

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CONFIRMATION CASE NO. 494 OF 1997

THE REPUBLIC

VERSUS

FRANCIS NDISALE

In the First Grade Magistrate Court sitting at Salima
Criminal Case No. 74 of 1996

CORAM: Mwaungulu, J

Manyungwa, Principal State Advocate, for the State

Defendant, present, unrepresented

Mangwana, Official Interpreter

Banda, Recording Officer

Mwaungulu, J

JUDGMENT

This case was set down by the Honourable Mr. Justice Tembo to consider the severity of the sentence. The defendant, Francis Ndisale, was convicted by the First Grade Magistrate sitting at Salima for burglary and theft. There is no problem with the sentence imposed for the theft charge. It is the six years' imprisonment passed for the burglary that the learned Judge queried.

The complainant's house was broken into on the night of 20th June, 1996. The defendant was seen selling a basin stolen from the house shortly thereafter. The defendant was convicted after full trial. He was sentenced as mentioned earlier.

The court below got the cue from the remarks of the prosecutor that a stiff sentence should be passed. There was concern that the offence was commonplace in the locality and something should be done about it. The court below however did not give reasons for the sentence it imposed. The sentence it imposed cannot be justified on any premise.

The lower court gave no reasons for the sentence it imposed. This is not proper. A sentencer should always give reasons for the sentence he is imposing. Sentencing is exercise of a discretion across the range of a sentence prescribed by the Legislature. The exercise of the discretion is reviewable both as regards the actual sentence passed and the reasons for it. The discretion, like any other, should be exercised judicially. The Court exercising the discretion must consider all the circumstances before it and the law on the matter. It is a wrong exercise of the discretion to overlook or de-emphasize a material factor. The court reviewing the exercise of the discretion will interfere with a wrong exercise of the discretion. It is very important, therefore, that a sentencing court should give reasons for the sentences it is imposing. Moreover the beneficiaries of our penal policy are entitled to know why and how a sentence has been arrived at. The victims of the crime will be appeased by the reasons and can walk tall in the firm understanding that the felon has received deserved justice. Equally, the public, which funds the criminal system to curb crime, are entitled to know how and why a certain approach was preferred. Ultimately, the reasons advanced by the court may be the better lessons to the offender and others who are on the doorstep of entering a life of crime.

In relation to the offence of burglary, it is clear that the court below is oblivious to the trend that this court is setting for this crime. Offences of burglary and housebreaking deserve long and immediate imprisonment. The offences are punishable with death or life imprisonment. They therefore belong to a group of offences regarded very seriously under our criminal law. Besides, in spite their seriousness, they are very commonplace, if the records of the courts are anything to go by. The two offences with the related offence of theft result in many millions of kwacha of loss of property in the country each year. Households spend an equivalent amount for insurance and security. The offences are a desecration of the home. It is for these reasons and others that this court is now recommending long, and immediate imprisonment for these offences.

In **Republic v Chizumila**, (1994) Conf. Cas. No 316, this court said that the starting point for burglary should be six years imprisonment with hard labour. The sentence should be scaled upwards or downwards to reflect mitigating and aggravating factors. Always this will involve a consideration of the extent and the circumstances in which the crime was committed, the personal circumstances of the defendant, the impact of the crime on the victim and the public interest in prevention of crime. For burglary the legislature directed its mind to trespass with intent to commit a crime. The extent of the trespass will have a bearing on the sentence actually passed. Where therefore there has been substantial damage to the premises or property in breaking and gaining entry, the sentence will be enhanced. Equally, where the victims were disturbed or injured, the court will regard that. Then there will be a host of other considerations that reflect a disposition beyond the ordinary mental requirement for commission of a crime,

such as meticulous planning or that more than one person was involved in the execution of the criminal design. All these, and the list is not exhaustive, are the sort of things that the sentencer has to look at when dealing with an offender convicted for burglary.

Here there is very scanty evidence of damage to the premises. All we know is that the house was locked in the night. The complainant was woken up by the sound of a basin. When he went out, the intruder was in and out of the house. This was by definition a simple burglary for which this court now approves a sentence of three years' imprisonment with hard labour. I set aside the six years imprisonment. The defendant will serve three years' imprisonment with hard labour. The sentences will run concurrently as the court below ordered.

Made in open court this 31st Day of July 1997.

D.F. Mwaungulu

JUDGE