



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL DIVISION

CONFIRMATION CASE NO. 942 OF 2021

CRIMINAL CASE NO. 275 OF 2021 SRM SITTING AT LIMBE

THE REPUBLIC

VS

ASK MUSSA.....CONVICT

Coram: JUSTICE R.M CHINANGWA

Kulesi State Advocate

Penama Legal Aid Advocate

Accused Present/Unrepresented

Amos Clerk/ Official Interpreter

ORDER ON CONFIRMATION

1. Introduction

This matter is before this court for confirmation of conviction and sentence. The accused was charged and convicted on two counts of robbery contrary to section 300 as read with section 301(2) of the Penal Code. After a full trial, the convict was convicted and sentenced to 10 years and 9 years imprisonment with hard labour. Below is the evidence that was before the court.

2. The Evidence

a) Prosecution Evidence

The first prosecution witness was Mary Julius. She stated that, 'I know the accused. On 2nd June 2021, I left home to pick up a child for my boss from school and my husband, called and asked me that we should meet for he wanted to see me. We met at the place where timber is sold in Limbe (Raiply). Then one of my phones rang and I picked it up and the accused plus two other people came, strangled me and took away the ringing phone from me and also asked for money, I told them that I did not have money. Then, the Accused, placed his hand into my Camisole and took another phone from me. It was around to 11:00 hours. Then, the accused hit my buttocks with a metal bar and I fell down. Then, he pounced on my husband and at that time, his two accomplices were just watching. He dipped his hands into my husband's jacket pockets and took away two Cell Phones and MK2,050.00 then he ran away together with his friends. Then, people came from a brick fence nearby and joined us in chasing the robbers and the accused climbed a brick fence and jumped into its compound and some people inside the fence apprehended him. Three Cell Phones were recovered from the defendant: Two for me and One for my husband. Then, we took the Accused to Limbe Police station but his two accomplices are still at large. I have one phone on me but I have forgotten the other one at home but my husband's phone is at Limbe Police station with regard to the other missing Cell Phones and MK2,050.00, the Accused did not give us a convincing answer and told us that he did not steal the MK 2,050.00.' In cross examination she added that, 'At the time you came, I had one phone in my hands and the other was in my camisole. You got the other phone from my camisole. You hit me with a metal rod and my buttocks are swollen right now. When I fell, you seized the rare opportunity and then you pushed on my husband'.

The second prosecution witness was Dyson Kambalame, he stated that, 'I know the accused person. He is the one who attacked and

robbed me of my two Cell Phones and MK2,050.00 cash. On 2nd June 2021 at around to 11:00 I was on my way from Limbe market where I had ordered second hand shoes and went to Raiply (along the Road to Chiwembe) to meet up with my wife, Mary Julius. In the course, of discussion, I saw the accused and two others (who put on masks which concealed their faces and the Defendant was carrying a metal rod. The accused did not put on a mask and he hit my wife with the metal rod while asking her to give him the two Cell Phones and my wife fell down. The 2nd accomplices pushed me dipped their hands into my pockets and took away MK2,050.00. Then, the accused jumped into a brick fence and was caught by guards working inside the brick fence. Then, we took the Defendant to Limbe Police station. My Cell Phone which was recovered is now at Limbe Police station'. In cross examination he added that, 'At the time you approached us, I put my one touch Cell phone on my laptop bag and got three Cell phones from my wife's hands. The two accomplices are the ones who stole MK2,050.00 from me'.

The third prosecution witness was Detective Sub Inspector Zintambila. He stated that, 'I know the accused. On 2nd June 2021, when we received a complaint from Mrs Mary Julius, aged thirty-five, Kandiwo village, T/A Kapeni, Blantyre. She said that at the time she was with her friend Dyson S. Kambalame they were coming from Chiwembe to collect a child from a certain Nursery school and on their way, they met up with the suspect and his friends who robbed them of four Cell Phones and MK 2,050.00 cash. Three Phones were recovered and the third one was damaged and the fourth one was not recovered. They called for help from well-wishers and people around assisted them to arrest the suspect and between him to Limbe Police Station, we charged it cautioned him. (PW 3 shown items) this is one of the cell phones recovered from the Suspect and two cell phones were given back to the complaint (Mary Julius). In cross examination he stated that, 'At the time the offence was committed they stole four Cell Phones from two Complainants (Two from each of them)'.

The court entered a finding of a case to answer and the accused convicts gave in evidence as below.

b) The Defence Evidence

The convict was the only defence witness. He stated that, 'It was on 2nd June 2021 before I left home my friends Adam and Steve) came home and I told them that I am not selling charcoal because there is a scarcity of the charcoal because transporters are being stopped from transporting them. I left home for a factory at Chiwembe to look for a job and found a car for YC full of garbage to throw away and they asked me to help them offload and they paid me K2,000.00. I proceeded to Limbe but on my way, I stopped at a Shebeen then Adam and Steve arrived and I left the Shebeen together with them. On the way, we saw a man and a woman seated and Adam told us that the man was owing him some money. When Adam got there, he just picked up Phones that were dangling on handbag and he gave the phones to me as Adam spoke to the man and Steve got hold of the woman and walked towards a brick fence. Then, I saw Adam and Steve running for their dear lives without uttering a word to me. Then, the man picked up a metal and assaulted my left leg but I denied allegations that I had conspired with them to rob them of their phones. I indeed told him that I know the two boys and we were together but that I did not know that they wanted to rob them of their Phones. In the course of discussions, one man holding a bible inquired and I gave him the Phones and gave them back to the owners. The three people came and inquired, they began assaulting me and I ran for my dear life, the owners shouted / screamed for help and then, I got apprehended by well-wishers and I was gashed by a stone and a machete. They took me to Limbe Police station and I identified the Complainants. On the same night, the police and I went to houses for Adam and Steve but we did not find them for they had moved homes. The police took a statement from and showed me one of the stolen phones. In cross examination he added that, 'Yes, I remember admitting the first charge but the Court entered the plea

not guilty because I denied to have stolen the money but the phones. I know that the other boys who are at large, I am their leader. I denied having taken the phones from the woman from her breasts. I remember that the woman complained that I assaulted her with a metal bar on her butts. I remember that my other two friends who are at large wore masks on this day but I was not surprised because nowadays the Corona virus, people are putting on masks. The two friends put on the normal masks and syndicates. Yes, I remember that after snatching the phones, I ran into an unfinished fence where I was apprehended and I asked them questions based in this event. I remember that I robbed the woman and my two friends robbed the man. I did not have common intention with the other two friends. Yes, my two friends ran away and I remained at the crime scene but I did not ask them to go together with me to Limbe Police station. Yes, I started running because people began assaulting me. I did not ask the complainants when they testified that I was busy discussing with them. I came to know on the material day and we have never quarrelled before'. In re-examination he added that, 'It is not true that I assaulted the woman and I was also not the Master of the other two accomplices who are still at large. It is untrue that I ran away into an unfinished brick fence and I was assaulted by men from a boys' quarter which was nearby'.

3. Issue for Determination

This court has to determine the propriety of the conviction and sentence.

4. Analysis of Law and Evidence

a) Soundness of the Conviction in Law?

The convicts were convicted with robbery under section 300 as read with section 301(2). Under section 300 of the Penal Code, robbery is defined. Simply put a theft which involves violence or threats of violence. In section 301(2) of the Penal Code, where the one is armed or in company of others during the robbery the sentence is life imprisonment. The question it was the offence

committed and was it committed by the convict? The commission of the offence is clear from the evidence of the first and second witnesses. This was the finding of the lower court. At page 17 of the lower court judgement it is recorded that, *'the two complainants positively identified the defendant herein as the one who robbed them of their four cell phones and mk2,500 cash in broad day light. He was not putting on a mask unlike his other two conspirators who put on face masks to disguise their faces. Further, when apprehended, the defendant was found with three of the four stolen cell phones right at a stone throw distance from the crime scene. ...there is overwhelming evidence as to the guilt of the defendant in respect of the offence herein for he was caught red handed by well-wishers in a nearby unfinished brick fence and also that three of the four cell phones were found on him.'* This court agrees with the finding of the lower court. The conviction is sustained there being evidence beyond reasonable doubt of the convict's identity and participation in the crime.

b) Is the sentence proper in law?

The convict was sentenced to two counts of robbery as he robbed the first and second prosecution witnesses. The convict was sentenced to 10 years and 9 years on the two counts of robbery. During the hearing for consideration of sentence enhancement, it was argued that the accused is youthful at 20years old; and is a first offender. The aggravating factors were that the offence is common; violence was used; some of the stolen items were not recovered; the offence was committed in the company of others and was planned. It is this court's view that in serious offences the fact that one is a first offender and youthful will only be considered to a limited extent in order to balance the legal requirement that a sentence should consider rehabilitation of the offender. Otherwise, the aggravating factors show how ruthless the convict was. In addition to those spelt out by the State and defence, this court observes as aggravating the violation of the first prosecution privacy. The convict put his hand inside her camisole and struck her with a rod in the presence of her partner. This couldn't have

been more degrading to the second prosecution witness. He was helpless to defend his partner. The court is guided by sentencing trends too. This simply brings consistency in sentencing. The defence has cited a number of cases where a sentence of 7 years was meted out such as Republic v Anthony Banda Confirmation Case No 14 of 2015. This court is of the view that the robbery was flat out having been carried out during broad day light. The victims were a target. This shows the convict was fearless and new exactly what he was doing. There was no regard to think that they would be caught just to prove that they had a clear exit plan. The victims were personally violated. The appropriate sentence should be 12 years for each count. The sentences are to run concurrently. Any aggrieved party has the right to appeal on both conviction and sentence.

Pronounced this 6th day of December 2022 at BLANTYRE.


R.M CHINANGWA

JUDGE