

**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CRIMINAL APPEAL CAUSE NO. 38 OF 2007**

BETWEEN

KENNEDY CHUNGA APPELLANT

-AND-

THE REPUBLIC DEFENDANT

CORAM: HON. JUSTICE NYIRENDA

Mr. Jangale : Counsel for the State

Mr. T.C. Nyirenda : Counsel for the Appellant

Mrs. I. Namagonya : Court Reporter

Mr. E. Kafotokoza : Court Interpreter

J U D G M E N T

The appellant in this case was charged with, tried and convicted of burglary contrary to Section 309 of the Penal Code and related theft contrary to Section 287 of the Penal Code. He was sentenced to four years imprisonment for burglary and one year imprisonment for theft. The sentences were made to run concurrently. He appealed to this court against his conviction and sentence.

The circumstances of the case are narrow on facts. The complainant's house was broken into and various household items were stolen there

from according to the appellant who was the first prosecution witness. The substance of his testimony was that during the night of the 20th December 2006 a gang of five thieves broke into his house. The gang came in with very bright torches which lit the corridors of the house. Among the five the complainant recognized the appellant. The complainant had seen the appellant before. At the time the complainant saw the appellant, the appellant was standing at the door way to the bedroom. The relevant part of the complainant's testimony was as follows:

*“five came into my bedroom. Out of the group I recognized the accused (the appellant) and another. I had seen the accused before. The accused had stood in doorway of my bedroom.-----
The people brought very strong torches that lit up the surroundings as if there was electricity. I was therefore able to recognize the accused and another”.*

The main stay of the appeal questions the identification of the appellant. It is argued that the appellant was not properly identified and that the guidelines to identification in *RV Turnbull* [1976] 3 ALLER 551 were not considered. The present case is not for the *Turnbill* guidelines. This is a case that turned on the complainant simply recognizing the appellant.

The testimony of the complainant was simple, clear and went unchallenged. I have no reason to doubt it. Issue has been taken with the magistrate's calling of a witness to negate the appellant's alibi. The truth is that, that witness was not necessary and the testimony of that witness might as well be ignored. The matter was well proven even without the testimony of this witness. The case against the appellant was more than established to the requisite standard and I have no doubt in my mind.

The appeal is also about the magnitude of the sentence. I will quickly say the appellant was lucky to have been sentenced to only four years imprisonment with hard labour. This was an aggravated robbery involving a gang of thieves. Ordinarily the appellant should have been sentenced to a term of not less than five years imprisonment with hard labour. I would therefore dismiss the appeal against sentence as well. The appeal is therefore dismissed in its entirety.

Made in Chambers this day of March, 2008.

A.K.C. Nyirenda
J U D G E