

**IN THE HIGH COURT FOR ZAMBIA
HOLDEN AT CHIPATA**
(Criminal Jurisdiction)

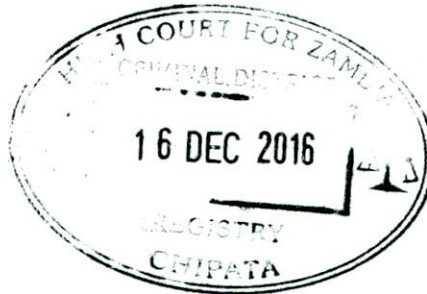
HJA/32/2016

B E T W E E N :

JAMES BOTHA

AND

THE PEOPLE



APPELLANT

RESPONDENT

Before Honorable Mrs. Justice M. Mapani-Kawimbe

For the Appellant:

Dr. H. Mbushi of HBM Advocates

For the Respondent:

Mrs. A.N Sitali – Deputy Chief State Advocate

Ms. C. Lupili – Senior State Advocate

Mr. M. Libakeni – State Advocate

Mr. W. Silwimba – State Advocate

JUDGMENT

Cases Referred to:

1. *Nachitumbi and Another v the People* (1975) Z.R 285 (S.C)
2. *Sikota Wina and Princess Nakatindi Wina v the People* (S.C.Z Judgment No. 8 of 1996)
3. *Communications Authority v. Vodacom Zambia Limited* (SCZ Judgment No. 29 of 2009)
4. *George Lipepo and Others v The People* (Appeal No. 389, 390, 391, 392 of 2013)

Legislation Referred to:

1. *Penal Code, Chapter 87*
2. *Criminal Procedure Code, Chapter 88*
3. *Constitution of Zambia, Chapter 1*

This is an appeal against conviction and sentence.

The appellant was charged with one count of personating a public officer contrary to section 102(b) of the Penal Code, Chapter 87 of the Laws of Zambia.

The particulars of the offence allege that James Botha on an unknown date but between 17th and 19th November, 2015 at Chipata in the Chipata District of Eastern Province of the Republic of Zambia, did falsely and deceitfully personate a Zambia Electricity Supply Corporation officer, a person entitled to install electricity at the house of Thaulo Banda when in fact he was not.

The facts leading to this appeal are that the appellant approached Thaulo Banda, Clara Phiri, Lighterwell Nyirongo and Isalan Mana of Munga compound as a ZESCO employee. **Sunyomgo Manga** testified as **PW1**. His evidence was that he received a complaint from Thaulo Banda about ZESCO employees who were asking for money before they could connect electricity at his home. PW1 told Thaulo Banda to take the ZESCO employees who were asking for money to his office. When Thaulo Banda took one of the purported employees to PW1's office, a Mr. Banda, he fled upon

seeing one of PW1's colleagues. When he was apprehended he claimed that he had gone to the ZESCO office to attend an interview.

Clara Phiri testified as **PW2**. Her evidence was that on 17th November, 2015 some ZESCO employees went to her home to connect electricity. According to PW2 the appellant was one of the ZESCO employees who went to her house. After a brief encounter, the appellant told her that he would follow up their discussion with her husband. **Thaulo Banda** testified as **PW3**. He told the Court that he received a call from PW2 his wife on 17th November, 2015. She told him that ZESCO employees wanted to connect electricity at their home. Later PW3 met the appellant, who told him that he was required to pay K250.00 for the electricity connection.

PW4 was **Lighterwell Nyirongo**. He testified that on 17th November, 2015 the appellant approached him to find out if he had a ZESCO quotation so that he could connect electricity at his home.

Isalan Mana testified as **PW5**. His evidence was that the appellant told him that he was a ZESCO employee and had been sent by his boss to find out the number of houses that had not been connected to electricity by December 2015.

Mulenga Katongo the arresting officer testified as **PW6**. His evidence was that he apprehended the appellant following PW3's complaint. His investigations revealed that the appellant approached a number of people in Munga compound and collected their quotations with an assurance that he would have their houses connected to electricity.

At the close of the prosecution's case, the appellant was found with a case to answer. The appellant gave evidence on oath and called one witness. He testified that sometime in 2014 he applied to ZESCO to have his house connected to electricity. He stated that his house stayed unconnected to electricity for a while. Sometime in 2015, he received word that Munga compound would be connected to electricity.

It was the appellant's evidence that he submitted a complaint to ZESCO over the non-connection of electricity at his house. In response, the Regional Manager at ZESCO asked him to produce evidence on the number of houses that were not connected to electricity. Upon that advice, the appellant went to PW3's home to inquire whether he was connected to electricity. The appellant testified that he went back to ZESCO in the company of PW3 to report

the findings and was surprised when he was apprehended and later charged with the offence of personating a public officer. It was also his testimony that he did not know why PW3 gave him K250.00.

Jackson Nkhoma testified as **DW2**. He told the Court that he and the appellant were experiencing problems in having their houses connected to electricity. He testified that he laid a complaint to ZESCO over the issue. It was his evidence that on 17th November, he called the appellant to inform him that a house in Munga Compound had been connected to electricity. Further, that the appellant went a day later to investigate the matter.

After the proceedings closed, the trial Court rendered its judgment in which, the appellant herein was convicted and sentenced to 24 months imprisonment with hard labour.

Disenchanted with the trial Court's judgment, the appellant brings this appeal advancing seven grounds as follows:

- 1. That I am a first offender in this matter.**
- 2. The Court did not consider my mitigation.**
- 3. That the sentence was harsh.**
- 4. The trial magistrate erred in law and fact when she failed to verify the allegations that the Appellant and others were asked by the regional manager to take evidence that other people had their houses electrified.**

- 5. That the trial magistrate erred in law and fact when she refused the Appellant to bring his 10 witnesses.**
- 6. The trial magistrate erred in law when she failed to send the sentence of 24 months to the High Court for confirmation as her jurisdiction was only six months sentence.**
- 7. Appeal against sentence.**

In support of the grounds of appeal, Learned Counsel for the appellant filed written submissions. The gist of the submission was that the trial Court did not take the initiative to clarify the statement by the appellant that the Regional Manager asked him to confirm the households which had been supplied power by ZESCO during the period. Counsel also argued that the trial Court did not accord the appellant an opportunity to call all his witnesses to support his case. He further submitted that the trial Court did not have jurisdiction to effect the sentence on the appellant for two years without confirmation by the High Court.

At the hearing of the appeal, Learned Counsel maintained that the Respondent did not challenge the allegation that the appellant was requested by the Regional Manager at ZESCO to report the number of houses that were connected to electricity in Munga Compound. Counsel contended that since the Respondent conceded

that the appellant's inability to present his witnesses was not a technical error but one of law; then it would be unfair to subject the appellant to another trial.

Counsel further argued that since the prosecution had called all its witnesses and considering that the error in *casu* was not technical; then it would be unfair to order a retrial because the appellant had already served six months in prison. Counsel concluded with a prayer to this Court urging it to quash the appellant's conviction and to set aside the sentence.

Learned Counsel for the Respondent filed submitted written submissions. It was submitted that the trial Court was on firm ground when it admitted the evidence of the prosecution witnesses, in that they proved that the appellant carried himself out as a ZESCO employee or personated a ZESCO employee. Thus, the prosecution proved its case.

Learned Counsel conceded that the trial Magistrate erred in law when it failed to accord the appellant an opportunity to call all his witnesses before closing his defence. Counsel cited Article 18 of the Constitution of Zambia which provides that:

“Every person who is charged with a criminal offence shall be given adequate time and facilities for the preparation of his defence.”

Counsel referred me to section 7 of the Criminal Procedure Code, which allows a Class III Magistrate to impose a sentence of up to 24 months imprisonment, submitting that the trial Court erred by not sending the case record for confirmation of the 24 months sentence by the High Court.

Counsel beseeched me to order a retrial of this matter, citing the cases of **Nachitumbi and Another v the People¹** and **Sikota Wina and Princess Nakatindi Wina v The People²**.

At the hearing, Counsel for the Respondent submitted that according to the **Sikota case** a retrial could only be ordered for good reason. Counsel argued that since the appellant was not allowed to call all his witnesses, thereby infringing his right to a fair trial, the appellant could therefore be properly heard in a new trial.

I am indebted to Learned Counsel on both sides for their submissions in this appeal. I have considered the grounds of appeal, the submissions and the record of the Court below.

Grounds 1, 2, 3, 6 and 7 all canvass an argument on sentence. I shall therefore deal with them at the same time. I will also deal with grounds 4 and 5 separately. For good order, I shall firstly deal with grounds 4 and 5 and thereafter move to the grounds that deal with sentence.

Section 102 (b) of the Penal Code creates the offence of personating a public officer. It provides that:

“Any person who falsely represents himself to be a person employed in the public service, and assumes to do any act or to attend in any place for the purpose of doing any act by virtue of such employment; is guilty of a misdemeanor and is liable to imprisonment for three years.”

The offence of personating a public officer occurs when a person who is not employed in the public service assumes to perform a function or to attend to a function in any place, which he is not entitled to.

The issue raised in ground 4 of the appeal is that the trial magistrate did not verify the allegation that the appellant and DW2 were asked by the Regional Manager of ZESCO to collect evidence on the number of houses that were electrified in Munga compound.

According to the lower Court's judgment at page 38 overflowing to page 39, lines 1-2, the appellant is quoted as follows:

“during his cross-examination the appellant stated that he did go to Munga compound and only to get evidence that Munga was supplied with power whereas Umodzi where he was staying was not supplied with power. The witness also told the Court that he got Thaulo's number only because he wanted him to stand as his witness at ZESCO as one of the people that were supplied with power.”

After carefully examining that portion of evidence, I find that there is variance between the evidence of the appellant and ground 4 of the appeal. Just like the trial Court, I do not believe that the Regional Manager at ZESCO could have asked the appellant to gather evidence of the houses that had been electrified in Munga Compound, when he is not even a resident of that compound but of Umodzi Compound.

I also find it incredulous that ZESCO which must have its own ways and means of processing complaints could assign an ordinary citizen, who is not one of its employees, the responsibility of finding out which houses are connected to electricity in Munga Compound. If the appellant was really assigned by the Regional Manager at ZESCO to check on the houses that had been electrified, why did he

not call the Regional Manager at ZESCO as his witness? The answer is quite obvious, which is the appellant was not assigned by the Regional Manager and decided on his own to personate a ZESCO officer. As a result he is in Court today because of the crime he committed. My upshot is that ground 4 has no merit and is accordingly dismissed.

The issue in ground 5 is that the appellant was not allowed by the trial Court to bring his ten witness. Let me point out that the issue raises a question of fact which an appellate Court can only determine in the context of the case of **Communications Authority v Vodacom Zambia Limited**³. In that case the Supreme Court held *inter alia* that:

“The appellate Court will not reverse findings of fact made by a trial Judge unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of facts or that they were findings which, on a proper view of the evidence, no trial Court acting correctly, can reasonably make”.

So far what has been presented in this ground of appeal, is a one sided account of events as perceived by the appellant. I cannot therefore arrive at a gross conclusion that the appellant was not given

adequate time or facility to prepare his defence without carefully interrogating the evidence before me.

The right to a fair trial is contained in Article 18 of the Constitution of Zambia and is an internationally accepted standard. In the case of **George Lipepo and Others v The People**⁴, the Supreme Court defined a right to a fair trial as follows:

“The right to a fair trial means a neutral trial conducted to accord each party to the proceedings their due process rights. There are various rights associated with fair trial. These include equal access to, and equality before the Courts; fair hearing; public hearing; right to a competent, independent and impartial tribunal established by law; presumption of innocence; right to prompt notice of the criminal offence one is charged with; the right to adequate time and facilities for the preparation of a defence; right to trial without undue delay; right to defend oneself in person or through counsel; right to examine witnesses; the right to an interpreter; and the prohibition of self-incrimination. These rights are all contained in Article 18 of the Republican Constitution.”

The non-observance of the rights stated above would render a trial unfair and an appellant Court could order a retrial of a matter. The question therefore is whether the right to a fair trial was impeached by the trial Court's decision to proceed with the case and thereby not allowing the appellant to call his ten witnesses.

that date the appellant did not appear before Court but instead sent his wife as he was allegedly ill. The matter came up on 7th March, 2016, where the appellant only presented one witness. Let me state that it does not necessary follow that if a litigant states that they have ten witnesses then all ten witnesses will be called to testify. In fact most litigants are known to produce long lists of witnesses who in practice do not attend Court at all.

Thus, in my considered view, where an accused person is dragging his matter, a Court can proceed in the interests of justice to dispose of it. This does not mean that an accused has been deprived of the right to a fair trial.

Thus, I find no merit in this ground of appeal, it accordingly fails and is dismissed.

The issues raised in grounds 1, 2, 3, 6 and 7 of the appeal all dwell on sentence. Under section 102 (b) of the Penal Code, the offence that the appellant was charged with carries a maximum penalty of three years. The appellant was sentenced to 24 months imprisonment by a Magistrate of Class III, whose jurisdiction on sentencing is three years as provided by section 7 (4) of the Criminal

Procedure Code. A sentence above six months requires confirmation by this Court.

In my view, I find that the trial magistrate became *functus officio* after she delivered the sentence. She was therefore not responsible for ensuring that the appellant's sentence was cause-listed before this Court for confirmation. According to the record at page 101, the trial Court in its judgment stated that the appellant's sentence was to be referred to this Court for confirmation. However, I am unable to discern whether this Court confirmed the sentence passed by the trial Court. However, it has come to my attention that the appellant served six months in prison.

The view I take is if the sentence has not been confirmed, then I hereby confirm the sentence of 24 months Imprisonment with Hard Labour with effect from 12th April, 2016. I have original and unlimited jurisdiction in all matters civil and criminal that come into the dependency of this Court to make such an order. Accordingly, the appellant must serve the remaining sentence of eighteen months forthwith.

Before I conclude, I wish to state that issues of mitigation though important as stated in grounds 1, 2 and 3 of this appeal are matters that fall in a Court's discretion and cannot be raised as grounds of appeal.

All in all, I find no merit in this appeal and dismiss it. The sentence should be carried out as imposed.

Leave to appeal is granted.

Delivered in open Court at Chipata this 16th day of December, 2016.



M. Mapani-Kawimbe
HIGH COURT JUDGE