



**IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CONFIRMATION CASE NO. 999 OF 2021  
CRIMINAL CASE NO. 697 OF 2021 SRM SITTING AT LIMBE DALTON**

**THE REPUBLIC**

**-VS-**

**BRIAN ZINGALE.....CONVICT**

**Coram: JUSTICE R.M CHINANGWA**

Kulesi State Advocate

Penama Legal Aid Advocate

Accused Present

Amos Court Interpreter / Court Clerk

**1. Introduction**

The convict was charged and convicted with two counts of robbery contrary to section 300 as read with section 301(2) of the Penal Code. The convict was sentenced to 8- and 6-years imprisonment with hard labour for each count. The matter was brought before this court on confirmation of the conviction and sentence. The evidence that was below the court is as recorded below.

**2. The Evidence**

**a) Prosecution Evidence**

The first prosecution witness was Alfred Gumbo. He stated that, 'I know the accused when he was identified by a person who was with me on the day, he robbed the some K48,000.00 and other items. It was at dawn of 13<sup>th</sup> November 2021 when returning from "Wishes Bar" at Kachere with a woman on our way to the woman's house. The bar is on the left side of the Zomba road. We went behind the bar. In the course, I just realised that I had been hit violently on the head. I fell down. Then two people came, fished out MK48,000.00 from my pockets. They continued assaulting me with their legs. I was able to see them because it was under moon light. I screamed for help but nobody came out of the nearby houses. By then, the woman stood nearby the crime scene. When, I regained consciousness, I saw the woman being hugged by one of my assailants. Then, the man said that: 'Mesa umanyengana ndi Sekwere?' The people left and I was taken back to Wishes Bar. Bar man for the Bar called for a mini bus for hire. I was taken to Limbe Police Station, they gave me a MR form to hospital and bring it back. On the way to the hospital, the woman told me that she did not Scream for help for fear that one of the assailants would have injured us more had he known that she had recognised him (i.e.) the one who hugged her). We went to police again at day break to get another MR form to Queen Elizabeth Central Hospital. At around 13:00 hours the same day, the woman called me that she had found a man who could identify my assailant. His name was Sekwele. We went to Hardware stage in Limbe and found him play Pool. We called the police at Limbe who came and apprehended him. We all boarded police vehicle to Limbe Police Station where statements were taken from us. The accused denied to have

committed the offence but the woman truly identified the Accused'. In cross examination, he added that, 'At Hardware, I told you that I do not know you'.

The second prosecution witness was Thandiwe Makandanje, she stated that, 'I know the Alfred Gumbwa, he is my boyfriend. On the night of 12<sup>th</sup> to the morning of 13<sup>th</sup> November 2021 I was at Wishes Bar drinking beer with Alfred (PW 1). In the course, we left Wishes for Town House but we did not stay longer (less than an hour). Then, we left for my house and we re-entered into the "Wishes Bar" and left for my house. We reached a certain Open space where there are Shebeens and then I heard Alfred Scream, "Mayo". I looked behind and saw two men putting on mask which only showed their eyes and mouths. The taller man was assaulting Alfred while the other one was fishing things from Alfred's pockets. Alfred asked them, "Tengani chilichonse koma mundisiile Moyo" 'At the time, I stood frozen nearby the Crime Scene. Later the Accused herein came and hugged me and told me that he knows me and could not harm me and that I should simply pay him some money. He also said that I was in love with Sekwele. Then, the defendant put his hand into my camisole and took away MK6,000.00 and since he spoke to me, I recognised him but did not show that I had recognised him. Before this incident, I knew the Accused by face but not by name. At the time, I came to know him by the incident the Accused came with Sekwele as I moved home for, he helped me carry my bed. He once stole a phone from a certain lady. Then, we went to Limbe Police Station for help. In the following morning, I started hunting for the Accused and

Sikwele helped me to find him at a pool table behind Hardware stage in Limbe'. In cross examination she added that, 'On the day, I moved home and you helped me but I did not pay you. We are not sworn enemies. I recognised you because we looked at each other and you mentioned my name, "Mwana Tha. Sindingakupange chipongwe". We were within close range. You put your hand into my camisole and took MK6,000.00 from away. I had known you only for roughly two weeks. I chatted with you twice. On the day I moved home and the day you stole a phone from a certain woman whom you gave it back'. In re-examination she added that, 'I recognised the Accused because he hugged me at close quarters facing one another, directly'.

The third prosecution witness was Detective Sargent Chimwemwe Jere. He stated that, 'On 13<sup>th</sup> November 2021 I received a Complainant from Alfred Gumba that on 11<sup>th</sup> November, 2021, he was at Whishes Bar at Kachere with a lady. When he reported, I gave him a MR he went to Queen Elizabeth Central Hospital with it. The lady who was with the Complainants recognized the Accused but did not show that she knew him. The following day, the lady informed the victim that he knows the Accused and led him to his working place for confirmation. Then, they informed my colleague Detective Sub Inspector Timbani. They went there and took the Accused to Limbe Police Station. Detective Sub Inspector Timbani is at MZUNI and the file was handed over to me. Then I called and interviewed the Complainant, took a statement from the Complainant. I also took a statement from the Accused and cautioned him but denied to have committed the offence'

The prosecution closed its case and the court entered a finding of a case to answer. The convict exercised his right to remain silent. The court later pronounced judgement at which the convict was convicted.

### **3. Issue for determination**

This court has to determine the propriety of the conviction and sentence. The question is did the State prove its case beyond reasonable doubt to sustain a conviction and was the sentence as ordered appropriate?

### **4. Analysis of Law and Evidence**

The two counts of robbery relate to first and second prosecution witnesses' encounters. The first prosecution witness had Mk48,000 stolen from him after he was beaten. The second prosecution witness had Mk6,000 taken from her camisole under threat as she witnessed the first prosecution witness being robbed. The fact that a robbery was committed that is theft with violence cannot be disputed. The identity of the perpetrator arises as an issue because the evidence shows that the second prosecution witness is the only person who identified the convict after he spoke to her. The chronology of events as taken from her testimony is that she was walking heading in one direction. Then she looked back when she heard the first prosecution witness scream. When she looked back the perpetrators were wearing masks. One of the perpetrators got close to her, mentioned her name and the name Sikwele as her boyfriend. The witness said she recognised the voice having met her perpetrator two weeks ago on two occasions and having been hugged by the perpetrator on the material day. She traced the perpetrator following these leads. The lower court

considered the Turnbull guidelines on identification as spelt out in Republic v Mwashoke Confirmation Case No 1187 of 1994. The witness knew exactly where to find the convict with the help of Sikwele having had earlier encounters with the convict. This court finds that the conviction was proper in law.

**b) Is the sentence proper in law?**

The convict was sentenced to 8 years and 6 years for the robberies where the first prosecution witness and the second prosecution witnesses were victims. Sentences meted out mainly achieve three things. That is the convict should be punished and rehabilitated; the victim loss should be mitigated and the public should be deterred from committing crime. In arriving at the appropriate sentence, the court also has to consider the sentencing trends of like offences. During the sentence enhancement hearing the youthfulness of the offender and fact that the convict is a first offender were raised in mitigation. The aggravating factors listed were that the offence is common and serious; violence was used; no recovery of stolen items; and the offence was planned and committed in a group. The parties cited cases which showed that an average of 7 years was meted out for robbery offences in the around the year 2008. A sentence of 12 years is appropriate on each count considering the manner in which the offence was committed. The convict had worn a mask; he was in a group; the victims were helpless and beaten. This court is of the view that the accused being youthful and a first offender should not shroud the seriousness of the offence. The convict was simply merciless.

**5. Finding**

The conviction is sustained and the sentence is enhanced to 9 years and 6 years imprisonment with hard labour respectively to run concurrently. Any aggrieved party has the right to appeal to High Court on both conviction and sentence.

Pronounced this 6 of December 2022 at BLANTYRE



R.M CHINANGWA

JUDGE