

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CONFIRMATION CASE NO. 6 OF 1996**

**THE REPUBLIC
VERSUS
ALUFEYO KWALALA AND DUBUSON MATAULA**

From the First Grade Magistrate's Court at Salima Criminal Case No. 104 of 1995

CORAM: MWAUNGULU, J

Divala, State Advocate, for the State

Accused, present and unrepresented

Tsoka (Mrs.), Official Interpreter

Mwenyeidi, Recording Officer

Mwaungulu, J

JUDGMENT

The Judge who looked at this matter thought that the sentence which the defendant received should have been suspended. The defendants, Alufeyo Kwalala, and Dubuson Mataula, who were convicted of the offence of theft contrary to section 278 of the Penal Code when they appeared before the First Grade Magistrate at Salima, were sentenced to nine months imprisonment with hard labour. The questions for this Court are whether the sentence was not manifestly excessive and should have been suspended.

The complainant is a watchman. He owns an oxcart. On the night of 10th of August 1995 he went to work. His oxcart, with both tyres intact, was parked at his house. He came the next day to find one tyre taken away from the oxcart. In the day he saw a man, to whom the first defendant had sold the oxcart, pushing it. The man led the complainant to the first defendant. The first defendant was arrested. He admitted the charge at the police and implicated the second defendant. They denied it in Court. The defendants were convicted and sentenced to nine months imprisonment with hard labour.

In arriving at the appropriate sentence the Court has to consider the gravity of the offence, the personal circumstances of the defendant, the personal circumstances of the victim and the public

interest in preventing crime. The first aspect involves looking at the penalty set down by the legislature and the circumstances in which the offence was committed. Theft is a felony. It is not, however, regarded as among the top brackets of offences regarded heinously under our Criminal laws. If anything, it is among the least of the felonies catalogued in our Penal Code. The maximum sentence for it is five years imprisonments with hard labour. What sentence to pass will depend on the circumstances in which the offence is committed. Since this is an offence against property, one main consideration in assessing the gravity of the offence is the nature of the property and its value. The property may have no value or just sentimental value but could be important generally or to the particular victim. In such a case a higher sentence will be passed. Obviously if the property stolen is of considerable value the sentence will have to be higher. When passing a sentence for this offence the Court, therefore, has to look at the gravity of the offence according to the law and the circumstances, in which the offence was committed which in this nature of offence includes a consideration of the nature and value of the property.

Here the offence is a simple theft. The maximum sentence is five years imprisonments. It is the tyre of the oxcart which was stolen. One has to think of all sorts of property which could be stolen. In particular the Court had to consider what sentence it could have passed if more than one tyre were stolen or the oxcart itself or several of them. Looking at the maximum sentence of five years and the nature of the property stolen, nine months imprisonment with hard labour must appear excessive for theft of a single tyre. The value has been put at K920.00. One could clearly envisage higher values of property, cars and property of greater value that Courts may have had to deal with. From this vista, nine months is excessive.

There is one circumstance in which the offence was committed which could call for greater punishment. This is the fact that the offence was committed in concert. This, however, does not justify imposition of an overly disproportionate sentence in relation to the gravity of the offence.

The sentencing Court thought that the sentence should be reduced because the oxcart was recovered. I do not think that this should have been because the defendants obviously had put a third party who bought the tyre in a mess.

There were of course the personal circumstances of the defendants, that they were young and first offenders. The sentencer had these in perspective but over looked them when it came to passing out the sentence.

Then there were public interest considerations, the commonplaceness of the offence and the need to protect the public. The requirement is fulfilled if the Court, having regard to the nature of the offence and the personal circumstances of the defendant and the victim, arrives at a sentence which a reasonable member of the public would say the defendant has really got what he deserves for the offence. All that a sentence has to be being that it is proportionate to the gravity of the offence, effuses equality with those similarly culpable and shows restraint. In this sense the sentence of nine months cannot be justified. The sentence should have been much lower, and it should have been suspended, as the Reviewing Judge thought, on the authority of *Bhobat V. Rep. (1994) Cr. App. Cas. No.29*.

The defendants here have already served the most of the sentence imposed by the Court below. I pass such a sentence as results in the immediate release of the prisoners.

Made in open Court this 30th day of January 1996 at Blantyre.

D.F. Mwaungulu
JUDGE