IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CONFIRMATION CASE NO. 149 of 2000

THE REPUBLIC

VERSUS

NDELEMANI

From the First Grade Magistrate Court at Dalton Road in Limbe Criminal Case No. 78 of 2000

CORAM: D F MWAUNGULU, J

Mwenelupumbe, Deputy Chief State Advocate, for the State

Defendant, present, unrepresented

Kachimanga, the official court interpreter

Mwaungulu, J

JUDGEMENT

The judge who reviewed this matter from the Dalton Road First Grade Magistrate Court thought this Court should review the sentence. The First Grade Magistrate at Dalton Road Magistrate Court at Limbe sentenced the defendant to eight months imprisonment with hard labour. The First Grade Magistrate convicted the defendant of theft by servant. Theft by servant is an offence under section 286 of the Penal Code. The judge probably thought the sentence was manifestly excessive.

There are problems with the date the Registrar set for this Court to review the sentence. The First Grade Magistrate sentenced the defendant on 7th February, 2000. The matter was in this Court two days later. On 9th February the reviewing judge ordered the case to be set down. The Registrar set the case down for 4th August, 2000. This Court has emphasysed matters Registrars should consider when setting appeal or confirmation cases for hearing. In Republic v Menard

and another, Conf. Cas. No. 951 of 1999, unreported, this Court said:

"The Registrar, when setting the case down for 3rd August, 2000, should have regarded the judge's actual directions, section 15 (4) of the Criminal Procedure and Evidence Code and section 107 of the Prison Act."

The First Grade Magistrate sentenced the defendant to eight months imprisonment. Factoring in the rebate in section 107 of the Prison Act, the prison authorities should have released the defendant around the 7th July, 200. Setting the case for review for 4th August, 2000 undermined the efficacy of the review process. Were this Court to reduce the sentence the defendant would have served the objectionable sentence. Conversely, were the Court to enhance the sentence, this Court is reluctant, properly in my view, to recall a prisoner already released to serve an enhanced sentence. The Registrar or those in charge of the criminal appeal and review list should set cases in a way that preserves the review or appeal process.

There is no problem where, like here, this Court confirms the sentence. Confirmation, where the judge has set the matter to be reviewed, is, however, the exception rather than the rule. Gross injustice to the prisoner or the public may be occasioned by not timeously setting the appeal or review on time. This may occur where this Court intends to enhance or reduce the sentence.

There were many mitigating factors. In this matter the defendant pleaded guilty to the charge. He stole K5, 000.00 at Caltex Limited where he was employed. He was offending for the first time. He is only 23 years of age. He made his mitigation statement without legal advice. He did not make the most of the opportunity. All he raised are problems the children and family would have if the lower court sent him to prison. The First Grade Magistrate never, properly in my view, considered these aspects. In Republic v. Asidi and another, Conf. Cas. No. 955 of 1999, unreported, this Court said:

"Imprisonment certainly involves hardship to family or dependants. Courts always hear these pleas. They are matters that defendants must expect if they commit crimes. If courts listen to these pleas more often, they will be preoccupied with the plight of the defendant's relations and ignore the crime the defendant has committed. It is only where there is prospect of serious hardship to family that courts out of mercy allow for domestic considerations."

The First Grade Magistrate considered that the defendant was young and offending for the first time. He thought however, that the offence is serious and that it involved breach of trust. He also thought he should pass a sentence that deters others from crime.

Speaking for myself, I do not think that breach of trust in itself aggravates the offence of theft by servant. I think the legislature had breach of trust in mind in creating this offence as an

aggravated crime. There are, however, cases where trust is critical to employment and the court has to consider its breach when passing sentence. Bankers, accountants, solicitors or postmen and the list is endless are illustrations. For these, courts have been more exacting. Lord Lane's, C.J., remarks in R v Barrick, 81 Cr. App. R. 78 in the Criminal Court of Appeal in England are apposite. The defendant here was in charge and custodian of the company's cash. He falls in the category of those whom the law reposits trust. The First Grade Magistrate was right in the way he treated the defendant.

The First Grade Magistrate, it appears, is not aware of the guidelines in Republic v Missiri, Conf. Cas. No. 1392 of 1994. This Court laid the following guideline:

"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 - K70,000 four years would be appropriate. Four years would be appropriate for sums between K60,000 and K100,000. The rest of the guideline principles in R vs. Barrick would apply in all cases."

When approaching guidelines this Court's remarks in Millo v Republic, Cr. App. No. 30 of 2000, unreported, must be born in mind.

Superior Courts prescribe guidelines after considerable deliberation. Guidelines achieve coherence and consistence. Without legislative policy on how courts determine an appropriate sentence, Superior Courts direct sentencers. Guidelines do not only provide sentencers an approach. They make justice more equitable, fair and reasonable. Defendants grieve if, on similar infraction of the law, they perceive sentencers treat them differently from others similarly blameworthy. Guidelines, therefore, in the long run serve public interest. It is in the public interest to avoid disparity.

Courts should not, however approach guidelines purely mathematically. There are reasons. At a certain level, a mathematical approach produces results and computations guidelines never intended in the first place. It is not intended, for example, that five years be divided by the number of kilograms to relate quantity to time. Secondly, variables affecting a sentence are themselves not amenable to precise mathematics. Mathematic's inner logic, however, coheres with law's and legal reasoning's logic. That graver instances of a crime or graver crime should attract heavy sentences is a mathematical expression and a logical legal phenomenon. The sentencer must explain variables necessitating departure from this logic. Consequently, while approaching guidelines mathematically is ridiculous, ignoring mathematic's inner logic means the guideline is illogical.

On the guideline the starting point is around a year. The court below had to factor the guilty plea, that the offender was committing the offence for the first time, loss of a job and age. The sentence would have been lower. I do not think that it would have been so different from the one the First Grade Magistrate passed. This Court does not interfere with a lower court's sentence merely because it would have passed a different sentence. It interferes where the sentence is manifestly excessive or inadequate as to involve an error of principle, the lower court ignored, accentuated or undermined a factor or there was an error of principle. The First Grade Magistrate's sentence is faultless in all regards. It is confirmed.

MADE in open this 4th day of August, 2000 at Blantyre.

D.F. MWAUNGULU

JUDGE