IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CRIMINAL APPEAL NO. 157 OF 2008

BETWEEN

DAISON MANDALA ……. APPELLANT

AND

THE REPUBLIC ……. RESPONDENT

CORAM : HON. JUSTICE MZIKAMANDA
: Mr. Maulidi, Counsel for the Applicant
: Thabo Chakaka Nyirenda, Counsel for the Respondent
: Mrs. Kabaghe, Court Reporter
: Mr. Kafotokoza, Court Interpreter

JUDGMENT

In this appeal the appellant had originally appealed against both conviction and sentence. The appeal against conviction was subsequently withdrawn. It was the appeal against sentence that was argued.

The appellant first appeared before the Second Grade Magistrate sitting at Mponela on a charge of unlawful wounding contrary to section 241(a) of the

Penal Code. It was particularized that the appellant on or about 2nd September 2008 at Khombela Village in the District of Dowa willfully and unlawfully wounded Bezazi Kantembe on the left arm. He pleaded guilty to the charge and he agreed that the facts narrated as establishing the offence were true. He was found guilty and convicted of the charge. He was sentenced to 15 months' imprisonment with hard labour. In arguing the grounds of appeal relating to the sentence the appellant stated that the sentence of fifteen months imprisonment is manifestly excessive and wrong in principle. He also argued that the learned magistrate erred in principle in imposing a custodial sentence to the appellant who was a first offender. Again the learned magistrate erred in principle in imposing a custodial sentence to the appellant who pleaded guilty. Finally, the learned magistrate erred in principle in imposing a custodial sentence without taking into account that the appellant was provoked by the complainant and that the appellant acted in a heat of the moment.

The facts of the case as per the court record were that on 22nd September, 2008 the complainant went to his garden given by his father. At the garden he found the accused cultivating it. A quarrel between the two ensued and this resulted ito a fight. The appellant hacked the complainant with a hoe on the left hand. The matter was referred to police and the complainant was taken to hospital for treatment. The appellant was charged with the present offence and he admitted it. He pleaded guilty in court on these facts. He was found guilty and convicted. It transpired that the appellant was a first offender and the lower court was so informed. In mitigation the appellant stated that he supported his father who is blind. He also supports a wife and three children. In passing sentence the lower

court simply said “15 months’ Imprisonment with hard labour from date of arrest”.

As to the ground of appeal that the sentence of fifteen months imprisonment is manifestly excessive and wrong in principle it was argued that the learned magistrate simply imposed a custodial sentence of fifteen months even though the record does not show any aggravating factors. It was further argued that the court below did not attempt to explain why a custodial sentence and no other means of dealing with the appellant. The court did not even attempt to consider mitigating factors such as that the appellant was a first offender and that the appellant pleaded guilty, thereby not wasting the court’s time. Counsel for the appellant referred this court to Sections 339 and 340 of the Criminal Procedure and Evidence Code governing the sentencing of first offenders and argued that this was a proper case in which the learned magistrate should have imposed a lesser sentence, in other words, a suspended sentence. This argument covered the two other grounds of appeal, namely that the learned magistrate erred in principle in imposing a custodial sentence to the appellant who was a first offender and that the learned magistrate erred in principle in imposing a custodial sentence to the appellant who pleaded guilty. In arguing the final ground of appeal Counsel stated the complainant approached the appellant on his own garden and struggled with him. The appellant tried to snatch the hoe used by the appellant in gardening. The complainant must be viewed as the aggressor and that the appellant acted in self-defense. The hoe then injured the complainant. In sentencing the appellant the court should have taken the provocation into account.

The State while conceding that the sentencing process was erroneous in some respects contends that there were aggravating factors that should govern the resultant sentence.

I would hasten to say that the approach in sentencing taken by the lower court was less than satisfactory. In sentencing the court simply said "15 months' Imprisonment with Hard Labour from date of arrest". It never gave reasons for that sentence. It is important for a sentencing court to give reasons for the sentence it imposes on a convict. This will not only enable the convict to know why a certain sentence has been imposed but it also enables a reviewing court to appreciate why the sentence of a given magnitude was imposed.

The case for first offenders as in this case is clearly provided for in Sections 339 and 340 of the Criminal Procedure & Evidence Code. Section 339(1) of the Criminal Procedure & Evidence Code provides that:

> *When a person is convicted of any offence (not being an offence the sentence for which is fixed by law) the court may pass sentence of imprisonment but order that the operation thereof to be suspended for a period not exceeding 3 years, on one or more conditions, relation to compensation to be made by the offender for damage or pecuniary loss, or to good conduct, or to any other matter whatsoever, as the court may specify in the Order".*

Of course to suspend a sentence whether for a first offender or for any other offender is a matter of discretion for the court. Such discretion must be exercised judicially. Section 341(1) of the Criminal Procedure and Evidence Code provides that:

> *"Where a person is convicted by a court other than the High Court of an offence (not being an offence the sentence for which is fixed by law) and no previous conviction is proved against him, he shall not be sentenced for that offence, otherwise than under Section 339, to undergo imprisonment (not being imprisonment to be undergone in default of the payment of a reasonable fine) unless it appears to the court, on good grounds (which shall be set out by the court in the record), that there is no other appropriate means of dealing with him.*

This means that a first offender should first be considered for a suspended sentence unless it appears to the court on good grounds that there is no other appropriate means of dealing with him. The good grounds must be set out by the court in the record. Imprisonment custodial sentence for a first offender may be justified where aggravating circumstances exist. Thus where the trial court has considered the provisions of Section 339 and 340 of the Criminal Procedure and Evidence Code and is of the view that imprisonment must still be ordered for the first offender, it must indicate on record why it felt compelled to impose that sentence (See Mwambala v Rep 13 MLR 283).

Now it is trite that this court will not interfere with a sentence imposed by a subordinate court unless that sentence is wrong in principle or is grossly inadequate or manifestly excessive. In the present case the sentencing process represented a departure from sentencing principles and therefore erroneous. This court therefore is entitled to interfere with the sentence from the lower court.

On the issue of whether the complainant was the aggressor or whether the appellant was the aggressor, the facts to which the appellant agreed showed that when the victim went to his garden which had been given to him by his father he found the appellant gardening it. In the quarrel that ensued the appellant hacked the victim with a hoe. In the statement the appellant made to police he said while he was at a garden there came the complainant who began to pull his shirt and taking away hoes. While he struggled to prevent the taking of the hoe then struck the complainant. The complainant and his relatives left and he too left. Having admitted to the facts and having stated as he did in the caution statement, the appellant can now not turn around to allege provocation on the part of the complainant and to have acted in self-defence. The ground of appeal that provocation should have been taken as a mitigating factor in sentencing is not made out.

As noted earlier this court would interfere with the sentence on the ground whether it was wrong in principle, grossly inadequate or manifestly excessive. No one has suggested that the sentence of 15 months imprisonment with hard labour for unlawful wounding is grossly inadequate. I would consider whether the sentence is manifestly excessive in the light of all the circumstances herein.

Unlawful wounding is a felony. It is thus a serious offence. In *Joseph Kungwezu Banda v Rep Crim. Appeal No,. 134 of 1996* Mwaungulu, J. was able to say the following about the offence of unlawful wounding that:

> *"The appellant contends that the court should have imposed a fine. I do not think so. The offence is serious. It involves bodily harm. Those who commit this offence exude a cruel and sadistic tendency or trait which is abhorrent to civility and disregard on human suffering. It should be very rare indeed that such conduct should be visited by a fine".*

In that case Mwaungulu, J. observed that the injury caused was not grave as it was described as *"pin-sized stab wound"* by the doctor. He observed that a sentence of 2 years imprisonment with hard labour was manifestly excessive. The appellant was set at liberty after having served about 9 months imprisonment. In ``*Rep. v Mussa Jackson Malaina Conf. Case No. 311 of 1998* Mwaungulu, J. described a sentence of 3 years imprisonment for unlawful wounding was manifestly excessive for unlawful wounding for the biting of a finger resulting in some swelling and some deep wounds. In *Republic v Patrick Gondwe Conf. Case No. 94 of 1998* this court confirmed a sentence of 12 months imprisonment with hard labour for unlawful wounding C/S 241(a) of the Penal Code.

In the present case the seriousness of the offence and the circumstances in which the offence of unlawful wounding was committed warrant an immediate custodial sentence notwithstanding` than the appellant is a first offender who pleaded

guilty to the charge. In all the circumstances I set aside the sentence of 15 months imprisonment with hard labour. Instead the appellant will now serve nine months imprisonment with hard labour.

This appeal succeeds to this limited extent.

PRONOUNCED in Open Court this 22nd day of December, 2008 at Lilongwe Registry.

R.R. Mzikamanda

J U D G E