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**IN THE HIGH COURT OF MALAWI**
**LILONGWE DISTRICT REGISTRY**
**CRIMINAL APPEAL CASE NO. 154 OF 2007**

SILIVAN MCHERE ……APPELLANT

AND

THE REPUBLIC ……RESPONDENT

From the First Grade Magistrate Court sitting at Ntchisi. Being Criminal Case No. 202 of 2007.

**CORAM: HON JUSTICE CHINANGWA J.**
Salima, Counsel for the Appellant
K. Banda, Counsel for the Respondent
Court Reporter, S. A. Mbewe
Court Interpreter, L. Munyenyembe

# JUDGMENT

The appellant Silivan Mchere appeared before the First Grade Magistrate Court sitting at Ntchisi from 9th October 2007 to 13th November 2007. It was on a charge of Theft c\s 278 of the penal code. Appellant was alleged to have stolen water pump parts (pump) at a borehole. He pleaded not guilty to the charge. After full trial, appellant was found guilty, convicted and sentenced to 24 months I.H.L. He now, through
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counsel Salima, appeals against both conviction and sentence.

The grounds of appeal are:-

(1) *That the trial court erred in convicting the appellant on the ground that the conviction was against the weight of evidence.*

(2) *The trial court erred in sentencing the appellant to 24 months I.H.L. considering all the mitigating factors presented and the nature of the offence charged.*

The relief sought is that the conviction and sentence be reversed.

At this juncture, I wish to remind myself that this is an appeal against the judgment of the trial court. The trial court had an advantage to assess the demeanour of witnesses. But I do not have such an opportunity. Furthermore, I remind myself to bear in mind throughout this judgment the provisions of section 5 of the Criminal Procedure and Evidence Code.

Evidence before the trial court was that at V: Maliseni, TA; Malenga, D: Ntchisi there is a water borehole. It has a water pump. It is for water supply to the local community. On 1st October , 2007 Mr Boniface Kawanga of the same village received a report to the effect that the water pump parts were stolen. The local community organized investigation among them were Mr Boniface Kawanga (pw1), Wilson Chabwera (pw2) and Mr Emmanuel Kabiwa (Pw3). They observed shoeprints at the scene . They tracked the shoeprints which led to the house of appellant. He was arrested as the culprit and handed over to Ntchisi Police station. D/Constable Chinula re-arrested appellant and charged him with Theft c\s 278 of the penal code. The evidence of Pw1,2,3 is similar. It is alleged that they found a spanner in the house of the appellant. To them it was a tool which he used to dismantle the water pump. Appellant was prosecuted and convicted on the charge of theft.

The evidence relied upon by the trial court was the shoeprints and the spanner. Counsel Salima for the appellant has argued quite strongly in the skeletal arguments. He argued that the presence of shoeprints

at the scene and finding of a spanner in appellant's house were not per se evidence that appellant was the culprit. Therefore the trial court should not have relied on circumstantial evidence which was not conclusive that the appellant was the culprit. Counsel Salima cited cases of ***Nyamizinga V. Rep*** 6 ALR Mal. 258, and also ***Moyo vs Rep.*** 4 ALR Mal 470 which are some of the local authorities on circumstantial evidence.

Counsel Banda for the State submitted that the State does not support the conviction and sentence. He prayed to the court to quash the conviction and setaside the sentence.

Having carefully examined the evidence and submission. I would concur that there was no cogent evidence upon which to convict the appellant. Observably no evidence was adduced to show that the pair of shoes which made the shoeprints was found in possession of appellant. No evidence was adduced to show that the spanner found in possession of appellant was strictly designed for use on such pumps only. Referring to the ***Nyamizinga v Rep*** (supra) in this case there was a theft in a shop. Police found fingerprints. The fingerprints matched with

those of Nyamizinga. He was convicted on the basis of fingerprints found at the scene. On appeal it was held that;

> *"To justify an inference of guilt from circumstantial evidence the prosecution must prove beyond reasonable doubt that the facts are incompatible with innocence of the accused and incapable of any other reasonable explanation and therefore evidence of fingerprints identified by an expert may by itself be sufficient proof of guilt if it leads to no conclusion other than the guilt of the accused".*

Chatsika J observed that there was no evidence to show that the appellant had not been in the shop prior to the breaking.

The State cited the case of ***Bokola v Rep,*** 11 MLR 145. for the proposition that:-

> "*the burden is on the State to justify inference of guilty from circumstantial*

evidence. It must negative all reasonable hypotheses of innocence."

In the present case the circumstantial evidence was not cogent enough to exclude other inferences. It was quite possible appellant was at the scene prior to the commission of the offence. It was also possible that another person who had a pair of shoes similar to shoeprints had been at the scene. Unfortunately police did nothing more other than desk work. In the circumstances, I do concur with both appellant and State that there was insufficient evidence to support a conviction. The conviction is quashed and sentence of 24 months I.H.L set aside. Appellant to be released forthwith unless held on other lawful ground.

Appeal allowed.

Pronounced in open court this 9th day of May, 2008 at Lilongwe.

R.R. Chinangwa
JUDGE