



**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CRIMINAL APPEAL NUMBER 16 OF 2008**

MTENJE KAZEMBE MUSUSA.....APPELLANT

V

THE REPUBLIC.....RESPONDENT

CORAM : **SINGINI, J.**
: Appellant, (Present but unrepresented)
: Miss Mchenga, Counsel for Respondent (Sate)
: Miss Mthunzi Court Reporter
: Mrs. Mnyenyembe, Court Interpreter

JUDGMENT

The appellant was tried before the Principal Resident Magistrate Court at Lilongwe for the offence of robbery with

violence contrary to section 301 of the Penal Code. He pleaded not guilty to the charge. After trial he was convicted of the offence as charged and on 24th January, 2008, he was sentenced to eight years imprisonment with hard labour to run with effect from the date of his arrest on 4th December, 2007. He has appealed against both conviction and sentence. I heard the appeal on 12th March, 2008. The appellant was unrepresented but was able to present his appeal by himself. The State opposed the appeal against both conviction and sentence, and I heard counsel for the State in opposition in addition to the skeleton arguments counsel had filed.

The first prosecution witness in the trial was one Twaliki. He was a taxi driver working for an enterprise called Agriboss Car Hire and Taxi operating in the City of Lilongwe. He testified that the appellant was one of four persons, all young men, who on 4th December, 2007, at around 11:30 am in the City of Lilongwe, hired the taxi he was driving that day. All the four boarded the taxi and there were thus five of them in the car with the driver. The four directed the driver towards Area 12 in the City and past that Area taking a dirt road into a vacant bushy piece of land between Kamuzu Barracks and the New State House. The driver testified that they told him that they were selling a plot within that land and they were to meet a prospective buyer at the plot. They then turned

violent towards the taxi driver and overpowered him injuring him seriously. They tied him up and left him on the ground, and according to his testimony, believing they had killed him. He later managed to untie himself and walked to the main gate of Kamuzu Barracks. He was found by a passing police vehicle which picked him, and so began the hunt for the stolen car and the investigations of the crime. The police however considered the driver himself to be a crime suspect and took him to the police station where they held him while they carried out their investigations.

After taking over the car, the robbers drove it away. As they drove away, the car developed punctures in two of its tyres and they could not drive further, prompting them to park the car at a nearby house belonging to one Zephaniah. He gave evidence as second prosecution witness. He testified that he accepted them to park the car there but suggested they park it outside the fence of the house next to where his oxcart was. They begged him to park the car inside the fence of the house and he accepted and that is where they left the car. He recalled that this was around 2:00pm. He saw that the car had two flat tyres and saw that there were four persons involved or who brought it to his house. They told him they would come back for the car. He testified that indeed later that day, when it was still day time, they returned to the house and

again he saw all the four of them including the appellant whom he clearly identified to the police and in his testimony in the trial court. He also testified that on this second occasion the appellant asked for water to drink from the house which he was given and drunk it.

Apparently the police had followed the direction of the vehicle and came where it was parked. They lurked around and then emerged to make the arrest of the four. The police evidence though, supported by the second prosecution witness, is that three of the robbers managed to run away and to escape the arrest, but the appellant was arrested there and then. He was taken to the police station where he was instantly identified as one of the four robbers by the taxi driver who was being held there. The driver maintained in his testimony in court that the appellant was one of the four robbers.

The appellant does not deny that he was found at the house where the car was parked and that he had stopped there at the time of his arrest. He admits having asked for water to drink from the house and that he was given the water which he drank, but he denies being in the company of three other persons or that this was the second time he had come to the house that day. His own story,

in his testimony in court, is that he came to town on his own to ask for, or collect, a debt of money which someone owed him. He then got onto a bus going to Dedza and got off at some place on the way to get another bus going to another place. The buses to that other direction were delaying and so he got a lift with a cyclist passing by whom he did not know. On their way ridding on the bicycle, they saw people gathered at the house where the car was parked with its hazard lights flashing. They stopped out of curiosity and that is when he indeed asked for water to drink from the house which he was given and drunk it. He says it was then that someone pointed him out to the police that he was in the group of four persons who had earlier parked the car at the house and thereupon the police arrested him. He testified that according to him the time was around 6:00pm. He called two witnesses, a seller of used clothing (*kaunjika*) operating in the same business place as the appellant carries on his own business and another from his home village in Mangochi, who testified on his character and they both stated that they knew him well and had known him to be of good character. In short he denied that he was involved in the robbery.

The real issue for determination is one of the identification of the appellant to have been in the group of people who robbed the taxi driver of the car and assaulted him in carrying out their

criminal act. The incident occurred during day time and I have found nothing for me to interfere with the finding of the lower court that the appellant had been correctly identified, particularly on the strength of the testimony of the driver of the stolen car and the owner of the house where the car was found parked, to have been part of the group of persons that carried out the offence with which he was charged and convicted. The two witnesses had engaged with the group for a reasonably long time to be able to correctly identify the individual members of the group. The appellant and the second witness even engaged in some conversation over the drinking water the second witness gave to the appellant, which the appellant confirmed did happen.

I accordingly dismiss the appeal by the appellant against conviction and I confirm his conviction.

I have considered the appeal against sentence. I accept the finding of the lower court that the appellant was in company of three others when committing the crime in this case. To my mind, this then raises the possibility that the appellant may have played the leading role among the four of them or may have been less culpable than all or any of his three criminal colleagues who have escaped arrest for the offence. In such circumstance it is, in my

judgment, proper as a matter of sentencing principle that he receives the benefit of being considered not to have played the leading role in the group's action in carrying out their criminal act and to have been sentenced bearing that factor in mind. In the circumstances of this case, I consider the sentence of eight years imprisonment the lower court imposed to be proper for the worst offender of the group and I would therefore impose a reduced sentence on the appellant. I accordingly set aside the sentence of eight years imprisonment imposed on appellant by the lower court and substitute a reduced sentence of five years imprisonment with hard labour to run from the date of his arrest as the lower court ordered.

PRONOUNCED in open court at Lilongwe District Registry
this 19th day of March, 2008.

E.M. SINGINI, SC
J U D G E

19/03/08

