IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

CRIMINAL APPEAL NUMBER 72 OF 2008

BETWEEN:

JABULANI CHIKWAURE ..... APPELLANT

AND

THE REPUBLIC ..... RESPONDENT

CORAM: **HON. JUSTICE POTANI**
Kadyampakeni, Senior State Advocate, Counsel for the State
Mr Makwinja, Counsel for the Appellant
E. Malani, Court Clerk
K. Chiphwanya, Secretary/Typesetter

JUDGMENT

Jabulane Chikwaure was convicted of the offence of making a false declaration for a passport contrary to section 327 of the Penal Code and sentenced to 6 months imprisonment by the First Grade Magistrate's Court sitting at Limbe. He now appeals against the sentence. There are three grounds on which the appeal is premised viz:

1. ***That the sentence meted out to the appellant was in the circumstances excessive and not justifiable in law taking into account the fact that the accused is a first offender and pleaded guilty.***

2. ***That the court erred in law by meting a sentence disproportionate to the circumstances of the case and therefore fit for an offender of a more serious offence and not a misdemeanor under section 327 of the Penal Code.***

3. ***That even if the lower court had been justified in meting out the said sentence, which is denied, the lower court erred in failing to direct the same to be suspended in terms of section 339 as read with section 340 of the Criminal Procedure and Evidence Code.***

The appellants prayer is for an order for a non custodial sentence or a suspended sentence or reduction of the sentence as the court deems fit.

The offence the appellant was convicted of is a misdemeanor punishable under section 34 of the Penal Code with a fine or imprisonment for not more than 2 years or both.

Mr Makwinja appearing for the appellant has argued that as the offence is misdemeanour and the accused being a first offender who pleaded guilty, the sentence is excessive and unjustifiable. He has further argued that the court fell into serious error by imposing a custodial sentence without addressing its mind to sections 339 and 340 of the Criminal Procedure and Evidence Code which provide for suspended sentences for first offenders except if there is no other appropriate way of dealing with the accused in which case

reasons for imposing a custodial sentence must be stated on the record which the lower court did not do.

Counsel for the applicant has submitted that by failing to address its mind to sections 339 and 340 of the Criminal Procedure and Evidence Code, which is mandatory, the court ended up passing a wrong sentence.

On the part of the state, it has been argued that failure by the lower court to allude to section 339 and 340 of Criminal Procedure and Evidence Code and to record the reasons for a custodial sentence did not occasion any miscarriage of justice as the sentence meted out is unjustified on the facts of the case.

It is indeed correct that it is mandatory for the court to consider sections 339 and 340 of the Criminal Procedure and Evidence Code when considering sentencing a first offender. It is however the view of the court, failure to consider the sections, in itself, would not be fatal to the sentence imposed. What is critical is whether the sentence imposed at the end of the day is wrong in principle or excessive. This leads to section 5 of the Criminal Procedure and Evidence Code which provides that no finding, sentence or order shall be set aside on account of mere irregularity. It is the position of the court that the failure by the lower court to allude to sections 339 and 340 of the Criminal Procedure and Evidence Code is a mere irregularity. It is to be noted that in arriving at the sentence passed the court was wary of the prevalence of the offence. Further as argued by the State, the offence herein was well planned as the accused had to travel all the way from Zimbabwe to commit it. In the circumstances even if the lower court had addressed its mind to sections 339 and 340, it could have most unlikely passed a suspended or a non custodial sentence even though the accused pleaded guilty. All in all, considering all the facts of the case, the sentence does not raise any sense of shock as to be said to be manifestly excessive. The appeal is dismissed.

DELIVERED in Open Court this 19th November 2008 at Blantyre.

H.S.B. POTANI

JUDGE