

**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CRIMINAL APPEAL NO. 55 OF 2007**

RAPHAEL SAINI..... APPELLANT

-VS-

**THE REPUBLIC.....
RESPONDENT**

From the First Grade Magistrate Court sitting at Lilongwe
Being criminal case no. 70 of 2007

CORAM: HON. CHINANGWA, J

Nkhono Counsel for the appellant
Chikango, Counsel for the state
Munyenyembe. Court Interpreter

J U D G M E N T

The appellant Raphael Saini appeared before the First Grade Magistrate Court sitting at Lilongwe from 2nd April, to 10th July, 2007. It was on a charge of Robbery contrary to section 301 of the penal code. Appellant pleaded not guilty to the charge. Nevertheless, after trial he was found guilty, convicted and sentenced to 5 years penal servitude.

Facts of the case alleged that William Mhango (Pw1) is a taxi driver employed by Mr. Chabvala. The taxi is a green Toyota Corolla registration No. RU 2342. He plied his business at Biwi car rank. On Saturday 24th March, 2007 at about 7 pm the appellant hired the taxi to be driven to area 6 within Lilongwe. Complainant charged K500. They drove to area 6. Appellant told the complainant to stop near a gate of a certain house. Complainant played the horn to admit entry. But the gate was not opened. Then from the darkness emerged 3 persons. Even in the dark he observed that one of them held a rifle. They pulled him out whilst wending a rifle at him. Surprisingly the appellant remained put in the passenger's seat unmoved. As he was being dragged out of the motor vehicle complainant managed to free himself and flee for dear life. The assailants drove away with the motor vehicle. Complainant reported the incident at Lilongwe police station. He then reported to his employer.

A week later he was called at Lilongwe police station. Complainant said that he identified the appellant among ten persons who were paraded. In court he maintained that it was appellant who hired him.

D/Inspector Munde (Pw3) based at Lilongwe police station received a report of the robbery from the complainant. They visited the scene. But no information gathered. On 31st

March, 2007 he received certain information from Detective Inspector Chaima. Acting on that information he invited complainant to Lilongwe police station. Complainant is alleged to have identified the appellant to have been hirer. On the strength of the identification, Pw3 recorded statement under caution exp1 and evidence of arrest exp2 from appellant.

D/Inspector Chaima (Pw2) told court that on 29th March, 2007 at 9pm in company of other police officers he arrested appellant at Alekeni Anene bar at Malangalanga garages area. He was arrested in connection of a theft of Toyota Corolla yellow in colour with South African registration. They took them to Lilongwe police station. Pw2 informed Pw3 in about the arrested persons in case they were involved in the present case.

Appellant in defence said that on 29th March, 2007 he was with friends drinking at Alekeni Anene bottlestore. They were arrested by police on allegation that they stole a motor vehicle. He denied knowledge of the theft. But he was forced to admit committing the offence.

Counsel Nkhono filed 4 grounds of appeal as follows:

- 1. The learned magistrate erred in law in convicting the appellant without proper evidence to support such a conviction.**
- 2. The learned magistrate erred in law in allowing evidence of identification parade procedure which could not be supported by well established principles of law and which in fact had a prejudicial effect on the appellant.**
- 3. The learned magistrate misdirected himself on the law governing identification parade as such the same caused miscarriage of justice.**
- 4. The learned magistrate erred in totally disregarding the defence evidence which was not in any way rebutted by the prosecution.**
- 5. All in all the conviction is against the weight of evidence in totality.**

In prosecuting the appeal counsel Nkhono dwelt much on police investigation which left a lot to be desired.

The state submitted that it did not support the conviction. The state conceded that Pw3 who was the police investigator in this case carried out partial investigation. He visited the scene of crime in area 6, but failed to inquire from the occupants of the house where robbery took place at the gate.. He should have enquired whether they had heard the commotion outside the gate. Whether they were expecting a visitor that evening.

Having arrested the appellant they should have taken him to the scene in area 6 and inquire from the neighbourhood whether he was a familiar person.

As rightly observed by counsel Nkhono the other taxi driver who informed complainant that he knew appellant should have been invited by the state to testify. That would have strengthened the case on the identity of appellant to have been the one who hired complainant.

Having carefully evaluated the evidence obtaining in this case I hold the view that the state did not prove it beyond reasonable doubt against the appellant. In the net result I quash the conviction and set aside the sentence of 5 years penal servitude. Appellant to be released forthwith unless held on other ground.

Appeal allowed.

PRONOUNCED in Open Court on this 28th day of September
2007 at Lilongwe.

R.R. Chinangwa
JUDGE