

IN THE HIGH COURT OF MALAWI

**LILONGWE DISTRICT REGISTRY
CRIMINAL APPEAL. NO. 110 /2008**

ELSON LOBO

VERSUS

THE REPUBLIC

CORAM : **HON. JUSTICE MZIKAMANDA**
: Unrepresented, Counsel for the Applicant
: Kayuni, Counsel for the Respondent
: Munyenyembe, Court Interpreter

JUDGMENT

The appellant, Elson Lobo, was jointly charged with Paul Elijah for breaking into a building and committing a theft therein contrary to Section 311 (1) of the Penal Code. He had pleaded not guilty to the charge when he appeared before the First Grade Magistrate sitting at Lilongwe. He was nonetheless found guilty and convicted of the offence with which he was charged after full trial. He was sentenced to 42 months imprisonment with hard labour. He now appeals to this court against both conviction and sentence.

It was particularized on the charge sheet that the appellant and Paul Elijah had during the night of 19th January, 2008 broken and entered Lilongwe CHAM Offices in the City of Lilongwe and had stolen there from 10 bicycles all valued at

K110,000.00. The evidence that was led showed that at Lilongwe CHAM Offices there is a container which was used to store various items. The container is secured with locks. In October, 2007 CHAM bought 116 bicycles identified as Eagle bicycles and kept these in the secured container pending distribution. On 1st January, 2008 there were 57 bicycles distributed. When on 19th January, 2008 the container was unlocked again for further distribution of the bicycles, it was discovered that the bicycles were in a disorderly position. A count of the bicycles revealed that twelve bicycles were missing. The matter was reported to Lingadzi Police. The Police visited the scene. Later the police recovered some bicycles and invited PW 1, an Administration Officer for CHAM who also handled the stores. PW 1 was able to identify the bicycles as those stolen from Lilongwe CHAM Offices. He described in court in detail the features that he used in identifying the bicycles. Each one of the bicycles was valued at K11,000.00 meaning that for the twelve bicycles that were stolen the value was K132,000.00.

According to PW 2, Sergeant Magwela of Lingadzi Police, having received the report of a breaking at Lilongwe CHAM Offices, he visited the scene of crime. He then carried out investigations. In the course of such investigations he arrested the appellant first who led to the recovery of three bicycles. Then the other convict was arrested and he led to the recovery of one bicycle. When PW 1 from CHAM was invited to look at the recovered bicycles he identified them as the ones that were stolen from CHAM Offices. When the two were interrogated on the matter they both alleged that they bought the bicycles from a guard from CHAM named Mr. Kaungwe and another, both are at large. Then the police recovered a bunch of keys from the appellant and the keys on that bunch could open the

container at Lilongwe CHAM Office, from which container the bicycles were stolen. The bunch of keys were tendered in the trial of another case of a similar nature that had taken place at the Malawi Red Cross and involving the appellant as well. In the course of cross-examination, PW 2 stated that the appellant had told him that he had been present at the time of the breaking and the theft but that those who stole refused him a share such that he only acquired the bicycles by buying from those who stole. He also said that the appellant had showed him where he got the keys from within the premises of Malawi Red Cross.

The defence evidence shows that the appellant and his co-accused worked for a guard company called safe tech. It appears that safe tech provides guard services to Lilongwe CHAM Offices for at the time of his arrest Paul Elijah was working at Lilongwe CHAM Offices as a guard. The appellant and his co-accused both stated that they bought the bicycles recovered from them from other people who were at large. The appellant even stated that he was issued with receipts by the sellers, which receipts were taken by PW 2, although he never cross-examined PW 2 on that point. He also did not cross-examine PW 2 on the question of the bunch of keys found on him, some of which keys opened the secured container from which the bicycles had been stolen.

The appellant filed nine grounds of appeal. In the first ground he simply states that the State failed to trace Kaungwe who sold the bicycle to him. The appellant also mentioned in his defence that it was Chauluka and Chauma who sold him the bicycles. It was in fact his co-accused who mentioned Kaungwe as the one who gave him the bicycle. It is therefore surprising that the appellant's ground of

appeal should mention Kaungwe whom he never mentioned before. It is surprising why the ground of appeal has avoided to refer to Chauluka and Chauma whom he mentioned in his appeal. The question that remains unanswered therefore is who exactly sold the appellant the bicycles? There is inconsistency in the story of the appellant a point which the lower court also noted.

In any event the appellant himself was unable to give an address of the persons who sold him the bicycles. In those circumstances it is futile for him to accuse the police of failure to trace the alleged sellers. Again the appellant did not challenge PW 2 on the receipts he alleged to have received from the sellers. In ground nine of the appeal he alleged that the receipts were given to police officers. That allegation is unsubstantiated and that explains why they chose not to raise it with PW 2.

The lower court dealt with the issue of bunch of keys recovered from the appellant and on which were keys that could open the container in question. As it transpired CHAM Offices and Malawi Red Cross Offices in Lilongwe sit in close proximity. The appellant never challenged PW 2 on the issue of the keys. It appears a mere afterthought that the appellant is raising the issue of the keys in this appeal. The appellant does not dispute having been found with the bunch of keys. He only argues that PW 2 never informed the court that the appellant was present when PW 2 opened the container using the bunch of keys. On that point the evidence as analysed by the lower court clearly shows the connection between the bunch of keys and the appellant and that there can be no doubt whatsoever that the appellant was aware that his keys could open the container.

None of his grounds attacking the decision of the lower court is made out. There was overwhelming evidence against him before the lower court to ground the conviction. The appeal against conviction is not sustainable and it is dismissed.

On the appeal against sentence the appellant simply complains that he is 19 years old and deserves a more lenient sentence. I must say at once that the sentence does not come to me with a sense of shock. While it is correct that short sharp sentences are appropriate for first time young offenders, it is also true that the court should take into consideration the seriousness of the offence as well as the circumstances in which it was committed. In this case not all the bicycles that were stolen have been recovered. In fact only four of the twelve bicycles stolen have been recovered. Again this was a carefully planned offence using a bunch of keys to unlock a storeroom made of a container. The offence was committed by persons whose job was to protect the very storeroom they broke and the very bicycles they stole. The sentence passed by the lower court conforms with the sentiments of Mwaungulu, J. as expressed in Republic v Mabvuto Damson Conf. Case No. 261 of 1995 setting down four years imprisonment as the starting point for sentencing in a case of breaking into a building and committing a felony therein C/S 311 of the Penal Code.

Sentence to be reduced to 36 months imprisonment with hard labour.

PRONOUNCED in Open Court this 16th day of July, 2009 at Lilongwe.

R.R. Mzikamanda

JUDGE