed in the most austere of circumstances. As I said in **Rep vs Chizumila**, 1994) Conf. Cas. No. 316, it is an aggravation of a crime if more than one person is involved in a crime. Here the appellant was working in concert with others in executing with precision a well-orchestrated plan in an exercise showing high criminality in destruction to the building and injury to the watchman. The purpose of sentencing is to reduce crime by passing sentences which prevent the offender and, in case of repeat offenders, others from committing crime. In view of aggravating factors here I have come to the conclusion that, which is regretted, that the mitigating factor, that the appellant was injured in the arrest, should be ignored and the appeal against sentence should be dismissed.

Made in open court this 12th January, 1996

D.F. Mwaungulu

JUDGE