

**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CRIMINAL APPEAL NO. 39 OF 2008**

BETWEEN

**KONDWANI JUSTEN 1ST APPELLANT
JAMES BANDA 2ND APPELLANT
FELESON SITOLO 3RD APPELLANT
JAMES GUNDE 4TH APPELLANT**

AND

THE REPUBLIC RESPONDENT

**CORAM : HON. JUSTICE MZIKAMANDA
: Unrepresented, counsel for the Applicant
: Mrs. L. Munyenyembe, Court Interpreter**

JUDGMENT

The four appellants were tried before the Second Grade Magistrate sitting at Mmboma Magistrate Court, Malomo in Ntchisi District on a charge of robbery contrary to Section 301 of the Penal Code. The particulars of the charge were that the four together with Thomasi Njazi, who has not appealed, during the night of 16th – 17th February, 2007 at Malomo Trading Centre in the District of Ntchisi being armed

with dangerous or offensive weapons, namely, two rifles and knives robbed Malomo, Chipiku Stores of two cartons of Embassy Menthol, Provision DCL Yeast, 256 Celtel Units (50 cents), 40 Buffen 100's and one Padox sachet all property valued at K194,246.50 the property of Chipiku Stores. They all pleaded not guilty to the charge. They were found guilty and convicted after full trial. They were each sentenced to 4 years imprisonment with hard labour. They now appeal against both conviction and sentence.

The case for the prosecution was that during the night of 16th to 17th February 2007 there were very heavy rains at Malomo Trading Centre where Chipiku Stores have a Wholesale Shop. Two persons PW1 and PW2 were during the night guarding the Chipiku Wholesale Shop at Malomo Trading Centre. The guards positioned themselves on different sides on the Shop. In the course of the night and as the rains were pouring heavily PW1 saw that three people approached and grabbed him. Two others joined in to over-power him. He identified the third accused person as one of the attackers. That night the third accused was armed with a rifle. The attackers used PW1's own torn uniform and belt to tie him. The attackers pushed PW1 into a kitchen where two of them sat on him while the others gained entry into the shop through the roof, having torn off the iron sheets. The attackers stole from the

shop and left. Then the two guards met and decided to report the matter to police at Malomo and to the Shop Manager who was then at his house. The time then was around 2.00 am. The Manager again reported at police and also checked the shop where he found that some items were missing. Notably missing were some cartons of Embassy Tobacco Cigarettes. Around 3.00 am the Manager phoned his friends in Ntchisi and Kasungu, informing them about the breaking and the theft. These friends were operating Wholesale Shops. At around 6.00 am the friend from Kasungu telephoned the Manager informing him that some people had approached him offering cartons of Embassy Tobacco Cigarettes for sale. Although he was suspicious about the cartons as they were partly wet he agreed to buy the cartons and gave them part payment, telling them to return later to collect the balance. The friend went on to say that he had informed the police who also visited the shop to wait for the sellers. The police arrested the sellers as they were attempting to get the balance of the selling price. The police arrested five people and brought them over to Malomo Trading Centre, Chipiku Shop where the breaking and the theft had occurred.

The story on the arrest of the accused person was told in detail by PW4, Mr. James Mike Mafuta, a Wholesaler at Kasungu Boma trading under the style Target. He confirmed having been telephoned by PW3, Mr.

Mwambene, a Chipiku Shop Manager at Malomo Trading Centre, that there had been a breaking and a theft at the shop in the course of the previous night. The night had been rainy at Malomo Trading Centre. He also said that not long afterwards some people brought to him two partly soaked cartons of Embassy Tobacco Cigarettes and offered them for sale. They offered at K800.00 per brick which normally sold at K950.00. He was suspicious. He agreed to buy but he gave K25,000 deposit leaving a balance of K50,000.00 to pay later.

Meanwhile he contacted PW3 and the police on his suspicions. PW 3 confirmed to him that some of the stolen items from Chipiku Shop were cartons of Embassy Tobacco Cigarettes. The police went to PW4's Shop and waited for the sellers as they returned to collect the balance of the sell price. The agreed time had been 8.30 am. When the seller returned, they were arrested by the waiting policemen. They turned out to be the 1st, the 2nd and the 3rd accused persons. The actual arrest was done by PW5, Detective Constable Mose, and other policemen who accompanied him. According to PW5, Kasungu Police had communication from Malomo Police Unit on the morning of 17th February, 2007 that Malomo Chipiku Shop had been broken into and items stolen there from. Shortly afterwards, Kasungu Police again got telephone call from Target Shop at Kasungu Town that he was

suspicious about one carton of Embassy Tobacco Cigarettes brought to his shop and offered for sale. He too had been informed about the theft at Malomo Chipiku Shop. PW5 was sent to Target Shop and sat under a tree waiting for the return of the alleged sellers. He was in the company of another. While there he saw the first accused person enter Target Shop. Then two others sat near the Shop and under a tree. PW5 then called for police reinforcement. The police first arrested the two who were sitting outside the shop as they had been in the company of the first accused person. When the first accused saw the arrests he came out of Target Shop and began to run away. He was pursued and was apprehended. While in police custody the first accused received several telephone calls from his friends and he disclosed that those were calls from his friends who were at Chinkhoma Trading Centre within Kasungu. The 1st Accused offered to lead the police to his friends at Chinkhoma. At Chinkhoma he showed the police where his friends were and those friends were arrested too. All were taken to Kasungu Police for interrogation. According to PW5 they admitted having offered for sale Embassy Tobacco to Target Shop. Some K16,000.00 was recovered from them, together with three phones. The recovered money was restored to the owner of Target Shop.

When the five accused persons were interrogated by Ntchisi Police they disclosed that in the course of committing the present offence they had been in the company of Frank Dickson and Frank Mphepo who both stay at Chinsapo in Lilongwe. A follow up was made but the two were never arrested. The accused nonetheless denied the charge of robbery. The accused had said that some of the stolen items were sold to unknown people.

The first appellant told the lower court that he is a business man who sales second hand shoes and empty sacks. On the day of his arrest he had sold sacks in Kasungu and was going to board a mini bus back to Lilongwe when the police arrested him. They took him to a police cell where he found the co-accused whom he did not know. Then they were all taken to Malomo Chipiku Stores, then Malomo Police Unit before they were taken to Ntchisi. In cross-examination he said he heard the evidence against him but it was not true he was running away from the police the time he was arrested.

The second appellant Kondwani Jasten told the lower court that he was a businessman who sold second hand clothes in Lilongwe. On 11th February, 2007 his mother-in-law informed him that his brother who had been sick in Mzuzu had died and that burial would be in Rumphi.

He and his wife left for Mzuzu for the funeral. He started the return journey on 16th February at 3.00 pm with a friend of his who drove a Siku Transport vehicle. They reached Kasungu at 8.00 am when he dropped off the free transport. He wanted to take a minibus. He was walking from Total Filling Station when two youngmen arrested and handcuffed him. They took him to police. They took his K4,000.00 and a phone and locked him up. Then they took him to CID office where he found the co-accused. From there they were all taken to a shop where they collected two cartons of Embassy tobacco and went to Malomo, Chipiku Stores before proceeding to Ntchisi. During cross-examination he said that he denied ever having committed the present offence.

The third accused Feleson Sitolo said that he was a businessman who sold fresh fish at Liwonde Road Block. On 16th February he went in the morning to meet fishermen to get fish which he would then deliver to different places. He got to one house where he used to deliver fish but he found no one there. When he went to the office of the owner of the house he was informed that , that owner had moved on transfer to Kasungu. His friends told him that the person had left behind K1,000.00 to give to him so that he could follow him to Kasungu. He thus boarded a bus at Liwonde Road Block. He reached Lilongwe in the morning hours and then he boarded a minibus to Kasungu. He got to Kasungu

and got off the minibus. As he walked towards New Building Society he bought maize and sat down under a tree. As he ate the maize he met a certain boy whom he was talking to. He continued to walk when three people approached him and arrested him. They took him to Kasungu Police Station where he found other men. They were all taken to Malomo Chipiku Stores and thereafter to Ntchisi Police Station.

The fourth accused person said that he is a local farmer at Mayani in Dedza. At the time of his arrested he had gone to Chinkhoma Trading Centre to see his brother. His mother had given him K5,000.00 for transport after selling irish potatoes. He did not find his brother. He was drinking cocacola at a Khonde when the police arrested him. When he asked what was wrong, he was told he would be informed at the station. The police took his K4,150.00. He was taken to Kasungu Police Station from where he was taken with others to Malomo Trading Centre, Chipiku Store. They were shown to the workers there before being taken to Ntchisi Police Station.

The Fifth accused, James Gunde said he was a businessman, selling clothes in Blantyre, at Bangwe. On 15th February he left his wife at 9.00 am and met an Asian, Marida in Limbe. He was given an order of Jeans and was given K60,000.00. He left Bangwe at 11.00 am for Lilongwe by

mini bus, arriving Lilongwe at 5.00 O'clock. The following day 16th of February he left for Mzuzu at 7.00, arriving Mzuzu at 12.00. He bought the Jeans on the same date and spent a night at Mlambe Inn. He left Mzuzu on 17th February at 8.00. When he got to Chinkhoma he dropped off the minibus and ran for a certain woman's house. He was told that the woman was at Bua Market. Then he went to a restaurant and called for nsima. He ate it. Then he went to a grocery and called for cocacola. Then his phone rang. It was a woman who wanted to know where he was. He told the woman that he was at Chinkhoma. After a few minutes the police arrived and arrested him. They took his phone and his K7,000.00. He was taken to Kasungu Police Station where he was locked up. A few minutes later he was taken to the CID Office where he found the four young men, the co-accused. He was told that he was arrested because of the phone number. They were taken to Malomo Chipiku Stores where they were shown to the watchmen, saying these are the thieves. Then they were taken to Malomo Police Unit before being taken to Ntchisi.

In cross-examination he said he wanted to take his money from Rosemary Phiri at Chinkhoma. He had phoned her while he was travelling from Mzuzu and she told him she was at home. In cross-

examination he said that at Malomo Chipiku stores the watchmen identified three people.

The appellants in this case, Kondwani Ronald Jasten Banda, James Banda, Feleson Sitolo and James Gunde filed similar grounds of appeal attacking both the convictions and the sentences. Their grounds of appeal can be summarized as follows:

1. That the learned magistrate erred in relying on insufficient evidence to prove the charge of robbery.
2. That the learned magistrate erred in relying on an identification parade which was not properly and professionally conducted.
3. That the learned magistrate conducted the trial in an unfair manner in that he rejected defense witnesses.
4. That the sentences imposed by the lower court were manifestly excessive.

This court is mindful of its role on an appeal like the present from the subordinate court. This court has the duty to recognize that an appeal from the subordinate court to this court is by way of rehearing. Thus this court must scrutinize the evidence on record afresh and is entitled

to make its own findings even if it means disagreeing with the findings of the lower court.

I have subjected the evidence on record to fresh scrutiny. I have considered the submissions made by the appellants as well as by the State. I have also examined the judgment of the lower court.

As to whether the evidence on record establish a robbery or not my mind is clear that it does. The evidence is not disputed that on the rainy night of 16th to 17th February, 2007 Chipiku Stores Shops at Malomo was broken into by tearing the Iron sheet roof open A piece of the torn iron sheet was produced in court. There is no dispute that the persons who tore the roof open found watchmen at the shop and overpowered them and tying them violently before preventing them from making any movement by sitting on one of them. There can be no doubt that the violence that the intruders exerted on the guards was intended to overcome any resistance from them. There is again no dispute that the robbers were armed with a gun although they did not fire it. If this is not sufficient evidence to establish a robbery then I am at a loss as to what evidence would. I am satisfied beyond reasonable doubt that a robbery occurred.

As to who committed the robbery the record contains no evidence of an identification parade. This court can not say whether there was an identification parade or not. Only PW1 raised the issue that he identified the 3rd accused who is the second appellant here as the one who was holding the gun during that night. PW1 emerged firm as to whom he could remember to have seen that night. He could not remember the others. I must say I am in total agreement with the State when it said that the evidence that established the connection between the robbery and the 1st accused, the 2nd accused and the 3rd accused is overwhelming. That evidence does not place reliance on identification of the robbers in the course of the night of the robbery. It was their involvement in the sale of the stolen goods within a period of five to six hours of the goods being stolen in Malomo, Ntchisi and the sale being done in Kasungu, a long distance away. The ground of appeal that in identification parade was unprofessional or fraudulent has not been made out.

On the issue of fair trial I see no substance in that ground. At the time a ruling of a case to answer none of the appellants said they would call defense witnesses. No defense witness was registered. The first accused in fact said he would call no witness. The case was adjourned for defense with the 1st appellant and the 4th appellant saying they

would wish to call witnesses. The adjournment was allowed taking that request into account. At the time the case resumed for defense all appellants said they were ready with their defense. At no point thereafter did any of the defense raise the issue of their witnesses. They closed their defense without calling any witnesses. There was no unfair trial. Again on the totality of the evidence the wife of the 1st appellant would not have made the case of the 1st appellant better for it is clear that she was not travelling with him when he was arrested. The circumstances of the appellant's arrest in Kasungu at Target Shop are revealing of his involvement in the present robbery.

As regards the connection of the 4th and 5th accused to the crime I am unable to go along with the analysis of the State that the two having been arrested at Chinkhoma Trading Centre, about 20 Km away from Kasungu, could not possibly be connected with the crime. The evidence of the arresting Officer was firm that the 1st accused while under police custody on the morning of his arrest received a number of telephone calls. He revealed that those telephone calls were coming from his friends with whom he committed the robbery and that those friends were at Chinkhoma Trading Centre. He led the police to the arrest of the two at Chinkhoma Trading Centre. There can be no doubt on my mind that the telephone calls that the 4th and 5th accused made to 1st

accused was to check on the program of the sales. Again it must be noted that not all the stuff that was stolen was recovered. Some were sold to unknown people. The 4th and the 5th accused must have been involved and concerned about the disposal of the stolen goods. Their story as to why they were found at Chinkhoma Trading Centre having travelled from Blantyre and Dedza is unbelievable and unacceptable. The magistrate rightly rejected those stories as being mere concoctious and afterthought, devoid of any grain of truth. There was ample evidence before the lower court on which a guilty finding against the third and fourth appellant was rightly made. The appeal against conviction can not succeed. It is dismissed with respect to all the appellants.

I must turn to sentence. Here too I have problems with the State's submission that the sentence of 48 months imprisonment reflects the current trend of sentences in cases of aggravated robbery. In fact to suggest that the sentences are manifestly excessive is to seriously minimize the gravity of the offence. In *Rep v Allan Chididi Confirmation case No. 1266 of 1994* a sentence of three and half years imprisonment with hard labour for a robbery where the accused was accompanied by nine others and metal instruments were used was enhanced to 8 years imprisonment with hard labour. In *Rep v Fanasoni Paguza Vashiko*

Confirmation case No 435 of 1994 a sentence of 4 years imprisonment with hard labour was enhanced to 9 years imprisonment with hard labour for an aggravated robbery. Again a sentence of 5 years imprisonment with hard labour in *Rep v Beziria Amidu and Others* *Confirmation case No. 23 of 1993* was enhanced to 9 years imprisonment with hard labour for an aggravated robbery. Recently an appeal against a sentence of 7 years imprisonment with hard labour for an aggravated robbery in *Felix Chisakasa v Rep* *Criminal Appeal No. 100 of 2008* was dismissed and the court described the sentence as being at the lower end of sentence for that category of offences. In the case at hand it would have been proper to consider enhancing the sentence. In all the circumstances however I have decided to reluctantly uphold it, emphasizing that it does not create precedent. This means that the appeal against sentence also fails. The appeal therefore fails in its entirety and it is accordingly dismissed.

PRONOUNCED in Open Court this 16th day of December 2008 at Lilongwe.

R.R. Mzikamanda

J U D G E