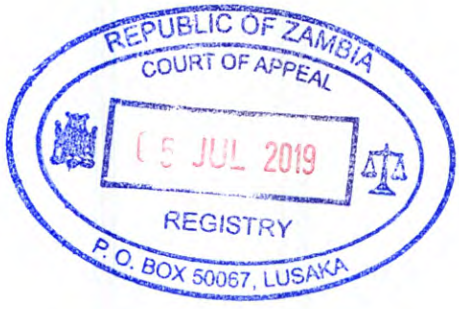
IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

Appeal No.01/2019

B E T W E E N:



KENNEDY MUNGAILA APPELLANT

AND

THE PEOPLE RESPONDENT

CORAM: Mchenga DJP, Chishimba and Mulongoti, JJA

On 23rd April 2019 and 5th July 2019

For the Appellant: D. Makinka, Legal Aid Counsel, Legal Aid Board
For the Respondent: A.K. Mwanza, Senior State Advocate, National Prosecution Authority

---

J U D G M E N T

Mchenga, DJP, delivered the judgment of the court.

Cases referred to:

1. Rahim Obaid v The People (2) Nadehim Quasmi v The People [1977] Z.R. 119
2. Nelson Banda v The People [1978] Z.R. 300
3. Director of Public Prosecutions v Risbey [1977] Z.R. 28
4. Jutronich, Schutte and Lukin v The People [1965] Z.R. 9
5. Richard Sinkonde v The People, Appeal No. 109 of 2018

Legislation referred to:

1. **The Penal Code, Chapter 87 of the Laws of Zambia**
2. **The Criminal Procedure Code, Chapter 88 of the Laws of Zambia**
3. **The Court of Appeal Act, Act No. 7 of 2016**

Introduction

1. This appeal emanates from the judgment of the High Court (M. Chanda J.), delivered on 27th September 2018. By that judgment, the appellant's appeal against his conviction by the Subordinate Court (Hon. R. Chikalanga) for the offence of theft of public servant, was dismissed. In addition, the High Court increased the sentence imposed by the trial magistrate from 12 months to 4 years imprisonment with hard labour.

History of the case

2. The appellant initially appeared in the Subordinate Court (Hon. D. Chimbwili), on a charge of Theft by Public Servant on 14th September 2010. He denied the charge and four prosecution witnesses were called. The witnesses called were Esther Siamasusu, Goodwill Muleya, Daniel Kambala and Elijah Zyambo.

3. At the end of that trial, he was convicted and sentenced to 2 years imprisonment on 28th February 2011. He appealed against the conviction and on 1st February 2012, the High Court (Chashi J, as he then was) set aside the conviction and ordered a retrial.

The re-trial

4. On 31st August 2016, the appellant re-took the plea before a different magistrate, but on the same charge of theft by public servant contrary to **sections 272 and 277 of the Penal Code.** The particulars of offence, as in the initial trial, alleged that on 19th May 2010, at Choma, in the Choma District of the Southern Province of the Republic of Zambia, being a person employed in the public service as Clerk of Court, he stole K3,800 cash the property of Esther Siamasusu which came into his possession by virtue of his employment.

5. He denied the charge and the matter proceeded to trial

Evidence in the re-trial

6. In September 2009, Jacob Muleya, Goodwill Muleya's father was ordered to pay K3,800 to Esther Siamasusu.

They were given a month to pay. Within the time they were allowed to pay, Goodwill Muleya took the money to the appellant who received it. He did not give him a receipt, he told him that they were out of stock and he should come back later.

7. In due course, bailiffs visited their homestead and seized 10 heads of cattle on the ground that they had not paid the K3,800 fine. He approached the appellant who agreed, in the presence of other court officials, that the amount had been paid. The appellant also wrote a letter, which he signed, setting out how he proposed to pay back the money. The letter was produced in court.

8. Daniel Kambala, the bailiff who witnessed the signing of the letter, was taken ill soon after he took the oath. He subsequently died before he could testify.

9. The appellant denied writing or signing the letter. He also denied receiving any money from Goodwill Muleya. He told the trial magistrate that his only role in the case was that of an interpreter. He told the court that the animals were seized because when judgment was

entered in favour of Esther Siamasusu, Goodwill Muleya's father failed to pay the judgment sum.

Trial magistrate's findings in re-trial

10. The trial magistrate accepted Goodwill Muleya's evidence and found that the appellant received K3,800 from him. He also found that since the money was paid into court, it was not stolen from Esther Siamasusu but from the judiciary, the appellant's employer. He convicted the appellant of the charge of theft by public servant and sentenced him to 12 months imprisonment.

Appeal to the High Court after re-trial

11. The appellant advanced 3 grounds in support of his appeal to the High Court. He argued that the case should not have proceeded on a charge of theft by public servant because no one from the judiciary complained of the theft. In addition, in the absence of evidence of who filed the complaint at the police station, he should not have been convicted. Finally, he argued that the letter he denied making or signing, should not have been relied on to determine his guilt.

12. After reviewing the evidence, the High Court judge found that there was sufficient evidence before the trial magistrate to warrant the appellant's conviction on a charge of theft by servant. She reviewed the testimony of Esther Siamasasu, Jacob Muleya and Daniel Kambala and concluded that it established that he received the K3,800 and signed the letter confirming receipt. He then undertook to pay back the money.

13. On the claim that there was no complainant, she referred to **section 90 of the Criminal Procedure Code** and opined that anyone could have filed the complaint and it was therefore immaterial that evidence was not led of who complained. The appeal against conviction was then dismissed for lacking merit.

14. The judge then invoked **section 327 of the Criminal Procedure Code**, which allows a judge to review the sentence even when the appeal is only against conviction. She considered the principles set out in the case of **Berejena v The People** and indicated that the sentence came to her with a sense of shock for being

totally inadequate. It was increased from 12 months to 4 years.

Grounds of appeal before the Court of Appeal

15. The sole ground of appeal is that the High Court judge erred when she determined the appeal on the basis of the proceedings of the original trial, when another judge, of equal jurisdiction, had already dealt with that record of appeal.

16. In support of the sole ground of appeal, Mr. Makinka referred to the cases of **Rahim Obaid v The People (2) Nadehim Quasmi v The People** and submitted that another High Court judge having quashed the appellant's conviction in the original trial and ordered a retrial, the judge in the court below had no basis to determine this appeal on the basis of the record of proceedings in the first trial. We were urged to set aside the sentence of 4 years imprisonment and remit the record back to the High Court for the re-hearing of the appeal before a different judge.

17. Mrs Mwanza conceded that the judge in the court below, erred when she relied on the evidence in the original trial. However, she submitted that even if she had only considered the evidence in the second trial, she would have still upheld the conviction.

18. Mr. Makinka's reply was that the trial magistrate heavily relied on the disputed letter. The appellant having denied receiving the money and disputed signing the letter, the prosecution should have led evidence proving that it was the appellant's signature that was on it.

19. As was rightly conceded by Mrs. Mwanza, it was erroneous for the Judge on appeal to take the proceedings of the original trial, into account, when hearing the appeal before her. The fact that it was the case is evident from her reference to the testimony of Esther Siamasasu and Daniel Kambala, as these two witnesses did not testify in the second trial. Notwithstanding, the issue really is whether the evidence in the second trial did prove the charge. This

deal with and there is therefore no need for us to send the case back to the High Court for the rehearing of the appeal.

20. The only witness who gave evidence that implicated the appellant in the second trial was Jacob Muleya. He told the trial magistrate that he paid him the judgment sum. He also told the trial magistrate that following the seizure of the animals, and upon being confronted, the appellant acknowledged receipt of the money and wrote the letter setting out how he was going to pay it back.

21. In the case of **Nelson Banda v The People** it was held, *inter alia*, that:

> **(i) There is no rule in our law that the evidence of more than one witness is required to prove a particular fact.**
>
> **(ii) In any given set of circumstances, where there is evidence that more than one person witnessed a particular event, if the happening of the event is disputed when first deposed to and the prosecution chooses not to call any of the other persons alleged to have been present, this may be a matter for comment and a circumstance which the court will no doubt take into account in the decision as to whether the onus on the prosecution has been discharged. …….**

In this case, the bailiff who witnessed the signing of the letter was called but died before he could give his evidence. That aside, it was still competent for the trial magistrate to determine the case on the basis of the credibility of the testimony of Jacob Muleya because he is the person who paid the money to the appellant. We are not persuaded by Mr. Makinka's argument that evidence should have been led proving the signature because the trial magistrate did not heavily rely on the letter, as he claims.

22. In the case of **Director of Public Prosecutions v Risbey** it was held that:

> "..... **where the issue is one of credibility and inevitably reduces itself to a decision as to which of two conflicting stories the trial court accepts, an appellate court cannot substitute its own findings in this regard for those of the trial court"**

In this case, the trial magistrate found Jacob Muleya's account of what transpired more credible than that of the appellant. Having examined the record and the judgment in particular, we find no basis on which we can fault him.

We find no merit in the appeal against the conviction and we dismiss it.

23. Coming to the sentence, we equally find no basis for tempering with it. In the case of **Jutronich, Schutte and Lukin v The People**, the Court of Appeal held that:

> **"In dealing with appeals against sentence the appellate court should ask itself these three questions:**
> **(1) Is the sentence wrong in principle?**
> **(2) Is the sentence so manifestly excessive as to induce state of shock?**
> **(3) Are there exceptional circumstances which would render it an injustice if the sentence was not reduced?"**

We do not find the 4 years sentence imposed by the High Court judge to be either wrong in principle or manifestly excessive as to induce a sense of shock in us. We uphold it.

Statutory judgment

24. In the case of **Richard Sinkonde v The People**, the appellant, a public servant employed in the Ministry of Justice, was convicted of the offence of theft by public servant, we held that **Section 171(1) of the Criminal Procedure Code**, made it mandatory in such a case for

the trial magistrate to enter statutory judgment in favour of Attorney General for the amount stolen. It follows, that having convicted the appellant for the subject offence, there was a misdirection when the trial magistrate failed to enter statutory judgment.

25. **Section 16(5) of the Court of Appeal Act** empowers this court to impose an order that the trial court could have imposed on the conclusion of a trial. Consequently, we enter statutory judgment in the sum of K3,800 in favour of the Attorney General.

Verdict

26. The the appeal against conviction fails. The increase in the sentence, from 12 months to 4 years, is upheld. Further, statutory judgment in the sum of K3,800, is entered in favour of Attorney General.

C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT

F.M. Chishimba
COURT OF APPEAL JUDGE

J.Z. Mulongoti
COURT OF APPEAL JUDGE