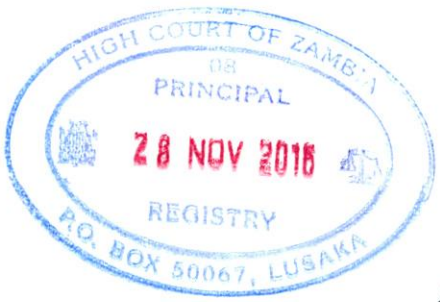
IN THE HIGH COURT FOR ZAMBIA **HPA/19/2016**

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Criminal Jurisdiction)



B E T W E E N :

FLORENCE NAMUKONDA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Before the Honorable Mrs. Justice M. Mapani-Kawimbe

For the Appellant	:	*Mr. K Muzenga, Deputy Director, Legal Aid Board*
For the Respondent	:	*Mrs. D.B. Shiyunga, State Advocate, National Prosecution Authority and Mr. C. Ng'oma, State Advocate, National Prosecution Authority*

J U D G M E N T

Case Authorities Referred To:

1. *Peter Kasanda v The People (1978) Z.R.190*
2. *Wilson Makasa Kapasa v The People (1980) Z.R. 144*
3. *Ngoma v The People (1976) Z.R 82*
4. *Haonga and Others v The People (1976) Z.R. 200*
5. *Alubisho v The People (1976) Z.R. 11*

Legislation referred to:

1. *Penal Code, Chapter 87*

The Appellant appeared before the Subordinate Court charged with the offence of theft contrary to Section 272 of the Penal Code. The particulars of the offence alleged that on 26th June, 2016 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia the Appellant stole cash amounting to KR 109, 350.00 (US$20,250) the property of Remezo Emeline. The Appellant was convicted and sentenced to three years simple imprisonment.

The appeal is against sentence and conviction. Two grounds of appeal have been advanced and they are as follows:

1. *The Learned trial Court erred in law and in fact when it convicted the Appellant of the offence of theft when the matter was a purely failed business transaction whose recourse, the complainant could properly have obtained under a civil suit.*

2. *In the alternative to count one, the Learned trial Court misdirected itself in law and in fact when it sentenced the Appellant to 3 years imprisonment when there were a lot of mitigating factors on the record especially that she was a first offender.*

The Appellant's conviction was based on the evidence of five prosecution witnesses, namely; **Emeline Remezo (PW1), Zephaniah Mbewe (PW2), Jowy Mweemba (PW3), Victor Mulongoti (PW4)** and **Jackson Kaputula (PW5).**

The brief facts are that sometime in June, 2012, the Appellant and PW1 entered into an agreement in which, the Appellant undertook to buy maize for PW1 from the Food Reserve Agency (FRA) in the Northern region. PW1 met the Appellant through her friend Sophia. After buying the maize, PW1 intended to export the maize to Burundi where she had some business. After finalising the agreement with the Appellant, PW1 deposited a sum of US$ 20,250.00 into the FRA account using the Appellant's company, Florina Mining. The transaction was confirmed by a deposit slip. PW1 testified that she gave the Appellant a copy of deposit slip and paid her K1,500.00 as a down payment of her commission.

PW1 awaited the loading list from the Appellant. However, in July 2012 she travelled to Burundi but exchanged her contact details with the Appellant. She told the trial Court that there was

no communication between her and the Appellant, until she called her. The Appellant told her that there was no maize in the Northern region in July 2012, and that maize was available in Kazungula. PW1 refused to get the maize from Kazungula, because it was too far from the Northern region, which she preffered. The Appellant promised to change the loading list at FRA, but was told by the FRA that there was no maize in the Northern region.

PW1 asked the FRA to refund her money, which was deposited into the Appellant's account. PW1 testified that the FRA only deposited K39,000.00 and when she inquired from the FRA, she was told that some maize had been collected by some people in Kazungula. PW1 told the Court that the Appellant did not give her the K39,000.00 which the FRA refunded, but instead paid her small amounts of money with a promise that she would pay back the rest. In frustration, PW1 decided to report the matter to the police. The Appellant was apprehended.

PW2 testified that a company called Florina Mining Company (the client) deposited US$ 20,250 into the FRA account on 20th

March, 2012 for the purchase of white maize. Later the FRA issued a delivery order and Florina Mining loaded some maize before it ran out. After loading three truck loads of maize the Client asked for a refund. The Client was refunded money equivalent to the maize not collected. The client did not want to collect maize from Janda in Kazungula, where the FRA had more maize stock.

PW3's evidence was that the Appellant and Sophia Nyandwa Phiri approached him sometime in August, 2012 over a maize contract the Appellant had with the FRA. In that contract, the Appellant was allowed to buy maize weighing 150 metric tones, which was supposed to be exported to Burundi. The Appellant told PW3 that she did not want to export the maize at Janda in Kazungula to Burundi because she would not make a profit.

The Appellant showed PW3 the delivery note in her company's name Florina Mining and told him that she was looking for a local buyer. PW3 told the trial Court that he called a Mr. Chamatele at the FRA who confirmed the Appellant's documents. PW3 and the

Appellant then executed a contract in which PW3 was to pay the Appellant K124,000.00 for 150 metric tones of maize.

PW3 paid the Appellant a deposit of K16,000.00. He then went with trucks to Kazungula where he only loaded 90 metric tones of maize on 24th and 27th July, 2012, because the FRA ran out of maize. On 27th July, 2012, PW3 deposited a further K18,000.00 into the Appellant's account. After about four days the FRA called PW3 to collect the third load of maize from Janda FRA depot. PW3 told the Court that he paid the Appellant a total of K 75,000.00. PW3 testified that after sometime he was approached by police officers regarding his maize transaction with the Appellant.

PW4 a banker at Finance Bank testified that officers from the Drug Enforcement Commission went to the bank to search the FRA Bank account on 17th June, 2013. The account showed that PW1 deposited cash on 20th June, 2012 into the FRA bank account. PW5's testimony was that he received a complaint on 6th May 2013 from PW1. His investigation confirmed that PW1 deposited money

into the FRA bank account. The Appellant told him that she loaded three truck loads of maize from the FRA depot in Janda Kazungula, which she sold to another person.

At the close of the prosecution case, the Appellant was found with a case to answer.

The Appellant gave sworn evidence and called four witnesses. The Appellant confirmed that she met PW1 through her friend Sophia. Her company Florina Mining had been given a license by the FRA to buy maize. She entered into a contract with PW1, so that she culd buy maize on her behalf, She told the trial Court that she and PW1 deposited US$20,250 into the FRA account and she followed up all the documentation with the FRA. She also told the Court that the FRA did not have enough maize in the Northern region but at Janda depot in Kazungula.

The Appellant testified that PW1 refused to load maize at Janda. In unclear circumstances, she told the trial Court that she gave Sophia PW1's money to buy her maize. She testified that she received a call from an unknown person from Kasama who warned

her that Sophia was untrustworthy. However, she had already given PW1's money to Sophia.

The Appellant testified that Sophia sold the maize at Janda. She called PW1 to collect K19,000.00, from her, which she did. Sophia and the Appellant's workers also received a portion of that money. The Appellant testified that Sophia did not pay PW1 all her money and she volunteered to pay her the balance. The balance was K50,000.00. The Appellant agreed with PW1 that she would pay it back in installments. The Appellant made some payments to PW1 amounting to K43,000.00 leaving a balance of K77,000.00.

Aaron Sinkonde DW2 testified that the Appellant asked him to deliver K1,700.00 to PW1. He met the Appellant along Cairo Road. However, he did not know the reason that the Appellant asked him to pay PW1. **DW3 George Nkonde** testified that he was given money by the Appellant to give PW1 on three occasions. At their first meeting he gave PW1 K3,500.00, then K800.00 and later K400.00. On all three occasions DW3 testified that PW1 refused to acknowledge receipt of the money. **DW4** was **Sofia Nyendwa Phiri**

who testified that the Appellant gave her K11,000.00 to buy her maize because she had been transferred outside Lusaka. The Appellant also gave other people some money to buy her maize. She also testified that the Appellant had some money which she wanted to refund PW1, although she never witnessed the transaction between the Appellant and PW1.

DW5 was **Fredrick Ngosa** who was the Appellant's former neighbour. He testified that the Appellant asked him to give PW1 K1,500.00, which PW1 received and signed for. He did not know how much money the Appellant owed PW1.

Learned Counsel for the Appellant and Respondent were given an opportunity to file Heads of Argument. By the time I started writing this judgment only Mr. Kelvin Musenga Learned Counsel for the Appellant had filed Heads of Argument dated 29th September, 2016, which he relied on. The essence of his submissions was in ground one that the Appellant and PW1 were involved in a business transaction which failed. As such PW1 could have had an adequate remedy under a civil suit as opposed to criminal redress.

Counsel submitted that the Appellant and PW1 agreed that the Appellant would pay back the money owed to PW1 and as such the Appellant did not steal PW1's money. He cited the case of **Peter Kasanda v The People**[1] which I find is extremely relevant to the principal of false representation but is of no value in this appeal. Counsel however, quite advisedly cited the case of **Wilson Makasa Kasapa v The People**[2] in which the Supreme Court agreed with the trial Court's definition of theft. Counsel further cited the case of **Ngoma v The People**[3], which I found rather unhelpful.

Counsel went on to submit that the offence of theft depended on the manner in which an accused person was alleged to have taken possession of money or property. He argued that PW1 voluntarily deposited money into the FRA account, in favour of the Appellant's Company Florina Mining, after a business transaction or agreement. Counsel argued that the business transaction which was created by the parties later failed.

It was Counsel's submission at the time of the trial, the Appellant had paid back PW1 K43,000.00 out of K120,000.00

leaving a balance of K77,000.00. Counsel insisted that the business arrangement between PW1 and the Appellant got frustrated when PW1 was told that maize was not available in the Northern region. As such PW1 had recourse for the failed transaction through a civil suit. Moreover the Appellant was in the process of refunding PW1 before criminal proceedings were instituted.

Counsel argued that the trial Court's attempt to spin the Appellant's case into a criminal matter at page J4, of the judgment in the last paragraph quoting lines 5 to 7 of the record of proceedings as follows:

> ***"It is a fact that instead of the said money to be deposited into PW1's account, the accused diverted the money into her account of this case",*** *(misrepresented the position at law).*

Learned Counsel for the Appellant further argued that the trial court did not weigh the evidence of PW1 against that of the Appellant and her witnesses to determine which one it believed, and providing reasons for so doing. He argued that at page 5 of the record of proceedings, PW1 denied that she received any money from the Appellant which was a lie, while at pages 6 and 7 of the

record, PW1 in cross examination, admitted that she had received some money from the Appellant. Counsel argued that the weight of PW1's evidence having lied on a material aspect affected her credibility as a witness. He called in aid the case of **Haonga and Others V The People.**[4]

Counsel submitted that because the evidence of PW1 was untrue, the only recourse for the Court was order a retrial of this case before a different Magistrate, so that fresh evidence could be taken and findings properly made in that regard. He prayed to the Court to allow the appeal, quash the conviction, set aside the sentence, acquit the Appellant and set her at liberty.

In the second ground of appeal, learned Counsel submitted that the learned trial Court misdirected itself in law and in fact when it sentenced the Appellant to three years imprisonment, when there were a lot of mitigating factors on the record, especially that she was a first offender. He contended that if this Court was of the view that the offence of theft was proved to the required standard, then the sentence of three years imprisonment was manifestly

excessive in the light of the fact that the Appellant was a first offender, who had already paid back part of the money in question. Counsel conceded that even though a defense was not created by the fact that a person who stole money intended to pay it back, he argued that one who refunds the whole or a portion thereof, accords him or herself very strong mitigating factor, viz sentence.

Counsel further, argued that the Appellant had espoused a strong mitigating factor and referred the Court to the case of **Alubisho v The People**[5] where the Supreme Court gave guidelines to appellate Courts on appeals against sentence as follows:

(i) ***With the exception of prescribed minimum or mandatory sentences a trial court has a discretion to select a sentence that seems appropriate in the circumstances of each individual case. An appellate court does not normally have such a discretion.***

(ii) ***In dealing with an appeal against sentence the appellate court should ask itself three questions:***

- ***a) Is the sentence wrong in principle?***
- ***b) Is it manifestly excessive or so totally inadequate that it induces a sense of shock?***
- ***c) Are there any exceptional circumstance which would render it an injustice if the sentence were not reduced?***

Only if one or other of these questions can be answered in the affirmative should the appellate court interfere.

Counsel argued that while the trial Court acknowledged that the Appellant deserved leniency, it cancelled the leniency when it handed the Appellant a three year sentence, which he contended was wrong, misconceived and unjustified at law. He further argued that the trial Court had the power to consider alternative noncustodial sentences or indeed to consider suspending the sentence altogether or part thereof.

Counsel submitted that there was nothing aggravating in the case which was capable of ruling out a noncustodial sentence, in the light of very strong mitigating factors, namely that the Appellant is a first offender and who has refunded part of the money. He argued that with time, the Appellant would have refunded the whole amount. He further contended that the sentence imposed by the trial Court should come to this Court with a sense of shock and urged the Court to interfere with the sentence. He concluded with a prayer to the Court to allow the appeal on the ground of sentence,

and to set aside the sentence of three years imprisonment and in its place impose a fairer penalty.

Counsel for the Respondent only filed Heads of Arguments on 12th October, 2016 when the Court had directed it to file submissions by 20th September, 2016. By the time Counsel filed submissions I had already substantially drafted the judgment. Suffice to say that the Respondent's heads of argument are on record.

I am highly indebted to Learned Counsel for the Appellant for his industrious research in his submissions. The offence herein for which the Appellant was convicted is created by **section 272** of the Penal Code. It provides thus:

> "***Any person who steals anything capable of being stolen is guilty of the felony termed "theft", and, unless owing to the circumstance of the theft or the nature of the thing stolen some other punishment is provided, is liable to imprisonment for five years.***

What constitutes theft is defined in **section 265 (1)** of the Penal Code as follows:

"A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing."

Subsection (2) of **section 265**, quoting the relevant paragraph provides that:

"A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with any of the following intents, that is to say:

(e) in the case of money, an intent to use it at the will of the person who takes or coverts it, although he may intend afterwards to repay the amount to the owner.

Subsection (5) of **section 265** is equally relevant and provides that:

"A person shall not be deemed to take a thing unless he moves the thing or causes it to move."

Theft occurs when a person falsely and without right takes anything capable of being stolen, or falsely changes for his or her use the thing that the person has stolen. Subsection (2) of Section 265 of the Penal Code sets a very important criteria in that where money is concerned, there is no defense created by the fact that the

person who has stolen money intends to repay the owner. The offence of theft requires that money is taken without the consent of the owner.

I have carefully considered the record and the evidence that was adduced by the prosecution and defense. It was argued in the first ground of appeal that the Appellant and PW1 were involved in a business transaction, which failed and as such PW1 would have had an adequate remedy under a civil suit, as opposed to criminal redress. It was also contended that the offence of theft depended on how the accused took possession of the money or property capable of being stolen.

Learned Counsel insisted that PW1 voluntarily deposited money into the FRA account, in favour of the Appellant's company Florina Mining after a business transaction or agreement. In addition, he was spiritedly argued by Counsel that at time of trial the Appellant had paid back K43, 000.00 out of K120,000.00 leaving a balance of K77,000.00.

Although the arguments for the Appellant were very tempting, I have not been swayed by them. This is a case of theft and is revealed by the evidence before Court. In my considered view, the prosecution proved that the Appellant received a refund from the FRA. Further, PW2 confirmed that the FRA only refunded PW1, K39,000.00 because some people picked up 90,000 metric tonnes of maize from its Janda depot in Kazungula. The evidence adduced by the prosecution proved that the Appellant used PW1's money for another purpose, which was to buy herself maize without PW1's approval and later to resale it to PW3 for a profit. I find that the Appellant did not deny that FRA deposited PW1's money back into her company's account.

The evidence of DW2, DW3 and DW5 to the effect that the Appellant asked them to give PW1 money on different occasions proves that the said defense witnesses, were only called to confirm that the Appellant had started repaying PW1 her money. They did not rebut the prosecution evidence that the Appellant converted PW1's money into a use that was not approved by her. It could

well be argued that the Appellant and PW1 were in a business relationship. However, that relationship profoundly changed when the Appellant decided to fraudulently convert PW1's money. The defence that Appellant had begun to pay back PW1's money in installments was no consequence.

I am fortified by subsection (2) of section 265 of the Penal Code which states that where money is concerned, there is no defense created by the fact that the person who has stolen money intends to repay the owner. I am also fortified by the case of **Wilson Makasa Kasapa**[2] where the Appellant was convicted on two counts of obtaining money by false pretences. The Appellant with another pretended to two different complainants that they were able by means of magic to inform them of the people who intended to do them harm. The Appellant succeeded in obtaining sums of money which he promised to return after performing the magic. He failed to return the money. The Supreme Court held that:

> ***"However, as it is quite clear that the complainants did not intend to part with the ownership of the two sums of money it follows that the taking of the money by the appellant was theft. This is what***

was found by the trial magistrate. In his Judgment the trial magistrate said that all there was to it really was stealing through a devised trick which the accused had executed."

In this case, I find that the Appellant devised a trick by not paying PW1 her money so that she could use her money to buy maize, which she sold to PW3. It was also a trick that she accused DW4 her friend of misusing the money after she received a phone call from an unknown person in Kasama. Needless to say that such a call could have been easily traced though mobile service providers and could have persuaded me into a different conclusion. Hence the element of suspense as to the identity of the caller is inconsequential.

What I find rather perplexing is that DW4 who introduced the Appellant to PW1 and arranged the Appellant's meeting with PW3, then became a person who the Appellant was not supposed to trust? This was surely a trick.

I am mindful of the other argument canvassed by Counsel for the Appellant that PW1 lied in her testimony, that she never received money from the Appellant. As such the weight of her

evidence was affected because she lied on a material aspect and was therefore an untrustworthy witness. I have carefully considered the record and find at page 4 of the trial Court's judgment between lines 13-25 that PW1 did deny receiving payments from the Appellant in examination in chief. However, at page 5 in lines 1 - 6,

PW1 conceded in cross-examination that she received payments from the Appellant. In re-examination, PW1 told the Court that the Appellant paid her money back in small installments. In the case of **Haonga and Others v The People**[4] the Supreme Court held *inter alia* that:

> ***"Where a witness has been found to be untruthful on a material point the weight to be attached to the remainder of his evidence is reduced; although therefore it does not follow that a lie on a material point destroys the credibility of the witness on other points (if the evidence on the other points can stand alone) nevertheless there must be very good reason for accepting the evidence of such a witness on an issue identical to that on which he has been found to be untruthful in relation to another accused."***

From the **Haonga** case I take it that a lie on a material point by a witness does not necessarily destroy the credibility of such witness on other points; if the evidence on the other points can

stand alone. I find that PW1's contradictory evidence as to whether or not she paid back some of her money by the Appellant did not destroy her case. After all there was the other independent evidence such as that of DW2, DW3 and DW4 which confirmed that the Appellant made some payments to PW1. The material issue still remained that the Appellant who had converted PW1's money offered the defence that she was in the process of refunding PW1. This is not a defence at all.

Even if I were to find that PW1 lied before the trial Court, there is still potency in the evidence of PW2, PW3 and PW4 that PW1 deposited money into the Appellant's account. Further, I also find corroboration in the evidence of PW3 that the Appellant told him that she did not want to export the maize to Burundi where she would not make a profit. These points of evidence all stranded together fortified PW1's case. I therefore find no merit in the first ground of appeal.

In the second ground of appeal, Learned Counsel submitted that the trial Court misdirected itself in law and in fact when it

sentenced the Appellant to three years imprisonment and did not consider the mitigating factors that the Appellant is first offender who had already paid back part of the money. Counsel conceded that even though it was not a defense that a person who stole money intended to pay back, in a proper theft case, he argued that one who refunds the whole or a portion thereof accords him or herself a very strong mitigating factor, which a trial Court must not ignore when it comes to sentence.

According to section 272 of the Penal Code, the offence of theft carries a maximum sentence of five years. I, therefore, find nothing shocking in the three year custodial sentence handed to the Appellant upon, which I should interfere. I hold that both grounds of appeal have no merit. I dismiss the appeal and uphold the conviction and sentence of the Appellant.

Leave to appeal is granted.

Delivered in open Court at Lusaka this 25th day of November, 2016.

M. Mapani-Kawimbe
HIGH COURT JUDGE