



**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CRIMINAL DIVISION**

**CONFIRMATION CASE NO. 518 OF 2021**

***Being Criminal Case No. 257 OF 2021, SRM Court, Limbe***

**THE REPUBLIC**

**V**

**CHISOMO JIVA.....CONVICT**

**Coram: JUSTICE R. M CHINANGWA**

Kulesi Public Prosecutor

Kumitengo Legal Aid Advocate

Convict Present

Amos Court Clerk/ Official Interpreter

**ORDER ON CONFIRMATION**

**1. Introduction**

The convict was charged and convicted with the offence of armed robbery contrary to section 301(2) of the Penal Code. Upon hearing the witnesses in the case, the lower court sentenced the convict to 72 months imprisonment with hard labour. Below is the evidence that was before the court.

**2. The Evidence**

**a) The Prosecution Evidence**

The first prosecution witness was Alinafe Kachitowi. She stated that, 'I know the accused because I saw him on 9<sup>th</sup> September, 2020 at Chilomoni mosque. On this day in the month, my mother sent me to collect bags for my aunt. Colleges were closed due to COVID 19 virus. Around noon I decided to get back home, when I was passing the mosque, somebody was passing by. I only met the accused. He greeted me, I proceeded with my journey but he stopped me. He asked where I stay. He keeps on asking me several questions it was bad. I said I had no time.

He offers me a bottle of water. I later answered his questions. He asked if I stay at Nthukwa. I said I am not the girl. He asked me the faculty I was pursuing, I told him that I am pursuing mental health. I told him that I don't have a boyfriend in Zambia (Nthukwa). He said I stabbed his sister back, I quarrelled with her for a man. He said his sister should come to see it if I was the one who stabbed her. I followed him up to Eagles church. He told me to wait him. He later came back. He asked if I had Mpamba or Airtel money Pin. I had a cell phone in my bag. He looked for surgical implements. I was scared. I surrender my cell phone to him. I had already switched it off. He took it for charging. I tried to resist him from taking it. He threatened to kill me. He said he want to charge it. He produced a pestle and a knife. The knife was red and blue. He said it would not be a problem to kill me because it was not his first time to kill people. I was restless. He disappeared. I got chance to escape. I screamed for help. Students came. They did not find the accused when they run after him. I was thinking properly. I had personal issues at home as since I was just week and idle. The value of the cell phone is K75,000.00. I reported the matter to Chilomoni Police Station. The cell phone is not yet recovered. The accused person wore short jeans, sports shoe (red), red jersey and a hat. I was called to go to Chilomoni Police at 7:30 am to identify him. The accused says he can give me money to buy the cell phone. I will only accept if he handles the money to me'. In cross examination she added that, 'We were supposed to return to the college after 3 weeks. Nobody passed him when we were discussing. You ...to scare me. You said you would kill me if I had resisted to surrender the cell phone to him. You did not would me. You threatened me. One boy ran after you. You took off your shirt to take the knife to either stab me or rape me. You came to me in a polite way as someone, I followed you. There is a mosque where we stood. There are also houses but people were not passing. It was today when you when you mentioned to be a son'.

The second prosecution witness was Detective Sub Inspector Bakili. He stated that, 'It was on 10/09/2020 when PW1 lodged a complaint against a male person. She said the person is tall, slim, with a red ...He complained that she met the man on 09/09/2020 at Shoppers grocery shop. She said the man robbed her of Techno pop 2 cell phone valued K75, 000.00. We have been receiving complaints against the described appearance. Hence, we sent W1 messages to all Police formation in Blantyre district. Hence in May (end) 2021 when Ndirande Police arrested the accused herein. He was armed with a toy shot object which he attempted to rob a certain girl in Ndirande Township. On 27/05/21<sup>he</sup> he took the accused from Ndirande to our formation for our victim to identify him. Pw1 managed to identify the accused. She managed to identify the toy shown. D1 Sergeant

Kondwerani insisted in investigating the matter. He obtained a CS and EA from the accused. The accused voluntarily gave statement and I was present when D/Sgt Kondwerani obtained CS and EA from the accused. I witnessed the records of the accused's caution statement and evidence of arrest'. In cross examination he added that, 'The value of the cell phone you robbed me is K75, 000.00'.

The court proceeded to enter a finding of a case to answer. The accused exercised his right to remain silent. The court found the accused guilty and was convicted on the above evidence.

### **3. Issue for Determination**

This court has to determine the propriety of the conviction and sentence? The State ought to prove beyond reasonable doubt that the crime was committed and that it was committed by the accused. In addition, the court has to met out an appropriate sentence.

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

#### **a) The Conviction**

The convict was convicted of armed robbery. This at law is theft using violence which involved use of weapons. The case only had two State witnesses. The victim gave her side of the story having encountered the convict. In summary her story is that she met the convict at around noon and using a knife the convict was able to get away with her phone. In the caution statement the convict stated that, *'I remember that I met a girl. I told her that she was flirting with another girl's partner. Whilst we were on the road, I asked her to give me her phone so that I look at the pictures. When she gave me the phone I went around a house and ran away with the phone'*. It is this court's view that the commission of the crime was proved having in mind that the victims phone went missing. The victim's story was very vivid. She explained a lot of detail of what had transpired. The next question pertains to the identity of the convict. The Turnbull guidelines on identification come to mind. In **Republic v Banda and another** [1995] 1 MLR where the Turnbull guidelines were applied, the court is first supposed to warn itself of the dangers of a conviction based on identification evidence. Secondly, *'the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in anyway, as for example, by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long*

*elapsed between the original observation and the subsequent identification to the police. Is the convict the person who committed the offence?* The victim's story when the convict approached her is similar to that narrated by the accused in the caution statement that is the convict had accused the victim of flirting with someone's partner. Secondly, the victim had quite a conversation with the convict who according to the facts was unmasked during broad daylight. The victim painted a clear picture of what happened. The victim had been called to the police station to identify the convict which she did. The court finds the conviction by the lower court proper in law.

#### **b) The Sentence**

The offence of armed robbery attracts life imprisonment. During hearing on consideration of enhancement of sentence the factors in mitigation raised were that the accused is a first offender and youthful at age 24. On the other hand, the aggravating factors are that the offence is common and serious offence; violence was used; the convict was armed and there was no recovery of stolen items. The sentencing trend in around 2008 for robbery is on average 7 years: Republic v Wilson Confirmation Case Number 70 of 2008; Republic v Kasondo Confirmation Case Number 447 of 2007. Currently, the sentencing trends have been increased depending on the circumstances in which the crime has committed. In **Republic v Happy Banda** Confirmation Case Number 246 of 2022, a robbery committed in a group and armed with a panga knife attracted 14 years imprisonment. Indeed, it is a sentencing principle that a convict has to be given a chance to rehabilitate whilst punishing the convict for the wrong committed. The court is also mindful of the fact that during sentencing the court considers apart from the convict; the effect of the crime on the victim, the deterrence to other would-be offenders. In a robbery the punishment pretty much dwells on the violence used against the person which threatens the sanctity of life. Armed robbers go out prepared to commit crime. This court is of the view that a sentence of 10 years will be appropriate for the convict.

#### **5. Finding**

This court confirms the conviction and enhances the sentence to 12 years imprisonment with hard labour. Any aggrieved party has the to appeal on both conviction and sentence.

Pronounced this .....day of .....2022 at BLANTYRE

  
**R.M CHINANGWA**

**JUDGE**