

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CONFIRMATION CASE NO. 588 OF 1998

THE REPUBLIC

VERSUS

MISAU ALUMANDO

From the First Grade Magistrate Court sitting at Nsanje criminal case number 181 of 1997

CORAM: D F MWAUNGULU(JUDGE)

Manyungwa, assistant chief state advocate, for the state

Defendant, absent, unrepresented
Kachimanga, official court interpreter

Mwaungulu, J

JUDGEMENT

The judge who reviewed this matter set it down to consider the sentence on the burglary count. The Nsanje First Grade Magistrate convicted the defendant, Missau Aluando, of the offences of burglary and theft under, respectively, sections 309 and 278 of the Penal Code. He sentenced the defendants to forty-two and eighteen months, respectively. The reviewing judge thought the burglary sentence was manifestly inadequate.

Whoever they were, in the night of 30th November, 1977, they broke and entered Mr. Chingolomondo's house. They broke the door of a fence round the house. They stole some bags of maize. The prosecution never proved the value of the maize. The next day, in the morning, at 5:30, the defendant and a friend sold maize and a tarpaulin stolen from the house to Mrs Issa. The defendant surrendered himself to the police. He denied the charge at the police and in the court below. He was, nevertheless, convicted of the offence.

The lower court said very little in the way of justifying the sentences it opted for. The sentence on the burglary count

however is impeccable. This Court has laid an approach in Republic V Chizumila Conf. Cas. No.316 of 1994. The starting point for burglary should be six years. Sentencers can scale up and down this starting point to reflect aggravating and mitigating circumstances. In this particular case, apart from that the defendant never pleaded guilty, there was more in mitigation than in aggravation.

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 is 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 standards this is a normal burglary.

The sentence may however be enhanced on account of matters extraneous to the crime itself. In relation to burglaries and housebreakings, 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. Bearing in mind that the defendant pleaded not guilty, fourty-two months imprisonment with hard labour is justified. I confirm the sentence.

This, however, is another instance where the Registrar did

not set the matter down timeously. The lower court's order is dated 20th February, 1998. The prison authorities, under section 15(4) of the Criminal Procedure and Evidence Code, could not keep the defendant beyond 20th February, 1999. If the defendant earned the rebate under section 1207 of the Prison Act, he would have been out by 20th June, 2000. The Registrar did not set the case down even by 20th August, 2000.

When setting confirmation cases the Registrar should closely consider the judge's remarks and the lower court's sentence. Where the judge recommends a reduction or an enhancement, depending on the length of the lower court's sentence, the Registrar should set the case down as soon as possible. The Registrar should set down the case within a very short time if the judge questions the conviction. A delay means the defendant will stay unnecessarily longer if the judge eventually quashes the conviction. Generally, the Registrar must consider the limits on prison authorities in section 15(4) of the Criminal Procedure and Evidence Code and the possibility of a remission under section 107 of the Prison Act.

Made in open court this 22nd Day of August, 2000

D F Mwaungulu
JUDGE