

**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY**

CRIMINAL APPEAL NO. 106 OF 2006

BETWEEN

JOSEPHY MOSES

-VS-

THE REPUBLIC

CORAM : HON. JUSTICE NYIRENDA

: Kayira, Counsel for the State
: Nkhono Counsel for the Appellant
: F.H. Njirayafa Court Interpreter

JUDGMENT

The appellant was convicted of robbery contrary to section 301 of the Penal Code and sentenced to seven years imprisonment with hard labour by the First Grade Magistrate Court at Lilongwe. He appeals to this court against his conviction and the sentence.

As regards the conviction his main ground is that it was against the weight of the evidence. The sentence is said to be manifestly excessive in all the circumstances of the case.

In open court both counsel for the State and for the appellant were of the submission that the conviction could not be supported on the evidence. I closely looked at the testimony of all the witnesses including that of the appellant. The following facts emerge.

On the material day the complainant, who is a motor vehicle mechanic, was contacted by someone whose vehicle had broken down. The complainant was given another vehicle by that person to drive to the spot where the vehicle had broken down. Indeed the complainant, in the company of two others went to repair the vehicle but when they got there the complainant established that the vehicle had merely run out of diesel so he decided to tow it to the owner.

One of the people he was with was controlling the vehicle that was being

towed. As they approached Area 18 Round About the two vehicles collided into each other forcing the front vehicle in which the complainant was, into a drain.

While the complainant was still in the vehicle three men approached. He asked them what they wanted and one of them said he wanted to help get the vehicle out of the drain. The complainant told them their help was not required. The complainant then came out the vehicle and got his cell phone to call the owner of the vehicles.

At that moment one of the three men came to him and demanded to have the cell phone. Upon the complainant refusing the thugs descended on the complainant. One of them pulled out a panga and hauled it at the complainant. He missed and the panga landed on one of his own gang cutting him severely. Eventually the thugs managed to snatch the phone from the complainant and took away with it.

In the meantime the complainant's friends had rushed to police at Area 18 Station to report the incident. Police responded timetiously and arrested the appellat within the vicinity whom they described as suspicious. Upon searching the appellat they found him with a panga knife.

When police arrested the appellat they took him to where the complainant was and soon as they approached the complainant the complainant immediately identified the appellat as the person who attacked him. In his testimony in court the complainant insisted that he recognized the appellat as the man who confronted him. Although the attack was around 7.00 pm there were cars passing and he was with the help of lights from those cars he was able to properly see the appellat and his gang. He had no difficulties in identifying appellat even before police asked him if that was the attack.

The complainant went further and told the court that the panga that was found with the appellat was actually the one he saw with the appellat that was used to attack him. I should quote briefly from the lower court record what the complainant said as follows:

“At that time my friend had already gone to report the accident to police. On arrival I found two unformed officers. They asked me if I can identify the people who assaulted me and took away my phone. I said I can. An order was made and I saw three people coming from the shadow or darkness. I immediately recognized the accused person as one of the three men who attacked me during robbery. The other two turned out to be plain clothes Police Officers. I easily identified the accused person because during the incident, vehicles were passing by with lights on from both sides.--- At police I was told that the accused was found with a panga knife and I recognized it as the very panga knife which he used during the incident.

Further to the testimony of complainant, was PW2's testimony which again pointed at the appellant. PW2 who was in the company of the complainant was in a much better position to explain what went on because while the assailants were on the complainant and trying to snatch the phone, he was himself right there watching the incident. He told the court that he watched the whole episode and in fact urged the complainant to release the phone to avoid injuries to him. He further told the court that he easily recognized the appellant when he was brought in by Police. He in fact told the police that the appellant had a knife with him. He also told the court that while the appellant was trying to use the knife on the complainant, he missed and injured one from his own group.

According to the police officer who arrested the appellant PW3 when he got the report of the robbery he decided to go to the scene of the crime. On the way he saw two suspicious persons. He stopped them and asked them where they were coming from. When the two men saw PW3 who was in the company of a uniformed police officer they took to their heels. One managed to disappear but the appellant was caught. According to PW3 the complainant later described the appellant and identified him immediately he was brought near him.

The appellant says he was running away from the police because he was carrying some trees which he had cut from a protected forest. PW3 disputed that the appellant was carrying any trees at the time he was seen running away.

The appellant was seen and identified by not just the complainant but also by PW2 whom in my judgment had enough time to see the three assailants. PW2 was left out of the fight because the attackers were after the cell phone which was with complainant.

It is also not mere coincidence in my view that when the appellant and his friend was confronted by police they immediately started running away. Upon being arrested the appellant was found with a panga that was positively identified by the complainant and the second prosecution witness as one that was used in the attack on the complainant.

The evidence in this matter is not circumstantial. It is direct evidence from two witnesses. I am more than convinced about the guilt of the appellant. The appeal against conviction is therefore dismissed.

It is on record that the appellant was not just in the company of several others but also that he was armed with a dangerous weapon. The appellant actually used the panga on the complainant but that it missed and landed on one of his own. The

appellant is already an extremely dangerous criminal despite being a first offender. I have had regard to the other mitigating factors raised here and the court below. I do not find the sentence to be offensive on the high. I would however allow for a minor reduction to sentence and now sentence the appellant to 5 years Imprisonment with Hard Labour on account of his age.

PRONOUNCED in Open Court at Lilongwe, this 19th day of September 2007.

A.K.C. Nyirenda
J U D G E