IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CRIMINAL APPEAL NO. 22 OF 2007

BETWEEN

ERASTO D. PHIRI

-VS-

THE REPUBLIC

CORAM : HON. JUSTICE MZIKAMANDA

: Kumange, Counsel for the Applicant

: Chiundira, Counsel for the Respondent

: Mbewe, Court Reporter

: Kaferaanthu, Court Interpreter

JUDGMENT

On 15th December, 2006 the Appellant Erasto Phiri first appeared before the Senior Resident Magistrate sitting at Lilongwe jointly with three others on a charge of robbery contrary to Section 301 of the Penal Code. The first accused person who was Richard Mfune pleaded guilty to the charge while the Appellant and two other denied the charge. After full trial the lower court found the Appellant and Anold Zacharia guilty of the robbery, along with Robert Mfune. It convicted them. It acquitted Godfrey Howa on the ground of insufficient

evidence. The court then sentenced Richard Mfune, Erasto Phiri and Anold Zacharia to 10 years imprisonment with hard labour. The Appellant now appeals against both conviction and sentence.

In the lower court the allegation was that the Appellant together with the four others on 13th December, 2006 at about 08:10 hours at Area 4 in the City of Lilongwe robbed Mr. Godfrey Dzanjalimodzi of one computer, one camera, one bag, 2 flush disks, batteries, one calculator and other items all to the value of K228,200.00 and at, immediately after the time of the said robbery used or threatened to use actual violence to the said Godfrey Dzanjalimodzi in order to obtain or retain the thing stolen or prevent or overcome resistance to its being stolen or retained.

The case for the prosecution was that the complainant is a businessman and an owner of a motor vehicle spare parts shop located at Area 4 in the City of Lilongwe. He also runs a fleet of transport vehicles. On 13th December, 2006 at about 8:00 am the complainant got to his shop at Area 4 and found his boys waiting for him. He was reading newspaper at the shop when he heard a noise outside his Toyota Camry SA 3345 parked outside. He went outside and saw his nephew Stanley Dzanjalimodzi who had been grabbed by some men struggling to snatch from him a big bag belonging to the complainant and containing various items. He rushed and tried to rescue nephew and he saw one of the men being Richard Mfune produce a gun and fired it. The boys at the shop tried to assist in wrestling with the attackers. The attackers overpowered them and rushed into a car. They sped off. He followed them and found them at MHC along the road to

Kamuzu Central Hospital. There he found the vehicle. The attackers again pointed the gun at him. He kept his distance but informed CID Chilondola. The Police said they were on their way. Group 4 Security searched for and caught up with the assailants who had abandoned their Nissan Sentra MH 123 white car and entered a maize field. The complainant hit the Appellant while the others arrested the remaining accused persons. The persons who had rushed into the bush had been arrested by Forestry Guards. The gun was recovered and two panga knives were found in the vehicle of the assailants. The Complainant identified the Appellant as one of the assailants. The nephew who was PW 2 had been hacked with the panga knife and had been threatened with the gun. The bag was recovered. Although PW 2 did not see the faces of the attackers he believed the Appellant was in the group. All the accused grabbed him.

Pw 3 Mrs Bertha Chipondankoka, a Parks and Wildlife Assistant was on the material morning on forest patrols snatching charcoal when she heard shouts of thief! Thief! Thief!. She saw three vehicles. Then she saw four persons come out of one vehicle and start to run. Then she heard a gunshot. She and her team ran after the man and blocked them. They apprehended two persons, Mfune and Howa. They got the vehicle and found two others already arrested. All four arrested were handed over to police. As natters turned out the vehicle the assailants used, had been hired from Lilongwe Market Taxi rank and was driven not by the crucial driver but a friend of the said driver who was eventually acquitted on the matter

The defence story of the Appellant was that on the material day, while he was at his shop at Lilongwe Central Market, some ne invited him to go and get money for hire of a DVD. He fuelled the vehicle and joined the other four passengers in the vehicle and the driver. The vehicle then got to Area 4 market where he was left in the vehicle as the remaining passengers went out. Then they came back running and commanded the driver to drive off. They drove off until they were stopped and pulled out of the car. They were assaulted and then taken to police. He was surprised that the people who had gone to collect eggs came running. He denied being part of the robbers. He was not aware of the plans of the robbers. That was effectively what his evidence was about.

In his judgment, the senior Resident Magistrate found that it was the Appellant and Anold Zacharia who robbed the complainant on the material day. They were caught fleeing the scene.

There are five grounds of appeal. These are that:

> The learned magistrate put much reliance on the prosecution evidence without looking at the defence evidence.
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> The first accused person had misled the court by refusing to testify when he had already undertaken to testify in the case for his co-accused person.
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> The learned magistrate treated the previous conviction of the 1st accused to the prejudice of the other accused persons, Appellant inclusive.

That the conviction is not safe and must be quashed.

That the sentence was excessive.

In arguing the appeal first through skeletal arguments and a court here counsel for the Appellant stated that the lower court chose not to consider the Appellant's version of events which differed from that of the prosecution. It was argued that the Appellant only found himself in the company of the robbers because he was invited to accompany them to go and collect money to be repaid to him. The Appellant at no point got off the car and never fled the locus in quo as he knew he was not wrong. Him and the driver were arrested in the vehicle while the two others were arrested in the bush as they tried to run away. Counsel also argued that Richard Mfune misled the learned magistrate as he pleaded guilty and that he was a previous offender and that he testified against the Appellant. There was a mistake in procedure which made the 1st accused to hang the Appellant without any corroboration. The conviction against the Appellant was wrong as he never took part in the commission of the offence and the learned magistrate omitted to take into account the defence put forward and the State never proved the case against the Appellant beyond reasonable doubt.

Counsel for the State on the other hand argued that the Appellant was positively identified by the complainant as having been one of the three persons who attached him and his nephew and stole the bag containing various items, which bag was eventually recovered from the car in which the Appellant was with the

other accused persons. It was argued that a co-accused is a competent and compellable witness for the defence under Section 210 of the Criminal Procedure and Evidence Code. According to Section 242 of the Criminal Procedure and Evidence Code an accomplice shall be a competent witness against an accused person and a conviction shall not be set aside merely because it proceeds upon the uncorroborated testimony of an accomplice. It was argued that Mr. Mfune was going to be a competent witness against the Appellant, had the prosecution wished to call him as their witness. The two went through separate trials. Mr. Mfune did not mislead the court. He was the Appellant's witness and not of the prosecution. The prosecution cross-examined him and there was nothing wrong with that. As regards sentence the State is of the view that owing to the seriousness of the offence and the circumstances the sentence imposed on the Appellant by the lower court was not excessive. The State pray that the appeal be dismissed in its entirety.

I have reminded myself that an appeal to this court from the subordinate court is by way of rehearing. This means that this court has a duty to subject the evidence to fresh scrutiny and make its own findings and its own conclusions.

This court is not constrained in any way to make its own conclusions on the evidence even if that means overturning the findings of the lower court.

This court is well aware that a lower court that heard the evidence would have had the advantage of seeing the witnesses and made an assessment of their

demeanour, something this court may not do at this stage. This court in assessing the evidence would bear this fact in mind.

As to the fist ground of appeal that the lower court put much emphasis on the prosecution evidence without looking at the defence evidence the law is quite clear that a court shall in assessing the evidence in a criminal case take into account both the evidence of the prosecution and that of the defence. A court shall weigh all the evidence before it in order to arrive at a just conclusion of any criminal case.

In the case at hand, I have difficulty in appreciating that the lower court failed to evaluate all the evidence before it including that of the defence. As a matter of fact the driver of the motor vehicle used in the robbery was acquitted of the charge after the lower court had evaluated his defence story where it said:

“I therefore find that the defence he used has reasonable grounds to believe that he may have not been part of the robbery.”

Elsewhere in the judgment, the lower court summoned the defence story of the Appellant pointing out that he denied involvement in the robbery but towards the end of the judgment the lower court came to the conclusion that the Appellant was part of the robbery. That was notwithstanding what he said in his defence. Clearly the lower court rejected the evidence of the Appellant and preferred that of the prosecution. The court observed that the Appellant and the others were caught fleeing the scene.

In any event I have myself subjected the evidence to fresh scrutiny including the defence evidence. The defence story of the Appellant is very brief. It is that he was found in the group of the robbers not for purposes of conducting the robbery, but for him to get his money which he had loaned out. He is the person who fuelled this vehicle. According to him this vehicle found him at the Flea Market, after it travelled from Lilongwe Central Market Taxi rank.

In these circumstances the story of the Appellant that he was a mere passenger in the vehicle sounds incredible. If the appellant hadn't provided the fuel for the vehicle probably it would not have gone where it went. The Appellant does suggest that he was equally surprised by the events that unfolded. Yet there is the unchallenged evidence of PW 1 that he identified the appellant as one of the attackers. All in all I am satisfied that the lower court considered the defence evidence and rejected it. It found the evidence of the prosecution believable. The first ground of appeal is not made out.

As to the second ground of appeal that the first accused person misled the court by refusing to testify when he had already undertaken to testify for the co-accused person, I must say I am at pains to appreciate how it could be said that the lower court was misled. The first accused pleaded guilty to the charge, was convicted and was awaiting sentence. Then the appellant applied that the 1st accused be called to testify in his support. The 1st accused appeared in court as defence witness No. 4 (DW 4). In his testimony, he said:

" I was arrested on 13th December with these 3. I have come to testify on behalf of Erasto Phiri. On 23rd January, 2007 I came to court and all his friends testified. On this day he testified, I was present. All they said including Erasto Phiri I heard. I recall that the court said I am witness for Erasto Phiri. I cannot add or remove anything. I will not say anything."

In cross-examination he said he hired the vehicle himself and the Appellant boarded it. It was the same vehicle used in the robbery. In re-examination he said in part:

"I cannot answer whether you were part of the offence or not."

While for a number of questions put to him the 1st accused said he could not comment, it is not clear to me how what he said could be said to mislead the court. He was the Appellant's witness. If he turned hostile to the Appellant, that would not be interpreted as misleading the court. What the 1st accused said as a witness of the Appellant forms part of the record and ought to be evaluated along with the other evidence. In any event there is nowhere in the judgment of the lower court where it can be said that the lower court made a finding on the basis of being misled by the 1st accused person. As was pointed out an accomplice is a competent witness whether for the prosecution or for the defence. The second ground of appeal is not made out. The third ground of appeal that the learned magistrate treated the previous conviction of the 1st accused to the prejudice of the other accused persons the Appellant inclusive ought to be considered along with ground No. 5 dealing with sentence.

As to the fourth ground that the conviction is unsafe and ought to be quashed counsel has referred to the fact that the Appellant remained in the car while the others escaped into a maize field until they were caught by Forestry Guards on patrol. The Appellant himself and the driver of the vehicle were arrested in the car by Group 4 Security people who had joined in the chase. The Appellant argued that because the driver with whom he was arrested was acquitted he too should have been acquitted as his remaining in the car while the others ran away is compatible with his innocence. I must say that the Appellant cannot in this case argue the acquittal of the driver as a basis for him securing an acquittal. Remaining in the car while others ran away in the circumstances in this case can hardly be said to be compatible with the Appellant's innocence. This was a car for which the Appellant had provided fuel. This was a car which in the words of the Appellant himself was being driven abnormally from the scene of crime in Area 4 of the City of Lilongwe. Indeed the vehicle drove for some distance in that abnormal manner until it got to Kamuzu Central Hospital road and from the round- about took a dusty road. This was the car which was being pursued by two vehicles. This was the car with four passengers on board including the Appellant and a driver and from where the passenger pointed a gun at the complainant as he pursued the vehicle. This was the car in which a gun, panga knives and a big bag containing a lap-top and other items belonging to the complainant were found upon the arrest of the Appellant and the others from it. The time was around 8:00 am. In all these circumstances the protestations of innocence by the Appellant appear incredible. He must have stayed in the car after it came to a halt because he felt there was nowhere else to run to and that with the hot pursuit

there was no chance of him and the others escaping any further. I would reject the contentions by the Appellant that he had been on the vehicle used in the robbery not knowing that there would be and there had been a robbery. Those contentions are incredible and without merit. The fourth ground of appeal must fail.

In the result the appeal against conviction fails. There is overwhelming evidence establishing beyond reasonable doubt that the Appellant jointly with others committed the robbery with which he was charged. The conviction herein is proper and it is upheld.

As regards the sentence I must say at once that it does not come to me with a sense of shock. This was an aggravated form of robbery in that it was committed by three people in the company of each other and armed with a gun and panga knives. Then PW 2 was actually hacked by the robbers who used a panga knife such that a scar remains on his arm. Besides the conduct of the Appellant and his fellow robbers terrorized the area.

Courts take a serious view of robbery especially of an aggravated form like the present one. In the present case the sentence of 10 years for the 1st accused who had a previous robbery conviction would remain undisturbed. However, it is clear that in principle the Appellant and the fourth accused who were both described as first offenders needed that mitigating factor to be taken into account. It does appear that the lower court took the fact that the Appellant was first offender into account. Had the lower court considered that fact it should have imposed a

different sentence for the first offenders. I therefore set aside the 10 Year Imprisonment with Hard Labour sentence in respect of the Appellant. Instead the Appellant will now serve 8 years imprisonment with hard labour. Similarly Anold Zacharia who did not appeal will now serve 8 years imprisonment with hard labour for being a first offender.

Appeal succeeds against sentence to this limited extent.

PRONOUNCED in open court this 28th day of October, 2009 at Lilongwe.

R.R. Mzikamanda

J U D G E