

IN THE SUBORDINATE COURT OF THE FIRST CLASS  
FOR THE LUSAKA DISTRICT  
HOLDEN AT LUSAKA  
(Criminal Jurisdiction)

The People versus                    **PUMULO LINYIKO & SITUMBEKO NYAMBE**  
BEFORE:                                **HIS WORSHIP F. KAOMA**  
FOR THE PEOPLE:                    **S. MISELO- PUBLIC PROSECUTOR**  
FOR THE ACCUSED:                 **IN-PERSON**

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**Charge**

In this case the accused stand jointly charged with with one count of **Breaking into a building with intent to commit a felony**, contrary to section 304 of the penal code chapter 87 of the laws of Zambia. The particulars of this offence allege that the accused on the 3<sup>rd</sup> Day of December, 2016, at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together, with intent to commit a felony, did break and enter into a building namely Havissaa Food Limited Ware House. Both accused pleaded not guilty to this charge hence leading to this trial.

**WARNING**

I warn myself from the outset that the burden of proof in criminal proceedings such as the present one lies squarely with the Prosecution. Notwithstanding the defenses available to the accused persons, the primary responsibility to prove the allegations against such a person remains with the Prosecution.

The Prosecution in this case is required to prove each ingredient that constitutes this offence **beyond reasonable doubt**. I must reiterate that proof **beyond reasonable doubt** is not synonymous with proof beyond any **shadow of doubt**. In the event of reasonable



doubt, such doubt must be decided in favor of the accused and he must accordingly be acquitted.

At this point I propose to analyze the law creating this offence before considering the evidence adduced herein.

### **ANALYSIS OF THE LAW**

The offence of breaking into a building and committing a felony therein is created by section 304 of the Penal Code chapter 87 of the laws of Zambia which is couched in the following language;

“Any person who breaks and enters a schoolhouse, shop, warehouse, store, office, or counting-house, or a building which is adjacent to a dwelling-house and occupied with it but is not part of it, or any building used as a place of worship with intent to commit a felony therein, is guilty of a felony and is liable to imprisonment for five years.”

For the purposes of this offence the expressions “breaking” and “entering” are both defined under section 300 of the Penal Code as follows,

**“Breaking”;** A person who breaks any part, whether external or internal, of a building, or opens by unlocking, pulling, pushing, lifting, or any other means whatever, any door, window, shutter, cellar flap, or other thing, intended to close or cover an opening in a building, or an opening giving passage from one part of a building to another, is deemed to break the building.

**“Entering”;** A person is deemed to enter a building as soon as any part of his body or any part of any instrument used by him is within the building.

It follows therefore that a prisoner need not enter the building but it suffices to prove that any part of the prisoner was actually in the building or the instrument used by him.

In this case going by the wording of section 304 for the offense to be completed the breaking must be accompanied by intent to commit a felony. It must be noted however that no specific felony has been mentioned under this section. Consequently, prove of intent to commit any offense described as a felony by law suffices.

It follows from the foregoing that in order to prove the guilty of the accused the prosecutions must prove each and every ingredient of this offence beyond all reasonable doubt. They must as such prove that there was;

- ❖ Breaking of a building
- ❖ Entering of a building
- ❖ The identity of the offender or offenders.
- ❖ Intent of the offenders

Having stated the law in this case it has now become absolutely necessary to analyze the evidence adduced in this matter by both parties.

In order to discharge their obligation in this case the State called to court 3 witnesses. At the close of the state case this court found each of the accused with a case to answer and accordingly put them on their defense. Their rights were explained to them in Nyanja. Both accused opted to give sworn statements. None of them called a witness in their defense of which they are perfectly entitled to do at law as it does not in any way have any bearing on the burden and standard of proof.

## **ANALYSIS OF THE EVIDENCE**

### **EVIDENCE OF THE PROSECUTION**

The first prosecution witness in this case was Moses Tembo a security manager at G4S secure Solution who I shall be referring to as PW1. This witness testified before this court that on 02/12/16 at around 12:00hrs he received a call that people were going to strike at Havissaa Food Grey Matter which call he said was anonymous. The company mentioned is their customer. According to this witness the person narrated to him that people were

going into the building at night. He then phoned the police at Mumbwa Road Police Post who told him to link up with them. They linked up in the day and strategized how to move. Around 19:00hrs they went to the site with 4 police officers. They took over the site from officers who were on duty that night. Around 20:10hrs they saw one person jumping in the yard which premise he said has a wall fence and a gate and when they took over they laid an ambush guarding all the 4 corners of the yard. He added that the premise is 70 X70m and it has 2 warehouses. He described the lighting system to have been good. He further deposed that after 2 to 3 minutes another person jumped in the yard. The two proceeded to the warehouse for Havissaa Food. He saw them breaking the rocks and open the door to the warehouse. He added that he saw them fidgeting on the locks but he could not see what they were using except he saw the door open. When the door opened but before they could enter the police moved and fired two shots. The officers commanded the two to lie down and after they apprehended them he called he called the customer Mr. Amai the owner of the business. Around 20:40hrs Mr. Amai arrived and found the two people they apprehended in the yard. This witness further deposed that he was able to identify the two people because the lighting was good so he saw them. He identified both accused in the dock as the two people they apprehended. It was his further evidence that after an arrest was made the locks were found but they did not find the instruments they were using. In addition he identified two locks in court that that were later admitted in evidence and marked P1

When cross examined by A1 testified that he was at a distance so he did not see the implements they used to break the locks. He added that the person who phoned opted to remain anonymous for security reasons. He reiterated that at first they removed the guards and took over operations. During further cross examination he testified that at first they wanted to know what they were up to and after they opened they went and arrested them. This witness maintained that they did not enter the warehouse after breaking the locks which locks were used to lock the warehouse. When cross examined by A2 he deposed that they were six of them when they apprehended them and that they were apprehended at the same point.

PW2 was Amaiy Hardas the Managing Director for Havissaa Food Limited and Gray Matter Zambia. This witness recalled that on 2/12/16 around 20:15hrs to 20:20hrs he received a

phone call from officer Tembo saying that they had apprehended 2 people who wanted to break into their warehouse at Chinika. He rushed to the site and reached around 20:30hrs. When he arrived he saw police officers, Mr. Tembo and officers from Secure Limited. He also found 2 people in police custody. They told him what happened. He added that he did see the 2 people because there was sufficient light. This witness like PW1 he identified both accused to be the persons apprehended. On the warehouse he found that 2 locks were removed. One was broken while the other was just opened. This witness described the two and accordingly identified them in court that were already marked P1. Afterwards the police got them. It was his further evidence that the warehouse was properly locked around 18:00hrs. He deposed that the premise is guarded by G4S Secure. The following day he went to the police to lodge a formal complaint.

During cross examination by A1 he deposed that the locks were in perfect condition when they locked. He added that he was briefed by Mr. Tembo of what transpired adding that what he was stating was a fact. When cross examined by A2 he deposed that it was officer Tembo who phone him but when he arrived he found some police officers as well.

PW3 was detective Constable Josphat Banda of Mumbwa Road Police post which is under Kanyama. This witness testified that on 2/12/16 he was on duty at the said police post when he received a phone from Mr. Tembo saying that he had been informed that there would be a breaking at Havissaa Food warehouse in Chinyika. He was told around 17:00hrs. He further told that the breaking would at 20:00hrs. he advised him to come around 19:00hrs so that an operation can be conducted. He organized his officers at around 19:00hrs they moved to the site with Mr. Tembo. Being armed with firearms, they took their positions. According to this witness all the warehouses were locked and the lighting system was good. He described the premises to have been fenced. At around 20:10hrs they saw two people jumping the wall fence into the yard. They went straight to one of the warehouses. He advised his friends to take time so that they see what they wanted. They went straight to a warehouse and started breaking. He didn't see what they were doing but he would see the fidgeting with the locks. Shortly, they opened the doors. Since he was near he fired a gunshot and ordered them to lie down which they did. His colleagues came to his aid and the apprehended them right at the scene. He handcuffed and searched them. He

found them with keys in their pockets. According to this witness, the keys were many but they were in bunches. He also went to the warehouse and picked 2 locks. He kept the locks in his possession. This witness like the other witnesses identified both accused in the dock to be the persons they apprehended. He also identified 2 locks and accordingly produced them as part of his evidence herein. He further identified 3 bunches of keys and positively identified them that were later admitted in evidence and marked P2. It was also his evidence that he interviewed the complainant who said the locks were his but the keys were not his. According to this witness when they apprehended the two the complainant was phoned and asked to come with locks. He came and observed what happened. He later took both accused to the police where he interviewed them in connection with the subject offense which both denied under warn and caution statement.

When cross examined by A1 he deposed that the first lock was damaged howbeit he did not see the implement they used to break it. He added that they only found the locks. It was his further evidence that he asked them about the keys they used but they refused. When further cross examined he deposed that both locks were damaged. He reiterated that the lights were there in the yard. He further averred that it is possible that they could have thrown the implements adding that the warehouse they broke is near the wall fence. And during cross examination by A2 he deposed that when they were jumping he did not see him with a breaking implement. He added that this witness was with his colleagues when they jumped.

At the close of the prosecutions' case I put both accused on their defense and after explaining the charge and their rights both opted to give a sworn statement. A1 called no witness while A2 called one witness in his defense. Their evidence is as follows;

## **DEFENSE**

The first witness for the defense in this matter was the first accused. He recalled that on 3/12/16 his friend Koni had a beaement at Garden house. They met at the market and talked to Situmbeko that they should go and spend a night at the funeral house. Situmbeko told them that he would go ahead of them. Around 19:00hrs he also started off. He phoned Situmbeko to find out where he as and in response he said he was near Chat. That is how he dropped off at Chat from a taxi. When he phoned him again he said he was somewhere at

the bakery. That is how he followed him. He found a guard for G4S running. He asked him if he was the one phoning Nyambe Situmbeko of which he admitted. The officer told him that he was inside the yard. He asked him to call him for him so that they start off. He went in the yard. According to this accused he was just surprised that police officers came out and order him to get inside. He tried to argue with him but two guards from G4S came out. They pushed him down and pulled him inside. That is where he found Situmbeko lying down. Shortly, they phoned the Indian. When he came they started talking but they didn't hear what they were saying. From there they took them in police custody. That was all in his defense.

When cross examined by the PP he admitted to have cross examined the arresting officer. He recalled having asked him about the things they used to break the locks. He added that he asked him because of the locks they brought as exhibits and also because they had no breaking implements. When further cross examined he admitted that he was there when the witnesses testified that they were apprehended right there and then. According to this accused he did not know what A2 was at the area adding that when he asked him he said he had gone to see his relative. During further cross examination he testified that his witness was the owner of the funeral although he was not there at the scene. According to this accused he does not know why he was apprehended. He denied breaking the building. He further deposed that he stays in Kamwala South but the warehouse for Havissaa is near Chat. He denied it being near the funeral.

The second witness for the defense was A2. He recalled that on 3/12/16 they knocked off from town. He agreed with his brother to go to a funeral in Garden house and this accused was the first to go. When he reached Chat he passed where Sililo Mubuyayeta works from. When he reached Havissaa bakery he found him with his friend Phiri who works for G4S. They opened and he entered inside the yard and sat in the guard room. He asked him if the bakery had started working but he said it had not started. After sometime he heard a sound of a motor vehicle at the gate. Sililo and Phiri went to open for the Vehicle. When they opened the gate 2 police officers and 2 G4S they came straight to this accused and asked what he was doing. He told them that he had come to see his young brother who works there. He was however, apprehended and taken inside. They started beating him. That is how he phoned A1. He came but immediately he reached he was as well apprehended.

Thereafter they searched them and only found them with phones. They later took them to the police and finally to court. That was all from this witness.

He was not cross examined by his co-accused. But when cross examined by the PP he testified that Sililo was his young brother who he came from the same area with and works for G4S. He adduced that he works at Havissaa warehouse and was one of those on duty. According to this accused he was not removed. It was his further evidence that he stays at Garden house. When further cross examined he deposed that he was not feeling well that is why he did not come to court. It was his further evidence that he would not know why the police fired a gun shot because he was already apprehended. He added that he heard the gunshot at around 19:00hrs. However, he conceded to have been apprehended at Havissaa Bakery. He reiterated that he just passed through to see Sililo as he was coming from Town going to the funeral house. He added that he called A1 when he was apprehended because they started beating him and he wanted him to come and help him. He insisted that it was him that phoned A1 and not vice versa. He denied being found with key but a phone. According to this accused none of them was found with keys. This accused admitted to have been in court when the witnesses said he jumped the wall fence. He added that he questioned why they left those who were guarding that night. According to him the warehouse was not broken into. It was his further evidence that he was apprehended around 18:30hrs.

DW3 in this case was Sililo Mubuyayeta a Security officer under G4S of Garden house. This witness deposed that he was shocked that he was called as a witness in this matter because as far as he was concerned he knew nothing in the matter. he added that on 3/12/16 he was off duty including on 4/12/16/ thus he was not Havissa that day. He denied ever calling A2 on 2/12/16. According to this witness he is the only Lozi man at Havissaa so A2 could have asked for his name. According to this witness it was his first time to see A2

When cross examined by the PP he deposed that he is not related to A2. He reiterated that on 3/12/16 he was not working at night. During re-examination he deposed that the place he works from is an open place so he might have known him.

This is the evidence of both parties in totality which I have closely considered and find some facts not in dispute while other facts are actually in dispute as outlined hereunder;



### **FACTS NOT IN DISPUTE**

It seems from the evidence that both accused do not dispute on 3/12/16 they were both apprehended at Havissa warehouse by police officers in conjunction with officers from G4S secure. The owner of Havissas warehouse was phoned after the apprehension. He went to the scene after which the accused were taken to the police and eventually brought to court on the allegation that they broke into the said warehouse. I therefore find these to be facts in this case.

### **FACTS IN ISSUE**

What seems to be in dispute to me is how the accused found themselves in the yard of Havissaa warehouse. It seem also in dispute to me as to whether there was breaking of locks and opening of the doors. If the answer is yes the identity of the person or persons that broke the locks and opened the door. These are the facts in issue I have to resolve in this case and I propose to resolve them concurrently with the application of the law.

### **APPLICATION OF THE LAW AND RESOLVING OF THE DISPUTED FACTS**

#### **a. Breaking of a building**

The first question to be decided is whether or not there was breaking of a building within the meaning of the law?

I must state here that for the avoidance of doubt I have decided to restate the definition of breaking as provided in section 300 of the Penal Code.

“A person who breaks any part, whether external or internal, of a building, or opens by unlocking, pulling, pushing, lifting, or any other means whatever, any door, window, shutter, cellar flap, or other thing, intended to close or cover an opening in a building, or an opening giving passage from one part of a building to another, is deemed to break the building.”

It is clear from the definition of the expression "breaking" in its plain and grammatical meaning includes the mere opening of anything used to close any part of the building. Consequently entry effected by taking out the glass from the door was held to be sufficient breaking; **R v. Smith, R& R. 417.**

It follows therefore that for the purposes of criminal law one need not break any part of the building to be guilty of this offence but it suffices to prove that the accused did push anything used to close any opening to the building.

To prove breaking in this case 3 witnesses have testified in favour of the prosecution. PW1 deposed that they saw 2 people fidgeting with the locks after they jumped the wall fence. Eventually, they saw the doors opening. His evidence is directly corroborated by the evidence of PW3 who was with him at the time they laid an ambush after getting information that some people were coming to break into the building. Further evidence was given by PW2 the owner of the warehouse in question. He deposed that he was called to go to the warehouse. Upon reaching he found two people apprehended and the warehouse was open. He found the two locks damaged. All the three witness positively identified the two locks in court that were admitted in evidence and collectively marked P1. I must state here that while the accused seem to refuse to admit that there was damaging of the locks followed by opening of the doors, there is sufficient direct evidence proving that fact and as such I find the same to be a fact. Further, giving the definition of breaking as expound above undoubtedly, breaking of locks coupled with the opening of the doors to the warehouse is breaking of a building within the meaning of the law. I am therefore satisfied beyond all reasonable doubt that there was breaking of a building.

#### **b. Entering of the Building**

The question that arises at this point is whether or not there was entering of the said building after breaking?

I must state here that going by the wording of section 304 of the Penal Code chapter 87 of the laws of Zambia for the offence of breaking into a building the *actus reaus* includes two things that is to say breaking and entering. Thus it is not sufficient for the prosecution to only prove breaking but they must as well prove entering. For emphasis sake I wish to re-state the definition of entry as provided by the Penal Code. It is couched as follows;

“A person is deemed to enter a building as soon as any part of his body or any part of any instrument used by him is within the building.”

I wish to state here that this definition is plain and unambiguous. In order to constitute entry at law therefore the prisoner must enter, or have entered the building. Whether, there has been entry or not certainly it is a question of fact to be decided by the trial court. However, from the foregoing definition of “entry” it is clear to me that it does not require the whole body of the accused to be within the building. It suffices to prove that any part of the accused was substantially in the building or any instrument used by him as was confirmed in the case of **R v Ryan (1996) Crim LR 32** which was based on same principle as the Zambian criminal law.

Reverting to the evidence, I must state from the outset that there is no evidence of entering as none of the eye witness deposed that he saw any of the accused entering the building in question after opening besides deposing to the act of opening the door. In the circumstance the offense of breaking into a building has not been proved to the requisite standard and as such I don't find the accused guilty of this offense. Notwithstanding, I find that there is overwhelming evidence of attempt to commit a felony contrary to section 390 of the Penal Code which is couched as follows;

“Any person who attempts to commit a felony or misdemeanour is guilty of an offence which, unless otherwise stated, is a misdemeanour.”

I must state here that before summing up I have found it absolutely necessary to define the word “attempt” for this purpose. It is defined 389(1) of the penal code as follows;

“When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.”

It follows from the foregoing that where a person embarks on an expedition to commit a crime and starts the process of committing such a crime but does not complete it to amount to a crime he will be guilty of attempt to commit such a crime.

The case before me is one clear example of attempt to commit a crime. This is so because it is clear from the overt acts of going to the warehouse when it was dark at about 20:00hrs, breaking the locks and opening the doors but before entry they were surprised by the alert officers thereby interrupting the whole expedition. The sum total of all these overt acts definitely leads to an irresistible inference of the fact that they wanted to steal from the building. In the circumstance I am satisfied beyond all reasonable doubt that there was an attempt to commit a felony namely, breaking into a building with intent to commit a felony.

**c. Identity of the offenders**

The crucial question that is to be decided at this point is as to the identity of the person or persons that attempted to commit a felony in this matter.

Reverting to the evidence adduced in this matter 2 witnesses for the prosecution narrated how they apprehended the two accused in this matter. The two witnesses are independent witnesses one being a senior officer from a security firm and another being a police officer in the Zambian police. Both adduced that they apprehended the two accused right at the scene after breaking and opening the door. PW3 went on to depose that he fired a gunshot and order both to lie down of which they did and they were apprehended. The accused denies these facts instead both accused avers that they were going to attend a funeral at Garden house. A2 was the first one to go but passed to see his brother DW3 at Havissaa. He was apprehended by officers who came and started to beat him. He called A1 to come and help him and when he came he was as well apprehended. A1 one however gave a conflicting statement on who called who. According to him it was him who called A2 to find out where he was after which he told him. When he went where he was he was as well apprehended. Further conflicting evidence was given by DW3 A2's witness who denied ever working on that night. He further denied knowing A2. It is clear from the evidence adduced that there is overwhelming evidence of the fact that it was the accused here that attempted to burgle to the warehouse herein.

In the circumstances and by the reasons of the foregoing therefore I am satisfied beyond reasonable doubt that the prosecutions have proved the offense of attempted breaking into a building with intent to commit a felony therein and I accordingly convict both of them

DELIVERED IN OPEN COURT

DATED THE ..... 2016



**F. KAOMA**

**RESIDENT MAGISTRATE**

