

CASE NO: 3PD/102/2016

IN THE SUBORDINATE OF THE FIRST CLASS  
FOR THE LUSAKA DISTRICT HOLDEN  
AT LUSAKA.  
(Criminal jurisdiction).



THE PEOPLE

VS

PERCY KAFULA MUBANGA

BEFORE: HON. MUBITA. A; MAGISTRATE III

For the State: Samuel Limbwambwa (PP)

For the Accused: In person

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JUDGEMENT

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Statutes referred to:

1. Criminal Procedure Code Chapter 88 of the Laws of Zambia.
2. Penal Code Chapter 87 of the Laws of Zambia.

Cases referred to:

1. Dorothy Mutale V The People (1997) S.J 51(S.C)
2. Phiri and others v The People (1973) ZR 50
3. R v Silverman (1987)86 Cr.App.R231 (CA)
4. Sinyinza v The People (1972) ZR 218
5. Whoolmington V DPP (1935) AC 462.

The accused stands charged with one count of obtaining money by false pretence contrary to section 309 of the Penal Code Chapter 87 of the Laws of Zambia.

Particular of the offence were that Percy Kafula Mubanga on unknown date but in the month of June, 2016 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, with intent to deceive or defraud, obtain K8500 from Oleg Turkin by falsely pretending that he had facilitated the issuance of his work permit when in fact not

When called upon to take plea he denied the charge. However, at the close of the prosecution case, he was found with a case to answer and was placed on his defence. The provisions of section 207 of the Criminal Procedure Chapter 88 of the Laws of Zambia were complied with. The accused elected to give sworn evidence and did not call any witnesses.

I warn myself from the onset that in criminal matters the onus to prove the accused guilty lies upon the prosecution and the standard of proof is beyond all reasonable doubt as provided for in the case of Whoolmington V DPP (1935) AC 462.

According to section 308 of the penal code chapter 87 of the Laws of Zambia, false pretence is defined as,

**"Any representation made by words, writing or conduct, of matter of fact or law, either past or present, including a representation as to the present intentions of the person making the representation or of any other person, which representation is false in fact and which the person making it knows to be false or does not believe to be true, is a false pretence."**

According to section 309 of the same Act above, provides as follows,

**"Any person who, by false pretence and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other to deliver to any person anything capable**

of being stolen is guilty of a misdemeanor and is liable to imprisonment for three years."

From the foregoing sections the State must satisfy the court that;

1. There was a representation made in writing, words or conduct.
2. The representation made must be a matter of fact or law and must be either past or present.
3. The person making the representation knew it to be false or did not believe it to be true.
4. There was an intent to defraud
5. The change of ownership of the thing was actually induced by false pretence.

In order for the prosecution to prove their case against the accused, six witnesses were called in.

PW1 was **Oleg Turkin** who testified that the accused collected some money, K8000 from him and his documents; and promised that he was going to employ him as a volunteer. He was not given a receipt for the money. He said he went with the brother to the accused and there was an issue of trust. He testified that a Mr. Banda the brother to the accused who had been know by him for two years, recommended the accused to do the work. He averred the accused also promised to do the work permit for him. He testified that the accused told him that he worked for Government and knew a lot of friends would do it. He averred that he was told to produce finger prints, clearance from the Police, and clearance from Ukraine, an affidavit in support and passport size photos.

On 13<sup>th</sup> July, 2016, the accused invited him to offer a job. He said the letter was signed by the accused and addressed to him. He said his names were there and the address from Ukraine. There after the accused wrote another letter to the complainant to go out and come back later. He said on 11<sup>th</sup> July, 2016, he received a letter from the accused inviting him to work with him for two years. He said the letter had his names and address. He was to be given a piece of land where he could build fish ponds and keep fish there.

He said when he came back from Ukraine he was trying to contact him but to no avail. He then realized that he was being cheated. He then reported the matter to Police where he gave a statement. He averred that he had not recovered anything from the accused.

The accused was identified by pointing.

When cross examined by the accused he indicated that he needed a job before he could acquire a work permit. When asked if at all he gave him the money he responded that he did and the brother was the witness. He said he sent his documents by email and that there was no answer to the same; but that the letters were for employment. He indicated that he was told to go the boarder and he was given a letter. He admitted that he was not going to be given a business visa while within the country. He also admitted that he was told to submit his documents before he was promised to be offered a job as a volunteer. He finally said he was not going to report the matter to police if he was given the work permit.

There was no re-examination.

PW2 was **Mubanga Lombe** who testified that he had a friend who he met through his former girlfriend. He said that friend had an almost expired work permit and consulted on how to go about it.

He promised him to wait so that he could consult his cousin Percy Kafula Mubanga because at one time he had employed an expatriate. When he approached him, he promised to do it and provided a list of items required for Oleg. He testified that all the documents were prepared and given to the accused. He said the accused was supposed to be given K2000 for commission, K2500 for Immigration agent and k3000 for the permit. He said he was there when the money was being paid, but it was not receipted. He said the accused demanded for the educational documents for Mr. Oleg, University qualifications, application letter, CV, copy of passport, finger prints, and police clearance. He averred that at a later stage, he was requested to pay another K1000 because the work permit was K4000 and said the money was paid in the presence of Arthur Longwe at the play house. He then called a friend at Solezi boarder and told the accused the required process. He said the accused then changed the documents and advised that he travels to Chirundu or Livingstone and when coming back, apply for a temporal business permit. He was given the number of the person to call in Chirundu.

He said Mr. Chibwe told him that it was not possible for Mr. Oleg to be given a business permit because it was done at the Headquarters. He then talked to the accused who advised that they should not come into the country until the expiry of the permit.

He testified that he consulted a Lawyer who promised to talk to someone at Immigration to help. When they went to the Immigration, he said they told that they swindled because they had no agent working for Immigration. He testified that when they went there the following day, they found the accused at Immigration reporting that someone was trying to bribe him who

was in the country illegally. He said the matter was reported to police and the accused was arrested.

He said the piece of paper was from a writing pad

Accused was identified by pointing

When cross examined by the accused he indicated that there was no amount shown on the paper.

During re-examination, he said that there was no document showing the requirements because it was all verbal.

PW3 was **Arthur Longwe** who testified that in the month of June, 2016, he went to Percy's work place with Lombe Mubanga. He said Percy was not there, but was met at the play house and was given money for Immigration papers. He said he did not know if there was anything written because he was not in the car. He testified that there was nothing written to show that money was given. He testified that he did not know the amount of money involved, but only saw the money. He averred that he did not know Percy before but was introduced to him by Lombe.

The accused was identified by pointing.

When cross examined by the accused he said Lombe was a trust worth person and that was why there was no need for any written documents.

There was no re-examination.

PW4 was **Hodges Mark Munsanje** who testified that in the month end of July, 2016 he was approached by his client by the names of Lombe Mubanga who wanted some advice regarding Immigration issues concerning his friend by the names of Oleg Turkin who at the time was in Zambia and the days of being in the country were about to expire. He said he was told by Lombe that he and Oleg

had commissioned Percy Mubanga Kafula in relation to obtaining a temporal permit from the department of Home Affairs in Zambia for further stay in the country for and on behalf of Turkin Oleg. He said that he was told that Percy Kafula was given some money in the range of K7000 or more and that some documents were handed over to him. He testified that the complaint from his client was that Percy Mubanga Kafula had not undertaken the task he was commissioned to undertake. He further said he was told that Percy had not returned the documents for Mr. Oleg and neither did he pay back the money since he did not deliver as commissioned.

He averred that he advised Mr. Lombe to go to Immigration and see Mr. Lwiindi who was the Head of complaints. He called Mr. Lwiindi to explain to him about his client's problem and to expect him. He testified that later he learnt that the documents for Mr. Oleg were handed over to Mr. Ngoma and that the same were still with him. He said Mr. Lombe went to Immigration and Mr. Oleg was given a temporal permit for one year.

He had not seen Percy Kafula before.

When cross examined by the accused, he said his role in the matter was to advise his client and how he went about the matter was within his domain. When asked on the issue of documents, he said he did find out why documents moved to Mr. Ngoma and he was called to pick them up. He said he had never had site of the documents.

There was no re-examination.

PW5 was **Jane Kayela** who testified that she was the Supervisor under risk and compliance. She testified that for someone to qualify to obtain a temporal permit should have no other permit that he may qualify to apply for, but the temporal permit. She

testified that the qualifications were a manager's cheque of K4000, copies of passport, passport size photos and a covering letter. She said the application was open to the applicant, meaning could do it himself or use a registered Immigration consultant and took 14 working days.

She testified that around June 2016, while on duty a male person, she came to know as Percy Mubanga went to her desk to inquire on the procedure of a foreign national obtaining a work permit .She advised him that the applicant should be outside Zambia and the Laywer should submit the following documents; qualifications of the applicant, offer of employment, employment contract, passport copies and a cheque of K2000.The applicant should only come into the country after the application was approved.

She testified that in the month of July, 2016 the accused went to report that the person he intended to employ was illegally in the country and wanted to use his company documents to apply for employment. She requested for the contact number for Mr. Oleg and reported the matter to her immediate Boss who intimated to her that earlier during the day two male persons went to his office to complain about Percy Mubanga kafula, who had agreed to help Mr. Oleg to get a temporal permit and that the same Percy was given some money to pay for the permit. She was given the mandate to summon Mr. Oleg and also to call Percy kafula Mubanga to the office so that she could get both sides of the story. She said Mr. Oleg reported in the company of Lombe Mubanga who indicated that he was the cousin to Percy Mubanga and that he did introduce him to Mr. Oleg. She said Lombe also explained the exchange of money which was supposed to be used in the processing of the documents. She said that Kafula denied getting any money from Oleg. She averred that at the time Oleg had valid



permit to be in the country. And also established that Percy Mubanga did not commit any immigration offence. She testified that since there was an issue of money exchanging hands which case was deemed to fall under the Zambia Police and handed over the matter to the IG in writing.

She did a minute on under a letter head of Immigration Department and addressed to the IG Police. She said the reference was obtaining money by false pretence and it had names of Percy Kafula Mubanga. She averred that it was signed by herself. She was the author of the same and submitted it as part of evidence and marked P1.

Accused was identified by pointing.

When cross examined by the accused she indicated that she was saying what she witnessed.

During re-examination, she said it around June when she had contact with the accused. She said she was not there when PW1 was testifying.

PW6 was number 10946 Detective woman inspector **Mweene Tryness** who testified that on 4<sup>th</sup> August, 2016, she was assigned to investigate a matter of obtaining money by false pretences. She said the matter came from immigration through a letter and the complainant was Turkin from Ukraine who complained that a known person obtained K8500 in pretence that he was going to help him with a temporal permit. She testified that she interviewed the complainant who had three documents. Among them was a piece of paper that he was given by the accused person where some requirements were written and the requirements included a CV, copy of his qualification, copy of passport and an invitation letter from Dumilist sprinklers. She testified that the invitation letter and the employment offer had date stamps from

Dumilist Sprinklers, names of Oleg Turkin and signed by the accused as the owner of the company and had a logo. The other document was a small piece of paper and the word requirement was circled.

The accused was apprehended and taken to the Headquarters. She interviewed him for the matter of obtaining money by false pretences and he denied the charge. She said according to him after being approached he went to Immigration to consult and even gave an invitation letter to Oleg who never went back to his company.

Under warn and caution statement in English the language understood better he gave a free and voluntary reply denying the charge. She then made up her mind to charge and arrest him for the offence of obtaining money by false pretence.

She testified that Oleg said the money exchanged hands in June, 2016 before the permit was processed and Mubanga Lombe was present. She averred that Arthur was also there when the balance was being paid. No money had been recovered because the accused denied the charge,

She said that she came across a CV for Mr. Oleg. The CV had the names for Mr. Oleg and his work experience and qualifications and a copy of his diploma. She said the documents were in her custody and submitted them as part of evidence and marked P2 for offer of employment, P3 for invitation letter, P4 for piece of paper with requirements, and P5 for the email.

The accused was identified by pointing.

When cross examined by the accused she indicated that she did not recover the money from him. She further indicated that a mutual trust from his cousin no wonder the money was given to

him. She said someone made a complaint and the date stamp was for Dumilist sprinklers.

During re-examination she said that she arrested the accused on the basis that the complaint by the accused was that the accused obtained K8500 from him.

The state closed their case.

DW1 was **Percy Mubanga Kafula** who testified that in the month of June, 2016, when his cousin Mubanga lombe introduced Mr. Oleg to him. He testified that he was to engage Oleg on part time basis while he was in the country. He told them that he had to first seek guidance from Immigration on how to go about it. He said at Immigration he was advised that a foreigner could not make any application for employment or discuss any business unless if he was on a business permit. He said he told to tell him to make an application while outside the country. He testified that he requested for the requirements which he was given and gave them to the two gentlemen. He also told Oleg to give him a CV and his qualifications. He said these were sent through an email and upon receipt of the same, he prepared a letter of employment offer. He also prepared an invitation letter for business consultations. When done with the company, he advised them to make applications with Immigration.

He averred that the appointment on the invitation letter was on 20<sup>th</sup> July, 2016. He said he did not do any communications as he was waiting for the same date. He testified that Oleg did not go there up to 12:00 hours and he decided to go to Arcades. He testified that he saw Oleg at a distance and called him. When he picked the call on the second attempt, he was told not to talk to him but to talk to Mr. Lombe Mubanga. He said, he went to immigration on the same day to find out if Mr. Oleg was in the

country on his invitation or by himself. He was told to put everything in writing and address it to the Director Immigration. He also left the phone number for Mr. Oleg and the immigration officer called him while he was there and told to report at Immigration at 14:00 hours. When he reached his office he was also called and told to report at 14:00 hours. He said when he went there he was told that he was pretending to be an Immigration officer and was to be arrested. He denied the allegations and a statement was recorded. After two weeks when he was called again by Immigration he was told that the matter was with force headquarters. He went to the Police to see the Deputy Director but was not there. He said, on Friday he went and met the Assistant Commissioner who showed ignorance of the matter. He was told to go to Immigration again which he did.

On 8<sup>th</sup> August, 2016, when he reached his office, a woman and four gentlemen went there and introduced themselves as police officers from Headquarters. He was told to accompany them. He said he was then arrested and charged with obtaining money by false pretences involving K8500. He denied the charge and told them that he did not demand for any money from Mr. Oleg when he was to involve him as a volunteer.

When cross examined by the state he said Mr. Lombe was his first cousin and introduced Oleg to him. He said that was not the first time of assisting people in such a manner. He indicated that Mr. Oleg needed a job and before immigration he had not given him a letter of employment. He said when he went to immigration he talked to Martin Mpulukuta who referred him to Jane who advised him that Mr. Oleg could not make an application while in the country and did advise him to leave. He was not sure if Oleg had left the country. He admitted receiving the

information from Oleg through email. He said the letters were collected on the 13<sup>th</sup> July, 2016.

He denied receiving any money from Oleg and that he was not interviewed concerning the same by Jane the Immigration Officer. He said he only became aware of the money at the Force Headquarters and not at Immigration. He said the cousin has never testified against him anyway else, but that it could be possible to develop a grudge against him

There was no re-examination.

The defence closed their case.

#### STATEMENT OF FACTS.

After considering the evidence from both the Prosecution and the Defence, the following issues were not in dispute that: The incident happened in the month of June, 2016. Percy Mubanga Lombe owns a company called Dumilist Sprinklers. Mr. Oleg Turkin was a foreigner who was in Zambia at the time and wanted to apply for a job as a volunteer. Mr. Oleg was introduced to DW1 by Lombe Mubanga. Percy Mubanga Lombe visited the Immigration Department where he was given the requirements needed for Mr. Oleg to qualify for an application for a job. Percy was advised that Mr. Oleg could not apply for any business permit unless he was not in the country. Percy received the documents from Mr. Oleg through an email. Percy did not commit any Immigration offence. The alleged offence of obtaining money by false pretence was reported to Force Headquarters by the immigration Department through writing.

It was not in dispute that the incident happened in the month of June 2016. PW1 testified that the accused was introduced to him by PW2. PW2 testified that he introduced PW1 to DW1 because he

had assisted someone before. PW1 wanted to obtain a business permit. This evidence proves that the representation was made in words.

The available evidence point to that that the contract made between PW1 and DW1 was to help him acquire a work permit. This is something that had to be done in future. DW1 testified that when to Immigration, he was advised that PW1 could not apply for anything if he had something already which was valid. He was told that PW1 needed to be outside the country. This was a clear indication that it was not something to be done there and then. In the case of Sinyinza v The People, (1972) ZR 218 it was held that any contract to do something in future cannot be treated as false pretence. This is clear because PW1 was to leave the country and start making applications for a business permit while outside the country

DW1 testified that upon being introduced to PW1, he went to the Immigration Department to inquire on the requirements. This is evidenced by P4 .The representation was made in words and it was a matter of fact. The fact that DW1 made efforts to go to Immigration and obtained the requirements which he handed over to PW1, it cannot be said that he knew the representation to be false or did not believe it to be true. He even went ahead to prepare letters of employment and invitation for PW1, something which was one of the requirements for PW1 to qualify for the permit.

PW1 testified that he gave DW1 money which was to be used in the facilitation of the acquiring of the work permit. When he was asked during cross examination to produce any evidence to that effect, he said everything was done on mutual trust. DW1 denied having received any money from PW1. In my view, mutual trust in

issues of money does not work well, even when dealing with your own relative. It could have applied well in a situation where DW1 had done some work PW1 before as it was in the case of R v Silverman(1987)86 Cr.App.R231(CA) in which the accused had done some work for the complainant before. And when he made an excessively high quotation for repairs and false representation was proved. PW2 said he was there when the money was being given but could not show any tangible evidence as prove of the same. It was also the evidence of PW3 that he was there when PW2 took the last amount/ instalment. When he was cross examined by the (accused), DW1 to tell the court the amount, he said he did not know how much was involved because he did not enter the car. One tenders to wonder what kind of a witness PW3 is who could not witness what was happening. With all these gaps in the prosecution evidence it is hard to believe that really there was money that exchanged hands. In the case of Phiri and others v The People (1973) ZR 50 it was held that "The courts are required to act on the evidence placed before them. If there are gaps in the evidence the courts are not permitted to fill them by making assumptions adverse to the accused. If there is insufficient evidence to justify a conviction, the courts have no alternative but to acquit the accused and when such an acquittal takes place because evidence which could and should have been presented to the courts was not in fact presented, a guilty man has been allowed to go free not by the courts, but the investigations officer.". Furthermore, in the case of Dorothy Mutale V The People (1997) S.J 51(S.C), "It was 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 which is favourable to an accused if there is nothing in the case to exclude such inference." So it is only fair that such

gaps and variations in inferences should be resolved in favour of the accused

The fact that DW1 made efforts to go to Immigration and obtained the requirements for work permit for PW1 and even went a mile further to offer PW1 a job for the same as one of the requirements, it would be unfair to conclude that he had intentions to defraud. Initially it was said that DW1 was pretending to be an Immigration Agent, but this was later proved wrong and PW5 said DW1 did not commit any offence against the Immigration Department. It was going to be a different story if he obtained the money if at all he did and then decided to disappear or varnish. PW1 testified that DW1 was not picking the calls. But it was DW1's evidence that he called PW1 at Arcades and in response was told not to talk to him but PW2. This evidence was not rebutted by the prosecution.

Having considered the discussion of the evidence above, I am satisfied that the Prosecution has failed to prove all the elements of the offence charged beyond all reasonable doubt. I, therefore **ACQUIT KAFULA MUBANGA LOMBE** of obtaining money by false pretences contrary to Section 309 of the Penal Code Chapter 87 of the Laws of Zambia.

DELIVERED IN OPEN COURT ON THE                      DAY OF                      , 2017

