

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Revision Case No. 9 of 2003

THE REPUBLIC

Versus

MARIA AKIMU

In the First Grade Magistrate Court at Liwonde Criminal Case Number 372 of 2003

CORAM: DF MWAUNGULU (JUDGE)

Mwenefumbo, legal practitioner, for the defendant

Banda, legal practitioner, for the State

Mangisoni, official court interpreter

Mwaungulu, J.

JUDGMENT

This matter comes under the general powers of this Court under the Courts Act to review criminal proceedings in subordinate courts. Only the sentence comes for consideration. The sentence the First Grade Magistrate passed against the defendant, Maria Akimu, attracted public concern and wide media coverage. The public's and media's concerns are in the context of international interest in environmental conservation and preservation of endangered species. Malawi ratified some instruments and, through appropriate legislative interventions, essays to abide by these international concerns and standards. There has been pointed and remarkable change in the law and management of national parks and wildlife through recent amendments to the National Parks and Wildlife Act in 1992. Consequently, what occurred on the 20th of July,

2003 and the sentence the First Grade Magistrate passed on 10th September, 2003 roused much interest and concern.

The events leading to the arrest of the defendant and retrieval of the tusks are phenomenal just as are dramatic. Officials of the National Parks and Wildlife Department, disguising as would-be purchasers of ivory, working on information, met the defendant at her house. They agree to buy some pieces of ivory at the defendant's house, at the defendant's father's house and another person's house. They eventually arrested the defendant and recovered the ivory but not without stiff resistance from the defendant's neighbours and relations when one national parks and wildlife official was badly injured. After conviction, the First Grade Magistrate, aware of section 110, quoted in a moment, imposed of a fine for K6, 000.00 and in default one year imprisonment. She paid the fine. The concern of the Department of National Parks and Wildlife, a germane one, is that this kind of punishment, given the huge financial returns to poachers and traffickers of trophies, will far from deter offenders and preserve the wildlife, our national treasure and indispensable ecological and economic pride, prize and heritage.

Despite what Mr. Banda, an environmental lawyer appearing for the Director of Public Prosecutions wants this Court to understand, there are definitely uncertainties in the wording of section 110 of the National Parks and Wildlife Act that should not be in a penal statute. Section 110 of the National Parks and Wildlife Act provides:

“Any person who unlawfully possesses or who purports to buy, sell or otherwise transfer or deal in any government trophy shall be guilty of an offence..... and shall be liable to a fine of K10, 000.00 and to imprisonment for a term of 5 years and in any case the fine shall not be less than the value of the specimen involved in commission of the offence.”

There are several scenarios. The first is the one advocated by Mr. Banda. Mr. Banda's scenario means that a court can impose a fine above K10, 000. The difficulty is whether K10, 000 is the minimum or whatsoever. It cannot be the minimum because the trophy could be less than K10, 000 in which case the court could still impose less than K10, 000. The K10, 000 in the section is neither the minimum nor the maximum. Why have it? The matter is complicated by the second scenario.

The second scenario reveals a further difficulty with the wording. Even accepting Mr. Banda's interpretation, does section 110 mean that the defendant is only liable to a fine of up to the value of the trophy with the result that the court could, in its discretion, impose a lesser sum? Does the section mean the court should impose the fine equivalent to the value of the trophy? Does the section mean that K10, 000 is the minimum fine?

The questions just raised are more pronounced in the third scenario. Assume, for purposes of conversation, that the legislature thought the value of any trophy would be less than

K10, 000. If the section means the court must impose a fine equivalent of the value of the trophy, the section means that while the fine must not exceed K10, 000, the court cannot impose a fine less or greater than the trophies value and must impose that value. If, for example, the value of the trophy is K6, 000, the court cannot impose K4, 000.00: The court must impose K6, 000. If the effect of the section is that the court has discretion, the maximum fine varies with the value of the trophy. The maximum sentence can be greater or less than K10, 000.

Penal statutes are construed strictly (*Stephenson v Higginson* (1851) 3 HL Cas 638 at 686; *Smith v Northleach Rural Council* [1902] 1 Ch 197 at 202). Where, in a penal provision, there is uncertainty, Courts construe the provision in a manner favourable to the subject: *Liew Sai Wah v Public Prosecutor* [1969] AC 295 at 301 per Viscount Dilhorne. Where there are many divergent constructions of a statute and it is difficult to sufficiently ascertain what Parliament intended the construction favourable to the defendant must be preferred. The legislature cannot intend to affect a subject's liberty by unclear or unambiguous words. On the wording of the section, the lower court assumed, correctly in my judgment, that the maximum fine was K10, 000. K6, 000 cannot have been an unreasonable fine.

The question on this review, in addressing Mr. Banda's concerns, must be whether, on the circumstances of this case the fine was an appropriate disposal of the crime and the offender. In the course of examining the defendant, I did ask for her reaction to the possibility of a prison sentence. The defendant raised domestic concerns. She spoke of how it was that she has to care for her elderly mother, children (she is a divorcee) and children of her dead relation. Mr. Mwenefumbo thought, correctly in my view, that in as much as section 110 of the National Parks and Wildlife Act provides for a fine and imprisonment, the court should, as the lower Court did, not impose a prison sentence but afford the defendant the option of paying a fine. This proposition has the support of many decisions of this Court and the Supreme Court. The principle bases on that where there is such an option courts must, particularly for first offenders, allow the defendant to mend his ways by avoiding prison sentence. On the other hand the legislature will include a fine and imprisonment as a claw back or a way of preventing the offender from reaping from, benefiting by or enabled with the financial proceeds of the crime. In such situation the court could impose a fine together with imprisonment. Sentencing courts should be more willing to do so in cases where there is a prospect of domestic or international trafficking. Moreover the general principle that Mr. Mwenefumbo relies on is subject to the consideration that, in an appropriate case, the court could impose imprisonment. Where, therefore, the prison sentence is the appropriate way of dealing with the offence, the court can impose it though the legislature prescribed a fine with imprisonment. The question is whether this case is such one.

Whether to impose a fine or imprisonment is a difficult question. It is resolved by the approach to sentencing based on the process that must occur in arriving at a prison sentence in every case or, at least under section 340 of the Criminal Procedure and Evidence Code, the case of a first offender. For first offenders, before imposing a prison sentence, a court must by a process of elimination rule out that a non custodial sentence is not the proper way of dealing with the offender. In deciding that question the sentencing court may regard the youth, old age, character,

antecedents, home surroundings, health or mental condition of the accused, or to the fact that the offender has not previously committed an offence, or to the nature of the offence, or to the extenuating circumstances in which the offence was committed. The sentencing court must exclude the propriety of imposing a fine, conditional or absolute discharge, probation or community service.

If the sentencing court concludes that a prison sentence is necessary, it must arrive at the right sentence and impose it. Under section 340 of the Criminal Procedure and Evidence Code, the offender committing crime for the first time, the Court must suspend the prison sentence unless for good reasons which must be recorded. Moreover, under recent amendments to sections 25 and 340 of the Penal Code and Criminal Procedure and Evidence Code, respectively, the Court must consider ordering community service. Of course these powers follow under section 340 of the Criminal Procedure and Evidence Code which provides:

“Where a person is convicted by a Court other than the High Court of an offence (not being an offence the sentence for which is fixed by law) 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.”

This Court, as pointed out in *Rep v Suleman*, Crim.Cas. No.144 of 2003, unreported exercises, under section 11 (b) of the Courts Act, the same jurisdiction and powers of a Subordinate Court.

Looking at the nature of the offence, the circumstances in which the offence was committed, the circumstances of the defendant, the circumstances of the victim (the public and the National Parks and Wildlife Department) and the public interest, a fine is inappropriate for disposing the offence and offender. Possessing, trafficking, hunting of trophies should in recent times be considered as a serious offence sui generis. Much of the trafficking, hunting and possession of trophies affects animals that are endangered species under many international and regional instruments or arrangements to which Malawi is a party. Under these, Malawi must not only resort to steps reducing threats to the species but eliminate completely all conduct that threatens these species. These steps, apart from the ornamental aspects for preservation of these species, enhance the ecological balance that environmentalists have advocated for long. There is huge and committed human and financial investment to enable communities around these ecosystems to harness the benefits of preserving and nurturing the endangered species populating these ecosystems. These grandiose and useful efforts are far from achieved by the conduct displayed by the defendant.

The record, as Mr. Banda said, shows a defendant who not only possessed and trafficked in considerable amounts of ivory but one well connected to others with more quantities of these trophies. The daring operation by the Department of National Parks and Wildlife reveals a

network and syndicate well connected. The threat to the ecosystem and endangered species accentuates by such a sophisticated network around this particular national park and its wildlife. The offence before this Court and the First Grade Magistrate Court is no small matter. The offence occurred in aggravating circumstances.

The risk to officials of the National Parks and Wildlife Department was, given this network, real from the beginning. It surprises few that the defendant called the village to attack with rocks and wood the National Parks and Wildlife officials performing a routine and useful arrest. One can pick a leaf from this that if, as it turns out, the financial returns are as good as are described, offenders will resort to measures like the ones against the National Parks and Wildlife officials to retain control and influence around the park. Offenders will take any step to victimize those who lawfully want them to account.

Of course the defendant offended for the first time. She is 38 years of age. She informs me that she has family to look after. Domestic concerns are not matters sentencing Courts regarded in passing sentence. Offenders must have factored the risk to family when embarking on crime. All offenders, fortunately or unfortunately, have families. If Courts unduly consider family woes after crime, they would be preoccupied with the plight of offenders' relations in total disregard of the crime and the victim. It is, therefore, in very exceptional circumstances, not present here, that a court, out of mercy, regards domestic matters. Ultimately the sentencing Court must regard the public interest in preventing crime.

The National Parks and Wildlife Act manifests the legislature's intention to protect endangered species and the ecosystem for the benefit of the people directly around the national park and the country. The legislation preserves our unique heritage and ecosystem. It is sound sentencing policy to ensure that the threat to these species and the ecosystem from the conduct of the defendant and all who, locally and internationally, are a menace, are punished appropriately. It is contrary to the public interest that the conduct displayed in this matter should be punished by a fine alone without imprisonment. If fines are the only punishment, all our efforts may fail. Those involved in hunting, possessing and trafficking in these trophies are more likely well resourced and financed to contain much earlier all our efforts in surveillance, investigation, prosecution of the crime and confiscation of trophies or their proceeds. Most cases of the magnitude of the present case must attract immediate imprisonment.

In arriving at the appropriate sentence the court must regard the maximum prison sentence. This is five years in respect of this case. This is an appropriate case where, for reasons earlier indicated, a fine and imprisonment are appropriate. The appropriate prison sentence, given that the defendant is committing crime for the time, is one year imprisonment. This is an instance of the offence where a community order serves very little to deter the offender to indulge in something which, from domestic and international concern about wild life and our ecosystem, should be viewed seriously and differently. The defendant possessed and trafficked ion the trophies. I will not suspend the sentence either. The defendant will pay the fine and serve the prison sentence of one year imprisonment with hard labour.

DELIVERED in open Court this 29th day of December, 2003 at Blantyre.

D. F. Mwaungulu

JUDGE