

**IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY  
CRIMINAL APPEAL CASE NO. 23 OF 2007**

**YEREMIA BANDA..... APPELLANT**

**-VS-**

**THE REPUBLIC..... RESPONDENT**

From the Senior Resident Magistrate Court sitting at Mchinji,  
being criminal case no. 84 of 2006.

**CORAM: HON CHINANGWA, J**

Nkhono, Counsel for Appellant,  
Kayuni, Counsel for Respondent  
Kafotokoza, Court Interpreter  
Kabaghi, Court Reporter

**JUDGMENT**

The appellant Yeremia Banda and three others namely: Mitholo Samisoni Chinoko, Fungulani Positani and Peter Staff Mbewe appeared in the Senior Resident Magistrate Court at Mchinji from 16<sup>th</sup> November, 2006 to 11<sup>th</sup> April, 2007. It was on a charge of Robbery contrary to section 301 of the penal code.

Particulars aver that during the night of 20-21<sup>st</sup> October, 2006 at Kambanda village in Mchinji district robbed Mrs Mercy

Jones K1,226,00 cash. They pleaded not guilty. Full trial was conducted. At the close of prosecution's case three had no case to answer. They were accordingly acquitted. The appellant was put on his defence. After trial appellant was found guilty, convicted and sentenced to 10 years penal servitude. In the trial court and before this court counsel Nkhono represented the appellant.

Appellant through counsel Nkhono appeals against both conviction and sentence. The petition of appeal has three grounds.

- (a) *The learned magistrate erred in law in convicting the appellant without warning herself the danger of convicting the accused without corroborative evidence.*
- (b) *The state fell short of the proof beyond reasonable doubt hence the learned magistrate erred in law to convicting the appellant.*
- (c) *The conviction was against the weight of the evidence.*

At this juncture it is pertinent to briefly state the facts of this case. The complainant Mrs Mercy Jones (Pw1) lives at Kambanda village, TA Kapando, in Mchinji district. She is married to Mr Jones Yesaya Banda (Pw3). She has four children. One of them is a daughter Zione Jones (Pw2). On

the night of 20-21<sup>st</sup> October, 2006 at about 7 pm the complainant and her children went to sleep. She went into her bedroom. The other children into theirs. In the course of the night she heard sounds of gunfire. Then bangs on the main door. Instantly another bang at her bedroom door. Three men entered. They tied her hands and started to beat her using a stick. They demanded money from her. The assailants searched all over the bedroom and under the beddings. They were able to locate money hidden at various places. They found K5,400 under a pillow. Another K21,000 belonging to NICE, and a further K1,200,000. The complainant sustained a cut wounds on the forehead and arm.

While these three men attacked complainant. There were others who attacked Pw2 and her relatives in their bedroom. They demanded money. One of them took a lamp which Pw2 used in her studies. The appellant used the lamp to search for money in that room. Pw2 said that she too had heard the gunfire and a bang on the door. Then the intruders entered into their room. One of them was armed with a panga knife. In the course of the assault, Pw2 sustained a cut wound on the forehead. According to the testimony of Pw2 she recognized the assailant being appellant. Appellant was no stranger to her because he is from the same locality. That he usually came to visit her father (Pw3).

When the assailants had bolted the complainant and her children went outside still crying with pain and traumatised. It was at that time that neighbours from the vicinity converged. It was too late to help.

Complainant and Pw2 were admitted at Kapiri Catholic Mission hospital they were there for 4 days. Complainant was referred to Mchinji district hospital for further treatment. For evidential reasons the medical report was inadmissible. When appellant and others were arrested twice at an identification parade at Mchinji police station. Pw2 identified appellant being one of the assailants on the night of the robbery.

The appellant denied being involved in or knowledge of the robbery. Counsel Nkhono attacked the trial court on many ..... I should start with the medical report. Counsel Nkhono is recorded on page 97 of the court record objecting to the admission of the medical report in evidence. The trial court obliged. Therefore it was not part of evidence. Surprisingly counsel dwelt at length in this court attacking the medical report. Arguing that it should not have been admitted. The reason being that it was compiled at Kapiri but officially stamped at Mchinji district hospital. I found his

labour on this issue futile because it was not part of evidence. I totally disregard his contention.

The second issue relates to police investigation process. Counsel belaboured the point what begins arrest or investigation. I found this point immaterial, which I did advise counsel accordingly.

The third issue is on identification. Counsel argued that appellant was not at the crime scene at the material time. He argued that Pw2 made a mistaken identity. He said that the evidence of Pw2 was confusing in that she said that when the assailants attacked, she was sleeping. Yet she also said that appellant used a lamp which Pw2 was using for her studies. Counsel Kayuni argued that Pw2 correctly identified appellant and the trial court was justified to attach weight on her evidence.

My understanding is that the lamp appellant used was the one Pw2 used in the course of her studies. Not that at that particular time of the attack Pw2 was engaged in studies. On identification there is evidence from Pw2 that appellant often visited Pw3 at home. Appellant conceded that he knows and is also known by the complainant's family. Therefore appellant is familiar to Pw2. It is probable that Pw2 recognised appellant among the assailants.

In the testimony Pw2 said that in the course of the attack she told the assailants that she knew some of them and that they were relatives.

Counsel Nkhono argued forcefully that Pw2's testimony was not corroborated by her relatives who were in the same room at the time of attack. There is a difficulty here because the circumstances call for corroboration. The state should have invited at least one of the children who were in the same room with Pw2 to testify. Otherwise considering the commotion and confusion at that time chances of mistaken identity of appellant on the part of Pw2 are highly probable.

In the circumstances it is my considered view that it is unsafe to uphold the conviction. Conviction is quashed and sentence of ten years penal servitude set aside. Appellant to be released forthwith unless held on other lawful ground. Appeal allowed.

Pronounced in Open Court on this 23rd day of August, 2007 at Lilongwe.

**R.R. Chinangwa**  
**J U D G E**