Mr Mkungama
M/s Knight & Knight

JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION
Criminal Appeal No. 20 of 2017
(eCMS 7016 of 2017)
(being criminal case 212 of 2016, FGM, Nchalo Magistrates' Court; CSA/HC/CA/99/2018)

MAFUKENI KAVALO

v

THE REPUBLIC

JUDGMENT

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nyaKaunda Kamanga, J.,

The appellant, Mafukeni Kavalo, appeared before the First Grade Magistrate sitting at Nchalo Magistrates' Court where he was charged and convicted of the offence of grievous harm contrary to section 238(1) of the Penal Code. It was alleged that the appellant who was on duty as a guard on or about the 19th May 2016 at Ilovo cane field in the district of Chikhwawa did grievous harm to Mabvuto Patrick. The victim was allegedly among thieves who were stealing sugarcanes and when he was apprehended he was seriously injured and had to be admitted at Queen Elizabeth Central Hospital for a month whilst undergoing treatment. After a full trial Mr. Kavalo was found guilty as charged and convicted and on 11th May 2017 the court imposed a sentence of 72 months imprisonment on the offender.

On 29th May 2017 the legal practitioners for the appellant filed in the High Court a notice of intention to appeal against the judgment that was delivered by the magistrate. The notice was filed outside the statutory period of time that is allowed for filing appeals as stipulated in section 349(1) of the Criminal Procedure and Evidence Code, hereinafter CPEC, and without leave of the court. The Registrar should be alert to steps that flout procedural requirements and not process and forward to judges for consideration documents that have not complied with the law and other necessary procedural requirements. The offender having failed to comply

with the statutory time limit for filing appeals the Registrar should not have accepted the filing and issuing of such irregular documents in the High Court registry and, in any event, this court should have declared this appeal incompetent on this basis and not proceeded for hearing as we have done: *Director of Public Prosecutions v Banda and another* [1996] MLR 166 (HC).

The appellant has indicated eight grounds of appeal against the conviction and sentence, which are as follows:

1. That the lower court erred in law when it admitted in evidence the complaint's medical report without having satisfied itself that the same had either been served on the appellant or that he had consented to it being tendered in evidence.
2. That the lower court erred in law when it proceeded to convict the appellant on the basis of the complainant's testimony without warning itself of the dangers of doing so in the absence of corroborating evidence.
3. That the lower court erred in both fact and law when it held that there had been proper identification of the appellant by the complainant.
4. That the lower court erred in both fact and law when it proceeded to convict the appellant on the basis of identification evidence of the complainant without having directed its mind to the *Turnbull* guidelines.
5. That the lower court erred in law when it completely failed to direct its mind to the appellant's defence of alibi.
6. That the lower court erred in both law and fact in convicting the appellant as the weight of evidence was against the conviction.
7. That the omissions and irregularities in the lower court amount to a failure of justice.
8. That in all circumstances of the case the sentence imposed by the court below was manifestly excessive and wrong in principle.

The law and procedure in criminal appeals

Offenders, like the appellant herein, have a right to appeal against the judgment of the subordinate court to the High Court under section 42(2)(*f*)(viii) of the Constitution. Section 346(2) of the CPEC allows convicted offenders to appeal against the judgment of the trial court on both the matters of fact and matters of law. The appellant is expected to show that the magistrates' court 'had excluded or included some evidence which was vital to the outcome of his case or indeed that the lower court had misapplied the law to the facts': *Cuthbert Mwatero Chifwenthe v Rep* [2012] MLR 64 (HC) at 71 also refer to the case of *Mulewa v Rep* [1997] 2 MLR 60 (HC). The procedure for conducting a criminal appeal from the

subordinate court to the High Court is by way of rehearing, by subjecting to fresh scrutiny all the evidence that was before the subordinate court, the findings of fact and the law applied and their reconsideration in the light of the trial proceeding: *Binny Thifu v Rep* [2008] MLR 18 (SCA); *Samuel Moyo v State* [2012] MLR 339 (HC); *Makuluni v Rep* [1993] 16(1) MLR 276 (HC). However the appeal court gives due veneration to the findings of the trial court based on credibility for the 'simple reason that it does not have the advantage, which the court below has, of seeing the witnesses and evaluating their credibility': *Chapfunga v Rep* [1997] 1 MLR 226 (HC) at 229 and *Chikakwiya v Rep I* [2005] MLR 53 (HC).

The Appellant's Arguments in Support of the Appeal

The appellant in his skeleton arguments, that he filed on 25th July 2017, in support of the appeal case, he raises several arguments that challenge the admission of evidence and the identification of him as the perpetrator of the crime, asserting that the appellant was not the person who committed the crime in issue and that there was miscarriage of justice in this particular criminal matter. The arguments of the appellant are outlined below:

1. *The rule against hearsay*

The appellant argues that for the conditions set out in s 180(3) of the CPEC to be satisfied there must be real consent from the other party which should not be imputed from mere silence of the other party. The appellant rely on the cases of *Joseph Njobvuyalema v State*, Criminal Appeal Cause no. 71 of 2007; *Republic v Zobvuta,* [1994] MLR 317 and *Mwapesa v Republic* [1984-86] 11 MLR 190 in support of this argument. It is submitted by the appellant that if consent is not sought and obtained, the report can still be received in evidence if the report is served on the other party with an endorsement on the report or otherwise of the other party's intention to tender the same in evidence. According to the appellant, in terms of s 180(3)(b) of the CPEC within seven days of such service, the other party must not indicate his objection to the proposal.

The appellant notes the law on admission of expert report under s180 of the CPEC is an exception to the rule against hearsay evidence. The appellant is of the view that the safeguards that are provided under s180 of the CPEC ought to be religiously adhered to.

The appellant argue that the medical report in the lower court was irregularly received in evidence as there was no enquiry as to whether the accused had been served with the medical report 7 days prior to being tendered in evidence in court and that in the alternative, it was not ascertained whether the appellant's consent

had been obtained as to the reception of the report in evidence. The appellant assert that since none of the two conditions under s180 (3) of the CPEC had been of the complied with the medical report should never have been received in evidence and it should not have relied upon by the court as it have led to a miscarriage of justice.

In summary then the appellant contend that it was wrong to admit the complainant's medical report without the court having satisfied itself that the same had either been served on the appellant or that he had consented to it being tendered in evidence.

2. *Identification Evidence*

The appellant correctly argues that a good identification strengthens the prosecution case and avoids a miscarriage of justice. It is the view of the appellant that convictions based on visual identification of the offender risk miscarriage of justice because of the risk of mistaken identity. The appellant argues that the trial court erred in law when it proceeded to convict the appellant on the basis of the complainant's testimony without warning itself of the dangers of doing so in the absence of corroborating evidence. According to the appellant, since PW2 was not an eye witness, there was nothing the court could have used to ascertain if indeed the complainant had been assaulted by the appellant.

The appellant notes that the complainant told the court that the person that hit him with a metal object was the appellant among a lot of people that he alleges to have been beating him on the day in issue. The appellant contends that the lower court erred in both fact and law when it proceeded to convict the appellant without scrutinizing the identification evidence of the appellant, which was less than satisfactory and could have led to a miscarriage of justice. Further, the appellant argues that the trial court misdirected itself when it found as a fact that there had been an identification parade as there was no evidence that any of that was followed in the court below. The appellant submits that the finding that there was an identification parade was erroneous.

3. *Defense of alibi*

The appellant notes that the prosecution has to disprove the defence of alibi while there is no burden on the accused to prove alibi: *Mwenefumbo v Republic* Criminal Appeal no. 155 of 1976; *Gamada v Republic*, Criminal Appeal no. 113 of 1975. The appellant states that when the beating of PW1 was taking place he was assigned to work elsewhere and his evidence was corroborated by DW2 and DW3 who stated that the accused on this day in issue was working at cane field numbers 2322 and not cane field number 2323 where the complainant was assaulted. The

appellant submit that the *actus reus* of grievously harming the complaint was not committed by the appellant as he was not present when the same was being committed. It is contended that the respondent failed to disprove that the accused was not at the scene when the complainant was injured. The appellant submits that the defense of alibi was ignored by trial court.

4. Corroborating Evidence

The appellant contends that corroboration of the complainant's evidence though not in law essential, is in practice almost a necessity and that a trial court should warn itself of the danger of relying on the uncorroborated evidence of the complainant: *Tinazari v Rep* [1964-64] 3 ALR Mal 184; *Banda v Rep* 4 ALR Mal 316 and *Kassimu Matenje v Rep*, Criminal Appeal no. 186 of 2007. The appellant submits that the omissions and irregularities as highlighted in the grounds of appeal amount to failure of justice. The appellant also submits that the sentence imposed on the appellant was manifestly excessive for a first offender and wrong in principle.

In conclusion the appellant submits that there was no evidence directly implicating the appellant beyond reasonable doubt, that the conviction of the appellant was based on poor quality of identification and unreliable testimony and uncontroverted defense of alibi. The appellant prays that he be acquitted and that the sentence be set aside.

The Respondent's Arguments

The Respondent, who did not appear at the hearing, filed skeletal arguments in which they submit that the appellant was correctly convicted by the lower court and that his appeal against convictional sentence should be dismissed. According to the respondent the issues of identification were well articulated by the lower court as appears on pages 1 and 3 of the judgment. The respondent contends that the appellant was well known to the victim and that there were no other obstacles between the victim and the appellant.

The respondent notes that at common law alibi evidence requires that the defense give advance warning to the prosecution. The respondent further notes that the defense of alibi appears on page 2 of the judgment. According to respondent DW2's testimony was not relevant to the victim herein as his testimony was hearsay and he did not know the complainant and he talked of another person who was apprehended and injured. The respondent asserts that DW3's story, that the appellant was not at the scene of crime, was hearsay too and there are inconsistencies in the stories of the defense witnesses. The respondent is of the

view that since the prosecution witness placed the appellant at the scene of the crime, the alibi is disproved.

In regard to the issue of corroboration, the prosecution has referred the court to the case of *Banda v Rep* 4 ALR Mal 316, which restates the position that as a matter of law corroboration is not required except in cases of perjury or treason and that a court can convict on the evidence of a single witness. Another authority that the prosecution rely on is the case of *Chapfunga v Rep* (1997) 1 MLR 226, which is along the same vein, that it is not necessary for a fact to be established by a particular number of witnesses, unless corroboration is required. The respondent submits that the nature of the offence that was committed by the appellant does not need to be proved by corroborated evidence.

The respondent agrees with the appellant that the tendering in evidence of the medical report by the Police as prosecution witness did not follow the procedure outlined in section 180(3) of the CPEC such that it should not have been allowed in evidence by the lower court and it should not carry much evidence. However, the respondent is of the considered view that the trial court convicted the appellant based on the evidence of the victim, who identified the appellant at the scene of the crime and whose testimony showed that the appellant had caused grievous harm to the victim. In that the victim was seriously injured as he was assaulted with a metal object several times and he was bleeding heavily and was admitted in hospital for a month. The respondent correctly argue that the medical report did not prove that the victim was assaulted but rather the report showed the extent of the injuries that the victim suffered which are material in sentencing.

In regard to the sentence that was imposed on the offender by the lower court, the respondent agrees with the finding of the lower court that this was a proper case where a custodial sentence was merited after analyzing the mitigating and aggravating factors. The prosecution submits that the sentence imposed by the trial court on the appellant does not appear to be massively excessive or wrong in principle and should be confirmed.

The Decision on Appeal

Having examined the record of the case, the grounds of the appeal, the arguments that have been filed by both parties in support and in opposition to the appeal, this court finds as follows in regard to the various grounds of appeal:

1. In regard to the first ground of appeal which asserts that the lower court erred in law in admitting in evidence the complaint's medical report without having satisfied itself that the same had either been served on the appellant or that he had consented to it being tendered in evidence, the record of the

case reveals that the charge sheet in this criminal matter was issued on 29th June 2016 and the plea taking process took place on 29th June 2016. Although the complainant referred to the medical report in his evidence and he identified it as ID1 it was Detective Sub Inspector Banda of Nchalo Police Post who testified as PW2 on 20th July 2016 who tendered it in evidence. The medical report was marked exhibit P3, and PW2 stated that the accused person (now appellant) 'was served with the medical report but he did not sign for it'. A perusal of exhibit P3, which is the appellant's nursing care record from surgical ward 5A of Queen Elizabeth Central Hospital, Blantyre, indicates among other thing observations that the victim was discharged on 6th June 2016 and that he had to attend a review on 17th June 2016. From the record of the case it is not very clear in terms of the date when the prosecution served the medical report on the accused person. There is endorsement on exhibit P3 that the 'accused denied to sign' which however is undated and does not indicate its author. There is no affidavit of service to that effect which would have helped this court to assess whether or not the service was conducted within the stipulated time limit and formally confirm how the accused person responded on being served with the medical report. It is not clear from the evidence why the appellant refused to accept service and yet he did not object to the tendering of the medical report or failed to cross examine PW2 on this document. The appellant lost the opportunity to object to the tendering of the medical report and assert the present ground of appeal, that he was not properly served with the medical report or inform the lower court the issues that he had with the medical report, so that the lower court could have made a determination on the matter rather keeping quiet when the report was being tendered and bringing up the issue belatedly at the appeal stage.

However, in the absence of the prosecution bringing proof of service indicating when the medical report was served and the lack of proof from the prosecution that the appellant consented to the use of the medical report in the proceedings this court can only agree with the argument of both the appellant and the respondent that the admitting in evidence of the medical report by the magistrate's court was erroneous as the prosecution did not follow the requisite procedure outlined in section 180(3) of the CPEC. According to the case of *Rep v Zobvuta* [1994] MLR 317 (HC) hearsay evidence under section 180 of the CPEC can only be admitted if conditions in subsection (3) fulfilled.

In as much that this ground of appeal succeeds, what should be noted is that the analysis of the evidence that was before the trial court reveals that the court convicted the appellant from the evidence of the victim, Mabvuto

Patrick, who identified the appellant at the scene and whose testimony showed that the victim had been seriously injured by the appellant by assaulting him with a metal object several times and that the victim bled: refer to pages 9 to 12 of the handwritten record of the case; page 4 of the typed transcript and pages 2 to 3 of the judgment of the trial court. Even in the absence of the medical report, the evidence of the victim as a prosecution witness was sufficient for the lower court to make a finding of guilty and convict the appellant of the offence that he was charged with. After all, the law is also clear that wrongly admitted evidence should not affect the verdict where other evidence justifies the verdict: *Chapfunga v Rep* [1997] 1 MLR 226 (HC).

2. The second ground of appeal questions whether the lower court erred in law when it proceeded to convict the appellant on the basis of the complainant's testimony without warning itself of the dangers of doing so in the absence of corroborating evidence. As we noted in the introductory paragraph, the record of the case shows that the appellant herein was charged, tried and convicted of the offence of grievous harm contrary to section 238(1) of the Penal Code. If counsel for the appellant appreciated the law of evidence and the instances where application of corroboration is required he would not have raised and argued this ground of appeal at all. The two reported cases of *Tinazari v Reg.* [1964-64] 3 ALR Mal 184 and *Banda v Rep* [1966-68] 4 ALR Mal 316 that the appellant rely on in support of this ground of appeal are irrelevant to this criminal matter as they concern offences that are sexual in nature where a warning on corroboration is required in practice and unsworn statements where corroboration is required in law. The appellant did not furnish the court with the copy of the judgment in *Kassimu Matenje v Rep*, Criminal Appeal no. 186 of 2007, let alone provide a summary of the said case so this court is unable to comment of that judgment.

   This court is of the view that since this criminal matter does not involve an offence that is sexual in nature, evidence of an accomplice or a case of unsworn statement, the trial court properly convicted the appellant based on the evidence of the complainant which did not require corroboration. In terms of the law and practice this type of offence and the kinds of witnesses that were called do not need to be proved by corroborative evidence. Generally and by the authority of section 212 of the CPEC there is no particular number of witnesses that is required for the proof of any fact. The case of *Chapfunga v Rep* [1997] 1 MLR 226 (HC) is very clear that except where corroboration is necessary there is no requirement that a fact be established by a particular number of witnesses.

The above procedural position in criminal litigation has been upheld by the Supreme Court of Appeal case of *Zgambo v Rep* [2000–2001] MLR 417 (SCA) which emphasises that that a single witness may suffice to prove a case and for a court to make a finding of guilt. This second ground of appeal is dismissed for lacking merits.

3. The third and fourth grounds of appeal question whether or not the lower court erred in both fact and law when it allegedly proceeded to convict the appellant on the basis of identification evidence of the complainant without having directed its mind to the *Turnbull* guidelines. The main question that the lower court had to address and that is also raised under these grounds of appeal is whether the appellant is the person who committed the offence of grievous harm against the complainant. The argument being raised by the appellant is that there was need for identification evidence in this criminal matter in accordance with the *Turnbull* [1977] QB 224 guidelines.

According to the case of *Cuthbert Mwatero Chifwenthe v Rep* [2012] MLR 64 (HC) the only issues that arise with regard to identification evidence do so in situations where it could not have been possible for the victim to make the identification or where the proper identification of the accused would be suspect. The case of *Chifwenthe v Rep* notes that these are the considerations that are also 'clearly and well stated in *Turnbull*': *Cuthbert Mwatero Chifwenthe v Rep* [2012] MLR 64 (HC) at p72.

In the present criminal matter, the record of the proceedings reveals that the appellant was well known to the victim, the incident occurred during daytime, he was able to recognize him because of the reflector clothes he was wearing, the metal bar he used for assaulting the victim and that there were no other obstacles between the victim and the appellant such that the complainant was clearly able to identify the appellant. It is therefore difficult to appreciate how the issue of identification evidence arises.

The evidence identifying the appellant and effectively linking him to the commission of the offence in issue was principally given by the victim himself, PW1. In examination in chief PW1 testified that he knew the appellant, that he had seen him before and that he was from Kaphiri Village which was a nearby village to Kanseche Village, where the victim came from. PW1 stated that he heard stop orders as he was going to his garden which is near Ilovo sugarcane estate. That a group of people surrounded him, beat him up with stones, shoes and he was bleeding profusely through the ears, mouth and nose and could not stand up. He stated that from the group of people he was only able to identify Bester Kavalo, the appellant, who happened to be facing him and had a metal object which is used for

irrigation. The complainant stated that the appellant held up the metal object with his two hands and hit the victim on the head and he fell down. When the victim was cross examined by the appellant he stated that he was able to identify the appellant from the group of people that surrounded him because he was facing him. The identification was further aided by the fact that the incident occurred during the day at around 2pm. Notably, the appellant did not dispute the particulars of the appellant as given by the complainant. In re-examination PW1 stated he had known the accused for many years. He confirmed that although a lot of people were beating him up, he only identified the appellant from the group as the appellant was facing him and was putting on a reflector jacket and had a metal object with him.

The appellant gave evidence on his own behalf, as DW1 and he stated that he was from Kaphiri Village under T/A Lundu in Chikhwawa district. He stated that he was working for Ilovo as a general worker and he denied knowing PW1 'save in respect of this case'. He stated that on 19th May 2016 he was on duty from 10 am to 3pm and he was instructed to work at Area 3 pump. When he did not find anybody there he went to pivot number 3223 where he worked alone. DW1 stated that later on he got a phone call from his friends who asked him to go to L2 at a pump. When he got there he found Luka who informed DW1 that they had arrested someone whom they had handed over to Police. DW1 denied meeting PW1 on this day and he also denied injuring PW1 as alleged. It is recorded as follows on page 9 of the record of the case

> 'I know the incident took place during the day time and that the victim was able to see his assailant. He was wrong to implicate me in this case. I heard him say his evidence in court but I did not do it. Those who were present during his arrest would be better placed to know who injured him and these were Luka, Joseph Nsona and others. PW1 was injured by David Butawo and not Luka'.

It is not clear how the appellant was able to know who was present when the victim was being assaulted and apprehended if he was not part of the team of the people who were assaulting the victim.

Joseph Nsona was a workmate of the appellant and one of the persons whom the appellant stated to have been present when the complainant was being arrested and he testified as DW2. However, the evidence of DW2 does not support that he was present when the victim got injured because while DW2 stated that the appellant was not present when the victim got injured he also said that 'I met people who had a thief with them' known as Potonkhwenda. DW2 also informed the court that he did not go with the

accused person where he was working on this day. DW2 alleged that the appellant was not present when the complainant got injured as he was assigned to work at a different field number 2322 while the victim was injured at field 2323. The magistrate noted that DW2 was 'quick to mention that the victim was better placed to identify the one who injured him since this was during day time'. DW2 denied knowing who injured the victim.

Another person whom the appellant mentioned to have been present at the scene was the supervisor Stonard Luka, who testified as DW3. DW3 testified that on 19th May 2016 he had assigned DW1 to work as guard at cane field number 3223. When he went to supervise he was informed by the guards that they had apprehended a person who was stealing sugarcanes. DW3 also stated that the accused person was missing and only returned after DW3 had telephoned him. On page 13 of the typed transcript DW3 stated that he believed that the complainant knew the accused person. DW3 alleged that the complainant was not present at the scene of the crime otherwise he would have found him together with his friends under the tree. It is not very clear how DW3 could confidently testify that the accused person was not present at the scene of the crime when he himself was not present and only received a report from other guards.

The magistrate did direct himself and he did address the issue of identification as follows on page 3 of the judgment

> 'In so far as the evidence of PW1 is concerned, we do not think he could have failed to identify one of his assailants during the day under question when he had seen him before, they are both from nearby villages and that this took place during day time and not at night. The issue of the type of light would not be an issue at all, there were no any other obstructions and that he was facing him. Since this was not his first time to see him and that it took some time when he had kept the accused under observation looking at the fact that they had to lift him up, wanted him to stand up from where he had fallen and that he was being held by the accused person and those with him. In our considered view, this was not dock identification but that he had seen him before and he had positively identified the accused person in dock as the very same person who hit him with a metal object on his head thereby causing severe injuries on his skull. '

This court agrees with the trial magistrate, that there was sufficient and credible evidence which would support the view that the appellant was correctly identified as the perpetrator who assaulted the complainant. An

examination of the judgment of the lower court shows that the magistrate fully appreciated and bore in mind the need for caution before accepting a conviction based principally on a witness' visual identification especially in a situation where the appellant was alleging that such identification was mistaken. Although the magistrate does not cite the case of *Turnbull* in his judgment but in addressing the issue of identification the magistrate does carefully examine the circumstances in which the identification was made by the complainant. The factors that he highlights are the same as those which are considered when conducting an inquiry under the *Turnbull* guidelines. All this brings to fore the fact that the magistrate was cautious when dealing with this part of the evidence and he did not just accept it at 'face value' as argued by the appellant. We note that the appellant failed to direct us to the exact page where the appellant alleges, under paragraph 4.4.7 of the skeleton arguments, that the lower court misdirected itself when it found as a fact that there had been an identification parade. We have examined the court record as well as the judgment and come to the conclusion that that the magistrate did not arrive at any such finding as alleged by the appellant. This court is of the view that considering the totality of the evidence, the quality of identification by PW1 was good enough and sufficient to find a conviction, the magistrate having found the complainant to be a reliable witness. It is not doubted that the magistrate was aware of the weaknesses and dangers of identification evidence. This ground of appeal has no merit and is dismissed.

4. The fifth ground of appeal is on whether or not the court erred in law by failing to direct its mind to the appellant's defence of alibi. Basically an alibi defence places an accused person at the relevant time of the incident at a different place from the scene of the crime and since the accused person is removed from the scene of the crime it renders it impossible for the accused person to be the perpetrator of the crime. Once the appellant raises alibi defence the prosecution has an obligation to disprove it and it is not for the accused person to prove it: *Bonzo v Rep* [1997] 1 MLR 110 (HC).

   The defence of alibi was raised by all the defence witnesses. To begin with the appellant denied knowing the complainant, he also denied wrong doing and stated that when the incident took place he was not at the scene of the crime and that he was elsewhere. The appellant also alleged that the victim was injured by someone named David Butawo and that those who were present when the complainant was being arrested would be in a better position to know who had injured the complainant. DW2 and DW3 were also called in defence to advance the arguments that were being raised by the appellant.

From an examination of the record of the lower court, this court notes that although the appellant did not comply with section 193A of the CPEC, which requires that prior to the commencement of the trial the defence should notify the prosecution of its intent to enter the defence of alibi, the magistrate in the course of analysing the evidence, on page 2 of the judgment still considered this defence after it had been raised in defence. The magistrate correctly found that the prosecution managed to disprove the defence of the alibi through its PW1 when he testified that the appellant was among the people who attacked him and described in detail the role that the appellant played in the commission of the crime. The magistrate noted the circumstances in which the crime was committed, such as the fact that the crime was committed during the daytime when there was enough light, that the appellant was known to the victim and the appellant was able to describe the mode of dress of the appellant, that the complainant had ample time to observe the appellant and his accomplices, which ruled out the issue of mistaken identity. It is therefore not true and a deliberate distortion of the record of the proceedings for the appellant to argue that 'the court below completely ignored the appellant's defence of alibi'. It is incorrect to argue, as the appellant has done, that the trial court paid a blind eye to the appellant's side of events in court.

As has been correctly argued by the respondent the defence of alibi was based on hearsay and the record of the case also reveals inconsistencies in the stories of the defense witnesses which means that the defence of alibi was a fabrication. For instance, in his testimony DW2 placed the appellant in a different cane field number 2322 from the cane field number 3223 that the supervisor DW3 claimed to have assigned the appellant. Further, DW2 also mentioned that the person who got injured and the thief were the same person and he was known as Potonkhwenda. That name that was mentioned by DW2 does not happen to be the name of the complainant in this matter, so DW2 could only have been referring to another incident and not the one in this criminal case involving Mabvuto Patrick. What comes out clear from the record of the case is that the complainant himself effectively placed the appellant at the scene of the crime while the defence witnesses were neither with the appellant where he claimed to be have been stationed nor with the complainant when he was been injured. In such a physical set up it makes the defence of alibi untenable. This ground has lacks merits and it will only be fair and just to dismiss it.

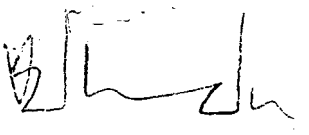
5. After considering grounds of appeal numbers 6 and 7 this court finds that the prosecution adduced sufficient evidence before the trial court to a standard of beyond reasonable doubt which warranted the finding of guilt and the conviction of the appellant. In terms of section 353(2) of the CPEC this court considers that it is appropriate to dismiss the appeal herein as there are no sufficient grounds raised by the appellant in support of the appeal to amount to a failure of justice requiring this appeal court to interfere with the judgment of the subordinate court.

6. In regard to the sentence which was imposed on the appellant and is appealed against as ground number 8 this court, after seriously considering the aggravating and mitigating factors, finds that the sentence of 72 months imprisonment that was imposed by the lower court on the appellant is neither wrong in principle nor manifestly excessive as to warrant tampering with. The custodial term is therefore confirmed as proportionate to the offender and the offence that he committed.

In summary then, the net outcome is that the criminal appeal against conviction and sentence is dismissed.

The appellant is at liberty to proceed with a second appeal to the Supreme Court of Appeal.

Pronounced in open court this 12th day of April 2018 at Chichiri, Blantyre.



Dorothy nyaKaunda Kamanga
JUDGE

Case information:

Mr. Mwayi Msungama	Counsel for the Appellant.
Respondent	Served/ Absent.
Mrs. Msimuko	Court Reporter.
Ms. Million	Court Clerk.
Date of hearing	13th February 2018.
Judgment perfected	15 May 2018.