

**IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CRIMINAL APPEAL NO. 1 OF 1996**

**JAMES MKWAMBA  
VERSUS  
THE REPUBLIC**

**From the First Grade Magistrate's Court at Balaka Criminal Case No. 60 of 1995**

**CORAM: MWAUNGULU, J**

**Chikonga, State Advocate for the State  
Accused, present and unrepresented  
Mangisoni, Official Interpreter  
Mukhuna, Recording Officer**

**Mawangulu, J**

**JUDGMENT**

This is an appeal by James Mkwamba from the decision of the Principal Resident Magistrate at Balaka. The Principal Resident Magistrate convicted the appellant of the offence of armed robbery contrary to section 301 of the Penal Code. The Court below sentenced the appellant to three years imprisonment with hard labour. When I heard the case on the 25th of February 1996, I allowed the appeal. I reserved judgment.

On the 3rd of May 1995 Mr. Gazamiyala was robbed at Balaka Bus Depot. He lost his briefcase, a wrist watch and cash. He left his house a bit early to catch the bus. At first, the time the incident took place is put as 5:00 in the morning. In cross-examination the time is put as 4:30 in the morning. The assailants, two of them, came on him. One had a panga knife. One of them demanded a briefcase. He told the complainant that should give over the briefcase if the complainant wanted life. The complainant shouted for help in vain. He struggled for the briefcase in vain. The complainant was stabbed in the elbow. The matter was reported to the police.

After this incident the police were on Virgil. On the night of the 4th and 5th of May the defendant and a friend who escaped were arrested at the depot with panga knives. The

complainant was called to identify the defendant.

There was an identification parade. It was conducted by Detective Constable Tsegula. The complainant was called. There were eight people involved. The complainant pointed at the defendant. He did the same when the people changed positions.

The identification by the parade was properly rejected by the Principal Resident Magistrate. Following what this Court had laid in *Andrew vs. Republic* [1971-72]6 ALR (M) 297, that an identification parade should be conducted by a police officer of a higher rank than a constable, preferably not the officer in charge of the investigations, and such officer should give evidence of the formation of a parade, whether any of the participants were similar in shoulder, height and dress to the accused, whether the accused was allowed to choose his position in the parade. The Principal Resident Magistrate thought that the parade conducted in this manner did not reach the mark. It was conducted by a constable in charge of the investigations. There was no evidence on the other aspect of the decorum of the parade. There was none.

It does appear from the record that before the parade the complainant was allowed to identify the defendant directly. The complainant said this when cross-examined by the defendant. This is also suggested by the evidence of the other policeman. The defendant also mentions it in his defense. The purpose of an identification parade is that there may be no doubt about the identification of the culprit by the complainant. It is hoped that by the identification parade the complainant may be given a chance to spot for the first time since the event the suspect from a group. The efficiency of the exercise is undermined if, before the parade, the complainant is given a chance to survey the defendant and later allowed to identify the defendant from the parade. There was reason, therefore, for rejecting the parade.

The Principal Resident Magistrate having rejected the evidence of the identification parade went on to consider whether the identification of the complainant of the appellant could be relied on. He referred to the case of *Chapingasa vs Republic* [1978-80]9 M L R 414. There is no evidence of visibility or illumination. All we know is that it was dawn. The time was 4:30 in the morning. The time more favourable to the defendant must be taken in view of the two suggested times. This is in May. The Court will take judicial notice of the weather. The Principal Resident concluded that in May at dawn it is not dark, one can see without difficult. This conclusion is surprising. The converse is true. In this month the sun is at the furthest spot in the Northern Hemisphere. In the Southern Hemisphere we are experiencing our shortest days and our longest nights. It would not be correct, therefore, to say that at dawn, particularly at the times suggested, there could have been light from natural illumination to facilitate the identification. Surprisingly, apart from that the people had panga knives, the complainant did not give to the police any description as to clothing, height and so on. This was because then, without light and good visibility, there was little to describe.

In fact here there was an identification parade which we have said was defective indeed. There is a whole danger that the complainant in his evidence in Court, with the defendant in the in the dock, could be reenforcing the impressions of the identification parade and labouring under the fact that the process has brought the correct person in Court. Such

prospect will always loom when an identification parade has been conducted and is relied on to prove the case.

It is for these reasons that on the 23rd of February 1996 I dismissed the appeal.

Made in open Court this 30th day of March 1996 at Blantyre.

**D.F. Mwaungulu**

**JUDGE**