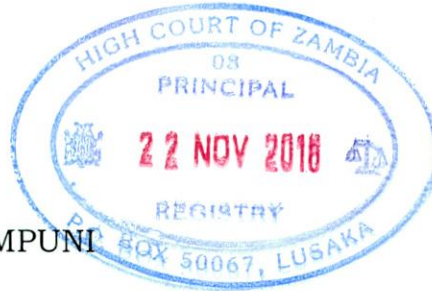


**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Criminal Jurisdiction)

HPA/17/2016



B E T W E E N :

ISABELA KABUKABU MPUMPUNI

APPELLANT

AND

THE PEOPLE

RESPONDENT

Before the Honorable Mrs. Justice M. Mapani-Kawimbe

For the Appellant : *Mr. L.E. Eyaa Messrs, KBF and Partners*
For the Respondent : *Mrs. D.B. Shiyunga, State Advocate,
National Prosecution Authority*

J U D G M E N T

Case Authorities Referred To:

1. *Nkhata and Four Others v The Attorney General*(1966) Z.R. 124
2. *Wilson Masauso Zulu v Avondale Housing Project Limited* (1982) Z.R. 172 (SC)
3. *Stephen Manda v The People* (1980) ZR 119
4. *Manongo v The People* (1981) ZR 152
5. *Dorothy Mutale and Richard Phiri v The People* SCZ Judgment No. 11 of 1997
6. *Mwewa Muroso v The People* (2004) ZR 207
7. *Woolmington v DPP* (1935) 25 Cr App R72
8. *Lunga Kabala and John Masefu v The People* (1981) Z.R. 102 (S.C.)

Legislation Referred To:

1. *Penal Code Chapter 87*

The Appellant was tried and convicted on one count of child stealing contrary to **section 171 (1) (a)** of the Penal Code. The particulars of the offence are that on 12th August, 2013 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia the Appellant forcibly and fraudulently stole a child namely **Purity Prisca Phiri** under the age of sixteen years who was under the lawful care of her parent namely **Ruth Nyirenda**. The Appellant was convicted and sentenced to three years simple imprisonment.

The appeal is against conviction. Three grounds of appeal have been advanced as follows:

1. *The trial Court erred in law in the following findings of facts on which facts she based her conviction:*
 - (a) *That it was at Findeco House that the accused got the baby from PW1 and disappeared with her and PW1 waited for her to come back with the baby from the room she had entered but to no avail.*
 - (b) *That the accused enticed PW1 to release the child to her.*
 - (c) *That the accused fraudulently took the child from its mother.*
 - (d) *That the accused had intent to deprive the mother of her child.*

Yet all the above findings are not based on any independent evidence apart from evidence of PW1 vis-a-vis the evidence of the convict as there was no independent witness during the

arrangement and conversation between the two concerning the child.

2. *The trial Court erred in law and in fact in finding that the prosecution have proved their case beyond all reasonable doubt whilst not all the ingredients of the offence the convict was convicted of was not proved.*

The evidence before the trial Court can be summarized as follows: on 12th January, 2013, **Ruth Nyirenda (PW1)** went to Lusaka city centre to buy shoes with her eight month old baby named Prisca. She was approached by the Appellant who asked if she could allow her to pose as the mother of her baby, because she wanted to get money from her husband, who worked at Findeco House.

PW1 went with the Appellant to Findeco House, where the Appellant got her baby and took her to the man whom she claimed was her husband. The Appellant thereafter disappeared with PW1's baby. After a while PW1 frantically searched for the Appellant and her baby at Findeco House. After her unsuccessful search, she went to Lusaka Central Police Station, where she reported that her child had been taken by the Appellant. After a few days, she received a

call from a police officer at Lusaka Central Police Station telling her to collect her baby.

PW2 was **Inspector Mathew Supher Kamela**, who testified that he investigated the complaint that was lodged by PW1 about her missing child. On 13th August, 2013, with assistance of PW1 he went to Findeco House, where he found the man the Appellant had gone to see. He identified himself as Mario and confirmed that he had seen the Appellant, PW1 and the baby. Mario gave PW2 the Appellant's mobile number. After PW2 conducted a search at the mobile company, the activity report showed that Appellant left Lusaka for Kaoma on 14th March, 2013.

PW2 told the Court that he travelled to Kaoma on 16th March, 2013 with a fellow officer. On 17th March, 2013, PW2 and another officer went to the Appellant's mother's house at ZESCO compound where they found the Appellant and apprehended her. At the time of apprehension, the Appellant's mother informed PW2 that the Appellant told her that she was pregnant in one of their telephone conversations but she never saw her pregnant. She nonetheless

believed her. PW2 testified that they found the Appellant with a bag containing baby apparel, milk, diapers and a blank under-five card. PW2 also told the Court that the Appellant had re-named the child Melissa. He travelled back to Lusaka with the Appellant, the baby and fellow officer. Upon arrival in Lusaka, he contacted the mother of the baby, who collected her from the Lusaka Central police station. Later, PW2 charged the Appellant with the offence of child stealing.

Detective Sergeant Patrick Mulenga testified as **PW3**. He testified that he travelled with PW2 to Kaoma on 16th March, 2013. Further, that they apprehended the Appellant at Kaoma at ZESCO compound on 17th March, 2013. He also testified that they found the Appellant with a bag containing baby apparel and baby food.

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

The Appellant gave evidence on oath and called two other witnesses. She told the trial Court that she met PW1 for the first time at the Lusaka city centre. PW1 told her that she was supposed

undertake a business trip but had nowhere to leave her baby. The Appellant offered to look after PW1's baby at the price of K500.00. She told PW1 that she was travelling to Kaoma, and she allowed her to travel to Kaoma with her baby. To measure her integrity, the Appellant testified that she introduced PW1 to her relative Mario at Findeco House and gave her his contact number. She also gave PW1 her sister's address in Kabulonga, where she had been staying in Lusaka.

After the exchange of contact numbers the duo parted company and the Appellant proceeded to Kaoma with PW1's baby. The Appellant told the Court that she was surprised to receive a phone call from police officers in Kaoma and later to be apprehended on the allegation that she had stolen PW1's baby.

Chester Chiteta Kufwainda testified as **DW2**. He told the trial Court that he met PW1 and the Appellant at Findeco House. The Appellant introduced him to PW1. The Appellant and PW1 did not disclose their business to him. However, the Appellant told DW2 that she wanted him to be a witness in the event that a problem

arose in the business relationship between PW1 and the Appellant. DW2 told the trial Court that police officers approached him on 13th August, 2013 regarding a stolen child.

The defence evidence also included **Susan Banda, DW3** who testified that the Appellant was her sister and had been staying at her house in Kabulonga whilst in Lusaka. The Appellant left for Kaoma on 12th August, 2013 to visit their mother. On 13th August, 2013 police officers went to her residence and asked for her mother's contact number as well as the Appellant. The police officers told her not to make any contact with the Appellant. A few days later, she testified that police officers called to inform her of the Appellant's apprehension that she was at Lusaka Central Police.

The learned trial magistrate found that the prosecution had adduced sufficient evidence to convict the Appellant.

At the hearing of the appeal, Learned Counsel for the Appellant relied on the Heads of Argument filed on 23rd September, 2016. Learned Counsel for the Respondent also relied on the Heads of Argument filed on 28th September, 2016.

The gist of the Appellant's submissions in ground one was that the learned trial Magistrate fell into error when she convicted the Appellant based on PW1's evidence. He argued that PW1's evidence was not corroborated by the other evidence on the circumstances leading to the theft of the child. The elements of evidence contested were that the trial Court did not state her reasons for accepting the evidence of PW1 over the Appellant. More specifically the trial Court's short comings were shown at page 7, paragraph 3, lines 13-16 of the judgment and at page 8 of paragraphs 3 and 4 lines 10-18 of the judgment quoting relevant portions as follows:

- a) *The convict got the baby from PW1 and disappeared with her.*
- b) *That the accused enticed PW1 to release the child to her.*
- c) *That the accused fraudulently took the child from its mother.*
- d) *That the accused had intention to deprive the mother of the child.*

The Appellant contended that these findings of fact were the only considerations that the trial Court took into account when she convicted the Appellant. The trial Court did not consider the explanation that was given at pages 27-30 of the record of

proceedings. The evidence in the main was that PW1 requested the Appellant to look after her baby at a fee of K500.00 for a week because she was going on a business trip. Learned Counsel submitted that if the Appellant intended to steal PW1's baby, then she would not have introduced PW1 to DW2.

Learned Counsel further argued that the trial Magistrate failed to take into account the fact that PW1 the mother of an eight month old baby could not have given her child to a stranger, who she met at a market unless there was an agreement. He called in aid the case of **Nkata and Four others v The Attorney General**¹ where the Court held that:

“Findings of facts can be reversed where by reason of some non-direction or mis-direction or otherwise the Judge erred in accepting the evidence which he did accept; or in assessing and evaluating the evidence, the Judge took into account some matters which he ought not to have been taken into account or failed to take into account some matter which he ought to have taken into account.”

Counsel for the Appellant also drew my attention to the case of **Wilson Masauso Zulu v Avondale Housing Project Limited**² where the Supreme Court held that: **“the Appellant Court will only reverse findings of fact made by a trial Court if it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon misapprehension of facts.”**

In further advancing his arguments, Learned Counsel for the Appellant relied on the case of **Stephen Manda v The People**³ where it was held that:

“An explanation which might reasonably be true entitles an accused to an acquittal even if the Court does not believe it, an accused is not required to satisfy the Court as to the innocence, but simply to raise a reasonable doubt as to his guilt, and such a doubt is risen if there exists an explanation which might reasonably be true.”

Counsel for the Appellant in ground two submitted that the trial Court erred in law and in fact, in finding that the prosecution had proved the ingredients of the offence the Appellant had been charged with and was subsequently convicted of. I was drawn to the case of **Manongo v The People**⁴. I was also drawn to the case of

Dorothy Mutale and Richard Phiri v The People⁵ where the Supreme Court held that: “**where two or more inferences are possible, it has always been a cardinal principle of criminal law that the Court will adopt the one more favourable to an accused if there is nothing in the case to exclude such inference.**”

I was further referred to the cases of **Mwewa Muroho v The People**⁶ and **Woolmington v Director of Public Prosecution**⁷ which elucidate the legal principles on the burden and standard of proof in criminal cases.

Counsel for the Appellant further argued that the Appellant gave a reasonable explanation which ought to have cast doubt in the mind of the Court as to how she came into possession of the baby. In that regard, he argued that the Appellant had met the test laid out in the case of **Stephen Manda v The People**³. Counsel submitted that the Appellant had a reasonable explanation on the blank under-five card, which she alleged was in the baby bag given to her by PW1. Further, that she had not changed the baby's name. Counsel concluded his submission with a prayer to the Court to

acquit the Appellant as the prosecution had not proved the ingredients of the offence she was convicted of.

On behalf of the Respondent, Learned Counsel argued in ground one that sufficient evidence had been adduced before the trial Court to corroborate the evidence of PW1. The case of **Ilunga Kabala and John Masefu v The People**⁸ was called in aid, where it was held that:

“It is trite law that odd coincidences, if unexplained may be supporting evidence. An explanation which cannot reasonably be true, is in this connection no explanation.”

She argued that it was odd that the Appellant gave the baby a new name two days after she was found with the baby. Further, that it was also odd that PW1 could have given her baby to stranger and then lodged a complaint to the police a few hours later. According to Counsel, this defied common sense and logic.

Counsel for the Respondent submitted that it was safe to rely on PW2's evidence that the Appellant was found with a blank under five card in Kaoma during her apprehension. She also submitted

that it was safe to rely on the Appellant's mother's information that her daughter her was pregnant and she believed that she had a baby. Counsel pointed out that this evidence was never challenged in cross-examination. As such the trial magistrate was on firm ground when she convicted the Appellant.

In ground two, Counsel submitted that the evidence of PW1 was corroborated. The evidence being that the Appellant changed the baby's name to Melisa. This fact was never challenged in the Court below. She dismissed the Appellant's evidence that she gave PW1 Mario's number submitting that the Appellant's phone number was instead recovered from Mario. Counsel concluded with a prayer to the Court to dismiss the Appellant's appeal.

I am indebted to both Learned Counsels for their submissions and have taken them into account in arriving at my decision. Although there are two grounds of appeal in this case, they all in my considered view give rise to the question, whether the prosecution adduced sufficient evidence to warrant the conviction of

the Appellant. I will therefore, deal with both the grounds of appeal at the same time.

The offence herein for which the Appellant was convicted is created by **section 171 (a)** of the Penal Code which provides that:

“Any person who, with intent to deprive any parent, guardian or other person who has the lawful care or charge of a child under the age of 16 years, of the possession of such child-

**(a) Forcibly or fraudulently takes or entices away, or detains the child...
Is guilty of a felony and is liable to imprisonment for fourteen years”**

Child stealing occurs when a person who is not legally entitled to the child takes away the child from the person who is legally entitled to it through force, fraud or enticement.

The evidence of PW1 worth reprising is that she was approached by an unknown woman, the Appellant, at the Lusaka city centre. The woman asked her if she could pose as the mother of her baby, before her husband at Findeco House. PW1 told the Court that the Appellant asked her for the favour so that she could get

some money off her husband. On the other hand, the Appellant testified that PW1 approached her at Lusaka City Centre, to ask her if she could look after her baby for a few days at a fee of K500.00, because PW1 had to travel out of town for business.

It is not in dispute that the duo, that is PW1 and the Appellant met for the first time on 12th January, 2013 at the Lusaka City Centre. They both went to see Mario at Findeco House with PW1's baby. They did not disclose the nature of their business to Mario. On the same date the Appellant travelled with PW1's baby to Kaoma. She was later apprehended by the police on 17th March, 2013 at Kaoma and charged with offence of child stealing. What disturbs me is how a mother of a young infant child could have given her baby to a total stranger who she met for the first time.

The Appellant's main argument in ground one is that evidence of PW1 upon which the trial Court convicted the Appellant was not corroborated. I do not agree with the Appellant. In my considered view, the evidence of PW1 was corroborated by PW2 and PW3 who

found the Appellant with the stolen baby in Kaoma. Further, PW2 testified that the Appellant's mother told him that the Appellant was pregnant and now with child. This evidence cannot be taken lightly. It is a great wonder as how the Appellant was found with a blank under-five card, which notoriously is only given out at clinics to a person who has direct responsibility of a child. In any case, details on under-five cards are entered by clinic or hospital staff. It is therefore, shocking that the Appellant was in possession of a blank under-five card.

I also find it surprising that the Appellant did not call her mother as her witness. Was she afraid that her mother could have confirmed the evidence of PW2 and PW3? I can only come to the conclusion that the Appellant being a complete stranger to PW1 planned to steal her baby on the pretext that she wanted to get some money off her husband at Findeco House. I find no merit in the Appellant's testimony that PW1 promised to pay the Appellant K500.00 to look after her baby. There is no sense in a mother of a young baby giving it away to a total stranger and then reporting the

incident to the police. This defies logic. In any event, an eight month old baby is totally dependent on its mother or near relatives and therefore, requires their love and attention. It is therefore unimaginable that a mother of such a young child would give her child to a total stranger. PW1 acted very irresponsibly in giving her child to a total stranger. I hope that she has learnt a lesson from this experience.

Moving on, I find no merit in the explanation given by the Appellant that she had an understanding with PW1. The explanation falls far short of the standard set out in the case of **Stephen Manda³ case** and **Dorothy Mutale and Richard Phiri⁵ case.**

I have not lost sight of the Appellant's submission that the trial Court erred in the following findings of fact.

- a) *That it was at Findeco House that the accused got the baby from PW1 and disappeared with her and PW1 waited for her to come back with the baby from the room she entered but to no avail.*
- b) *That the accused enticed PW1 to release the child to her.*

- c) *That the accused fraudulently took the child from its mother.*
- d) *That the accused had intent to deprive the mother of her child.*

After careful considering the evidence, I find that PW1, PW2, the Appellant and DW2 all testified that the Appellant and PW1 went to Findeco House with PW1's baby. The Appellant testified she travelled to Kaoma with PW1's baby. There is no doubt in my mind that the Appellant enticed PW1 to release her child, otherwise she would not have agreed to the Appellant's proposal. I therefore, find that the Appellant fraudulently took PW1's baby with the intention of depriving her of the child.

PW2's evidence that the Appellant's mother told him that the Appellant was pregnant and now with child was not dismissed by the Appellant. I am also inclined to the evidence of PW2 and PW3 whose prime responsibility is to uphold law and order. In my considered view, they have no reason to lie and therefore provide the most important source of corroboration of PW1's evidence. They

also remove the danger that the Appellant whom they apprehended upon a complaint laid by PW1 was falsely implicated.

I therefore, hold that the appeal lacks merit and is accordingly dismissed. I uphold the conviction of the Appellant.

Leave to appeal is granted.

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

M. Mapani-Kawimbe

M. Mapani-Kawimbe
HIGH COURT JUDGE