



IN THE HIGH COURT OF MALAWI

CRIMINAL DIVISION

LILONGWE DISTRICT REGISTRY

CRIMINAL APPEAL NUMBER 88 OF 2018

(Being Criminal Case No. 253 of 2018 before the First Grade Magistrate Court sitting at Mkukula)

CHIMWEMWE KAFERAWANTHU.....APPELLANT

-v-

THE STATE.....RESPONDENT

CORAM: Honourable Justice Dr. C.J. Kachale, Judge

Appellant, Present but without any Legal Counsel

Ndyani, Senior State Advocate of Counsel for the Respondent

Namagonya, Court Reporter

Choso, Court Clerk

JUDGEMENT

On 18th July 2018 *Chimwemwe Kaferawanthu* was convicted by the First Grade Magistrate at Mkukula on charges of theft of a motor vehicle contrary to section 282 (i) of the Penal Code. The allegation was that around 2nd November 2017 the said *Chimwemwe Kaferawanthu* had stolen a motor vehicle Suzuki Alto the property of *McPhilip Matchumbuza*. Despite his plea of not guilty *Chimwemwe Kaferawanthu* was convicted after full trial and sentenced to 36 months imprisonment with hard labour. In these proceedings he has appealed against both the conviction and the corresponding sentence. In essence he challenges the conviction as being unsafe and against the weight of the evidence; as regards the sentence he contends that it did not conform to the sentencing principles and was rather harsh in all the circumstances of the case.

The state opposes the appeal: it has been pointed out that the evidence adequately shows that though *Chimwemwe* initially acquired the vehicle for hire, by failing to return it six months afterwards, he had clearly converted the same to his own use. Thus the state supports the conviction and has further affirmed the

sentence of 36 months imprisonment as befitting the crime and the present offender; therefore the state has urged the court to dismiss both limbs of the present appeal.

This being an appeal, the court handles the case by way of rehearing; in that sense it has to review all the evidence and arrive at own conclusions independent of the trial court determinations. In that vein, my court has taken the time to study the lower court record thoroughly. The totality of the evidence establishes beyond a reasonable that on 1st November 2017 *Chimwemwe Kaferawanthu* was introduced to the owner of Suzuki KK 6318 by a mutual friend *Stewart Mwale*. The initial hire was for a day (i.e. 2nd November 2017 from 6am to 6pm); however *Chimwemwe Kaferawanthu* did not return the car as agreed. Instead he drove to Dedza for other business errands; when the hired car broke down *Chimwemwe* towed it to a garage where the problem was diagnosed as a ruptured engine block. The engine was dismantled and certain parts given to *Chimwemwe* so that he could have them repaired in Lilongwe for subsequent fitting in Dedza. All that happened in November 2017.

Over five months later the car had not been collected from Dedza; the owner (with the assistance of the police) arranged for the car (with engine dismantled) fetched the same at own expense back to Lilongwe. Meanwhile the appellant was no longer reachable by phone when the complainant or owner of garage tried to contact him. Initial visits to his parents' home where he lives proved futile; the information then suggested that he had fled the jurisdiction to Zambia. In early May 2018 he was apprehended and brought to trial for his actions; at the end of the case the magistrate found him guilty.

According to section 271 (1) of the Penal Code *"A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing."* Under section 271 (2) *"A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with any of the following intents, that is to say—(d) an intent-to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion."*

Thus in order for a conviction to be sustained the following elements must be established:

- i. There must be a thing capable of being stolen;
- ii. There is need for an owner;
- iii. There is need for evidence of fraudulent conversion or an intention to permanently deprive the owner of his property.

Reading through the decision of the magistrate it is quite evident that she properly addressed her mind to these issues: it was found that there was a vehicle Suzuki Alto registration number KK 6318 which belonged to one *McPhilip Matchumbuza*. According to the record though *Chimwemwe* had initially acquired possession of the vehicle legitimately (i.e. it was lawfully hired) however when *Chimwemwe* proceeded to use the vehicle in breach of the terms of the hire agreement an intention for conversion arose. Indeed the totality of his subsequent conduct buttressed the conclusion of fraudulent conversion: for starters, when the vehicle engine was dismantled at *Chimwemwe's* instance without recourse to the owner that was inappropriate conduct.

Even after he had taken some spare parts from the garage in Dedza to a warehouse in Lilongwe without informing the owner of the vehicle *Chimwemwe* can be deemed to have acted without a lawful claim of right. Eventually he began to avoid phone calls from the friend who had facilitated the initial hiring in the first place. Over five months later the Police had to hunt him down in order for him to answer to the charges; that is not conduct of a person who was acting in good faith at all. In the considered opinion of this court (which affirms the conclusions of the trial magistrate) the mere fact that the initial possession was lawful cannot legitimize the blatant illegalities which permeate *Chimwemwe's* subsequent dealing with *Mr. McPhilip Matchumbuza's* property which had to be recovered without certain important spare parts. Therefore, this court concludes on appeal that there is adequate evidence on the record to justify a finding of guilt for theft of a motor vehicle; the appeal against conviction is hereby dismissed for lacking merit.

Now turning to the sentence; the starting point is to observe that the law-under section 282 of the Penal Code- prescribes ten years as the maximum penalty for the offences listed thereunder. In the present case *Chimwemwe Kaferawanthu* was condemned to 36 months imprisonment with hard labour upon conviction.

He has asked this court to consider reducing the same. An appellate court is entitled to interfere with an order in sentence if the same is manifestly excessive (or inadequate) or is otherwise wrong in principle. Looking at the determination of the lower court there is a serious misdirection on the part of the sentencer which might have wrongly affected the sentence meted out.

Having properly discussed the gravity of the offence of theft of motor vehicle as evidenced by the statutory amendments of 2011 which doubled the maximum penalty from five to ten years, the lower court made other observations which are clearly wrong in principle. These are the precise words of the court below which reflect some substantial misdirection in principle:

“Again it is observed that there is nothing on the side of the accused person to show that they will assist the complainant on the problems with the car yet they were able to find him legal counsel and they can also afford to pay for further studies of the accused person as the accused said he is starting a course the coming semester. This shows that the side of the accused person has other priorities and they are not remorseful for what happened otherwise they could have held their other programmes and assisted the complainant to fix his car. For this reason the court feels the accused deserves a stiff penalty.”

Reading through that paragraph it would appear that the court erroneously attributes some fault to the convict based on the conduct of his family; that is outright impermissible. One is liable for sanctions in respect of one’s own behaviour or misbehavior; hence there was a fundamental error of law when the trial court proceeded in that fashion.

Even more surprising is the decision of the lower court to penalize someone severely precisely because he could afford to hire legal counsel; in our system of justice it would be a very sad day for the administration of criminal justice if one’s ability to access legal counsel was to be used as a yardstick for determining severity of criminal sanction. That approach by the lower court is manifestly contrary to the legal safeguards of a fair trial.

This legal error therefore warrants the severest censure from this court: the offender must be penalized for the moral and legal responsibility he bears as defined in the pertinent statute and not with reference to some economic status (whether real or perceived). Our system of justice guarantees equality before the law; the poor thief and the rich thief must both be punished for stealing not for their poverty or affluence. In any event, as earlier observed, it is wholly inappropriate to draw into the analysis the apparent lack of proper priorities on

the part of the family of the convict as relevant considerations in deciding the penalty he deserves; it is the offender and not his entire family who must be considered for punishment and the sentencing court must never lose sight of that very critical factor.

On the strength of these observations, this court will set aside the sentence of 36 months imprisonment with hard labour for being premised on wrongful sentencing considerations. Instead this court on appeal will substitute a sentence of 20 months imprisonment with hard labour.

In the final analysis, therefore *Chimwemwe Kaferawanthu's* appeal against sentence is upheld; he is hereby condemned to **serve 20 months imprisonment with hard labour effective from 20th July 2018.**

Order accordingly.

Made in Open Court this 21st day of November 2018 at Lilongwe.


C.J. Kachale, PhD
JUDGE