

IN THE SUBORDINAT COURT OF THE SECOND CLASS 2PG/128/116

FOR THE LUSAKA DISTRICT

HOLDEN AT LUSAKA

(CRIMINAL JURISDICTION)

THE PEOPLE

V

JONATHAN SIWALE

BEFORE: HON. R.MWANSA

FOR THE STATE: MR. MUKOMBWE, N AND MR. KAKOMA

FOR THE DEFENCE: IN PERSON

JUDGEMENT

In this case the accused person stands charged with the offence of theft contrary to section 272 of the Penal Code Chapter 87 of the Laws of Zambia. The particulars being that on 19th November 2016, he at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, did steal a bicycle valued at K900 the property of Mulenga Banda.

When called upon to plead he denied the charge. Thereafter, I entered plea of not guilty.

I warn myself from the outset that the onus lies on the prosecution to prove their case beyond all reasonable doubt and there is no onus on the accused person to prove his innocence. Accused person is entitled to give and call evidence or say nothing at all. If he elects to remain silent this does not affect the burden on the prosecution. If after considering all the evidence in this case

there is doubt created in my mind as to the guilt of the accused person, this shall be resolved in favour of the accused persons.

I must state aptly that the standard of proof in criminal cases is beyond all reasonable doubt. This has been held in a number of judicial precedents. One such is the case of **Mwewa Murolo .v. The People (2004) 206** where the Supreme Court held inter alia that;

“The standard of proof must be beyond all reasonable doubt.”

The offence as provided for under section 272 of the Penal Code Chapter 87 of the Laws of Zambia is as follows;

“Any person who steals anything capable of being stolen is guilty of the felony termed ‘theft’, and, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, is liable to imprisonment for five years.”

On the other hand section 265 (1) of the same act provides that ***“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.***

In order for accused to be found guilty of this charge, the prosecution must satisfy me with each and every ingredient of the offence being;

1. That the accused person did take steal one bicycle
2. That the bicycle was something capable of being stolen
3. That accused had the intention to deprive the owner permanently.
4. That accused person had no claim of right.

The state in this matter called 3 witnesses. **PW1** was Mulenga Banda who told the court that he works as a painter at Nutrifeed and he recalled that around 09:00hrs on 19th November 2016, he took his bicycle around Mtendere at the

neighbours place bamake Ruth (mother to Ruth), when he reached he left the bicycle outside so that bamake Ruth's husband can repair the bicycle for him.

PW1 after leaving the bicycle went to assist accidents victims nearby where he meant Jonathan the accused herein who had carried the pink bag and wore a black coat. PW1 remained at the scene and all of the sudden the accused disappeared, later PW1 went back to bamake Ruth's Place and he was asked whether he allowed the accused to get the bicycle and he answered that he didn't and quickly he started following the tyre marks for the bicycle and managed to trail the accused who he saw at a distance riding his bike near Chama lodge but PW1 couldn't keep up with the accused speed because his gumboots were too heavy.

In XXN PW1 told the court he saw the accused with his bicycle and he was very far hence he couldn't catch up him. PW1 knew the accused because he saw the accused and that the accused wore a track suit black in colour and roughers.

In REXN nill.

PW2 was Judith Sakala (bamake Ruth) who recalled that around 09:00hrs whilst doing laundry the father to Isaac PW1 came to her house and brought a bicycle so that PW2's husband can fix the breaks.

PW1 left the bicycle outside and then PW2 went to get the pegs from the house when she later saw from the window the accused taking the bike but she was not alarmed she took it that maybe the accused was allowed by PW1 to take it since the accused was with him at the accident scene helping victims however when PW1 come back PW2 asked him whether he allowed the accused to take the bicycle and PW1 run after the accused who carried a pink bag and was wearing black coat.

In XXN PW2 told the court the accused wore grey and black clothes and that she saw him getting a bicycle.

In REXN PW2 said that the accused was the person who took the bicycle.

PW3 was Makamba Priscilla who told the court that she was an officer at Simon Mwansa Kapwepwe Police Post. She recounted that on the 24th November 2016 when she reported for work and she was allocated the docket of theft where PW1 reported that the accused stole his bicycle valued at K900.00.

PW3 interviewed the accused who was already in custody but he didn't give satisfactory answers hence she was prompted to charge him with the subject offence and under warn and caution statement administered in Bemba, the accused gave free and voluntary reply denying the charge hence was arrested pending court process.

PW3 identified the accused in the dock.

The item was not recovered.

There was nil XXN

The state closed their case and the accused was found with the case to answer and put on his defense and rights where explained in line with Section 207 of the Criminal Procedures Code, he elected to give sworn evidence and called no witnesses.

DW1 was Jonathan Siwale who first attempted to retake plea but again changed his mind and opted to give defence.

DW1 recounted that on 24th November 2016 around 03:00hrs there were some people who were involved in a road accident and he went to help the victims at the accident scene at that time he was staying at the sisters place when he come to visit. Later on the following day he was asked by PW1 whether he got PW1's bicycle and he thought PW1 was joking and didn't take it serious.

DW1 told the court that PW2 only suspected him because of his hair cut and any one can cut his hair like that.

DW1 didn't take the bicycle.

In XXN DW1 told the court that he stayed in Ndeke Vilage in Kitwe and that he come to Lusaka on 20th February 2017 and before that he was in Kitwe where he went in December 2016 to start school and that on the particular day he was wearing kudro shirt, had the pink and black bag which had clothes inside and that time he was in Lusaka and he denied taking the bicycle.

This was the gist of the evidence before me, considering the whole evidence, I found that the following facts are not in dispute that a bicycle worth K900 belongs to PW1, the accused carried a pink and black bag on the particular day. The accused and the victim where both on the accident scene assisting the victims, the accused wore black clothes. The husband to PW2 repairs bicycle and PW1 left it for repair when it was stolen at PW2's house outside.

The facts in dispute are that the accused was the one who took the bag and that he was only identified by his hair coat.

Having established the facts, I now apply the said facts to the law. I ask myself a question whether the accused person did commit the alleged offence. The evidence in this matter is tending to implicate the accused person, that he is the one who stole the bicycle belonging to PW1. What evidence is there? There is direct evidence from PW1 that he took his bicycle to be repaired by PW2 but the accused stole the bicycle when PW1 was at the accident scene and he was seen taking it by PW2 and PW1 also saw him at a distance, both PW1 and PW2 said that the accused a pinkish bag and wore black clothes the same identity which the accused confirmed that indeed carried a pink and black bag and wore black clothes.

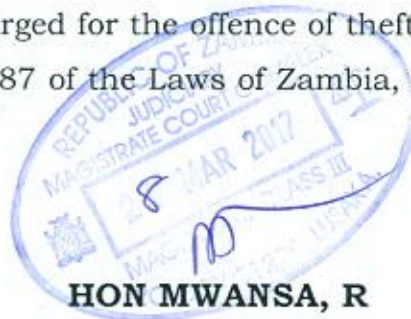
If the accused story is to go by I find it hard that he didn't steal the bicycle and that he was only recognized by his hair cut, evidence which has no legs to

stand on as the hair cut identification didn't not rise in the prosecution case but the identification was based on his clothes.

As such I am satisfied that the bicycle was stolen by the accused as it was something capable of being stolen, it was converted to the accused own use when he got and never returned hence his intention was to deprive the owner permanently and he had no claim of right.

I am persuaded by **Woolmington V the DPP (1935) AC 462** that *“Throughout the web of criminal law one golden thread is always to be seen that it is the duty of the prosecution to prove the accused guilt If at the end if and on the whole case, there is a reasonable doubt, created by the evidence given by either the prosecution or the accused. If the prosecution has not made out the case the accused is entitled to an acquittal.*

The above is satisfied as such I find that the state has proved the case beyond reasonable doubt and there is no slight doubt or lingering doubt that the offence was committed by any other person other than the accused thus, I find the accused guilty as charged for the offence of theft contrary to Section 272 of the Penal Code, Chapter 87 of the Laws of Zambia, consequently I convict him accordingly.



HON MWANSA, R
MAGISTRATE CLASS II

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