



Library

IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CRIMINAL DIVISION sitting at Chichiri  
CONFIRMATION CASE No. 143 of 2020



(being criminal case no. 174 of 2019, SGM, Nchalo Magistrates' Court)

REPUBLIC

v

DIVERSON LANKEN

---

ORDER ON CONFIRMATION

---

nyaKaunda Kamanga, J.,

This criminal matter from Blantyre Magistrates' Court was remitted to the High Court for review in line with section 42(2)(f)(viii) of the Constitution, section 25 of the Courts Act and section 15(1) of the Criminal Procedure and Evidence Code (hereinafter the CPEC) to enable the High Court of Malawi verify the legality of the proceedings and whether the defendant was subjected to a fair trial and sentencing by the subordinate court.

On 6<sup>th</sup> September 2019, the 40 years old defendant, Diverson Lanken, appeared before the Second Grade Magistrate sitting at Nchalo to answer a charge of the offence of grievous harm contrary to section 238 of the Penal Code. After trial the defendant was found guilty and convicted as charged. The evidence revealed that the defendant on or about the 13<sup>th</sup> day of August 2019 at a Osman Village in the district of Chikhwawa did grievous harm to Lingstone Melekasi in that while they were arguing over thorn bushes the victim took the defendant's knife. As they struggled the defendant pushed the victim resulting in him falling down. An x-ray report revealed that the 44 years old victim sustained a fractured right rib on the right side of the chest.

In mitigation of sentence the prosecution noted that although the convict was a first time offender he had committed a serious offence. The defendant informed the court that he had family obligations which included taking care of an orphan and being responsible for a pregnant wife. The court noted that the victim invited the injury on himself by taking the offender's knife and cutting the offender's flowers and placing thorns around the offender. The offender reported the issue to the village head and the victim failed to follow the advice to remove the thorn bushes. On 19<sup>th</sup> March 2019 the Magistrate after considering the maximum penalty in light of the mitigating and aggravating factors he thought the defendant did not deserve a harsh custodial sentence although he applied excessive force in committing the offence. The magistrate being of the view that the victim deserved compensation he invoked section 32(1) of the Penal Code and sentenced Lanken to compensate the victim with K30,000 in default 12 months imprisonment with hard labour.



Section 238 of the Penal Code provides that, any person who unlawfully does grievous harm to another shall be guilty of a felony and shall be liable to imprisonment for 14 years. The 14 years imprisonment is the maximum sentence that has been reserved for the worst cases of causing grievous harm of which the present matter cannot be said to be one such case. The *Magistrates' Court Sentencing Guidelines* (Blantyre: Malawi Judiciary, 2018 at 24) suggests the starting point for the punishment for committing the offence of grievous harm as a sentence of five years imprisonment. However, as was noted by the trial magistrate the sentence guideline can be scaled up or down depending on the aggravating and mitigating factors that can be discovered in various cases. The case law also provides good guidance on sentencing trends in similar cases. In *Jussa Afiki v Republic*, criminal appeal no. 116 of 2007, the High Court set aside a 5 years sentence passed on a charge of causing grievous harm for being outrageous and on the side of excessiveness and substituted thereto 18 months imprisonment sentence. The appeal judge took into consideration the fact that accused person was a first offender, pleaded guilty to the charge and that he was of a youthful at 21 years old. In *Francis Katete v Republic*, criminal appeal no. 55 of 2000, the High Court set aside a 15 months sentence imposed by the lower court on a charge of causing grievous harm and substituted thereto 12 months imprisonment. After finding that the lower court's sentence was excessive, bearing in mind that the accused was a first time offender, was of youthful at 28 years old age and was as much a victim in the fight. In the case of *Demba Zambezi v Republic*, criminal appeal case no. 34 of 2009, the High Court reduced a 12 years sentence passed by the lower court and imposed 8 years imprisonment in its place. In *Naison Lucius v Republic*, criminal appeal case no. 46 of 2008, the complainant was attacked with a metal bar and sustained injury on the right cheek and his collar bone was broken, the accused was sentenced to 8 years imprisonment with hard labour by the lower court. On appeal the High Court reduced the sentence to 5 years imprisonment and noted that the accused was entitled to a measure of leniency due to his age and the fact that he was a first offender. The above mentioned cases are important in shading light on the sentencing trends to consider for this type of offence. However, in offences of this nature one most important factor that is considered in imposing an appropriate sentence to the accused is the degree of injury sustained by the complainant. It must be borne in mind that the degree of injury varies from case to case and hence the variation in sentencing. It is trite law that the sentence must fit the offence, the offender and as well as the public interest.

Having examined the record of the case this court is of the view that the finding by the lower court of guilty and the conviction of the defendant for the offence of grievous harm contrary to section 238 of the Penal Code, following

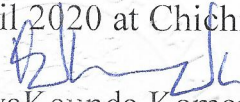


the defendant's trial, is well founded and is hereby confirmed. Grievous harm is a serious violent offence and custodial sentences must always be considered. In regard to punishing first time offenders, it is of course pertinent to have recourse to sections 339 and 340 of the CP and EC which provide for consideration of a suspended sentence for first time offenders. The court in *Republic v Fatsani Sakhwinya*, High Court / PR Confirmation case no. 359 of 2013 (unreported 24 July 2013) emphasises that for first offenders a sentence can only be as fits the offence and for the purpose of reforming or preventing the offender from committing similar offences in the future.

After considering the serious bone fracture that was sustained by the victim, the maximum penalty for the offence of grievous harm, the guideline sentence of 5 years imprisonment and the sentences in similar cases that have been outlined above this court is of the considered opinion that although sentencing is discretionary, the compensation of K30,000 that was imposed on the defendant for committing this violent offence was unusual and not an appropriate form of punishment. Not only is it far below the maximum penalty of 14 years imprisonment as well as the sentence guideline of 5 years imprisonment but it is above all manifestly inadequate and worth interfering with by this review court. What court's should understand is that if the prosecution had desired a lighter penalty they had the discretion to charge the defendant with a less serious offence, such as the offence of unlawful wounding under section 241(a) of the Penal Code where the maximum penalty is 7 years imprisonment and the sentence guideline is 12 months imprisonment. This being a criminal matter sentences imposed must first and foremost be in line with the penal provision and sentencing guideline as well as being proportional and meaningful since in terms of section 32(2) of the Penal Code the criminal proceedings do not really bar the victim from making a civil claim for damages for the personal injuries sustained.

Having made the above observations and noting that under paragraphs 4, 5 and 6 of the *Judiciary Measures on Coronavirus (COVID19)* of 27<sup>th</sup> March 2020 it would be a challenge to set down this matter to consider enhancing the sentence at the earliest opportunity and that it would also not be appropriate to add to the prisoner population through this review process during the COVID 19 pandemic this court reluctantly confirms the compensation and the default sentence that was imposed on the defendant.

Dated this 22<sup>nd</sup> day of April 2020 at Chichiri, Blantyre.

  
Dorothy nyakaunda Kamanga  
JUDGE

|                 |   |                       |
|-----------------|---|-----------------------|
| The Prosecution | : | Absent                |
| Defendant       | : | Absent /unrepresented |
| Mr. Amos        | : | Court Clerk           |