

**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CRIMINAL APPEAL NUMBER 110 OF 2006**

ANTONY JERE

VS

THE REPUBLIC

**From the First Grade Magistrate Court sitting at Lilongwe.
Being Criminal Case No. 238 of 2005.**

CORAM: HON. CHINANGWA, J.

Kayuni, Counsel for the State
Appellant, Present/Unrepresented
Kaferaanthu, Court Interpreter
Mrs Mhone, Court Reporter

JUDGMENT

The appellant Antony Jere, Andrew Kaliati and John Binali appeared before the First Grade Magistrate Court sitting at Lilongwe from 8th November, 2005 to 14th July, 2006. There were tried for the offence of Breaking into a building and committing a felony therein contrary to section 311(1) of the penal code.

The particulars aver that Antony Jere, Andrew Kaliati and John Binali from August to November, 2005 at area 4 in

Lilongwe broke and entered into a factory belonging to Stripes Industries and stole therefrom hair braids extensions (mesh) valued at K450,000 the property of Stripes Industries. The appellant and co-accused pleaded not guilty, but each was found guilty, convicted and sentenced to 54 months penal servitude.

The appellant appealed against both conviction and sentence. His grounds of appeal are listed as follows:

- (a) *My boss Abdul Singale refused to appear before the court to testify my involvement in the case.*
- (b) *There was something fishy with the way the case was handled, the police kept on changing prosecutors – changed them twice.*
- (c) *The case was changed from theft to breaking into a building leads me to be suspicious.*
- (d) *The witnesses paraded by the state were unable to testify anything in connection with the charges leveled against me.*
- (e) *My mobile, which had the sms sent to me by my boss Mr Singale ordering me to ferry the said goods*

to his area 23 shop was confiscated and the messages deleted so as to destroy evidence.

At this juncture it would be prudent to remind myself that I did not have the advantage of the trial court of assessing the demeanour of witnesses. Furthermore, an appeal is more like a rehearing of the case. I also bear in mind the provisions of sections 3-5 of the Criminal Procedure & Evidence Code.

Facts of the case show that Feraz Hamdan (Pw1) owns Stripes Industries which is situated at area 4 in Lilongwe. The company manufactures hair braids which are commonly known as mesh. The appellant worked for the company as a security guard. Whereas Andrew Kaliati and John Binali worked for Securicor, but were assigned guard duties at the complainant company premises.

According to the testimony of Pw1 he noticed that hair braids products were missing from the factory. On the night of 2nd November, 2005 Osman Tande (Pw3) a watchman for Plate Cut Ltd was on night duty. This company is adjacent to the complainant company. He saw appellant and co-accused each carrying bags from the complainant company to the gate. Pw3 asked appellant and co-accused what they were carrying but they did not answer. Pw3 informed fellow guards Mr. Adam Wylesi (Pw4) working for JB Car Hire. Pw3 then saw a motor

vehicle registration number TO 519 driving out of the gate. One of the occupants in the motor vehicle was appellant. Pw3 reported the incident to pw1.

As part of investigation Pw1 assigned Ms Fane Lombola (Pw2) a security guard for Securicor to go to appellant's house and buy hair braids. Indeed she bought it from appellant worth K4,600. The same was identified to have been manufactured at Pw1's factory. According to Pw1 value of stolen hair braids was K460,000. The incident was reported to Lilongwe police station who arrested appellant and co-accused.

In this court appellant repeated the contents in his petition. He said that it was Abdul Singale who gave him the hair braids to sell on his behalf. They used to communicate with Abdul on these deals by cellphone. Appellant said that police deleted a sms message sent by Abdul Singale relating to the sales of the hair braids.

In the course of investigation appellant's bank account (exp3) was examined. It showed that on 27th September, 2005 he deposited K136,000 cash. It was a wonder because his wages were between K2,500 to K3,500 per month. His explanation was that he used to do business of selling cosmetics. In court he said that he sold a head of cattle intended for dowry. He deposited the proceeds in the bank.

Counsel Kayuni for the state adopted skeletal arguments written by counsel Kalebe. He urged this court to uphold both conviction and sentence. Counsel submitted that appellant does not deny to have been seen carrying bags containing hair braids from the factory. He conveyed it out in a motor vehicle. He does not deny that he was selling it at his house. His defence that it was given to him by Abdul Singale is unbelievable because the said Abdul Singale denied it.

The starting point is that appellant admits to have been found in possession of hair braids stolen from the complainant company. His defence is that it was given to him by Abdul Singale. Although appellant told court that he would call one witness to testify. There is no record in his testimony where he indicated that the witness was Abdul Singale. There is no record that he sought the trial court's assistance to summon Abdul Singale to testify.

The second issue relates to appellant's bank account with the OIBM. The account statement has entries from 24th November, 2004 to 31st October, 2005. The highest amount of money he ever deposited was K14,000 on 11th December, 2004. Then on 27th September, 2005 he deposited K136,000 cash. It raised genuine suspicion because all along he had never deposited such a large of money at once. The trial court

disbelieved his explanation that he had a business of selling cosmetics. That he had raised K100,000 from the sell of one head of cattle.

The Trial court found as a fact that the deposit were proceeds from sales of hair braids stolen complainant company. I have no justification to disagree with the trial court's finding.

The next issue relates to change of prosecutors. I find no issue at all because he has not shown how that prejudiced his case. It has no merit.

On ground (d) it is my view that the testimony of witnesses established that appellant was connected to the breaking and theft. For example Pw1 testified to the effect that appellant was his servant. That hair braids were being stolen from the factory.

Pw3 saw appellant and co-accused carrying bags. Later he saw appellant in a motor vehicle registration no. TO 519 driving away from the premises.

Pw2 bought hair braids from appellant. Pw1 identified the same to have been stolen from the complainant company. Above all appellant concedes that he was found in possession of hair braids stolen from the complainant company.

On ground (e) appellant contends that he was suspicious the charge was changed from theft to breaking into a building. The state was at liberty to make amendments provided that the trial court consented. On page 65 of the court record the prosecutor applied to amend the charge under section 151 of the Criminal Procedure & Evidence Code. Counsel for appellant did not object to the amendment. In this regard appellant cannot now turn around to cast unfounded suspicion on a properly entered amendment. This ground has no merit.

On the final analysis I find that there was overwhelming evidence proving the case against the appellant and co-accused beyond reasonable doubt. Therefore, the trial court cannot be faulted for convicting appellant. The appellant did not say anything in respect of sentence.

Appeal against conviction and sentence dismissed in its entirety.

Pronounced in Open Court on this 3rd day of May, 2007 at Lilongwe.

R.R. Chinangwa

JUDGE