

**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CRIMINAL APPEAL CASE NO. 86 OF 2008**

BETWEEN

ANORD ZAKARIYA APPELLANT

AND

THE REPUBLIC RESPONDENT

Being Criminal Case No. 238 of 2006 before the Senior Resident Magistrate sitting at the Chief Resident Magistrate's Court – Lilongwe.

CORAM : CHOMBO, J.
:
: Appellant, Unrepresented, Present
:
: Mr. Chiundira for the State
:
: Mrs. Mbewe, Court Reporter
:
: Mr. Munyenembe, Court Interpreter

JUDGMENT

The appellant was found guilty and sentenced to ten years on a charge of robbery contrary to section 301 of the Penal Code. The appellant appealed against conviction and sentence.

The appellant filed five grounds of appeal as follows:-

1. I did not plead guilty to the charges against me and, equally Mr. Robert Namaan who pleaded guilty in the same case denied my involvement in this scandal.

2. All the Police witnesses failed to identify me as the person who acted on the scene.
3. I was only caught by the mob which was on the scene on suspicion that I was one of the gang that robbed the complainant after a period of an hour.
4. The lower court already failed to establish the reasons as to why I had a case to answer.
5. The lower court also Jeopardized my right of association when it gave a reason that by virtue of being found in company of Mr. Robert Namaan who pleaded guilty in the same case and he is not a first offender. Subsequently was going to share the blame and the lower court even failed to rationalize the blame when itself, said I was supposed to get a suspended sentence.

The State opposed the appeal in its totality. The State filed a skeletal argument in support of its position.

The evidence on record is that the appellant indeed denied the charge but only the first accused known as Richard Mfunne, and later it became apparent to court that he was also known as Robert Namaan, admitted it.

The first accused was convicted and the hearing proceeded in respect of the three who denied it. After the appellant denied the charge the State invited five witnesses. In his evidence the complainant stated that he is a businessman and has a shop in Area 4. On the material day he saw the three accused persons (and the 1st accused who had already been convicted). He gave keys to the shop to his servants to clean the shop and he was waiting on the parking lot. After his

servants had finished the cleaning and he gave his bag to his nephew – Stanley Dzanjalimodzi – who was with him in the car, Toyota Camry SA 3345.

He suddenly heard some noise outside the car and when he got out to find out what was happening he saw that Stanley had been grabbed by some men who wanted to snatch the bag from him. PW1 immediately went to rescue Stanley. As he tried to wrestle with the men Robert Namaan fired a gun and this scared PW1 and he ran for cover. Stanley continued wrestling with the two men over the bag – and PW1 identified one of the men as the appellant. Stanley was overpowered by the two men, they got the bag and the three robbers rushed into a get-away vehicle that was on stand by. PW1 gathered courage and gave chase. The robbers pointed the gun at him when they noticed he was following them and he stayed a far off watching which way they were going. He meanwhile phoned the police. Before Police came Group 4 Security Guards who were nearby came to PW 1's rescue and caught up with the robbers. The robbers then got out of their Nissan Sentra MH 1023 and started to run into maize fields nearby and within no time all the robbers were arrested although the robbers had shot the gun in an attempt to scare the security guards. The gun was surrendered and PW1's bag was recovered but on inspection it was found that computer cables and some cash were missing. Panga knives were also recovered from the get- away vehicle used by the robbers.

Stanley Dzanjalimodzi, PW 2 testified that on the material morning as he got the bag from the car, one of the three robbers hacked him on his arm with a slasher in a bid to rob him. He wrestled with the robbers for the bag then Richard Mfuno threatened him with a gun in his face and his accomplices managed to overpower

him and the three run away into a car. He saw the three that attacked him but he could not state with certainty who in particular hacked him with the slasher. But as he wrestled with the robbers over the bag he was able to see them at short range and was able to identify the appellant as one of them.

Pw3, a Wildlife Officer, testified that on the day in question, she was on patrol with her colleagues within the forest just after Chilambula roundabout when they heard somebody shouting "thief, thief". They saw a white car and 4 men came out of the car and started to run and immediately following was Securicor guards who gave chase. There was a gun shot from one of the four that came from the first car and PW3 and her fellow officers run to block the four men and she also shot in the air and two men were immediately arrested. PW3 and her colleagues arrested Mfuno and Howa and the Security staff arrested Phiri and Zakaria and the four men were handed over to Police. She saw a gun and panga knives in the vehicle that the robbers were using.

PW4, another Wildlife Officer confirmed PW3's evidence that they were together on duty at the said forest and Securicor guards were chasing a white vehicle. When the first vehicle stopped, 4 men came out and started running away and he came out from his vehicle and his colleague PW3 arrested two of the robbers and the third one was arrested by the Securicor guards. By the time PW3 and PW4 went towards the robbers' vehicle they found that the fourth man had already been arrested and was in the car. When Police arrived the four robbers were handed over to Police and the robbers' vehicle was driven by the Wild Officer to Police.

PW5's evidence was that he drives his boss' car on hire and is stationed at Lilongwe Depot Taxi Rank. G. Howa, one of the accused, asked PW5 to use the car on the material day and to pick up a friend across Lilongwe bridge. When they stopped to pick up G. Howa's friend, PW5 discovered that Howa's friend was Mfune. Then the three picked up another of their friend but PW5 did not see his face. At the flea market they stopped the car and the passengers dropped leaving Howa and PW5. When PW5 asked Howa what the passengers wanted to purchase Howa did not respond but merely got out of the car and followed his friends. Howa came back with Mfune and 2 others and that they were going to pick up the wife of Mfune. PW5 was given K20 and told to go back to the rank. After about an hour he heard that Howa was seen in a Police vehicle. He went to Police and claimed his vehicle and he was told to go collect the owner of the vehicle.

PW6 testified that he got a telephone call from Mr. G. Dzanjalimodzi that he was attacked by armed robbers. He followed up the matter and found that the robbers had already been arrested. He re-arrested them and recovered two panga knives, a gun, and a black bag. He recovered another panga knife from the place where PW2 had been attacked by the robbers. He then interviewed and recorded statements from the four but they all denied the charge.

In defense the appellant testified that the 1st accused asked to hire his taxi. He told him that he has no vehicle but had applied for a driver's job. Howa, had car keys and he said he was going across Lilongwe Bridge so he chanced a ride with

him. There were two others already in the car when he joined them with the intention of dropping off at the market but he did not drop as he had earlier intended to but he had no agreement whatsoever with the robbers. After he got out of the car he heard the shout of “thief”, thief” and when he checked what was happening he found that his friend Howa was being assaulted by Securicor guards. As he went closer to try and help his friend he was arrested and it was alleged he was one of the robbers.

The appellant stated that on the day in question he was merely arrested because he went to see what was happening to his friend, Howa.

The evidence of PW3 was that whilst patrolling the forests she saw three cars that drove into the forest. The first was the car of the robbers, then Securicor guards. Four men came out of the first cars’ tail was a Securicor car and immediately the car stopped Securicor guards came out of their car and chased the four men. PW3 with her colleagues blocked the four men trying to escape. Two were arrested and she told the two still on the run to surrender. A gun was fired and she fired back and Mfunne and Howa were arrested. By then the appellant was already arrested and was in the car. By the time the Police car parked the four had already been arrested and they were handed over to Police. The evidence of PW4 is almost the same as that of PW3, and it was already outlined in detail.

DW1, Howa gave evidence that the appellant is the one who hired the car but did not tell his friends where they were going. After Bottom Road (I assume this is Bottom Hospital junction) Appellant stopped the car to collect his friend Mfunne

and DW1 was asked to wait for him at the Irish potato market and he waited for 30 minutes. Not long after three people came to the car carrying a bag and DW1 was told to go to Area 4. What I find interesting is that in cross examination the said friend of the appellant, Howa, actually stated that it was the appellant who hired the vehicle from DW1 and the two had never chartered before. It is necessary, I believe it is necessary to quote what the record states:

“Yes you came to hire my car. I do not know what you do. We have never chartered before.”

This is interesting because the appellant had actually stated that he was found on the scene where the robbers were arrested because he wanted to rescue a friend, DW1, the same one who said that he and the appellant have never chatted before nor does DW1 know what the appellant does. I asked myself if it is possible for friends, and as appellant would want us believe, that they are good friends, to have never chatted before, This would be some kind of a strange friendship. Further, the appellant said that he rushed to rescue the said Howa who was being assaulted. In his own evidence in chief Howa did not at any one point state that he was assaulted by Securicor guards. In fact his evidence corroborates that of PW3 and PW4. He said that

“I was directed to go via Kamuzu Central Hospital, I was told to take Manda Road. I stopped the vehicle and when I asked the Securicor vehicle stopped and blocked us and they all run away.”

And further in cross-examination the same DW1 said *“I knew not where you dropped at KCH roundabout”*.

There was at no point in time when the appellant put to DW1 the issue of DW1 being assaulted and the appellant rushing in to assist him. According to the evidence on record it was actually the appellant who hired the car, which, from the evidence on record, was used as a get-away car. At or near the place of the robbery the appellant had actually dropped from the car and was among the three men that run into the car carrying the bag and was in the car up to Kamuzu Central Hospital roundabout when the car was blocked by the Securicor car. What has not been rebutted is the fact that the appellant is the one who hired the vehicle, then he got off at two points, at the flea market, and at the KCH round about where the get-away vehicle was blocked by the Securicor car, and where the all the three men, including the appellant, run away from the vehicle. When DW1 was cross-examined by the Prosecutor, DW1 maintained his evidence that it was the appellant who hired him and that he had never known the appellant before. DW1 also stated that when the appellant and 3rd accused, dropped from the car they came back running into the car and they had the bag that was exhibited in court as having been robbed from the complainant. This is the evidence that the lower court was presented with when it found that the charge had been proved beyond reasonable doubt.

The appellant submitted that when he asked for one Mfuno to be his witness the court threatened him. When the said Mfuno came into court as DW4 he stated that he had been summoned as a witness for Phiri. But the appellant, when accorded a chance to cross-examine the witness, chose not to put any questions

to the said witness. If therefore the appellant was earnest about cross examining the said witness he would have taken that advantage but he chose not to, he can not now therefore claim that he was denied the opportunity to question the said witness.

The appellant also submitted that the lower court was breaching his right of association when it alleged that his conviction was purely based on the fact that he associated with Howa, one of the robbers. As already pointed out there is no evidence on record that there was any existing relationship between the appellant and the said Howa prior to the robbery in question. The court did not breach any right of association of the appellant by any order. There was no way that the court could have curtailed the said right as the case only came to court after the event of the robbery. I do not find any substance in this allegation.

All in all, I find therefore, that the decision of the lower court to find the appellant guilty was properly grounded and based on the evidence before me, I confirm the same. I have looked at the bases of the sentence imposed and agree with the reasoning of the lower court; especially on the aggravating circumstances of the case. I therefore also confirm the same.

MADE in court this 3rd September 2008.

E.J. Chombo
J U D G E