REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

ZOMBA DISTRICT REGISTRY

CRIMINAL APPEAL NUMBER 29 OF 2018

(Being Criminal Case No. 110 of 2016 before the CRM sitting at Zomba)

BETWEEN

INNOCENT BRAKE .... **APPELLANT**

AND

THE REPUBLIC .... **RESPONDENT**

Coram: *Honourable Justice Violet Palikena-Chipao*

Mr. A. Salamba, Senior State Advocate, Counsel for the Respondent

Appellant, Present but Unrepresented

Mboga (Ms), Official Interpreter and Court Clerk

JUDGMENT ON APPEAL

The Appellant was convicted by the Chief Resident Magistrate Court sitting at Zomba of the offence of three counts; breaking into a building and committing a felony therein, theft of a motor vehicle and robbery contrary to sections 311, 278 and 301 of the Penal Code. He was sentenced

was not there but was only brought to his attention 2 days later. He also argued that the CCTV was rejected by the court which means that there was no tangible evidence against him. He submitted that the magistrate wrongfully convicted him when the evidence by the police was false.

On the sentence he argued that he was just a driver who gave a lift to the people who ran away and that he was deprived of motor vehicle number SA9068 as it was forfeited to the government on account of being used in the commission of an offence. The state opposed the appeal arguing that there was no procedural irregularity in the lower court and that the Appellant after being told of his options in defence opted to testify but called no witnesses. On forfeiture, the State argued that before the order was made, the Appellant was heard. It was also argued that there is nothing wrong with the sentences and that the appeal should be dismissed and the convictions and sentences by the lower court be upheld.

This court is mindful of the principles guiding it in exercise of its power on appeal as laid down by the Supreme Court of Appeal in **Pryce v. Republic, [1971-76] 6 ALR (Mal) 6.** It was emphasized in that case that an appellate court is entitled to undertake a fresh review of the evidence and arrive at its own conclusions, independent of those at trial. While the appellate court is called upon not to disregard the decision of the trial court; at the same time, it is called upon to carefully consider the decision without shrinking from overruling it where the court comes to the conclusion that the judgment was wrong.

The first ground of appeal is that the Appellant was denied the right to parade witnesses for his defence. It is noted from page 122 of the court record where upon making a finding of a case to answer the court explained four options which the Appellant had in defence which included testifying and or calling witnesses. The Appellant indicated that he would testify but he would call no witnesses. After he gave his evidence, the Appellant did not indicate that he wanted to call witnesses as such the court adjourned the matter for judgment. His assertion that he was denied the right to parade witnesses cannot be supported by the evidence on the record. This ground of appeal therefore fails.

Second ground of appeal is that the state failed to parade witnesses. He argued that the state failed to parade witnesses on the finding of the flash disk at his house and also who witnessed the search at his house. The record shows that a search was conducted by police at the house of the Accused in his presence of the wife of the Appellant. PW12 told the court that he conducted a search at the house of the Appellant in Lilongwe on 11th April, 2016 and that he conducted the search in the presence of the Appellant's wife. The record also indicates that PW13 interviewed the Appellant and his wife and that his wife said that the flash disc and documents werefound in

Company told the court that about K10, 327, 030 was stolen and that the police informed the office that they recovered K4, 535, 990. He said their office received the money and banked the same with the bank. He tendered in evidence a deposit slip which was marked as Exhibit P. The deposit slip was proof that there was money recovered and the absence of the actual cash being available before the court did not discredit the fact that money was recovered. This ground of appeal therefore cannot stand.

The seventh ground of appeal was that the CCTV that was brought in court by the State and was rejected by the magistrate as an indication that there is no tangible evidence. The lower court did not reject the evidence of the CCTV as the Appellant suggests. The lower court admitted the CCTV evidence and actually used the same in its analysis. Of significance is what the lower court said on page 40 (first paragraph) of its judgment;

> *'The evidence of the CCTV was also illuminating. PW1 testified after watching the CCTV, he saw two people getting into the cash office. They had metal bars they used in breaking the cash chest. He also said that the Accused was seen on the CCTV footage that was watched at the office. When he led the court in viewing the footage, it was verified that there was a face of the Accused and his colleagues who had put all the effort to accomplish their mission of getting the money.*

The court went on to say the following (in the last paragraph on page 40)

> *'The conduct of the accused when he was apprehended, the breaking implements that were found in his car, items identified by PW1 belonging to Chibuku Products, the speaker, the CCTV footage and the scumber incriminates the Accused'*

The above quoted two paragraphs clearly shows that the CCTV was admitted in evidence and that its evidence was used by the court in arriving at its conclusions. The argument that the CCTV evidence was rejected therefore, has no basis and cannot be supported by the evidence on record. This ground of appeal also fails.

When arguing his appeal, the Appellant also argued that the police lied in their evidence and also that the evidence was not sufficient to ground a conviction. Going through the evidence on the record from the lower court and the analysis of the lower court, it comes clear that the three offences with which the Appellant was charged were proved beyond reasonable doubt. What the Appellant raised does not raise any issues as to the fact that offences were committed but that he was not involved in the commission of those offences.

In its analysis the lower court found enough circumstantial evidence for drawing the conclusion

The Appellant also appealed against the sentence arguing that it is excessive. Upon conviction, he was sentenced to 5 years for breaking into a building, 3 years for theft and 15 years for robbery. I am mindful of the powers this court has on appeal against sentence. This court's business is not to tamper with the sentence of a lower court unless it can be shown that the same was manifestly excessive or wrong in law (***Mapopa Nyirenda v. Republic*** Criminal Appeal No 6 /2011 (PR)). Breaking into a building is punishable with 10 years imprisonment whereas theft is punishable with 5 years imprisonment. Robbery (aggravated) if punishable with life imprisonment or death.

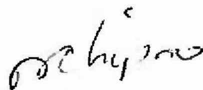
The starting point for breaking into a building and committing a felony therein is 3 years imprisonment which can be scaled upwards or downwards depending on the circumstances (see ***Medson Mwakilima & Others v. Republic*** Criminal Appeal No. 94 of 2016 (MZ)). From the circumstances, there were serious aggravating factors which outweighed the mitigating factors. The Appellant was in the company of other people, dangerous weapons were used, several offences were broken into, guards who were manning the offences were threatened, value and quantity of stolen property and cash was quite substantial and no recoveries were made. In these circumstances the sentence of 5 years cannot be said to be excessive. I will not tamper with it.

The second count was theft of motor vehicle. The vehicle was recovered. It was abandoned because it was stuck in mud. The stolen vehicle was a Toyota Hilux double cabin. The offence was committed in the same transaction as the offence of braking into a building and committing a felony therein which means that there were more minds involved in the offence and that guards were put under threat. The sentence of 3 years does not come with a sense of shock. It is upheld. It will be noted that the Appellant was charged with simple offence of theft but he should have been charged with an aggravated form of theft of a motor vehicle which is provided for under section 282(i) of the Penal Code.

Then there is the offence of robbery for which he was sentenced to 15 years. The *Magistrates Court Sentencing Guidelines of 2007* which puts the starting point for armed robbery at 10 years. These Guidelines have been applied in cases of ***Muyaya v Republic Criminal Appeal No. 33/2015; Republic v. Jackson Mangochi Confirmation Case No. 405/2015.*** The court has also considered cases of ***Republic v. Jackson Malola*** Confirmation case no. 658 of 200 where a sentence of 14 years was ordered; ***Muyawa v. Republic*** Criminal Appeal No. 33/2015 where in a case of simple robbery whose maximum sentence is 14 years, a sentence of 12 years was reduced to 8 years having considered the Magistrate's Court Sentencing Guidelines; ***Dziwani Jasi v. Republic Criminal Case No 6 of 2015*** where a sentence of 15 years was approved. Recently this court upheld a sentence of 15 years on appeal in the case of ***Muhammed Ali & Another v. Republic***

The appeal is dismissed except for the order that the sentences should run consecutive. It is so ordered.

Pronounced in Court this **28th October, 2021**.



Violet Palikena-Chipao

JUDGE