



IN THE HIGH COURT OF MALAWI

CRIMINAL DIVISION

LILONGWE DISTRICT REGISTRY

CRIMINAL APPEAL NO. 34 OF 2018

(Being Criminal Case No. 22 of 2018 before The Mchinji First Grade Magistrate Court)

BETWEEN:

LLOYD PHIRI.....APPELLANT

-AND-

THE REPUBLIC.....RESPONDENT

Coram: **Honourable Justice Dr. C.J. Kachale, Judge**
Appellant, Present but Not Legally Represented
Supply (Ms.), Senior State Advocate for the Respondent
Nyalaya (Mrs.), Court Reporter
Zulu, Court Clerk

JUDGMENT

On 17th January 2018 *Lloyd Phiri* appeared before the First Grade Magistrate at Mchinji on allegations of theft by servant contrary to section 278 as read with section 286 of the Penal Code. The indictment alleged that in December 2017 *Lloyd Phiri* being a Subsidy Clerk stole fertilizer worth K547, 600 as well as K457, 240 cash from Farmers World (his employer) at Tembwe Shop in Mchinji. Despite his denial of the charge, he was convicted after full trial and sentenced to 42 months imprisonment.

On 12th March 2018 *Lloyd Phiri* wrote a letter from Maula Prison lodging the present appeal. The essence of that letter would suggest that he is challenging the sentence only for being excessive, though in its response the state discussed both the propriety of the conviction as well as the adequacy of the sentence.

On a reading of the lower court record, one reaches the conclusion that the state established beyond a reasonable doubt that *Lloyd Phiri* was employed by Farmers World as a Subsidy Clerk at its Tembwe Satellite Shop in October 2017. In that capacity *Lloyd Phiri* received quantities of fertilizer which were vouched for in documentary proofs. Cash sales were likewise recorded and funds not properly remitted by the appellant. Instead, he simply abandoned the shop and was later traced to Chigwirizano in Likuni (Lilongwe) a fortnight later. In his defence he explained that when he discovered a huge cash shortage in the cash chest, he suspected that the money had disappeared by magic; he therefore left the shop and reported the shortage-not to the Police nor his employer as one might have expected-but rather to his parents. His phone was no longer reachable and the complainant only managed to find him through their own initiative.

In its response the state has cited the Supreme Court decision of **Nguwo and another-v-Rep** [1991] 14 MLR 384 to support their argument that the conviction cannot be faulted. According to the editor's summary that decision proposes that

Shortage per se is not proof of theft. The trial court must consider whether the relevant circumstances proved in evidence, including the deficiency, show beyond reasonable doubt that the accused stole the property. The court must consider the size of the deficiency, whether persons other than the accused had control of the stock or access it, whether it is reasonably possible that the deficiency is due to causes other than dishonesty on the part of the accused and whether circumstances have been proved suggesting the accused enriched himself by the property stolen.

See also the cases of **Banda-v-Rep** [1971—72] 6 ALR (Mal) 328 and **Rep-v-Nathaya and others** [1993] 16(2) MLR 744.

In this context it has been pointed out that the appellant had sole control of the stock (his defence that he got less stock from the drivers has been disproved by the delivery notes to the contrary which he duly signed for). His failure to lodge a proper report of the missing funds and his lifestyle of profligacy at the time he was apprehended all combine to show that his own dishonesty accounts for the missing cash and stocks.

Accordingly, the court has no hesitation to uphold the present conviction as being well established by the available evidence i.e. *Lloyd Phiri* was a Subsidy Clerk in the employ of Farmers World at Tembwe Satellite Shop and in that capacity received cash in respect of sales of fertilizer which had been delivered to him in

the course of his employment. The said cash and stocks went missing in his custody and he has failed to properly account for the same.

As regards the sentence, it has been pointed out that on the authority of the sentence scheme proposed in the case of **Rep-v-Missiri** (1994) Conf. Case No. 1392 (unreported) three and a half years is within the suitable range for the loss occasioned by the appellant. On that score alone, this court does not believe that it has the legal justification for interfering with the sentence herein.

The appeal against the sentence must accordingly fail for lacking any merit; it is hereby dismissed as such.

Made in open court this ^{18th} day of July 2018 at Lilongwe.


C.J. Kachale, PhD

JUDGE