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IN THE HIGH COURT OF MALAWI

MZUZU REGISTRY

CRIMINAL APPEAL NO. 136 OF 2017

Being Criminal Case No. 131 of 2017 in the FGM's Court sitting at Chitipa

JULIUS NYONDO

PETER MUYWANGA

VERSUS

THE STATE

CORAM: HON. JUSTICE T.R. LIGOWE
W. Nkosi of Counsel for the State
G. Nyirenda of Counsel for the Appellant
C. Chawinga, Official Interpreter
J. Chirwa, Court Reporter

JUDGMENT

Ligowe J

1 The two appellants were convicted by the First Grade Magistrate sitting at Chitipa upon a plea of guilty to the offence of bringing in property dishonestly acquired outside Malawi contrary to section 331 of the Penal Code. They were sentenced to five years imprisonment with hard labour each. The facts of the case are that on 9th July 2017, James Mumba aged 24 of Nampute Villgae, T/A Waitwika in Zambia was plying his trade ferrying people on his motorcycle between Nakonde (Zambia) and Kameme (Malawi).

The same day James Mumba, 24 years old and Peter Muywanga, 26 years old, had agreed to steal a motor cycle. Peter Muywanga pretended to hire James Mumba on the way to Kameme while Julius Nyondo waited to ambush them in the way. After some distance Peter Muywanga asked James Mumba to stop as though he wanted to urinate. Immediately Julius Nyondo came out from the bush and together threatened to stab James Mumba with a knife. They told him to leave the motor cycle and they rode it going towards Kameme. Suspicious of the speed at which they went, people around the area phoned Ipenza Police unit in Malawi and the Police blocked the road. Upon seeing the Police ahead the appellants branched towards Hanga River. They damped the motor cycle and ran into Tanzania. The Police sent messages around and they were arrested in Tanzania and brought back to Malawi.

2 In his sentence the trial Magistrate considered the fact that they are first offenders and they looked remorseful. He also considered the seriousness of the offence that it carries a maximum of seven years imprisonment and that it is prevalent along the borders of Malawi, Zambia and Tanzania. He took into account that the appellants are the ones who stole the motor cycle in barbaric manner and that they had planned to commit it in company. And stated that such acts, dent the good relationship between bordering countries.

3 Here is an appeal against the sentence on the ground that it is excessive. Counsel Nyirenda argued on the appellant's behalf that the Magistrate did not take into account that the two are first offenders who needed to be considered for suspended sentences under section 340(1) and 339(1) of the Criminal Procedure and Evidence Code. Counsel cited *Rep v. Kholoviko* [1996] MLR 355 where the Judge held that first time offenders should only be sent to prison if there are real and compelling reasons to justify it. The Judge had applied *Rep v John* Conf. Case. No. 73 of 1995 (unreported) where Mwaungulu J had cited with approval a statement in the case of *R v. Cox*(1992) 14 Cr App R 479 that:-

“While the seriousness of the offence is a legitimate factor when deciding to suspend a sentence, it should not be thought that a sentence cannot be suspended simply because the offence is serious.”

The court also applied a statement in *Current Sentencing Practice 1993* that:-

“The fact that the offence is so serious that only a custodial sentence can be justified, does not necessarily mean that the offender must be given a custodial sentence. If there are strong personal mitigating factors present, the court may impose some other form of sentence.”

4 Counsel submitted that the appellants were remorseful. The motor cycle was recovered. They did not harm the owner of the motorcycle. And that, the trial court should not have emphasized much on the prevalence of the offence in the area.

5 Counsel for the State agreed that five years for the offence is harsh. He however contended that the appellants admitted to have robbed the victim using an offensive weapon. They had run away when the police wanted to arrest them. The offence was a breach of trust of the victim in transport business. And that the appellants tarnished the perception of Malawians around the area. So, the sentence is not manifestly excessive, as the aggravating factors outweigh the mitigating factors and it will afford peace to the community.

6 The rule for dealing with an appeal against a sentence was stated in *Rep v. Kholoviko* (op cit) and *Rep v. Mkoma* [1995] 2 MLR 598, that since sentencing is a matter of discretion for the sentencing court, the appellate court will not interfere with the discretion unless the sentencing court erred in principle, or the court overlooked a material fact or the sentence arrived at is manifestly excessive or inadequate as to comport that there was an error of principle.

7 Section 331 provides:-

“Any person who without lawful excuse, knowing or having reason to believe the same to have been stolen or obtained in a way whatsoever under such

circumstances that if the act had been committed in Malawi the person committing it would have been guilty of a felony or misdemeanour, receives or has in his possession any property so stolen or obtained outside Malawi, or having himself so stolen or obtained such property, brings the same into, or has it in his possession within Malawi, shall be guilty of an offence of a like degree (whether felony or misdemeanour) and shall be liable to imprisonment for seven years.”

It is clear that this provision prohibits bringing into Malawi property stolen or unlawfully obtained from outside Malawi. The offender may have stolen or unlawfully obtained it himself or may have merely received or possessed it, knowing or having reason to believe it was stolen or unlawfully obtained. The offence is a felony or a misdemeanour depending on whether the manner it was obtained outside Malawi is a felony or a misdemeanour in Malawi. The maximum sentence is seven years imprisonment but certainly the felony is aggravated compared to the misdemeanour. The offence in the present case is a felony because the motorcycle was robbed from the victim. And it is aggravated because the robbery element.

8 The offence is in the bringing. That a weapon was used and that it entailed breach of trust, speak to the manner in which the motor cycle was obtained. The aggravation is covered upon classifying the offence as a felony or a misdemeanour. The same cannot be considered again.

9 There is always recovery of the property stolen or unlawfully obtained when the offence under section 331 of the Penal Code is committed. This is in itself not a mitigating factor unless the property is restored to the owner. The lower court ordered the motorcycle to be returned to the legal owner in this case.

10 The Magistrate cannot be faulted for considering the seriousness of the offence and its maximum penalty, the prevalence of the offence around the area, that the appellants stole the motorcycle themselves and that they planned to bring it into Malawi after stealing. He cannot be faulted also for considering that the appellants are first time offenders and were

remorseful. What he did not consider is that the motorcycle was returned to the owner and that they pleaded guilty.

- 11 In the case of *Rep v Chimimba* Confirmation Case Number 138 of 2013, Justice Mwaungulu laid down some guidelines on determining a sentence while considering aggravating and mitigating factors of the case. He stated that prudence requires to start going upwards when scaling up and down the starting point in sentencing. And that it is prudent to indicate a value to every factor. If there are two aggravating factors, for example, in house breaking, namely, seven people were involved in the burglary and in the course there was rape and the rape was not included in the charge, the sentence would say for each of these a year is required. He further stated that the sentence must do the same when scaling down for mitigating factors. And that it must be remembered that a plea of guilty will attract almost a third reduction from the determined sentence. In any instance the mitigating factors, however, must not be overplayed as to arrive at lower sentences that are in principle and in fact inadequate as to comport an error of law or principle.
- 12 I have not come across a sentencing guideline for the offence under section 331 of the Penal Code. This is the opportunity to do so.
- 13 The offence in section 331 is in bringing into Malawi property stolen or unlawfully obtained from outside. The section mentions several acts which are offences in Malawi as the mode in which the offender could have the property brought into Malawi. These are theft and any other way of obtaining property which is a felony or a misdemeanour in Malawi, including receiving and possession of property knowing or having reason to believe the same to have been stolen or so obtained. This essentially covers most the offences relating to property under Division V of the Penal Code. There are misdemeanours as well as felonies. As earlier said the offence is either a felony or misdemeanour depending on whether the manner in which the property was obtained, received or possessed outside, is a felony or misdemeanour in Malawi. The sentencing guideline for the misdemeanour should be different from the one for the felony.

14 For the misdemeanour, there are misdemeanours in Division V to consider. The lowest of the misdemeanours is unlawful use of vehicles or animals under section 299 punishable with a fine of K10 000 and imprisonment for six months. The highest of the misdemeanours is obtaining by false pretences under section 319 punishable with imprisonment for five years. There are other misdemeanours in between punishable with imprisonment for one year, a fine and imprisonment for two years¹ and imprisonment for three years. The starting point for this offence which is a misdemeanour should therefore take into account legally bringing into Malawi property obtained by way of unlawful use of vehicles or animals under section 299. This is so because a starting point is the lowest threshold for a specific offence given the *mensrea* and *actusreus* of the crime as provided in the penal provision. See *Republic v. Keke*, Conf. Case No. 404 of 2010 (High Court) (Principal Registry) (unreported). I am therefore of the view that a fine of K10 000 or imprisonment for six months would be the appropriate starting point. From this point the offence should be aggravated according on the nature of the misdemeanour in issue. Other relevant aggravating factors like high value of the property brought and smuggling should be applied. Similarly, relevant mitigating factors available in the case, until the court arrives at the appropriate sentence.

15 Where the offence is a felony the felonies in Division V range from theft under section 278 punishable with imprisonment for five years to armed robbery under section 301(2) or housebreaking and burglary under section 309 punishable with imprisonment for life or death. There are other felonies in between punishable with imprisonment for seven years, ten years and 14 years. The starting point for the felony should therefore consider simple theft under section 278. I am therefore of the view that imprisonment for one year is the appropriate starting point. From this point the offence should be aggravated according on the nature of the felony in issue. Other relevant aggravating factors like high value of the property brought and smuggling should also be applied. And similarly,

¹All misdemeanours whose punishment is not specially provided as provided in section 34 of the penal Code

relevant mitigating factors available in the case, until the court arrives at the appropriate sentence.

16 This far the aggravating factors in this case are that the manner in which the appellants obtained the motorcycle was robbery, they planned for it and it is prevalent around Kameme in Chitipa. The mitigating factors are that the appellants are first time offenders, they pleaded guilty, they were remorseful and the motorcycle was returned to the owner. In view of the starting point of one year, this court finds five years imposed by the Magistrate excessive. One and half years is appropriate.

17 Counsel for the appellants rightly pointed out the need to consider first offenders for suspended sentence. Section 340(1) of the Criminal Procedure and Evidence Code states:

“Where a person is convicted by a court of an offence 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”

18 Section 339 (1) of the Criminal Procedure and Evidence Code states:

“Where a person is convicted of any offence the court may pass sentence of imprisonment but order the operation thereof to be suspended for a period not exceeding three years, on one or more conditions, relating to compensation to be made by the offender for damage or pecuniary loss, to good conduct, or to any other matter whatsoever, as the court may specify in the order”

19 Yes a sentence cannot be suspended simply because the offence is serious. In fact it is mandatory under section 340 of the Criminal procedure and Evidence Code that a first offender should be given a suspended sentence under section 339 or be given a fine. If a first offender has to serve a prison term, it has to be in default of payment of a fine. Or there have to be good grounds which have to be set out by the court on record that there

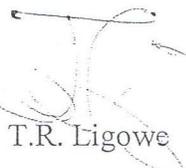
is no other appropriate means of dealing with the first offender but imprisonment. Section 15(1)(c) of the Criminal Procedure and Evidence Code requires any sentence of imprisonment upon a first offender imposed by a subordinate court, which is not suspended under section 340 to be reviewed by the High Court. On review the High Court checks for any ground recorded showing that there was no other appropriate way of dealing with the offender and if the ground is good enough. If there is no ground recorded or the ground is not good enough the High Court has the power to alter the sentence. It is therefore important that Magistrates should always remember to record why they think it is not appropriate to deal with the offender otherwise than a custodial term of imprisonment.

20 This kind of decision is informed by the purpose the magistrate would like to achieve by the sentence. It is clear in section 339 that the conditions for a suspended sentence have a purpose. It could be to restore and repair the harm caused by the offence or the offender's good conduct and rehabilitation. If the purpose is to punish, to deter or to incapacitate the offender there may be justification for a custodial sentence.

21 In the circumstances of the present case, the appellants need to be punished and the same can only be achieved by spending time in prison.

22 The appeal succeeds in that the sentence is reduced to imprisonment for one and half years.

23 Made in open court this 10th day of April 2018.


T.R. Ligowe
JUDGE