IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CONFIRMATION CASE NO. 568 OF 1997

THE REPUBLIC

VERSUS

WILLIE NYIRENDA

In the First Grade Magistrate Court sitting at Mangochi
Criminal case No. 49 of 1997

CORAM: MWAUNGULU J
Manyungwa, Principal State Advocate, for the State
Defendant, present, unrepresented
Mangwana, the official interpreter
Banda, the recording officer

Mwaungulu, J

JUDGMENT

This case was set down by the judge who reviewed this matter from the court below to consider the sentence. The First Grade Magistrate at Mangochi sentenced the defendant to three years imprisonments with hard labour. He convicted the defendant of the offence of theft by servant contrary to section 286 as read with section 278 of the Penal Code. The judge who reviewed the matter thought that this sentence was manifestly inadequate. The Principal State Advocate doers not agree. I do not agree too. The sentence, as the Principal State Advocate observed is on the higher side.

There is not much to this case, the defendant having pleaded guilty to the charge preferred against him. The defendant was employed as a cashier at Ngapeni estate. Occasionally he received money for disbursements.

He purloined K8, 300. He admitted the matter at the police and in the court below. The court below was right in ordering immediate imprisonment for the offence. The sentence was however manifestly excessive.

The judge who reviewed the matter thought the sentence was manifestly inadequate. He thought, correctly in my view, that the offence is serious because the maximum sentence prescribed for the offence is fourteen years' imprisonment. The History of the provision is that the maximum sentence had to be increased from what it was, seven years, to fourteen years. It is this which prompted the observation of the Supreme Court of Appeal in **Namate v. Republic**, (1975) MLR that the only explanation for the legislative intervention was that the offence was regarded a serious one. This notwithstanding, the sentences that courts pass in a particular case will depend on many factors. On the range that the statute has laid as a maximum sentence the court has to choose a particular sentence to fit what he has to deal with. Admittedly that the maximum sentence is severe indicates to sundry that the matter is a serious offence and courts should bear that in mind. The court has however to pass a sentence that fits the crime, the offender, the victim and the public interest in prevention of crime.

The reviewing judge's observation that the matter should be looked at more seriously because there were two instances of fraud is appropriate. If a servant has shown a tendency or propensity to take away from his master, it is appropriate and legitimate that the court should treat him more seriously. This is because such a propensity indicates unbridled criminality and is likely to affect fellow employees who hitherto have tried to exude honesty and integrity. As the Lord Chief Justice Lane observed in **R v. Barrick**, 81 Cr.App.R 78, dishonesty by servants affects other employees and partners in a way that we cannot imagine. This court followed the principle in **Republic v. Kaunda**, (1997) Conf. Cas. No. 778). The matter should however be approached cautiously.

It must always be remembered that it is only by rules of drafting of charges that the different and many offences are lumped together. If a man commits several thefts while employed, they are distinct offences. They are only put in one count for ease. If each offence was charged separately, an appropriate sentence would be made foe each distinct offence. Clearly, if that was the case, the sentence that a court has to pass on the inflated figure would not reflect the severity of each crime. However, there is the other rule that, if an offender is convicted of several offences, the sentence on each offence can be increased to reflect that he has committed several offences. This is to avoid the obvious injustice to a man who has only committed single offence to suffer the same sentence as the one who has committed more offences in case the sentences of

the latter have been ordered to run consecutively(**Republic v. Nhlema**, (1994) Conf. Cas. No. 502; **Republic v. Nduna**, (1995) Conf. Cas. No. 1212). That the defendant committed several thefts while employed is a relevant consideration. It is a matter which by the rules of drafting has been taken care of, though not perfectly, by lumping the distinct offences in one count. The matter should be therefore be approached carefully.

In the court below the magistrate thought it an aggravating factor that the situation before him involved a breach of trust. Obviously the sentence to pass for the offence of theft by servant should depend on the quality and degree of trust reposed on the servant(**R v. Barrick**, per Lord Lane, Chief Justice, England). This is to differentiate the sentences of those in whom much trust is rested and those of whom less is expected. That a servant is in breach of that trust cannot be an aggravating factor on its own. This aspect has been catered for in section 286 because this offence is an aggravated offence of theft.

The reviewing judge thought that the sentence here is manifestly inadequate. He proposed a sentence of seven years. Several years ago K8500 was a whole fortune. One has to bear in mind that with inflations and devaluation of the currency, the value of money has gone down. We are not only dealing with actual money in our courts. Even where money is involved, thefts today involve much larger sums than was the case here. Today servants steal property from employees, property which on current values of money is worthy a lot in monetary value. Our sentences should allow for inflation and devaluation. After all is done, it will be seen that the sentence here is manifestly excessive.

I realise how difficult it is to arrive at an appropriate sentence in a particular case. Good sentencing practice is a product of long experience at the trade. Much of that experience is achieved by comparing sentences that courts with a concurrent jurisdiction and similar locality impose. If uniformity is a quality of justice comparison becomes imperative. There must be included in that panorama the peculiarities of each case and individual personal factors. Equally much assistance is available in decisions of superior courts who from time to time assess the national temperament. Sentencing courts are not bound by such sentences. Where sentences of superior courts establish a trend, departure has to be explained or justified on the evidence.

This court has tried to lay a guideline for theft by servants. In **Republic v. Missiri**, (1994) Conf. Cas. No. 1392 it was said:

“In Malawi, after looking at sentences that have been approved by this Court on appeal or review, I would suggest the following guideline. Where the amount is less than K10, 000 two years would be appropriate. Cases involving sums between K10, 000 and K30, 000 would attract a sentence of up to three years. Where a greater sum is involved of let us, say between K30, 000 and K70, 000 four years would be appropriate. Six years would be appropriate for sums between K 70,000 and K100, 000.”

The appropriate sentence is one year’s imprisonment with hard labour. I set aside the sentence of the court below. The defendant will serve a year.

Made in open court this 31st Day of July 1997

D.F. Mwaungulu

JUDGE