JUDICIARY

IN THE HIGH COURT OF MALAWI

CRIMINAL APPEAL NUMBER 20 OF 2007

MADALITSO MAFUPA

VERSUS

THE REPUBLIC

CORAM: THE HONOURABLE JUSTICE E. B. TWEA
Miss Kayuni, State Advocate for the State
Appellant present in person
Mrs Moyo – Official Interpreter

J U D G M E N T

Twea, J

This is an appeal against conviction and sentence.

The facts of the matter are that the house of the complainant, PW1, was broken into on the night of 18th September 2006. Entertainment equipment was stolen. Nothing was recovered.

The convicted person was subsequently arrested on the evidence given by the wife of the complainant to police. In the court below, she informed the court that she saw the convicted person on the night in issue under the security light when she peeped outside. She said the convicted person took away a TV screen, home theatre and 6 DVD's. Further that convicted was in the company of friends. She told the lower court that she was able to identify the accused because she had seen him before this date.

The appeal against the conviction is basically on identification of the convict. It was the argument for appellant that in the heat of the moment PW2, wife of the complainant, could not have properly identified the appellant as one of the intruders. It was put to this court that in her evidence in chief she alleged that the appellant had carried the stolen items. In cross – examination she said she saw him carrying stones and that he run away when she challenged him.

This evidence had caused me some anxious moments.

I bear in mind that the complainant, PW1, told this court that he did not see the intruders. It was his evidence that he heard the people who gave chase to the intruders say that one of them was the appellant. He did not refer to his wife, PW2, having equally identified the appellant. Further, it was his evidence that the one who claimed to have identified the appellant refused to come and testify. This is corroborated by the prosecution dispensing with a witness they failed to bring to court.

It was in the evidence of both PW1 and PW2 that they know and knew the appellant before the matter in issue. It is rather strange that PW2 would not have disclosed her identification of the appellant to PW1, her husband or, on the other hand, that PW1 would have overlooked to mention this in his evidence if she had so disclosed. It is strange that PW1 had to refer to a third party, that refused to come to court, as the one who identified the appellant.

PW3 the investigating officer told this court that he relied on the evidence of PW2 and another lady on the identification of the appellant. However, when the appellant denied the charge he did not cause any follow up. According to his evidence PW2 did not go to Police to give information, she was actually summoned and questioned. It is strange that PW2 had not volunteered to inform police of the identity of the person who broke into and stole from their house. There was no identification parade conducted in this case. The identification therefore is based on the evidence of PW2 which can be challenge for in consistency.

I therefore agree with the appellant that the identification by PW2 in this case cannot be relied up. The conviction is unsafe. I accordingly quash it and set aside the sentence. Unless the appellant is in custody for any other lawful reason he must be released forthwith.

Pronounced in Open Court this 17th day of January, 2008 at Blantyre.

E. B. Twea

JUDGE