IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CONFIRMATION CASE NO. 1607 OF 1998

THE REPUBLIC

VERSUS

PETER MUZUZI

From the Second Grade Magistrate sitting at Midima

CORAM: D F MWAUNGULU (JUDGE)

Manyungwa, Assistant Chief State Advocate, for the state

Defendant, absent, unrepresented

Kachimanga, official court interpreter

JUDGMENT

This case was set down by the reviewing judge who considered enhancing the sentences on the barglary and theft of a bicycle offences. The reviewing judge thought that the sentences on the two counts should be enhanced because there were manifestly inadequate. The defendant was the only one convicted on the charge against the two others. The cases against the others were withdrawn when the defendant pleaded guilty to the charge. The Midima first grade magistrate convicted the defendant on three counts. On the first count the defendant was convicted of barglary and on the second count the defendant was convicted of theft of a bicycle an aggravated theft. He was sentenced respectively with three years imprisonment with hard labour, one year imprisonment with hard labour and six months imprisonment with hard labour. The reviewing judge as I said was concerned with the sentences of barglary and theft of a bicycle.

On the night of 30th August, 1998 the complainant Mrs Jean Mataka of Dzolopi village, chief Kadewere, Chiradzulu district went to sleep. She looked the doors of the house. Around 4 o'clock she waked up to find that the door of the house was widely opened. She discovered that property worth at K3,000 and a bicycle were stolen from the house. The defendant was arrested

by the police. He admitted the charge at the police. He also pleaded guilty of the charge when he appeared before the first grade magistrate in the court below. The defendant is 25 years of age. He made the mitigation statement himself. There wasn't much in it. Of course the defendant raised domestic concerns. These were properly overlooked by the court below. When sentencing the defendant however the lower court alluded to that the offences for which the defendant was convicted were very, very serious ones. He therefore passed the sentence that I have just passed.

Obviously the sentence of six months imprisonment with hard labour for theft of a bicycle is out of touch with the guideline that this court has followed closely since 1964 when the case of Crown vs Paulo was decided. It might be useful to reproduce the guideline because the lower court seem not to have even looked at the guideline. The appropriate sentence here was eighteen months imprisonment with hard labour. The reviewing judge was therefore right that this sentence was manifestly inadequate.

On the barglary charge the sentence is not manifestly inadequate. It is not necessary for this court to interfere. Obviously the lower court although did not refer to the case of Republic vs Chizumila passed the sentence which agrees with this sentence. There, after reviewing previous sentences and approaches, this Court suggested a starting point of six years for the offence of burglary. The starting point would be scaled upwards or downwards depending on aggravation or mitigation.

If there are strong mitigating factors the sentence would be much lower than six years. The trend set down by this Court is that three years is appropriate where the defendant pleads guilty, offends for the first time, is young and the burglary itself is the usual one. Burglars should expect immediate loss of liberty, and a loss for some longer time, because of the commonplaceness of the offence and its seriousness to victims and the public. Sentences for less than three years should be the exception and only where there are strong mitigating factors. Where there are some aggravating factors and mitigating factors considerably outweigh the aggravating factors, sentences would be higher than three years but not close to six years. Where there are aggravating factors and they outweigh mitigating factors the sentences would be getting closer to six years. Six years, as the survey in Republic v Chizumila showed, is appropriate for an offender who, because of his previous convictions, has lost all entitlement to mercy. Consequently, previous convictions do not per se justify a sentence close to six years. The sentencing court has to decide in fact whether previous convictions completely disentitle the defendant to mercy. The six years will be exceeded where the burglary is really serious, however difficult it is to define. I can however foresee several people committing a series of burglaries with a lot of damage to premises and a lot of violence and intimidation to victims, vulnerable and sold alike. This has happened before. A court would be very justified there to pass a meaningful sentence that is well beyond the starting point.

Burglary in its mental complexion involves the intention to commit a felony when entering a

dwelling house. That is the mental situation, the mens rea, sentencing is directed at. Anything enhancing this mental element deserves greater punishment. Consequently, sophisticated preparation or planning, involvement with others, and malicious and malevolent disposition during the trespass indicate a high level of criminality and culpability courts will visit with heavy sentences. None of these levels of culpability are present here. The mental element was nothing more than the ordinary one required for the crime.

Equally, the actus reus the sentence is directed to the trespass. Anything that makes the trespass shocking and serious will justify a heavier punishment. This will be the case where during the trespass, there is serious damage to the property or the trespass is accompanied by violence and profligacy. It might also be that the trespass is conducted in a very sophisticated manner as to indicate a high level of criminality. The court is likely to impose a sentence for the crime. None of these aspects are present here. By all standard this is a normal burglary.

The sentence may however be enhanced due to matters extraneous to the crime itself. In relation to burglaries and housebreaking, the sentence could be enhanced if the occupants were disturbed and put in extreme fear, anxiety and danger. Equally, the crime will be considered pronounced if the victims are vulnerable, young or elderly. None of these are present here.

There were more things in mitigation therefore. These were the defendant's first offences. They are not the worst instances of the crime. This is the sort of offence where this Court approves three years where there is a plea of guilty. The sentence of six years imprisonment with hard labour is manifestly excessive. One aspect, however, transposes this sentence from the usual burglary. The offence was committed by more than one person. In Republic v Makanjila, Conf. Cas. No.597 of 1996, unreported, this Court said:

" The offence was committed in concert. Close to twenty armed men swooped on the complainant's house with much pomp. In **Republic - v - Zaola** (1995) CC No. 276 this court said:

'There were further aggravating circumstances. The defendant was in a company of others. The practice of this court has been to increase sentences where more than one person is involved in the commission of the crime' "

There is a great threat to society when a people act in concert to commit crime, more so heinous crime.

I set aside the sentence of six years imprisonment with hard labour. The defendants will serve four years imprisonment with hard labour.

Made in open court this 26th June, 1997

D F Mwaungulu
JUDGE